The Surprises of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance

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Abstract: This article examines some of the unexpected developments in the application of Part 9 of the Rome Statute on International Cooperation and Judicial Assistance, focusing particularly on Articles 97 and 98. Written from the perspective of one of the negotiators, the intention behind these Articles is contrasted with the ways in which they have been applied in practice. With reference to Article 98 there is a discussion about its use by the United States as a basis for the development of a series of non-surrender agreements. In the case of Article 97, there is detailed consideration of South Africa's request for consultations in relation to the visit of President Al-Bashir of Sudan and the subsequent work of the Assembly of States Parties (ASP) to the development of an understanding on the application of Article 97, which was adopted at the recent meeting of the ASP.

CRIMINAL LAW
1. Introduction

My friend Håkan Friman, one of the negotiators of the Rome Statute, had contributions to make across the various working groups. He was focused on Parts 3 (General Principles), 5 (Investigations and Prosecution) and 6 (Trial) of the Statute, but he had practical experience with extradition and mutual assistance and so I would chat with him often about what was going on with the cooperation regime. He, in turn, would brief me on the never-ending challenges in his part of the Rome world.

I am fairly confident from our exchanges that he would agree some of the most surprising issues surrounding interpretation and application of the ICC Statute have arisen in the context of Part 9 on International Cooperation and Judicial Assistance. Perhaps this was to be expected. This was a part of the Statute which had not received much attention from those focused on the highly sensitive political issues in New York and Rome. The negotiation of Part 9 was primarily left in the hands of experts in the field of international cooperation — extradition and mutual legal assistance — throughout the preparatory work and at the diplomatic conference.

This is not to say that there were not difficult challenges or starkly diverging views on the structure and content of Part 9, depending on the (particular) political perspective of a state as to how the ICC Statute should function. Most notably, there was an overarching struggle between those advocating for a ‘vertical’ system and those arguing for a more ‘horizontal’ structure protecting state sovereignty. However, as the main architects of Rome came from an international cooperation background, the construction of the text and the compromises agreed were generally framed on the basis of the perspective of those familiar with state-to-state international cooperation and were seen with the more technical lens of a practitioner.

Perhaps given this background it was inevitable that when a more ‘political’ viewpoint was applied to certain articles within Part 9, the interpretation and application of those provisions would be quite different than was anticipated by most of the drafters.

2. Article 98

A. How It Has Been Used

The most obvious example of an unexpected use of a provision within Part 9 is the reliance by the United States (US) on Article 98 as the basis to negotiate a series of agreements designed to shield US citizens and personnel from any possible surrender to the ICC. Article 98 provides as follows:

(1) The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

(2) The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.
On the basis of this provision, the United States has entered into agreements with several countries which provide that the nationals of either state, on the territory of the other state, will not be surrendered or transferred directly or indirectly to the ICC without the express consent of the state of nationality. The agreement also precludes re-extradition by a third state to the ICC without the state of nationality consenting.

B. The Drafters’ View of Article 98

There is some speculation that Article 98 was deliberately designed to allow for agreements of this nature to shield US nationals, if the ultimate compromise on the Rome Statute was not to the liking of the United States. I have no comment on that position as nothing in my interactions at the time supported that perspective. To the contrary, the background to Article 98 was a relatively simple one.

As is described in detail below, one of the central issues in the negotiation of Part 9 was whether there would be any exceptions to the cooperation obligation. In other words, would the Statute specify grounds on which a request for cooperation by the Court could be refused? Delegations supporting a strong vertical structure were arguing in favour of having no grounds upon which a state could refuse to assist. This was seen as the cooperation obligation which would be the most favourable to the Court.

But even those advocating heavily for that result could see that there was a practical problem with such an outcome. Without a basis to refuse, a state could be faced with the situation where the execution of a request from the Court would require that state to violate an existing obligation under international law. The potential for conflict of obligations was foreseen as a practical problem, albeit not quite in the way it has manifested itself.

The discussion among the cooperation experts at the time focused solely on pre-existing obligations of a general nature. It did not extend to the idea of states creating or initiating the conflict of obligations through their own actions. There were various specific questions raised by experts in this context. What would a state do if the Court’s request sought a search of diplomatic premises of another state or of the premises of an international organization? What if a warrant for the arrest of a foreign head of state or government or a minister is issued or unsealed while that person is in the midst of a visit to a State Party to the ICC Statute? Even more realistically, what if the arrest of foreign military personnel is sought when they are present on the territory of a State Party pursuant to a Status of Forces Agreement? These were the types of issues identified by several states, both vertical and horizontal structure supporters, as being of genuine concern.

It was these possible practical situations which motivated and informed the discussion which then took place at New York and Rome. Importantly, and distinct from how it has been interpreted, the scenarios envisaged were confined to situations where a state was already actively subject to an obligation under international law when a request for assistance by the Court was presented. Whether contemplated or not, the discussion at the time did not focus on states creating new obligations to other states to rely on the provisions of Article 98 to limit the cooperation obligation under the ICC Statute. Admittedly, with the benefit of hindsight, the language of Article 98 could have been more clearly articulated to reflect the narrow purposes envisaged at the time of its drafting. Nonetheless, even the most careful drafting could not have fully prevented the fundamental legal and political issues which have surrounded implementation of Article 98 in particular in terms of its relationship with Article 27. It stands as perhaps the most difficult interpretation issue to arise under Part 9 of the ICC Statute.

But it is not the only one. There are other examples of interesting and surprising issues which have arisen in relation to the cooperation obligations, such as the question of witness subpoena powers.
3. Article 97

However, probably the most unexpected controversy in all of Part 9 discussions, to date, is the issues which have arisen in relation to Article 97 on Consultations.5

A. The Idea

To fully appreciate why any polemic debate about this Article is surprising, it is necessary to consider the origins and purpose of Article 97 as contemplated by the drafters.

1. The Grounds of Refusal Issue

Article 97 was inserted as a direct consequence of the compromise achieved on one of the most challenging issues in the negotiation of Part 9 of the Statute. As mentioned above, namely, whether there would be any grounds upon which a state could refuse to execute a request for arrest/surrender or for other forms of cooperation detailed in the ICC Statute. In the Draft Statute that went to Rome6 there were two starkly different options in the Article related to arrest and surrender7 and in that detailing other forms of cooperation. Article 87(3) on [Surrender][Transfer][Extradition] of persons to the Court set out the following options in terms of grounds of refusal in sub-paragraph 3:

3. [Option 1: No grounds for refusal.]
[Option 2: A State Party may deny a request for [surrender] [transfer]
[extradition] only if:
(a) with respect to a crime under [article 5 (b) through (e)] [article 5 (e)], it has not accepted the jurisdiction of the Court;
[(b) the person is a national of the requested State;]
(c) the person has been investigated or has been proceeded against, convicted or acquitted in the requested State or another State for the offence for which his [surrender] [transfer] [extradition] is sought [, except that a request may not be denied if the Court has determined that the case is admissible under article 15];
[(d) the information submitted in support of the request does not meet the minimum evidentiary requirements of the requested State, as set forth in article 88, paragraph 1 (c);]
(e) compliance with the request would put it in breach of an existing obligation that arises from [a peremptory norm of] general international law [treaty] obligation undertaken to another State.]8
Article 90 on Other forms of cooperation [and judicial and legal [mutual] assistance] in sub-paragraph 2 provided as follows:

[2. Grounds for refusal

Option 1

A State Party shall not deny a request for assistance from the Court.

Option 2

A State Party may deny a request for assistance, in whole or in part, only if:

(a) with respect to a crime [under [article 5, paragraphs (b) through (e)] [article 5, paragraph (e)], it has not accepted the jurisdiction of the Court;

(b) the authorities of the requested State would be prohibited by its national laws from carrying out the action requested with regard to the investigation or prosecution of a similar offence in that State;

(c) execution of the request would seriously prejudice its national security, ordre public or other essential interests;

(d) the request concerns the production of any documents or disclosure of evidence which relates to its national [security] [defence];

(e) execution of the request would interfere with an ongoing investigation or prosecution in the requested State or in another State [or with a completed investigation or prosecution that might have led to an acquittal or conviction, except that a request may not be denied if the investigation or prosecution relates to the same matter which is the subject of the request and the Court has determined that the case is admissible under article 15]; (f) compliance with the request would put it in breach of an existing [international law] [treaty] obligation undertaken to another [State] [non-State Party].]

As evidenced by the texts, there was support for no grounds of refusal and for a detailed list of exceptions. The grounds of refusals included in option 2 in both draft Articles reflected essentially the typical grounds of refusal applicable to extradition and mutual assistance, respectively, in state-to-state practice.

While achieving a compromise was a daunting task for both arrest and surrender and other types of cooperation, the fundamental concerns were quite different for each and the options on grounds of refusal very distinct as evidenced by the texts. With arrest and surrender, the major hurdle was engrained extradition principles and the concern that the removal of certain grounds of refusal could generate constitutional prohibitions which would prevent the ratification of the ICC Statute by several important states. In particular, the most contentious grounds identified were refusal to extradite nationals (a constitutional issue for some states, such as Germany and Brazil) and supporting information failing to meet evidentiary requirements (a constitutional issue for some states, including the United States).

For other forms of cooperation, a much broader set of grounds remained in the Draft Statute reflecting the kinds of flexible provisions often found in state-to-state practice, designed to safeguard sovereignty in terms of the use of criminal law investigative powers. This included if the state had not accepted the jurisdiction of the Court with respect to the crime if the requested state would be prohibited by its national laws from carrying out the action requested; and the broad exclusion where execution would seriously prejudice national security, ordre public or other essential interest.

Also included with respect to both surrender and other cooperation was a provision recognizing that the execution of the request might require a breach of existing international law or a treaty. As discussed above, this issue was ultimately addressed in Article 98, albeit deliberately not as a ground of refusal.
Finally, it is interesting to note that the draft of Article 87 also included a very complicated paragraph 6 with various optional texts related to the perplexing problem of competing requests for arrest and surrender. This issue was also ultimately addressed separately in Article 90 of the ICC Statute on competing requests.

With these very specific examples in the Draft Statute, for states arguing in favour of no grounds of refusal for arrest and surrender or other types of cooperation, one of the key strategic goals was to provide sufficient flexibility in the Statute to raise comfort levels regarding an absolute cooperation obligation.

2. The Dispute Resolution Proposal

The proposal in the Draft Statute to try and provide a solution which would be an alternative to grounds of refusal at least with respect to surrender was a form of 'dispute resolution' mechanism to be applied if there were problems with the execution of a particular request. Thus Article 87(5) of the Draft Statute provided as follows:

**Application to the Court to set aside [surrender] [transfer] [extradition]**

A State Party [having received a request under paragraph 1 may, in accordance with the Rules of Procedure and Evidence16] [may, in ... days of receiving a request under paragraph 1], file a written application with the Court to [set aside] [withdraw] the request on specified grounds [including those mentioned in articles 15 and 18]. Pending a decision of the Court on the application, the State concerned may delay complying with the request but shall take appropriate measures [as may be available] to ensure the compliance with the request after a decision of the Court to reject the application.

However, it became evident that it would be difficult, if not impossible, to reach consensus on such a mechanism, as there was no agreement as to whether the Court or the state should have the final say. In addition, to include or require resort to a formal mechanism was viewed by some states as contrary to the very nature of the obligation in this Part: cooperation. As a result other ideas had to be explored.

An interesting post-script to this original proposal is that contrary to the view of the drafters of the Statute, the judges of the Court chose to include a provision with a similar aim in the Court regulations (albeit its application is limited to Article 93 — requests for other forms of cooperation — not request for arrest and surrender).

Regulation 108 provides as follows:

(1) In case of a dispute regarding the legality of a request for cooperation under article 93, a requested State may apply for a ruling from the competent Chamber. (2) A ruling under sub-regulation 1 may be sought only after a declaration has been made by the requesting body that consultations have been exhausted and within 15 days following such declaration. In case of requests under article 99, paragraph 4, and should no further consultations be possible, the requested State may seek a ruling within 15 days from the day on which the requested State is informed of or became aware of the direct execution. (3) An application under sub-regulation 1 shall not of itself have suspensive effect, unless the Chamber so orders.
(4) The Chamber may hear from participants to the proceedings on the matter.
(5) If the Chamber rejects the application referred to in sub-regulation 1, the Chamber may grant the requested State additional time within which it shall execute the request or the Chamber shall lift any suspension of direct execution.\textsuperscript{14}

As outlined below, although not applicable in the specific case, this Regulation did form part of the inspiration for proposals ultimately presented by states with reference to Article 97.

3. Consultations

As an alternative to the dispute resolution mechanism, what resonated among the international cooperation practitioners participating in the negotiations was the familiar concept of consultations.

Consultation on the execution of requests for assistance was a common part of the practice of international cooperation in criminal matters on the state to state, considered essential to the effectiveness of any system. The general acceptance of the idea was evidenced by its reflection in the United Nations Model Treaty on Mutual Legal Assistance with Article 21 reading as follows:

\begin{quote}
Consultation

The Parties shall consult promptly, at the request of either, concerning the interpretation, the application or the carrying out of the present Treaty either generally or in relation to a particular case.\textsuperscript{15}
\end{quote}

And so it was this familiar and non-controversial concept that the negotiators began to focus on. The idea was to have a specific statutory provision available to states should there be practical problems with the execution of a request. At the same time, it should be a flexible mechanism which could be used to encourage successful execution of the Court's requests for assistance by providing a forum for addressing issues through discussion, as opposed to providing for refusal or adversarial challenge. In essence, it was intended as an Article that would allow for the Court and a state to work together to solve practical problems.

This concept of mutual resolution of challenges was a general theme in Part 9 with other provisions encouraging consultation with a view to trying to obtain the execution of the request in whole or in part or with conditions.\textsuperscript{16} All of these provisions were designed to minimize any circumstances where a request would be denied and to encourage successful cooperation with the Court.

4. The Inclusion of Examples

However, there remained concerns that a general consultation provision would not be sufficient to allay the apprehensions which some states had about the specific types of execution problems which might be encountered along the way. More would need to be added to ensure that there was visible recognition of those concerns. It was recognized that any article on consultations could not be left vague and some examples (though not exhaustive) would need to be included.
With this as background, as an alternative to the Draft Statute dispute resolution proposal, a text on consultations was proposed by the Chairman of the Working Group on International Cooperation in a discussion paper. The proposal, with minor amendments, was adopted ultimately as Article 97 which reads as follows:

**Article 97**

**Consultations**

Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter. Such problems may include, inter alia:

(a) Insufficient information to execute the request;

(b) In the case of a request for surrender, the fact that despite best efforts, the person sought cannot be located or that the investigation conducted has determined that the person in the requested State is clearly not the person named in the warrant; or

(c) The fact that execution of the request in its current form would require the requested State to breach a pre-existing treaty obligation undertaken with respect to another State.

Paragraphs (a) and (b) capture the most common concerns of the practitioners. One of the dominant discussions surrounding the negotiation of Part 9 related to the issue of what material the Court would have to provide in support of requests for cooperation.

Of particular concern were the evidence requirements for requests for arrest and surrender. There were deeply divided positions, largely drawn across lines of legal traditions. For many states of a common law legal tradition, there were significant concerns that the surrender of an individual for prosecution, without the production of evidence in support, would violate legal precepts and constitutional requirements. For those of a civil law tradition, evidence was not a requirement, even in state-to-state cooperation, and there was strong opposition to the inclusion of such a requirement for the Court. In particular, many practitioners who had experienced the difficult challenge of producing sufficient evidence to obtain extradition from common law states did not want to see the Court having to deal with these types of requirements.

Ultimately, the compromise language of Article 91(2)(c) of the ICC Statute was agreed upon. It required the production by the Court of documents, statements and information as may be necessary to meet the requirements for the surrender process in that state, albeit they could not be more burdensome than normal extradition requirements and should, if possible, be less burdensome. This requirement was accompanied by a focused 'consultation' clause captured in Article 91(4), which allows the Court to request consultation with a state either generally or specifically regarding evidence requirements.

Similar concerns had been raised with regard to requests for other forms of cooperation. However, the matter did not have the same level of controversy in the context of requests for the gathering of evidence in the territory of the requested state. For most states — whatever the legal tradition — it was not possible to use compulsory measures to gather evidence without underlying information to justify the action. Once again compromise language was included in Article 96(2)(e), which recognized that the request from the Court had to contain 'such information as may be required under the law of the requested State in order to execute the request'.

While compromise was eventually achieved in both contexts, there were lingering fears that these evidence and information requirements could prove to be a major stumbling block in the execution of requests, if the Court was unable to produce the necessary material to meet the legal requirements of states. This coloured discussion in other contexts, especially when it came to the consultation provision. States needed to be re-
assured that a legitimate request for necessary supporting material would not result in a violation of the obligation to cooperate.

This background hopefully explains why the first problem identified for possible consultations under Article 97 was insufficient information to execute the request. This was the preoccupation of many throughout the discussions on Part 9 and a key motivation for the inclusion of the consultation clause.

The second example in Article 97 related to requests for arrest and surrender and also was derived from the cumulative experience of the practitioners in the room. Commonly in state-to-state practice, information will indicate that a wanted person is in a particular state but subsequent investigations will fail to locate him or her or will establish that it is not the person sought. As the ultimate result in such situations is that the request for arrest and surrender would have to be ‘refused’, it was a preoccupation of some of the drafters that this situation be specifically recognized. In essence, provided that the efforts to locate and identify the person were in good faith, it would not be categorized as non-cooperation if he or she could not be found or identified as the person sought. As a result, this became the second specific exception included as an example of where consultations would be useful.

Interestingly, it is also an illustration though that some of the concerns which captivated the drafters would ultimately prove not particularly relevant for cooperation with the ICC. The circumstances of concern in this regard would arise when an extradition request was submitted to a specific state or states on the basis of information indicating the presence of that person in the state. In fact, the original practice of the Court was quite different in that requests for arrest and surrender — once issued — were submitted to all State Parties without regard to whether there was information linking the wanted person to that territory. Today, that practice appears to be changing. Regardless of the view as to whether that was appropriate practice or not, it meant that there were multiple situations where states did not respond to requests for arrest and surrender simply because there was nothing to suggest the wanted person was on the territory of that state. As a result, the danger anticipated from extradition practice, that this would be interpreted as non-cooperation, has simply not arisen.

The third example included in Article 97 — situations of conflicting obligations — is the one which is at the centre of the controversy surrounding the Article.

For the drafters it was an obvious subject to reflect in the consultation provision especially as the Court’s Rules of Procedure and Evidence (RPE) would be negotiated only later. States would need to have a mechanism to communicate with the Court in the case of a purported conflict with a pre-existing obligation under international law to a state. However, it is safe to say that the drafters did not contemplate the complex, politically charged situations which have arisen in practice or that Article 97 would be used to try and resolve them.

B. The Unexpected Interpretation Problem

1. Consultation with a Chamber

Despite all these detailed considerations leading to the adoption of the Article, one issue was not discussed or addressed. With what authority within the Court would the consultations be conducted or, more specifically, could a consultation be held directly with a Chamber?

Of course, the use of the term ‘Court’ meant that in principle the consultations could take place with any organ of the Court, including the Chamber,
as might be relevant in the particular circumstances. In other sections of Part 9, the RPE further clarify the procedures to be followed and, in particular, make reference to the appropriate organ for communications. For example, Rule 176 sets out the regime for requests for cooperation by the Court with reference to relevant organs as does Rule 194 with respect to requests for cooperation made to the Court.\(^\text{23}\)

However — if contemplated by any particular participants with reference to Article 97 — this point was never the subject of specific discussion during the negotiation.

This lack of attention is probably at least partially attributable to a misconception by those participating in the negotiations coming from a common law tradition. At least that is the case for the writer. For common law practitioners it was likely not envisaged that consultations would be held directly with judicial officials, regardless of the issue. Rather, the expectation was that any discussion about execution problems — even if the warrant or order in question emanated from a Chamber — would be conducted with the Office of the Prosecutor (OTP) or in the case of a pure request from a Chamber, with officials within the Court Registry. This view failed to consider the particular structure of the ICC Statute and also the fact that for civil law jurisdictions, international cooperation is often carried out on a judge-to-judge basis.

Additionally, no rule was ever adopted with reference to Article 97. This was mainly because the Article was viewed as self-evident and was not intended to create a structured process but rather a platform for resolving problems. There was consensus that it should be left unconstrained to make it as effective as possible in resolving issues. And given the scope of the case-specific issues which could possibly arise in practice, it did not seem useful to hamper the application of the Article with procedural rules.

But importantly, in taking that approach, no consideration was given to the possibility that Chambers would be directly involved in consultations raising unexpected complexities in terms of the procedures that might apply.

It is this issue which is at the heart of the unexpected controversy which has arisen in relation to Article 97. In essence, if a consultation can take place with a Chamber what should be the contours of such an exchange?

In this regard, it is important to note that the Article has in fact served the exact purpose it was intended for with the types of problems illustrated by paragraphs (a) and (b) — practical problems which may impede the execution of a request. Both the prosecution and the Registry make reference to the Article in outgoing communications. Moreover, whether Article 97 is specifically cited or not, consultations between the Court and states regarding cooperation requests are commonplace and considered extremely important to successful cooperation.

2. Invocation of Article 97(c)

Practice with reference to Article 97(c) has been different. Factually there have been several instances where the issue of purported conflicts of obligations have arisen in the context of the arrest warrant issued for President Al-Bashir of Sudan.\(^\text{24}\) However it was only in 2015 that a state — South Africa — sought to invoke Article 97(c) in this context.

As reported by the Registry to the Chamber\(^\text{25}\) on the basis of a request presented by South Africa for consultations under Article 97, on Friday 12 June 2015 a Single Judge of the Trial Chamber convened a meeting with the Embassy of South Africa to The Netherlands. Representatives of the Registry and OTP were also present at the meeting. At the meeting, the Ambassador began his representations by noting his surprise
that a request for consultations had led to an appearance before a Chamber, which was not what he had envisaged for a consultation process.

He went on to read out a Note verbale which referenced the African Union Summit being held in South Africa from the 7 to 15 June 2015 and the possible attendance of Omar Al-Bashir. It recounted that invitations had been issued to heads of state and government in line with decisions of the African Union (AU). It stated that in accordance with the Agreement between South Africa and the AU on the hosting of the Summit, representatives of AU Member States are accorded immunity from personal arrest or detention.

The submission was made in the Note verbale that Article 98 of the ICC Statute was applicable in these circumstances of conflicting obligations. It called for a flexible approach to be adopted to properly balance the competing obligations. The note also outlined arguments advanced by South Africa in support of its position that Article 98 was applicable and the Court should not proceed with the request for arrest and surrender.

In response, the OTP representative highlighted the late request for consultations given that South Africa had been asked to identify any problems with execution of the request in a note submitted two weeks earlier and President Al-Bashir was expected to arrive in South Africa the next day. The prosecution also submitted that based on ICC jurisprudence, South Africa was obligated to arrest President Al-Bashir.

The Single Judge, after some introductory remarks, essentially agreed with the latter prosecution submission. He indicated that the matter had already been settled in Chamber jurisprudence and it was clear that South Africa had an obligation to arrest and surrender President Al-Bashir. It was for South Africa to decide what action to take in light of that obligation, with the resulting consequences to be determined in accordance with law.

At this point, the Ambassador sought clarification on process, specifically as to the status of this meeting. He emphasized that from the perspective of South Africa this appearance before Chambers was not a consultation, but rather a meeting at which they could place on record their request for a consultation. He stressed that he was not an authority or expert on judicial matters and he had been sent not to comment on the substantive issue but to seek a consultation. He also pointed to the fact that in invoking Article 97, South Africa was unclear as to how to proceed as there was no precedent for such a consultation.

There were several exchanges on the point with interventions by the Single Judge, the OTP representative and the Ambassador.

But at the end of the day the positions remained entrenched. The Single Judge insisted that the matter had been decided already and no change of course was possible. Most significantly, on the procedural point, it is clear that the Single Judge and OTP considered that proper consultations under Article 97 had been conducted. The South African Ambassador, however, evidently felt quite differently. He had arrived expecting a diplomatic exchange without a determination and faced instead a Chamber and a decision.

What the exchange evidenced was something not considered by the drafters of Article 97 — that the term 'consultations' can mean very different things depending on the context and the particular perspective of individuals. The drafters were focused on consultation in its ordinary meaning of a meeting for deliberation, discussion or decision. However, there are other contexts in which the word takes on different meaning such as in the diplomatic world. Whether it was a question of words or definitions, it is evident from the exchange that South Africa's representative and the Single Judge, each had a very different idea as to how these consultations should be structured and carried out.

C. The ASP/Bureau Intervention
1. The ASP Fourteenth Session

South Africa — obviously unhappy with the way in which the consultations had proceeded — decided to bring the matter before the Assembly of States Parties (ASP). At the 14th session of the ASP in November 2015, South Africa introduced a supplementary agenda item related to Articles 27, 98 and 97. After debate in the plenary on the matter the following conclusion was reached:

At its 7th meeting, on 20 November 2015, the Assembly discussed agenda item 21 in a high-level debate and agreed 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. Articles 27/98:

Regarding the relationship between articles 27 and 98 of the Rome Statute, some States Parties raised concerns, and it was noted that interested States Parties could refer the matter to the Bureau for further consideration and attention.26

2. The Bureau Working Group

The Bureau took up this issue at its meeting of June 2016.27 With respect to the relationship between Articles 27 and 98, South Africa had submitted a Note verbal in May of that year seeking the establishment of a Working Group on implementation of Articles 97 and 98 including a request to look at the issue of the relationship between Articles 27 and 98. However, no consensus could be achieved in support of a Working Group on this latter issue. As a result, the Bureau limited its decision to Article 97 establishing a Working Group to examine the application of Article 97, in close consultation with the Court. Ambassador Maria Teresa Caffi of Chile was named the chair of the Working Group.

In November 2016 the Chair reported on the Working Group activities and status.28 The Working Group had held three meetings (31 August, 28 September and 10 November) which were open to all States Parties with participation of representatives of the Court. But the mandate accorded to the Working Group was vague in nature. Discussions were further complicated by the fact that the Bureau mandate (to examine the application of Article 97) and the mandate given by the ASP (‘consider … proposals to develop procedures for the implementation of Article 97’) did not correspond, with the latter being more specific in terms of the action to be taken. As a result, as evidenced by the issues outlined in the November report, there was not much agreement on a way forward as of the conclusion of the initial mandate.

The first two meetings had addressed precisely the mandate given by the Bureau — consideration of the application of Article 97 with presentations from both the Court and representatives of national jurisdictions active in cooperation with the Court. Given the mandate as presented by the ASP, from the beginning a central issue for states was whether rules or regulations should be elaborated in support of the Article or should other means be found to clarify the procedures in relation to the same. Of concern particularly to the Court was the need to ensure that the flexibility of Article 97 was not damaged by the importation of defined procedures. To illustrate the potential problem emphasis was placed on the drafting history of Article 97 and the fact that it was designed to provide a flexible basis through which any problems with execution of requests could be
addressed. For this reason, the drafters had used broad language and a deliberate decision had been taken not to constrain the Article with procedural rules. The intention was to have a general tool which could deal with the full range of scenarios that might arise.

As noted in the Report, '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'. The Court presentations also highlighted that while examples were included in Article 97, it was of general application to all of Part 9. The current practice of the Court was highlighted to demonstrate that such consultations — whether specifically citing Article 97 or not — were crucial to the successful execution of requests and were conducted regularly by the OTP and Registry.

In the course of the discussions, a clear division became evident as between the vast majority of cases under Article 97 which related to the types of examples set out in sub-paras (a) and (b) and the consultation which had arisen in the South African context for the first time, relating to sub-para (c) on competing obligations.

3. The ASP Fifteenth Session

That distinction helped to focus the way forward for the Working Group in terms of the development of any procedures for Article 97. By the time the recommendation to the next ASP was agreed, there was general consensus that any elaboration of procedure should concentrate on that aspect of Article 97(c) — leaving the remaining types of consultations unhindered by any additional process.

Thus the ASP resolution at the 15th Session in 2016 incorporated the following language regarding the continued mandate of the Working Group:

3. With regard to cooperation

… 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.

4. The Reconvened Working Group

Pursuant to this mandate, in the reconvened Working Group meetings of 2017 the discussion moved towards finding a practical recommendation, as opposed to considering the issue more broadly as had been done in the initial phase. An informal drafting group was established to elaborate a text that would assist with the implementation of Article 97(c). It was intended to first focus on substantive questions and consider the format and legal status of any outcome later. Ambassador Sabine Nolke of Canada was selected to chair the drafting group.

Specifically, the idea was to try and clarify the procedure for, and content of, a consultation related to competing obligations. The challenge was that evidenced by the differing views expressed in the consultations between South Africa and the Chamber outlined above. In essence, who should be involved in the consulta-
tion and should it be of a diplomatic or judicial nature? Those issues and diverse views were equally reflected in the subsequent discussions within the drafting group.

After six meetings between February and mid-September 2017 the informal drafting group produced a text of an 'Understanding with respect to article 97(c) consultations' which was submitted to the Working Group. The Working Group report to the ASP for its 16th session attached a draft resolution and the text of the understanding for proposed adoption at the ASP in New York from 4–14 December 2017. The resolution with attached understanding was adopted by consensus at the 12th plenary meeting on 14 December 2017.

In the end, the Working Group and drafting group did not attempt to resolve the differing views but rather presented their understanding of the availability of options for a consultation under Article 97(c). The two options presented reflect generally the differing perspectives of South Africa and the Chamber in the situation which arose.

The key provision in the understanding is paragraph 2 which provides that in the case of a request for cooperation which originates with a Chamber the requested state should make a request for consultations in writing to the Chamber or to the Presidency of the Court. In the latter case, the consultations are stated not to be of a judicial nature. For reasons that are not clear both types of requests are to be transmitted through the Registrar (albeit it is unusual for requests to the Presidency, a separate organ of the Court, to be transmitted through the Registrar). The other key component of the understanding is captured in paragraph 7 of the Understanding which provides that '[n]either the request for consultations, the consultations, nor any outcome of consultations has suspensive effect, unless a competent Chamber so orders'.

The matter now rests with the ASP for their consideration.

**D. The Chamber's Article 87 Decision**

Interestingly, after all the debate and discussion in the ASP and Bureau, the Pre-Trial Chamber responsible for the Al-Bashir matter has recently cast doubt on the relevance of Article 97 to situations where a state wishes to raise substantive issues related to possible competing obligations.

In addition to the Article 97 consultations, the Pre-Trial Chamber ultimately had to address the fact that South Africa had not arrested President Al-Bashir while he was in that country in terms of the requirements of Article 87 of the ICC Statute. Article 87 provides:

> Where a State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Given the outstanding arrest warrant and request for arrest and surrender, the issue arose as to what findings the Chamber would make and what action, if any, it would take. In a decision released on 6 July 2017, the Chamber found that South Africa failed to comply with its obligations by not arresting and surrendering Omar Al-Bashir. However, the Chamber considered that it was not warranted to refer South Africa's non-compliance to the ASP for a variety of reasons.

Of relevance to this article is an interesting segment of that decision where the Chamber considered the argument that South Africa was entitled not to comply with the request for arrest and surrender because of its
interactions with the Court in June 2015, namely the disputed consultations. The Chamber made some comments directly relevant to the subject which had been discussed within the Bureau Working Group. First, it reiterated a principle already stated earlier in the decision that the application of Article 98(1) of the Statute is incumbent upon the Court and the Article does not give the requested state any right to suspend or deny cooperation.

The Chamber went on to examine the nature of Article 97 remarking that it was constructed on the implicit and realistic expectation that due to practical reasons, straightforward cooperation may occasionally not be possible and thus consultations will be needed. In examining the specific examples in the Article, the Chamber noted that Article 97 does not make explicit reference to situations falling under Article 98(1). Importantly, they expressed the opinion that the common feature of the examples in Article 97 was situations where remedial action on the part of the Court could overcome the obstacle. In essence, a consultation would be merited if there is a possibility for the Court to rectify the situation by providing more information, or withdrawing or amending the form of the request to avoid conflict.

Finally, they pointed to Rule 195 that provides specific guidance on the interaction between the Court and a state under Article 98. Namely, if there is a problem with execution in respect of Article 98 the state notifies the Court and provides any relevant information to assist the Court in the application of Article 98. The Chamber considered this as further support for its interpretation of the Article and also noted the clear conceptual difference from Article 97. The former involves provision of information and a determination by the Court; the latter a bilateral exchange aimed at resolving the matter.

In concluding, the Chamber made it clear that it did not go so far as to exclude the applicability of Article 97 consultations in relation to Article 98 situations. However, it seemed to restrict its application to those instances where consulting might bring clarity as to the possible obstacle to cooperation if that were not clear. However, the Chamber went on to specifically reject the application of Article 97 in the manner sought by South Africa — to hold discussions with the Chamber on the legal question as to whether South Africa had the duty to arrest Omar Al-Bashir and surrender him to the Court. In the view of the Chamber as this was the focus of the consultation proposed by South Africa, there was no purpose in the particular case for the consultations to have been continued and prolonged. Only a judicial process could have settled the matter, not a political and diplomatic procedure. The Chamber further reiterated that such consultations in any event had no suspensive effect.

In sum, in the view of the Pre-Trial Chamber, Article 97 is intended for situations where an issue with respect to a cooperation request has the potential to be resolved through discussions and clarification. With respect to Article 97(c) that would be the case where further clarity of facts might be attained through a consultation. However, the Chamber clarified that the proper basis for approaching the Court on the substantive conflict issue is Rule 195.

If this interpretation of the limited application of Article 97(c) is applied in future by this and other Chambers, it may reduce significantly the relevance and usefulness of any text that is ultimately adopted by the ASP. However, all of that will need to await future developments.

4. Conclusion
Whatever the outcome, the discussions surrounding Article 97 illustrate well how even the most innocuous provisions of the ICC Statute can become controversial. And the reverse is also illustrated with Part 9 more generally. Some of the most contentious issues which preoccupied the drafters — such as the perils of an absolute cooperation obligation in terms of practical cooperation problems — have not proven to be a particular challenge. No doubt there will be more surprises in store as practice under Part 9 and the Statute as a whole further develops.


2. Art. 98 ICCSt.

3. See e.g. Agreement between the United States of America and Gabon, available online at https://www.state.gov/documents/organization/165197.pdf (visited 13 October 2017); Agreement between the United States of America and Afghanistan, available online at https://www.state.gov/documents/organization/183325.pdf (visited 13 October 2017); See also Kress and Prost, supra note 1, at 2119–2123.


5. Art. 97 ICCSt.


7. Which at that time was framed with optional language surrender, transfer or extradition.

8. Draft Statute for the International Criminal Court, supra note 6, at 134.

9. Draft Statute for the International Criminal Court, supra note 6, at 144.

10. This provision related to refusal of cooperation in the case where the state had not accepted jurisdiction over the crime was ultimately not retained anywhere in Part 9 or elsewhere in the ICCSt. That it was considered and removed supports the view that it ultimately jurisdiction is triggered with respect to the crime of aggression but without application to all States Parties as foreseen by the Kampala amendments, the cooperation obligation will remain for all States Parties.


12. Art. 90 ICCSt.

13. Draft Statute for the International Criminal Court, supra note 6, at 135.


16. Art. 91(4) ICCSt.; Art. 93(3) ICCSt.; Art. 96(3) ICCSt.

Art. 97 ICCSt.

Art. 91(2)(c) ICCSt.

Art. 91(4) ICCSt.

Art. 96(2)(e) ICCSt.

Request to all State Parties to the Rome Statute for the Arrest and Surrender of Omar Al-Bashir, Al-Bashir (ICC-02/05-01/09), Registrar, 6 March 2009. See also discussion in Kress and Prost, supra note 1, at 2049–2050.

Rules 176 and 194 ICC RPE.

Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Al-Bashir (ICC-02/25-01/09), Pre-Trial Chamber 1, 12 December 2011; Decision Pursuant to Art. 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, Al-Bashir (ICC-02/05-01/09-140), Pre-Trial Chamber I, 13 December 2011; Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al-Bashir’s Arrest and Surrender to the Court, Al-Bashir (ICC-02/05-01/09), Pre-Trial Chamber II, 9 April 2014.


Ibid., § 6.

Ibid., § 7.


Ibid., §§ 1–12 and Annex.

Resolution on consultations pursuant to article 97(c) of the Rome Statute of the International Criminal Court, ICC-ASP/16/Res.3, 14 December 2017.

Ibid., Annex, § 2 Understanding.

Ibid., Annex, § 7 Understanding.
Decision under art. 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, *Al-Bashir (ICC-02/05-01/09)*, Pre-Trial Chamber II, 6 July 2017.
