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COMMITTEE OF THE WHOLE

PROPOSAL SUBMITTED BY THE REPUBLIC OF KOREA
FOR ARTICLES 6 [9],* 7 [6] AND 8 [7]

Acceptance and exercise of jurisdiction of the Court

1. The acceptance and exercise of jurisdiction is one of the cardinal issues to be resolved in the establishment of the International Criminal Court. During the debate in the Preparatory Committee, there emerged two conflicting schools of thought on this issue: one preferred to confer on the Court inherent jurisdiction, while the other adhered to the State consent regime at each stage.
2. In our view, both schools have their respective shortcomings. Those who favour the concept of inherent jurisdiction overlook the fact that the proposed Court is a treaty body to be created through the consent of States. It is State consent that justifies the jurisdictional link between the States Parties to the Statute and the Court. Foregoing any precondition to the exercise of jurisdiction would run a risk of rendering the acceptance of the Court's jurisdiction meaningless. In such a case, the Court would likely exercise its jurisdiction over the offenders of the crimes under the Statute, irrespective of whether the interested States had accepted the Court's jurisdiction. Furthermore, the rationale behind the rule of complementarity makes the jurisdictional link based on State consent indispensable.

* The numbers within square brackets indicate the numbering of the corresponding articles in document A/CONF.183/2/Add.1.

3. On the other hand, the adherents of the State consent regime also fail to recognize that the requirement of State consent at two distinct stages - acceptance and exercise - would render the Court ineffective owing to this jurisdictional hazard. For the Court to be as effective as possible, State consent should be called for once, when a State becomes a party to the Statute. Otherwise, it would deprive the Court of the predictability of its function by granting States a de facto right of veto to determine whether the Court is able to exercise jurisdiction. Thus, State consent to the acceptance and exercise of jurisdiction should be integrated into a single act.

4. The Republic of Korea believes that an appropriate compromise formula on the jurisdiction of the Court should be sought, whereby the merits of the two ends of the spectrum could be combined. The core elements of a potentially viable compromise are as follows:

(a) State consent constituting the basis of the jurisdiction of the Court should not be separated at the two different stages - acceptance and exercise of the Court's jurisdiction. By becoming a Party to the Statute, a State is considered as having accepted, and agreed to the exercise of, the jurisdiction of the Court once and for all. In this sense, it would be apt to regard the Court's jurisdiction as *automatic* rather than *inherent*;

(b) For the sake of jurisdictional nexus, there should be a requirement that one or more of the interested States has given its consent to the exercise of jurisdiction by the Court, which, in accordance with (a) above, is acquired automatically by becoming a State Party to the Statute. The interested States should include the territorial State, the custodial State, the State of the nationality of the accused, and the State of the nationality of the victim. Unless one of the four categories of interested States is a Party to the Statute, the Court is not able to exercise its jurisdiction over a case in which that State has jurisdictional nexus. Hence, the requirement here is not cumulative, but selective.

5. Based on these two core elements, the Republic of Korea is putting forward a compromise proposal on the jurisdiction of the Court (see annex). The proposal is intended to address the concerns of both those eager to ensure the effective functioning of the Court and those wary of possible encroachment by the Court on the State consent regime.

6. The approach the Republic of Korea proposal has taken is similar to that of the United Kingdom proposal, contained in A/AC.249/WG.3/DP.1. However, there are two fundamental differences between the two proposals:

(a) Essentially, while the United Kingdom proposal requires the cumulative consent of the territorial State and the custodial State, the Republic of Korea proposal requires only the consent of one of the four categories of interested States, which is selective. This will give the Court a wider window of opportunity to exercise its jurisdiction;

(b) The second difference is a conceptual one. The United Kingdom proposal rests on the premise that the Court has universal jurisdiction over the core crimes, while the Republic of Korea proposal presupposes that jurisdiction is conferred upon the Court based on State consent pursuant to the provisions of the Statute. This difference is to be reflected in the approach to a non-State Party becoming engaged in the functioning of the Court.

7. The delegation of the Republic of Korea hopes that the present proposal would be used as a basis for resolving existing differences over the jurisdiction of the Court at the Diplomatic Conference. The delegation also welcomes any comments or suggestions thereto.

ANNEX

Article 6 [9]

Acceptance of the jurisdiction of the Court

1. A State that becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
[2. Subject to the provisions of the Statute and the conditions of the Rules of Procedure and Evidence, a State that is not a Party to the Statute may, by declaration lodged with the Registrar, accept the jurisdiction of the Court in respect of a particular case, if the acceptance of jurisdiction by that State is required for the exercise of jurisdiction by the Court under article 8.]

Article 7 [6]

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of the Statute if:

- (a) A case in which such a crime appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 11;
- (b) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 12; or
- (c) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations in accordance with article 10.

Article 8 [7]

Preconditions to the exercise of jurisdiction

In the case of article 7, paragraph (a) or (b), the Court may exercise its jurisdiction with respect to a crime referred to in article 5 if one or more of the following States are Parties to the Statute [, or have accepted jurisdiction in accordance with article 6, paragraph 2]:

- (a) The State on the territory of which the act in question occurred, or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
- (b) The State that has custody of the suspect with respect to the crime;
- (c) The State of which the accused of the crime is a national; or
- (d) The State of which the victim is a national.
