

Some Thoughts on Russia and the International Criminal Court
November 2012
David Kaye

During the October 17th Security Council debate focusing on the Council's relationship with the International Criminal Court, Russia's UN Permanent Representative, Ambassador Vitaly Churkin, provided a revealing overview of the official Russian attitude toward the Court. While Russia has not ratified the Rome Statute, one can read in Ambassador Churkin's statement some fundamental agreements with the purposes of the Court and international justice more generally. "It is clear," he said, "that persons guilty of particularly serious crimes under international law must be brought before the Court." The Council's attention to the ICC is in recognition of "the great potential of the Court in the area of international justice." The Council "has a serious new tool with which to achieve that goal" of fighting impunity, and the two entities "must interact within the framework of their respective mandates and with mutual respect."

All of this is good and important from the Court's perspective. It demonstrates an underlying commitment to accountability that, at least in principle, the Government of Russia shares with the Court and those Member States that support the Court. To the extent advocates seek to influence Russian policy on the Council toward the Court, they should recognize these elements of common ground.

However, not all was hopeful in the Russian intervention, for despite the positive elements, Ambassador Churkin devoted the bulk of his intervention to concerns, sometimes obliquely identified, that Russia has about the Court and the Council-Court relationship. These concerns may be expressed in the following categories:

1. **The Peace-Justice Balance:** Ambassador Churkin noted the importance of achieving "a harmonious combination of measures to restore peace and steps to ensure accountability." He recognized the importance of the Court's judicial independence, yet he suggested that its "activities must be carried out in the light of common efforts to settle crisis situations." Indeed, the referral experience, he argued, shows that "serious political and legal consequences" sometimes follow Court engagement. He seemed concerned that referrals made "either too fast or too slowly" can undermine stability and the search for peace. Objectively speaking, this is unsurprising. However, the tenor of the comments suggests a strong discomfort with Court involvement in situations in which the Council is also seized. Churkin's closing remark questioning "[t]he extent to which [the Court] can work in a mature and balanced way and find its own place in the international system" suggests an overarching concern that the Court not 'interfere' with the peace-and-security mandate of the Council. A Russian official made the argument less delicately in a research interview, arguing that Russia aims toward stabilization in the Council and that international justice may interfere with the goal of stability.

2. **Head of state immunity:** Ambassador Churkin came down on the side of those who argue that UNSCRs "do not abrogate the norms of general international law on the

immunity of heads of State in office.” Putting aside the legal arguments, the focus on preserving the customary norm of immunity may give Court supporters pause. Churkin did not try to offer a way to support Court efforts to apprehend “high officials” against whom there are outstanding arrest warrants. Instead, his suggestion that only “a direct instruction” from the Council may abrogate immunity provides a hint of displeasure that the Court seeks the arrest of those for whom immunity customarily would attach. A Russian official made the related concrete argument, in an interview with the author, that the ICC enjoyed “good relations” with Sudan until the Bashir arrest warrant – which, whether true or not, indicates a belief that the ICC itself is the cause of some of its cooperation problems.

3. Aggression: Ambassador Churkin indicated displeasure concerning the outcome of the Kampala compromise over the crime of aggression, which he said “does not fully take into account the powers of the Council.” To be more precise, he said, “[w]e have concerns about the Court exercising jurisdiction with regard to the crime of aggression in the absence of any definition of the crime of aggression by the Security Council.” At the present time, of course, the Court’s exercise of jurisdiction over the crime of aggression remains speculative. Yet Russia is laying down a marker that aggression could pose problems for it over the long-term development of Council-Court relations.

In short, the Russian position, as expressed by Ambassador Churkin, strongly suggests concern that the Court risks undermining what is seen as the established roles of the Council. Churkin’s emphasis on how the Court must carry out its activities highlights a case-by-case approach in which Russian policymakers will focus on Council equities and security/stability/peacemaking as much as, if not more than, principles of accountability and justice.

A research trip to Moscow in September, involving discussions with officials, activists, and academics, anticipated Churkin’s intervention. However, one of the most striking observations – made in Moscow and in preparatory work beforehand – was just how few Russians think, write, or argue about the ICC. The community of Russian scholars who make study of international justice a principal item on the research agenda is tiny, probably numbering under a half-dozen. Inquiries with think tank experts on Russian foreign policy, in the West and in Moscow, draw generally blank responses or referrals to experts in Russian criminal law. Whereas official discussion of the ICC in the West extends to policy and legal entities, discussion in Russia appears limited to a small number of legal experts in the Ministry of Foreign Affairs. Human rights activists in Moscow across the board expressed the view that the ICC was not high among their priorities today (for good reason, one might add); but they also tended to express disappointment that early interest in the Court among officials, academics, and activists dissolved over the first decade of the Court’s existence.

Academic experts who follow Russian policy toward the Court generally expressed the belief that the Russian approach to human rights – of which they see international justice as a part – is, in one expert’s view, Machiavellian and

instrumentalized. In other words, Russian official interest in international human rights, it was often argued, derives from political needs and defensiveness. One expert argued that the top government officials have “deep-seated insecurities,” are increasingly inward-looking, and are torn between the desire to be seen as a mature, human rights-respecting government and the perceived need to maintain Russia’s national sovereignty. At the same time, there is an overarching sense of diminishing authority internationally – except in the context of the Security Council, where Russia maintains its privileged permanent position.

Several interviewees expressed the view that the only decision maker who matters on issues of accountability is President Putin. One noted that Putin expressed outrage (whether manufactured or not) over the mob killing of Qaddafi, a fact that may color his views of future referrals and the Council’s engagement with the ICC. One of the problems identified by an academic interviewee is that Russian policymaking at this time is both concentrated in the Kremlin and highly opaque; it is nearly impossible, he suggested, to know with any certainty how ICC decisions are made, the factors that go into them, and who provides advice. The only safe conclusion, it was suggested, is that Russian decisions are made on a case-by-case basis, with the impact on perceived Russian equities an overriding factor.

Given the concerns and the Syria experience, in which Russia has opposed Council engagement repeatedly, a small group of academics argued that a long-term approach is important. They argued for laying the groundwork for long-term Russian engagement with the Court and support of the Court through the Council. They suggested the need for university and law school programming that educates students about international courts and tribunals, including through the use of conferences and academic exchanges. They also suggested a need for policy-oriented education today, emphasizing that a shorter-term target audience would not be lawyers or students but policymakers, think-tank experts, and others who focus on Russian security and foreign policy.