PERMANENT MISSION
OF THE PRINCIPALITY OF LIECHTENSTEIN
TO THE UNITED NATIONS
NEW YORK

NEW YORK, 17 OCTOBER 2012
SECURITY COUNCIL – OPEN DEBATE
PEACE AND JUSTICE, WITH A SPECIAL FOCUS ON THE ROLE OF THE ICC
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PERMANENT REPRESENTATIVE OF THE PRINCIPALITY OF LIECHTENSTEIN TO THE UNITED NATIONS

Mr. President

It is a great honor for me to address this Council today also on behalf of the Permanent Representative of Jordan, H.E. Zeid Ra'ad Hussein al-Hussein and H.E. Bruno Stagno Ugarte of Costa Rica. As the three former Presidents of the Assembly of States Parties of the International Criminal Court, we have closely followed the relationship between the Council and the Court in the past ten years. A generic debate on this relationship is very timely, and we are grateful to you for initiating it. Like others, we would suggest that the Security Council discuss this issue in regular intervals. In the early days of the Court, the debates in the Council revolved largely around the use of article 16 of the Rome Statute, which gives the Council the competence to defer investigations and prosecutions for a period of 12 months. They led to some of the most controversial and questionable resolutions to come out of this Council –resolutions 1422 (2002) and 1487 (2003), which we consider contrary to both the Charter of the United Nations and the Rome Statute. Today, thankfully, this topic belongs to the past – though it would serve the Councils interest to be better prepared for possible deferral requests in the future.

At the heart of today's political debate is the other competence the Rome Statute gives to the Security Council: Its authority to refer situations to the Court (art. 13b Rome Statute). The Council has used this

competence only twice in ten years – in 2005 on the situation in Darfur (SCR 1593) and in 2011 on Libya (SCR 1970) – but still more frequently than expected when the Statute entered into force. Supporters of the Court have generally welcomed these referrals as breakthroughs for international criminal justice: The 2005 decision on Darfur was made in an overall climate that was difficult for the Court. And the Libya referral seemed to illustrate the preparedness of the Council to act swiftly to ensure accountability for the most serious crimes – even by unanimous vote! Nevertheless, we believe that our assessment today must be more calibrated. Referral decisions by the Council have proven to be a mixed blessing for the Court – and for international criminal justice, as they were driven by political convenience as much as by the desire to establish justice

The referral decisions were significant in the history of international criminal justice, but they came at a high cost for the Court. The Court was accused of politicization, of bias against a particular region, of manipulation by powerful countries who chose to stay outside of the Rome Statute – and it has found itself with very limited support from its constituency. It is thus paying the price for the decisions – and sometimes lack thereof – made by this Council. Obviously, this is neither in the interest of the Court and justice more broadly, nor in the interest of the Security Council. The Council should therefore take several steps to move toward a more symbiotic relationship with the ICC as an independent judicial institution. In order to genuinely advance accountability, several aspects of the Councils practice would have to be addressed in future referrals.

Most importantly, the Council must **back up its referral decisions** with measures that enforce cooperation: A referred State's obligation to cooperate with the Court is based solely on the Chapter VII power of the Council. Lack of cooperation by that State is therefore a violation of its obligation under article 25 of the UN Charter. Nevertheless, the Council has been notoriously silent in most instance where the Court required its backing – or even tacitly acquiescent. The Council does not even have a mechanism to deal with notifications of non-cooperation by the Court – a serious shortcoming that needs to be fixed urgently! Our colleague from Togo and others have talked about this earlier today in this debate. An important challenge in this respect may be coming the Council's way once the Court has decided on the admissibility challenge put forward by the Libyan Government.

Closely linked to this is the question of the **financing of judicial Court activity** triggered by a referral decision. In referring situations to the ICC, the Council effectively uses the Court as an alternative to the

establishment of an ad hoc-tribunal – a very cost-efficient alternative, as the comparison with other tribunals illustrates. Both the relationship agreement between the Court and the United Nations and the Rome Statute indicate clearly that the costs arising from such referrals should therefore be borne by the UN budget, subject to a decision by the UN General Assembly. We do not think that the independence of the hoc - tribunals has been undermined by the fact that they were financed by the UN membership.

Finally, the Council should delete the language **exempting certain individuals from the Court's jurisdiction** from future referral decisions. These formulations corroborate the suspicion of selectivity in creating accountability and are a reflection of an ideology that we hope the Council has overcome. They may also not withstand the judicial scrutiny of the Court, once the occasion arises.

In addition to subjecting the language it has used in the past to a fundamental review, the Council should also do what is necessary to address some of the problems that have arisen in connection with referrals. In particular, the **rules concerning complementarity** should be clearly reflected in referral decisions, in accordance with article 19 of the Rome Statute. The Statute always gives primacy to the jurisdiction exercised by national authorities, but it also provides for very clear rules governing such jurisdiction. And finally, referral resolutions should stipulate that cooperation obligation by the referred State is – obviously – based on the **Rome Statute in its entirety**. This way, the Council could prevent discussions suggesting that referred States would have to respect only parts of the Rome Statute. Indeed, it is the integrity of the Rome Statute that makes the Court deliver justice in an independent and credible manner, and thereby contributes a fundamental building block to sustainable peace. The Council has made important advances in the area of accountability. It should now make full use of the potential offered through the Rome Statute system. A genuine commitment to accountability also entails that immunity agreements contrary to international law are not endorsed by this Council

Mr. President

Ultimately, the political challenge for the Security Council will often be to square the principles of peace and of justice. That is often not an easy task, and we clearly need more and more inclusive discussions of this challenge. We find it difficult to understand though why the Council is unable le to make a simple and straightforward statement on accountability concerning the situation in Syria: There is ample evidence that crimes against humanity and other international crimes are committed by the parties to

the conflict. The Council should therefore call for accountability in this situation and ultimately, if there is genuine political will, refer the situation to the Court.

The activation of the Court's jurisdiction over the crime of aggression, hopefully in 2017 will create an additional connection between this Council and the International Criminal Court. The Kampala consensus preserves the competence of the Council under article 39 of the Charter. At the same time the Court's exercise of jurisdiction is not ultimately contingent on the Council decisions. Both legally and politically therefore the Kampala consensus strikes a careful balance.

I thank you.