

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-RoC85-01/23**
Date of original: **26 May 2023**
Date: **30 June 2023**

THE PRESIDENCY

Before: Judge Piotr Hofmański, President
Judge Luz del Carmen Ibáñez Carranza, First Vice-President
Judge Antoine Kesia-Mbe Mindua, Second Vice-President

**SITUATION IN THE PEOPLE'S REPUBLIC OF
BANGLADESH/REPUBLIC OF THE UNION OF MYANMAR**

Public

**Public redacted version of "Decision on the 'Motion for Review of the Registrar's
Decision on Legal Aid', dated 10 May 2023 (ICC-RoC85-01/23-1-Conf)" dated
26 May 2023 (ICC-RoC85-01/23-2-Conf-Exp)**

Decision to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Applicant
Ms Megan Hirst

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the
Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Osvaldo Zavala Giler

Counsel Support Section
Mr Pieter Vanaverbeke

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations
Section

Other
Pre-Trial Chamber I

The Presidency of the International Criminal Court (the ‘Court’) has before it the application brought by Ms Megan Hirst (the ‘Applicant’) dated 10 May 2023 for judicial review of a decision of the Registrar dated 25 April 2023, pursuant to regulation 85(3) of the Regulations of the Court (the ‘Regulations’).¹

I. PROCEDURAL HISTORY

1. On 12 April 2023, the Applicant applied for legal assistance to the Registry pursuant to regulation 85 of the Regulations and regulation 131 of the Regulations of the Registry (the ‘Request for Legal Aid’).² The Applicant sought legal assistance to cover the costs of a mission to Bangladesh in May 2023, to [REDACTED].³
2. On 25 April 2023, the Registry rejected the Request for Legal Aid, stating that the Registry’s Single Policy Document on the Court’s Legal Aid System (the ‘LAP’) did not foresee the provision of legal assistance by the Court ‘to (potential) victims at the investigations/interview stage’ (the ‘Impugned Decision’).⁴ The Registry informed the Applicant that legal assistance can be provided to Legal Representatives of Victims once a chamber renders a decision on the participation of victims, such decision triggering the provision of potential financial assistance within the context of the LAP.⁵ An extract from an email sent by the Registry to the Applicant, referred to in the Application, shows that the Registry indicated that the Impugned Decision may be considered as the Registrar’s decision for the purposes of regulation 85(1) of the Regulations.⁶
3. On 1 May 2023, the Applicant requested the Registrar to review the Impugned Decision.⁷ The Applicant argued, *inter alia*, that the Impugned Decision amounted to a blanket rejection of victims’ right to legal representation at the investigation stage and was

¹ Applicant, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Motion for Review of the Registrar’s Decision on Legal Aid, 10 May 2023, ICC-RoR85-01/23-1-Conf (the ‘Application’), para. 1.

² Applicant, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, *Ad Hoc* Request for Legal Aid for an LRV Mission, 12 April 2023, ICC-RoC85-01/23-1-Conf-Anx1, p. 2, *annexed to* Application, ICC-RoR85-01/23-1-Conf.

³ Request for Legal Aid, ICC-RoC85-01/23-1-Conf-Anx1, p. 2, paras 11-13, 24-27.

⁴ Email from the Registry to the Applicant, 25 April 2023 at 13:06, ICC-RoC85-01/23-1-Conf-Anx2, p. 3, *annexed to* Application, ICC-RoR85-01/23-1-Conf.

⁵ Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

⁶ Application, ICC-RoR85-01/23-1-Conf, para. 6.

⁷ Applicant, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Request for your Review of a Decision on Legal Aid by CSS, 1 May 2023, ICC-RoC85-01/23-1-Conf-Anx3 (the ‘Request for Review’), pp. 2-3, 5, *annexed to* Application, ICC-RoR85-01/23-1-Conf.

founded on an incorrect understanding of the applicable law.⁸ No decision from the Registrar was issued on this request.

4. On 10 May 2023, the Applicant filed the present Application for judicial review of the Impugned Decision by the Presidency pursuant to regulation 85(3) of the Regulations (the ‘Application’).⁹

II. THE IMPUGNED DECISION

5. In the Impugned Decision, the Registrar rejects the Request for Legal Aid,¹⁰ noting that the LAP does not foresee the provision of legal assistance to (potential) victims at the investigation stage of the proceedings and referring, in this regard, to paragraphs 55 to 58 of the LAP.¹¹
6. The Registrar considers that legal assistance may only be provided to legal representatives of victims once a chamber issues a decision on the participation of victims in the relevant proceedings and that no such decision has been rendered in the current situation.¹² The Registrar considers, in addition, that, in the absence of such decision, there are currently no Legal Representatives of Victims as such in the situation.¹³

III. THE APPLICATION

7. The Applicant requests the Presidency to rule that the Impugned Decision’s rejection of ‘*all* legal aid for victims’ at the investigation stage is wrong in law and order the Registrar to issue a new decision on the merits of the Request for Legal Aid.¹⁴
8. The Applicant submits that the Impugned Decision imposes a blanket denial of any legal assistance for victims in a situation before the Court.¹⁵ She argues that the Registrar’s assertion that legal assistance can only be provided to victims once a chamber renders a decision on the participation of victims in the relevant proceedings is unsupported, and

⁸ Request for Review, ICC-RoC85-01/23-1-Conf-Anx3, pp. 2-3.

⁹ Application, ICC-RoR85-01/23-1-Conf, paras 1, 54.

¹⁰ Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

¹¹ Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

¹² Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

¹³ Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

¹⁴ Application, ICC-RoR85-01/23-1-Conf, paras 2, 54.

¹⁵ Application, ICC-RoR85-01/23-1-Conf, paras 2, 18-27.

unclear as to what decision it refers to.¹⁶ According to the Applicant, it is also unclear to which decision the Registrar refers to when determining that there are no Legal Representatives of Victims as such in the situation, ‘in the absence of any decision otherwise’.¹⁷

9. The Applicant explains that on 12 June 2018, she submitted the application forms for participation of ten victims from Myanmar to the Registry, along with powers of attorney.¹⁸ She further states that application forms for participation in the proceedings are not transmitted by the Registry to the Pre-Trial Chamber for determination in the context of a situation, and no general decisions about victim participation are issued at this stage. According to the Applicant, this does not mean, however, that victims cannot be represented, nor that they can only receive legal assistance after an individual judicial determination of their applications, or the issuance of a decision on victim participation in the proceedings.¹⁹
10. The Applicant also submits that the Impugned Decision is based on a misinterpretation of the LAP as there is no indication in the provisions of the LAP that legal aid cannot be provided to victims at the situation stage.²⁰ The Applicant argues that paragraphs 55 to 58, to which the Registrar refers in the Impugned Decision, do not concern the ‘availability of legal aid’ but rather, its scope,²¹ and that while there is no mention in the LAP on the provision of legal aid for victims at the situation level, paragraph 9 and Section V of the LAP leave open the possibility for the Registrar to make *ad hoc* allocations of legal aid as required for the effective representation of victims at any stage of the proceedings.²²
11. The Applicant further submits that a blanket prohibition on legal assistance at the situation level would defeat the victims’ rights as provided for in the Court’s legal framework, as victims participate in the Court’s proceedings pursuant to article 68(3) of the Rome Statute and that this article applies at any stage of the proceedings.²³ Finally,

¹⁶ Application, ICC-RoR85-01/23-1-Conf, paras 18-22, 42.

¹⁷ Application, ICC-RoR85-01/23-1-Conf, para. 21, *referring to* Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

¹⁸ Application, ICC-RoR85-01/23-1-Conf, para. 11.

¹⁹ Application, ICC-RoR85-01/23-1-Conf, paras 22-25.

²⁰ Application, ICC-RoR85-01/23-1-Conf, paras 30-41, 43.

²¹ Application, ICC-RoR85-01/23-1-Conf, para 34.

²² Application, ICC-RoR85-01/23-1-Conf, paras 37-41.

²³ Application, ICC-RoR85-01/23-1-Conf, paras 45-48.

the Applicant submits that the Registrar's approach is inconsistent with the purpose of legal aid, which is to make victims' rights achievable in practice, and seeks a direction from the Presidency that victims may receive legal aid in respect of participation in a situation, without the need of a prior decision by a Pre-Trial Chamber.²⁴

IV. DETERMINATION OF THE PRESIDENCY

12. The Presidency recalls that prior to the judicial review of a decision of the Registrar, it must be satisfied that the Application is properly before it.²⁵
13. The Presidency notes that the Application is brought under regulation 85(3) of the Regulations,²⁶ pursuant to which decisions on whether legal assistance should be paid by the Court taken by the Registrar are subject to review by the Presidency. The Presidency further notes that the Impugned Decision rejects the Request for Legal Aid, by which the Applicant requested to be provided with financial assistance for the purpose of a field mission,²⁷ and that the Registry indicated that it considers the Impugned Decision as the Registrar's decision for the purpose of regulation 85(1) of the Regulations.²⁸ Accordingly, the Presidency, by majority consisting of Judge Hofmański and Judge Mindua, finds the Application properly raises matters under regulation 85 of the Regulations.
14. Judge Ibáñez Carranza considers that the matter cannot be considered as properly before the Presidency, as a preliminary matter, due to the inadequacy, in terms of content and format, of the Impugned Decision. In her view, the so-called Impugned Decision does not satisfy the requirements of a decision under regulation 85(1) of the Regulations, despite the Registry's statement to the contrary. This is because the Impugned Decision does not adequately address the arguments raised in the Request for Legal Aid and fails to sufficiently provide reasons to enable the Applicant to understand its factual and legal basis. She recalls that the Presidency has had previous occasion to find that the Registrar must provide reasons for his decisions, so as to inform an applicant why her application

²⁴ Application, ICC-RoR85-01/23-1-Conf, paras 49-53.

²⁵ See e.g. Presidency, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, [Decision on the 'Application for Judicial Review of the Registry Decision issued on 27 September 2021', dated 5 October 2021 \(ICC-RoR220-06/21-1\)](#), 31 March 2022, ICC-RoR220-06/21-3, para. 16.

²⁶ Application, ICC-RoR85-01/23-1-Conf, para. 1.

²⁷ Impugned Decision, ICC-RoC85-01/23-1-Conf-Anx2, p. 3.

²⁸ Application, ICC-RoR85-01/23-1-Conf, para. 6.

has been unsuccessful and enable the applicant to assess whether to seek review.²⁹ While such reasons need not be elaborate and may be brief, “[w]hat is paramount is that the applicant should be able clearly to understand the factual and legal basis upon which the decision has been taken”.³⁰ Judge Ibáñez Carranza considers that the Impugned Decision, which is additionally informal in its format, fails to satisfy these basic requirements. Judge Ibáñez Carranza considers that, in the absence of a formal decision by the Registrar containing a sufficiently clear elaboration of the legal and factual arguments used to deny the Request for Legal Aid, the matter should have been remitted to the Registrar by the Presidency as a preliminary matter with a direction that the Registrar should provide the Applicant with a fully reasoned decision on the Request for Legal Aid. Accordingly, Judge Ibáñez Carranza considers that the matter need not be considered any further by the Presidency at present.

A. Standard for judicial review and applicable law

15. The Presidency recalls that the judicial review of decisions of the Registrar concerns the propriety of the procedure by which the latter reached a particular decision and the outcome of that decision. It involves a consideration of whether the Registrar has: acted without jurisdiction, committed an error of law, failed to act with procedural fairness, acted in a disproportionate manner, taken into account irrelevant factors, failed to take into account relevant factors, or reached a conclusion which no reasonable person who has properly applied his or her mind to the issue could have reached.³¹
16. In respect of applicable law, Article 68(3) of the Rome Statute provides, in part, that ‘[v]IEWS and concerns [of the victims] may be presented by the legal representatives of

²⁹ See Presidency, [Public redacted version of “Decision on the ‘Request for Review of Decision to Deny the Applicant admission to the List of Assistant to Counsel Pursuant to Regulation 125\(4\) of the Regulations of the Registry’”, 4 September 2015, ICC-RoR125-01/15-5-Conf-Exp](#), 1 October 2015, ICC-RoR125-01/15-5-Red (the ‘Decision of 1 October 2015’), para. 28.

³⁰ [Decision of 1 October 2015](#), ICC-RoR125-01/15-5-Red para. 28 referring to [Decision of 20 December 2005](#), ICC-RoC72-02/05, para. 19.

³¹ The standard of judicial review was defined by the Presidency in its [Decision on the Application to Review the Registrar’s Decision Denying the Admission of Mr Ernest Midagu Bahati to the list of Counsel](#), 20 December 2005, ICC-RoC72-02/05 (the ‘Decision of 20 December 2005’), para. 16; and supplemented in its Decision on the application to review the decision of the Registrar denying [REDACTED] privileged visits with Mr Lubanga Dyilo, under regulation 221 of the Regulations of the Registry, 27 November 2006, ICC-01/04-01/06-731-Conf, para. 24. See also Presidency, [Reasons for the ‘Decision on the “Application for Review of Decision of the Registrar’s Division of Victims and Counsel dated 2 January 2008 not to Admit Prof. Dr. Sluiter to the List of Counsel”’, 10 July 2008, ICC-RoC72-01/08-10](#), para. 20; Presidency, [Decision on the application to review the decision of the Registrar denying the admission of Ms Magdalena Ayoade to the list of experts](#), 6 August 2009, ICC-RoR56-01/09-2, para. 11.

the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence’.

17. Rules 90(1) and (5) of the Rules of Procedure and Evidence (the ‘Rules’) provide, respectively, that ‘[a] victim shall be free to choose a legal representative’ and ‘[a] victim or group of victims who lack the necessary means to pay for a common legal representative chosen by the Court may receive assistance from the Registry, including, as appropriate, financial assistance.’
18. Rule 93 of the Rules provides, that ‘[a] Chamber may seek the views of victims or their legal representatives participating pursuant to rules 89 to 91 on any issue, *inter alia*, in relation to issues referred to in rules 107, 109, 125, 128, 136, 139 and 191. In addition, a Chamber may seek the views of other victims, as appropriate.’
19. Regulation 83(2) of the Regulations provides that ‘[t]he scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.’

B. Merits

20. The Presidency notes that article 68(3) of the Rome Statute safeguards the entitlement of victims to present their views and concerns at the stages of the proceedings determined to be appropriate by the Court. It also notes that rule 90(1) of the Rules states that a victim is free to choose a legal representative. Nonetheless, the entitlement to participation and legal representation for victims is distinct from the entitlement to legal assistance funded by the Court, which must be prudently managed by the Registry. Rule 90(5) of the Rules provides that victims ‘who lack the necessary means to pay for a common legal representative *chosen by the Court* may receive assistance from the Registry, including, as appropriate, financial assistance’ (emphasis added). The Presidency notes that the phrase ‘chosen by the Court’ emphasises that it is the responsibility of the relevant chamber of the Court to determine how to organise financially-assisted legal representation of victims at any stage of Court proceedings before it.

The Presidency, by majority consisting of Judge Hofmański and Judge Mindua, understands the Impugned Decision to properly reflect this basic principle. It is clear that the Applicant is not a common legal representative chosen by the Court. Therefore, the

victims that have chosen to appoint the Applicant as their legal representative, even if they lack the means to pay, do not currently qualify for financial assistance by the Court.

21. In view of the above, the Presidency, by majority consisting of Judge Hofmański and Judge Mindua, sees no error in the Impugned Decision's overall finding that there is currently no legal basis for the payment of legal assistance to the Applicant.

V. CLASSIFICATION

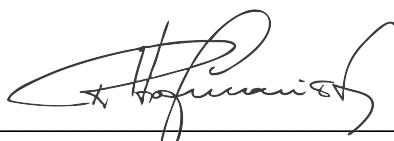
22. Noting that the Applicant has filed a public redacted version of the Application,³² the Presidency intends to make this decision publicly available. If there is any information in this decision requiring redaction prior to publication, the Applicant and/or the Registrar may inform the Presidency thereof no later than by 4pm on 16 June 2023.

In view of the above, the Presidency, acting by majority consisting of Judge Hofmański and Judge Mindua, hereby **CONFIRMS** the Impugned Decision.

Judge Ibáñez Carranza considers that the matter should have been remitted to the Registrar and the Registrar ordered to provide the Applicant with a fully reasoned decision on the Request for Legal Aid.

Done in both English and French, the English version being authoritative.

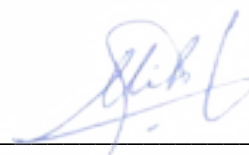
³² Applicant, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Public Redacted Version of Motion for Review of the Registrar's Decision on Legal Aid with Confidential Annexes 1 to 3, 10 May 2023, ICC-RoR85-01/23-1-Red.



Judge Piotr Hofmański
President



Judge Luz del Carmen Ibáñez Carranza
First Vice-President



Judge Antoine Kesia-Mbe Mindua
Second Vice-President

Dated this 26 May 2023

At The Hague, The Netherlands