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Newsletter # 2

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This newsletter presents information on the main interpretative criteria established by the Appeals Chamber of the Special Jurisdiction for Peace (SPJ) Peace Tribunal in the: 1) Interpretative Judgement 1 of April 3, 2019, and 2) Interpretative Judgement 2 of October 9, 2019.

Interpretative Criteria established by the Appeals Chamber of the Peace Tribunal in the interpretative judgements 1 and 2

The interpretative judgements establish common and binding interpretative criteria, as well as practical guidelines for the SJP bodies, regarding the application of the regulations in force. They are issued by the Appeals Chamber of the Peace Tribunal at the request of the Judicial Panels, the other Chambers of the Tribunal or the Investigation and Prosecution Unit, or when ruling on an appeal.

The Appeals Chamber has so far issued two interpretative judgements, in which it has established the following interpretative criteria:

1. Interpretative judgement 1 of April 3, 2019 (TP-SA-SENIT 1 of 2019)

This judgment has been handed down at the request of the Judicial Panel for Determination of Legal Situations (SDSJ for its Spanish acronym). Most of the concerns raised by the SDSJ arise from the need to integrate the provisions of the regulatory framework previous to Law 1922 of 2018, the case law of the Appeals Chamber and Law 1922 of 2018 on matters related to its powers, its duties and the development of specific procedures[1]. To that extent, the interpretative criteria established by the Appeals Chamber in this judgement make it possible to clarify aspects of the SDSJ's competencies and the procedures it must follow for the granting of provisional benefits and the evaluation of the transitional justice plan of contributions for the people appearing before SJP.

- **Can the SDSJ informally grant provisional benefits and early release, detention in a military or police unit, revocation/substitution of preventive detention measures and suspension of arrest warrants?**

Context: Before the entry into force of Law 1922 of 2018, the test for granting all provisional benefits was the responsibility of the Ministry of Justice, the Executive Secretary of the SJP and the ordinary justice. Later, Law 1922 of 2018 (Article 48) established that "the SDSJ, upon assuming the case, shall verify whether the person appearing before the SJP is affected by any restriction of liberty; shall decide on the granting of conditional, or transitory, conditioned and anticipated release, and/or the deprivation of liberty in a military or police unit (...)", without making express reference to the revocation/substitution of preventive detention and the suspension of arrest warrants, which may also be granted by the SDSJ. Therefore, it was not clear to the SDSJ whether it could unofficially grant all the above-mentioned provisional benefits.

Response: As a general rule, the SDSJ may unofficially grant the provisional benefits of conditional and early conditional release, deprivation of liberty in a military or police unit, revocation/substitution of preventive detention, and suspension of arrest warrants, when it determines their origin and compliance with the established requirements. The exception to this rule, established by the Constitutional Court in Sentence C-070 of 2018, is effective when the prospective beneficiary is associated to proceedings at the trial or execution stage, in which case the SDSJ may not suspend the arrest warrants.

- **Can the SDSJ grant conditional and early release to State agents who have been deprived of their liberty after the entry into force of Law 1820 of 2016 and who meet the other conditions for access to such benefit?**

Context: Article 51 of Law 1820 of 2016 establishes that the benefit of conditional and anticipated transitory release "will be applied to agents of the State who, at the moment of the entry into force of the present law, are detained or condemned (...)". Based on this rule, the Appeals Chamber of the for Peace Tribunal had indicated, in Order 31 of 2018, as a requirement for granting this benefit: "(ii) That [the subject] is actually deprived of their liberty, either as a defendant or as a convicted person, as of the entry into force of Law [1820 of 2016]" (para. 55). Therefore, it was not clear to the SDSJ whether it could grant the aforementioned benefit to people who had been deprived of liberty after the entry into force of Law 1820 of 2016.

Answer: The SDSJ may grant conditional and early transitory release to State agents whose deprivation of liberty is ordered or materializes after the entry into force of Law 1820 of 2016. Regardless of the date of the deprivation of liberty, the granting of benefits entails: (a) the analysis of competence factors; (b) the evaluation of the conditionality regime; and (c) the verification of the specific formal requirements established (which can be corrected). Provisional benefits are of preferential application and may take place even when the potential beneficiary is not materially deprived of liberty.

- **What is the procedure the SDSJ should apply for the granting of provisional benefits and how can victims participate in this process?**

Context: Law 1922 of 2018 regulated the proceeding for granting provisional benefits, without expressly repealing the previous rules that regulated it. Therefore, it was not clear to the SDSJ whether, in relation to the procedure for granting relational benefits, Law 1922 of 2018 complemented the rules that preceded it, or tacitly repealed them in cases where they were contrary.

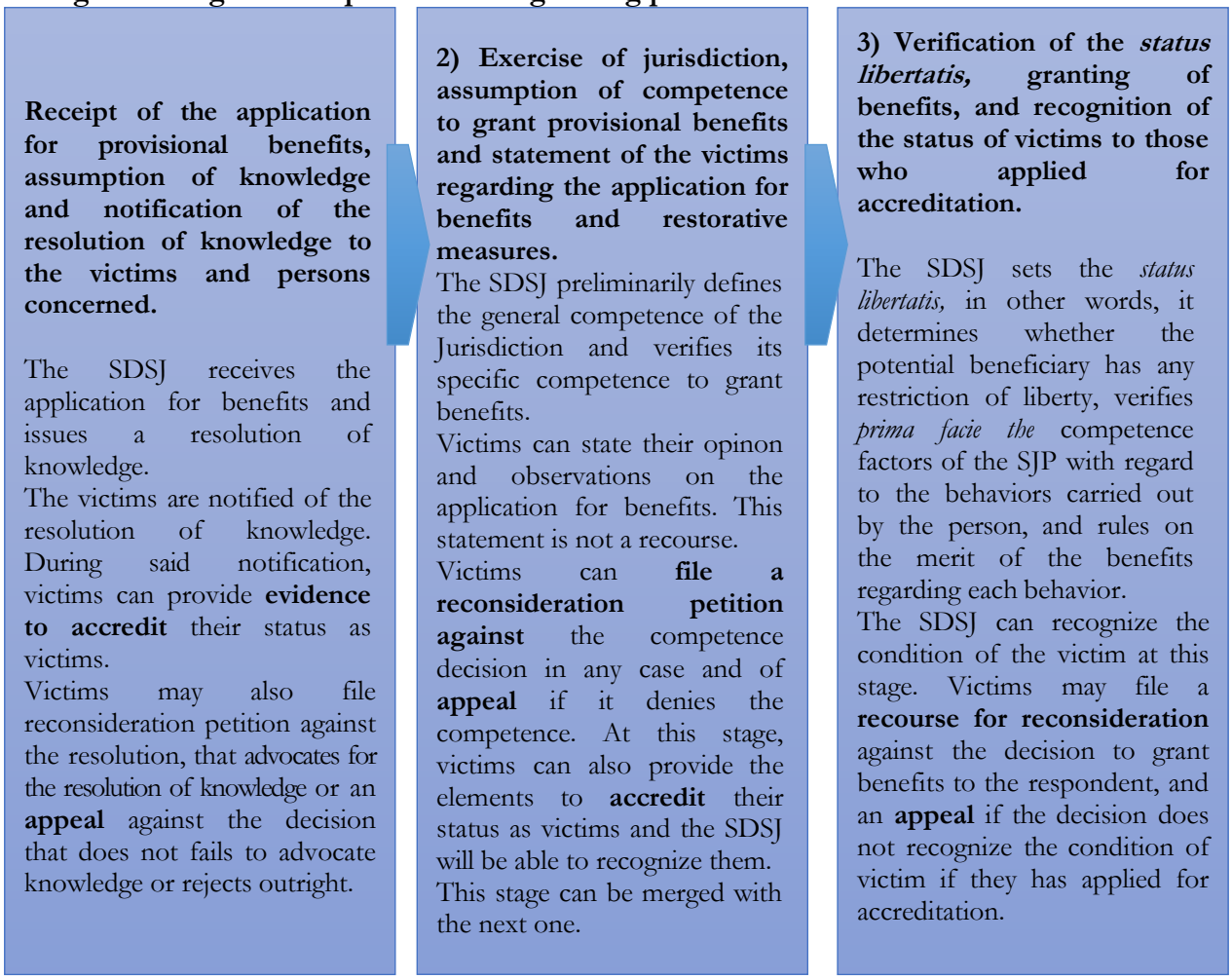
Answer: The SDSJ must move forward with the procedure for granting provisional benefits in accordance with Article 48 of Law 1922 of 2018, without resorting to previous rules. Victims can participate in the procedure for the granting of provisional benefits, since this offers guarantees their rights, the restorative paradigm is materialized, and they can contribute to the comparison of information. To this end, **victims will be notified from the start of** this procedure[2].

In cases where **victims** do not get notified through the media and within the established time limits, **they may be represented** by Public Ministry at its own initiative, the Autonomous System for Legal Advice and Defense (SAAD for its Spanish acronym) of the SJP and social organizations. As a general rule, collective representation of victims

should be encouraged. In addition, during the procedure for granting benefits, victims may request accreditation, which may be recognized by the SDSJ. However, accreditation as a victim is not necessary to participate in the procedure. The **requirements for accreditation as** a victim are: (a) a declaration of being a victim and the desire to participate in the proceedings before the SJP; (b) the submission of, at minimum, preliminary evidence of their condition of victim; and, (c) an account of the events, indicating at minimum the place and time when they occurred.

The procedure for granting provisional benefits has three stages:

Figure 1. Stages in the procedure for granting provisional benefits



(Own elaboration based on TP-SA-SENIT 1 of 2019)

- **Does the SDSJ have the authority to evaluate the plan of contributions to the transitional justice program of those appearing before the SJP, and, if so, how should it do this evaluation?**

Context: The jurisprudence of the Appeals Chamber has indicated that third parties and State agents who are not members of the Public Force must present a plan of contributions, pointing out that: "Those who avail themselves of the SJP must, therefore,

express a *concrete, programmed and clear* commitment to conform to the constituent principles of this system" (Order 19 of 2018, para. 9.16). However, it was not clear to the SDSJ the extent of its competence to evaluate the plan of contributions, nor the intensity with which it should carry out such an evaluation.

Response: The SDSJ is competent to evaluate the plan of contributions to the transitional justice submitted by the persons from whom it is requested. This evaluation should take place in three stages:

Figure 2. Stages in the procedure for granting provisional benefits

Preliminary examination of the dialogical and restorative suitability of the plan of contributions for restoration. The plan of contributions must be clear, concrete, scheduled and suitable for fostering a restorative dialogue.

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Dialogic or interaction phases between victims and those appearing before the SJP. The victims (and the Public Ministry) can state their opinion on the content of the schedule proposed by the person appearing before the SJP. If there are disagreements about the proposal, it is returned to the person appearing before the SJP so they may decide whether to adjust it. From this point on, there can be further exchanges between victims and those appearing before the SJP, and even spaces for interaction, at the discretion of the judge. Finally, the SJP will define the necessary arrangements and determine whether the refusal of the person appearing before the SJP at any point constitutes a refusal to comply with the conditionality regime.

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Evaluation of the plan of contributions. It must meet the following criteria:

a) Procedural criterion for the evaluation of the plan of contributions. Check if the restorative dialogic procedure has been performed.

b) Material evaluation criteria of the truth plan. Ascertain that the commitment to contribute to the truth includes one's own behaviors and those of others, macro-crime and victimization phenomena, conditions that facilitate the behavior, funding structures and patterns, etc.

c)Material evaluation criteria of the restoration plan (where applicable). Verify that the remedial actions correspond to the severity of the damage, the level of responsibility of the person appearing before the SJP, their personal characteristics and the type of process completion to which they may have access.

If the matter was not selected by the SRVR, at this stage it is established whether the plan has generated the conditions for the non-punitive determination regarding the legal status of the person appearing before the SJP.

(Own elaboration based on TP-SA-SENIT 1 of 2019)

- **Is the duty to submit a plan of contributions compatible with the right to not incriminate oneself of people appearing before the SJP?**

Context: On the one hand, as already noted, third parties and State agents who are not members of the Public Force have a duty to present a clear, concrete and scheduled commitment of contributions to truth, justice, reparation and non-repetition in order to

join the SJP (Tribunal of Peace Appeals Section, Order 19 of 2018). Likewise, according to Legislative Bill 01 of 2017 (transitory article 5), those who enter the SJP have the duty to provide the full truth. On the other hand, the Constitution establishes the right against self-incrimination (Art. 33). Therefore, it was not clear to the SDSJ whether the duty to submit a plan of contributions was compatible with the right against self-incrimination of the persons accessing the SJP.

Answer: The people appearing before the SJP have a duty to present a serious plan of contribution and a duty to contribute to the truth. However, these duties do not constitute coercive obligations, i.e. they are not backed by coercive state action. For this reason, they are duties compatible with the right of individuals not to be forced to testify against themselves.

- **Can the SJP require the submission of the plan of contributions to the transitional justice program from all those appearing before it, and at what point can it do so?**

Context: The Appeals Chamber clearly stated, in Order 19 of 2018, that third parties and State agents who are not members of the Public Force have the duty to present a clear, concrete and scheduled commitment of contributions to truth, justice, reparation and non-repetition in order to join the SJP. Later, in Order 20 of 2018, it stated that: "all person appearing before the SJP, but especially those who appear voluntarily, such as civilian third parties and State agents who are not members of the Public Force, must make a concrete, scheduled and clear commitment regarding the achievement of the rights of the victims (...)" (para. 31). For this reason, it was not clear to the SDSJ whether the submission of the plan of contributions to the transitional justice program was a requirement for all people appearing before the SJP or people applying to be included, nor from what point it could be required of those who were obliged to appear before the SJP.

Response: The SJP may require the submission of the plan of contributions to the transitional justice program to those appearing before the SJP or from people applying to for inclusion in the SJP at any time, including those who are obliged to appear before the SJP. However, submission of the plan of contributions to the transitional justice will only be a prerequisite for admission to the SJP or the granting of provisional benefits for civilian third parties or State agents who are not members of the public force, with respect to matters in which they are involved in criminal proceedings in the ordinary justice system.

2. **Interpretative judgement 2 of October 9, 2019 (TP-SA-SENIT 2 of 2019)**

This sentence is rendered at the request of the Review Chamber of the Peace Tribunal. The questions raised by the Chamber concern matters relating to its competence and arise from the entry into force of Law 1957 of 2019. To that extent, the interpretative criteria established by the Appeals Chamber in this sentence make it possible to clarify aspects related to the powers of the Review Chamber and the Judicial Panel for Amnesty or Pardon to hear applications for conditional release and the powers of the Review Chamber to check and supervise provisional benefits.

- **Which body of the SJP has the competence to hear applications for**

conditional release?

Context: Before the entry into force of Law 1957 of 2019, the Judicial Panel for Amnesty or Pardon (SAI for its acronym in Spanish) processed requests for conditional release. Later, Article 157 of this Law regulated the regime of people on probation or transferred to transitory normalization zones. While for the SAI this norm gave clear competence to the Review Chamber to deal with all requests for conditional release, for the Review Chamber this norm only gave it competence to deal with some requests for parole. Thus, for the Review Chamber, it was necessary for the Appeals Chamber to make clear whether the jurisdiction to hear parole applications was with them or with the Amnesty Chamber.

Answer: As a general rule, the SAI has the authority to hear, both in general and in the context of amnesty and pardon procedures, requests for the conditional release of former members of the FARC-EP, people under criminal investigation/trial as members of the FARC-EP and, together with the SDSJ, people linked to crimes related to social protest. Within the framework of this competence, the SAI shall interpret that requests only for conditional release are also requests for amnesty or pardon. Furthermore, when granting conditional release, the SAI must impose the conditions for its exercise.

As an exception to this rule, the Review Chamber of the Peace Tribunal has the power to grant conditional release to people convicted or accused of indisputably non-amnestiable or non-pardonable offences who, despite having received provisional release benefits, have not been materially released. This exceptional competence is not conditional on the SAI previously defining whether the conduct attributed to the potential beneficiary can be considered or not for amnesty.

The purpose of Articles 157 (the rule that raised the Review Chamber's interpretative doubts) and 158 of Law 1957 of 2019 is to establish the general competence of the Peace Tribunal's Review Chamber to review and supervise the provisional benefits granted to former members of the FARC-EP, people under criminal investigation/trial as members of the FARC-EP, and people linked to crimes related to social protest. To this end, it may impose or adjust the conditions for the exercise of the provisional benefits and monitor compliance through the bodies or authorities responsible for the operational part of this work. The review and supervision of the benefits must be carried out in a differentiated manner, depending on the seriousness of the conduct for which the benefit is granted, particularly whether or not it can be considered for amnesty.

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These interpretative judgements help to unify the normative interpretation of the various bodies of the SJP and to ensure greater legal certainty. This is important for a Jurisdiction that, in addition to being transitory, plays a fundamental role in peace building for the country and in the guarantee of the rights of victims. However, in relation to the requirements for the accreditation of victims, it is noted that the Appeals Chamber, in interpretative judgement 1 of 2019, moves away from a literal interpretation of the rule that regulates this matter (Article 3 of Law 1922 of 2018) to propose another interpretation that is contrary to the purpose of the rule of ensuring the participation of victims. This is specifically evidenced by the fact that while the Appeals Chamber refers to

the account of the victimization as a requirement other than summary evidence of the victimization[3], Article 3 of Law 1922 of 2018 states that the account of the victimization is an example of summary evidence that the victim can provide to prove his or her status[4]. For this reason, it is important that in future decisions the Appeals Chamber unify criteria of interpretation in this matter, respecting the literal wording of the law and the aim of ensuring the participation of victims before the SJP, which is its ultimate aim.

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[1] On the competence and functioning of the Judicial Panel for Determination of Legal Situations, see Law 1957 of 2019, articles 43 and following. On the functions of this Judicial Panel, see Law 1957 of 2019, articles 84 and 85.

[2] Notifications are made in accordance with the general rules established in the General Procedural Code. For **determined and located** victims, personal notification of the resolution that assumes knowledge, notification by notice if the victim does not appear within the period in which he or she is cited through personal notification and notification by status of the proceedings that take place after the resolution that assumes knowledge. For **certain untraceable victims and certain identifiable and traceable indeterminate** victims, notice of the decision instituting proceedings and notification of the status of subsequent proceedings is appropriate. The decisions taken at the hearing shall be notified by way of a witness box. (TP-SA-SENIT 1 of 2019, paras. 101-108)

[3] Specifically, the Appeals Chamber, in interpretative judgement 1 of 2019 (para. 128), noted that: "128. Article 3 of Act 1922 requires three conditions for accreditation: (i) manifestation of "*being a victim of an offence and* [wishing] *to participate in the proceedings*"; (ii) evidence *"even in summary form" of* such status; and (iii) account of the facts, *"specifying at least the time and place"* of their occurrence.

[4] Article 3, paragraph 1, of Law 1922 of 2018 states: "Upon receipt of a case or group of cases by the respective Chamber or Section, or after the Examination Chamber has checked the reports, a person who claims to be a victim of an offence and who wishes to participate in the proceedings must provide even summary evidence of his or her status, such as an account of the reasons why he or she considers himself or herself to be a victim, specifying at least the time and place of the victimizing events".