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**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. Introduction¹**

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 97.²

2. At its 3 June 2016 meeting, 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. All States Parties were invited to attend the working group since its inception. Ambassador Infante was re-appointed as Chairperson of the open-ended working group by the Bureau, on 20 December 2016.

3. On the basis of the recommendation contained in the report of the Chairperson of the working group,³ the Assembly, at its fifteenth session, “request[ed] 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 request[ed] the open-ended working group to report on this issue with recommendations to the sixteenth session of the Assembly”.⁴

¹ From document ICC-ASP/15/35.

² *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.

³ 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 (ICC-ASP/15/35), para. 22.

⁴ ICC-ASP/15/Res.5, annex, para. 3 (c).

II. Deliberations of the open-ended working group

4. The open-ended working group held four meetings, on 19 January, 14 February, 24 February and 23 October 2017. States Parties and the organs of the Court were invited to participate in all meetings.

5. The working group continued its consideration of the central elements involved in article 97, paying full attention to the 3 October 2016 proposal by South Africa and by four States Parties on the implementation of article 97 of the Rome Statute. States considered the nature of the article 97 consultations; the first point of contact for a State wishing to have consultations with the Court (the President, Registrar, the relevant Chamber); the timeline for consultations; and the format of the outcome of the consultations, whether the group should draft an outcome text, and the legal status of that text, including formulas such as binding Rules or Regulations. Some support was expressed for the working group to draft regulations/guidelines, while some States suggested that all questions relating to the sequence of steps to implement article 97 should be clarified before discussing the format of the outcome.

6. States highlighted the importance of continuing to seek the views of the Court and any recommendations it might wish to propose. At all meetings, States stressed the importance of respecting the judicial independence of the Court.

7. At the 14 February 2017 meeting, the Chef de Cabinet of the President of the Court made a presentation on the Court's position on the issues before the group and indicated that the Court would not participate in any drafting exercise that States Parties might undertake, due to the legal independence of the respective roles. At that meeting, the working group decided to establish an informal drafting group on article 97 (c), to elaborate a text that would assist the implementation of article 97 (c), which would first focus on the substantive questions, and consider the format and legal status of any outcome at a later stage. Some delegations suggested that a future outcome might be useful for the application of the entire article 97, which encompasses several subject-matters.

8. The informal drafting group elected Ambassador Sabine Nölke (Canada) as its Chairperson and, since its inception, was open to all States Parties. The group held six meetings, on 27 February, 16 March, 20 April, 31 May, 20 June and 8 September 2017 and considered a paper titled "Chair's text on Article 97 consultations", a rolling text prepared by the Chairperson, which was revised to reflect the emerging agreement among States.

9. The paper contained options relating to, inter alia, the initial request for consultations and the recipient of that request; the possible invitation to a relevant organ or official to participate in the consultations; procedures for advising the State Party and any other relevant organ or official of the request; the timeline; having the resolution of the issue form part of the record of the proceedings; procedures to be followed when the consultations had been unsuccessful or one of the parties decided to request a ruling. On 19 September 2017, the Chair of the informal drafting group disseminated a paper entitled "Understanding with respect to article 97(c) consultations", which reflected an understanding of a basis for consensus, based on the comments and proposals received from delegations in written form, as well as discussions and consultations in the context and meetings of the informal drafting group.

10. On 23 October 2017, the Bureau working group considered a draft resolution entitled "Draft resolution on consultations pursuant to article 97 (c) of the Rome Statute of the International Criminal Court" to which the "Understanding" referred to in paragraph 9 was annexed. The working group considered various proposals to improve the proposed text and approved the text of the draft resolution by consensus.

11. Some delegations expressed concerns regarding, inter alia, the use of the terms "fundamental principles" and "principles" in preambular paragraph 2, which in their view constituted terms which did not directly relate to the concrete procedural steps for the implementation of article 97, paragraph (c). Further, the meaning of such language could change over time, resulting in a different interpretation from the one intended by the drafters of the resolution. As to the word "fundamental" it could suggest that there is a possible hierarchy between the principles that underlie the Rome Statute. On the other

hand, some delegations highlighted that certain principles were embedded in the Rome Statute, and were its core pillars, e.g. complementarity and judicial independence, and that nothing in the adoption of an Understanding should be interpreted as reforming those principles which apply to the Court as well as to States Parties. In order to achieve consensus the delegations participating in the working group agreed to retain the word “principles”.

III. Recommendation

12. The working group conveys to the Bureau for its consideration a draft resolution entitled “Draft resolution on consultations pursuant to article 97 (c) of the Rome Statute of the International Criminal Court” and the “Understanding with respect to article 97 (c) consultations” (see annex), and requests the Bureau to convey the draft resolution and the Understanding to the Assembly for its consideration at the sixteenth session, in accordance with resolution ICC-ASP/15/Res.5, annex I, para. 3 (c).

Annex

Draft resolution on consultations pursuant to article 97(c) of the Rome Statute of the International Criminal Court

The Assembly of States Parties,

Bearing in mind the provisions of Part 9 of the Rome Statute on international cooperation and judicial assistance, as well as relevant Rules of Procedure and Evidence,

Convinced that full respect for the principles and provisions of the Rome Statute is essential for effective international cooperation and judicial assistance,

Conscious of the importance of procedures and mechanisms enabling States Parties to cooperate with the Court, particularly when a State Party receives a request under Part 9 of the Rome Statute in relation to which it identifies problems which may impede or prevent the execution of the request,

Mindful of the central role of international cooperation and judicial assistance between States Parties and the Court with respect to the issues described in article 97(c) of the Rome Statute,

Recalling that at its fourteenth session the Assembly of States Parties discussed the issue of the application and implementation of article 97 of the Rome Statute,

Considering that on 3 June 2016 the Bureau established a working group to examine the application of article 97 in close consultation with the Court, while observing the judicial independence of the Court, and that this working group was open to all States Parties,

Further considering the request of the Assembly of States Parties at its fifteenth session, that the working group continue to explore all possible means to improve the application of article 97 of the Rome Statute, in particular regarding problems identified under subparagraph c), in close consultations with the Court,

Acknowledging the active participation and contributions of States Parties to the deliberations of the working group by providing their views and proposals on cooperation with the Court,

Reaffirming its commitment to the principle of judicial independence of the Court,

1. *Adopts the* “Understanding with respect to article 97(c) consultations” contained in the annex to this resolution.

Appendix

Understanding with respect to article 97(c) consultations

The following serves to clarify the process for consultations between a State Party and the Court in cases as provided for in article 97(c) of the Rome Statute:

1. Where a request for cooperation originates from the Office of the Prosecutor, the requested State should, without delay, make a request in writing to the Office of the Prosecutor for a consultation in accordance with rule 176 of the Rules of Procedure and Evidence.
2. (a) Where a request for cooperation originates from a Chamber of the Court, the requested State should, without delay, make a request for consultations in writing to:
 - (i) The Chamber of the Court that issued the request for cooperation; or
 - (ii) The Presidency of the Court. Such consultations will not be of a judicial nature.
- (b) Such a request for consultations should be transmitted through the Registrar.
3. Subject to article 40 (1), article 42 (1) and (2) and article 43 (1) and (2) of the Rome Statute, for consultations carried out under paragraph 2, the Chamber or Presidency may invite the participation in the consultation of any other relevant organ or official in a position to assist, if appropriate and the requested organ or official consents.
4. Upon receipt of a request for consultations under paragraph 1 or 2, the Office of the Prosecutor, Registrar, or Presidency, as appropriate, should, without delay, inform the State Party and any other relevant organ or official in writing about the proposed date, location and/or other modalities of the consultation process.
5. The consultation should proceed and be completed without delay.
6. (a) If the organ issuing the request, the Presidency or the requested State Party considers that the consultations have been exhausted, it should give written notification to the other participants in the consultations.
 - (b) Following receipt of such notice, the matter may be addressed in accordance with article 87 and other applicable provisions of the Rome Statute as required.
7. Neither the request for consultations, the consultations, nor any outcome of consultations has suspensive effect, unless a competent Chamber so orders.
8. The above is without prejudice to the principle of judicial independence and the flexible nature and scope of consultations as provided for elsewhere in article 97 of the Rome Statute.
9. The above will be interpreted and implemented consistently with the Rome Statute and the Rules of Procedure and Evidence, including rule 176.