

**Fifteenth session**

The Hague, 16-24 November 2016

**Report of the Chair of the working group of the Bureau on
the implementation of article 97 of the Rome Statute of the
International Criminal Court****I. Introduction**

1. At its fourteenth session, the Assembly, in its discussion of agenda item 21 “Application and implementation of article 97 and article 98 of the Rome Statute”, agreed *inter alia* as follows:

Article 97:

Following the plenary debate held at the fourteenth session of the Assembly on the supplementary agenda item introduced by South Africa, States Parties expressed their willingness to consider, within the framework of the appropriate subsidiary body of the Assembly, proposals to develop procedures for the implementation of article 97.¹

2. At its 3 June 2016 meeting, the Bureau considered the 23 May 2016 request of South Africa to establish a working group on the application and implementation of articles 97 and 98 of the Rome Statute. The Bureau established a working group of the Bureau, chaired by Ambassador María Teresa Infante Caffi (Chile), to examine the application of article 97 in close consultation with the Court. It reaffirmed the importance of preserving the independence of the Court and the integrity of the Rome Statute and of avoiding any interference in the work of the Court.

3. The working group held three meetings, open to all States Parties, on 31 August, 28 September and 10 November 2016. Representatives of the organs of the Court participated. In addition, on 4 October 2016, the Court organized an induction session on the conduction of consultations under Part 9 of the Rome Statute.²

II. Court practice in relation to the implementation of article 97

4. At its first meeting, the working group heard presentations by the three organs of the Court on the implementation of article 97. All presenters concurred that the flexibility inherent in article 97 was crucial to enable the Court to undertake consultations with the requested State and that such consultations could be either formal or informal.

5. The presentation included an overview of the negotiating history of article 97, that highlighted the two key points of article 97 which had influenced the formulation of the article, i.e. (a), and that it was designed to be a problem-solving provision to facilitate cooperation under Part 9 of the Rome Statute, not to suspend such cooperation; and (b) that

¹ *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourteenth session, The Hague, 18 – 26 November 2015 (ICC-ASP/14/20)*, Vol. I, Part I, para. 59.

² This was part of an induction session for diplomats, which included a session on cooperation.

it was an article of general application to the whole of Part 9, functioning as a mechanism to deal with the various technical or substantive problems that could arise in implementing a request for cooperation, where discussions between the Court and a State would be essential in resolving said matters. Further, the presentation underscored that the negotiators had intended the formulation of article 97 to be stated in broad language with the aim of ensuring flexibility, which would benefit both States and the Court. States had preferred that the mechanism not be restrained or restricted by procedures, and for this reason had decided not to include a rule on article 97 in the Rules of Procedure and Evidence.

6. Furthermore, it was recalled that the negotiators had recognized that State cooperation would be essential to the functioning of the Court and that the Rome Statute conceived it as one of the foundations of the criminal justice system where there should be no arbitrary grounds for refusal to cooperate. The absence of rules for article 97 was intended to provide the necessary flexibility for consultations, since it was not foreseeable to elaborate rules and procedures to govern every possible scenario that could arise. Consultations were case-specific, might be time-sensitive or protracted, could be either informal or formal, and might be resolved inter-parties or could require resolution by a Chamber. In summary, consultations could be either formal or informal, and this flexibility had proved useful for the Court.

7. The Court highlighted the importance of flexibility in implementing requests for cooperation. Article 97 was a tool at the disposal of the requested States to draw to the attention of the relevant organ any difficulty in implementing a specific request for cooperation. Consultations were often crucial to the execution of the requests for cooperation and were conducted on a regular basis in relation to each request. Such consultations related to a range of issues, operational, practical, or substantive ones, and served as a problem-solving mechanism for the benefit of the implementing State. They also aimed to enable effective and timely execution of a request for cooperation, particularly when it pertained to a judicial deadline.

III. National experiences with respect to the application of article 97

8. At its second meeting, the working group heard presentations by representatives of two situation countries, the Democratic Republic of the Congo (DRC) and Côte d'Ivoire, on their experiences with the implementation of cooperation requests by the Court. The group also heard from Belgium's Federal Coordinator for the cooperation with the International Criminal Court and Tribunals, Central Authority, on the implementation of requests for cooperation.

9. A representative of the Democratic Republic of the Congo, described its legal framework for cooperation with the Court, the key actors (institutional, political and operational focal points), the formal and informal procedures for cooperation, and the practical steps followed. Furthermore, the DRC had also faced the same situation as South Africa with respect to the arrest warrant issued for Mr. Al- Bashir, a case in which there had been no consultations. He stressed that if consultations were not carried out, there was a high chance that a State would not be able to comply with the request for cooperation.

10. A representative of Côte d'Ivoire cited the legal basis for judicial cooperation between his State and the Court and indicated the offices responsible for implementing cooperation with the Court. He described the steps which constituted the procedure for execution of requests for assistance, and the process of consultation with the Court in dealing with requests for cooperation.

11. The Federal Coordinator for Belgian judicial cooperation with the international criminal jurisdictions, President of the Belgian Task Force for Criminal Justice, informed the meeting of the procedures followed in relation to requests for cooperation from the Court and how difficulties are addressed, including consultations with the Court to comply with an arrest warrant. He outlined the causes for consultation applicable to any request for cooperation and the procedures followed in respect of specific causes for consultation.

IV. Issues identified with respect to the implementation of article 97

12. Some delegations recalled that the working group had been established pursuant to the mandate to the Bureau for the purpose of discussing the nature and scope of the consultations envisaged in article 97. Its purpose, although comprising an examination of the day-to-day implementation of the article in order to identify and attempt to respond to the type of matters that had led South Africa to raise the issue at the fourteenth session of the Assembly, were not limited to these questions.

13. States highlighted the importance of the working group respecting the judicial independence of the Court, and some cautioned that certain matters that were *sub judice* should not be considered.

14. Furthermore, of the three situations listed in article 97 that could trigger consultations, the provisions of sub-paragraph (c) were seen as posing complex problems of compliance with the Court's request for cooperation when it may require a State to breach a prior treaty obligation. A view was expressed that this provision envisioned a possible conflict of law and legal principles between customary international law, a regional treaty and the Rome Statute, and that article 97 was designed to assist States to address this matter in search for a solution.

15. Regarding the mandate of the working group, some States referred to the legislative history of the article as a useful tool since it showed that ensuring flexibility had been a key factor that explained the broad scope of the article. Other States regarded that it was also of interest to look at the possibility to extend the mandate of this working group in order to seek for possible developments of regulations or of rules or procedures to implement article 97, and that States should be allowed to submit alternative texts thereof.

16. Some delegations suggested that the working group should first evaluate the usefulness as well as the necessity of elaborating rules on article 97. Furthermore, it was suggested that it should also rely on the Court's collaboration when considering this matter. If regulations were then considered necessary, the group should ascertain the Court's proposals, as well as the timeline it envisaged in light of the *sub judice* process.

17. Some delegations remarked that the implementation of article 97 under the form of regulations or rules had to respect the legislative intent of the drafters of the article. It was also stated that additional legal obligations on States should be avoided.

18. Further, it was suggested that in case of total disagreement on the subject, the Assembly could consider a request to the International Court of Justice for an advisory opinion on the conflict of laws, rather than seeking judicial interpretation by the Court.

19. The representative of South Africa³ provided substantive comments about the resorting to article 97 on the basis of conflicting treaty obligations. In invoking article 97 with a view to consulting with the Court on problems that were considered to prevent it from complying with an arrest warrant, this State Party expressed that it found that there were no clear procedures allowing for a distinction between the diplomatic and legal processes for consultations.

20. The representative of South Africa also said that there should be an analogy with the situation encompassed by article 93, paragraph 3, of the Statute and regulation 108 of the Regulations of the Court. He suggested that procedures to address problems arising under article 97 be drawn up along the lines of rule 108, which set out specific procedures and timelines in respect of a dispute on the legal situation of a request for cooperation. Then, only when this stage was exhausted, should it be referred to a judicial phase. Before this, article 97 was to be seen as a process characterized by its diplomatic nature. Accordingly, a proposal submitted by South Africa on the implementation of article 97 of the Rome Statute, dated 3 October 2016, was conveyed to all States Parties on 7 October, to serve as an input for further discussions of the subject.

³ South Africa had proposed the consideration of regulations for article 97 at the fourteenth session of the Assembly.

21. States noted that the issue was important to all States as difficulties could arise in respect of any request by the Court for cooperation. States agreed that discussions on this issue should continue, including consideration of the proposal put forward by South Africa. There was therefore a shared interest to explore procedural elements to bring more clarity in this respect and to seek agreed conclusions thereof.

V. Recommendation on the way forward

22. The Bureau recommends the following paragraph for inclusion in the omnibus resolution:

Bearing in mind the obligation of States Parties to fully cooperate with the Court, *requests* the open-ended working group of the Bureau on the implementation of article 97 of the Rome Statute to continue exploring all possible means to improve the application of article 97 of the Rome Statute, in particular regarding problems identified under subparagraph c), in close consultation with the Court, and *also requests* the open-ended working group to report on this issue with recommendations to the sixteenth session of the Assembly.
