

BOOK REVIEW

Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, Brill, 2018, 268pp, ISBN 978-90-04-34221-7, €145
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UN Security Council (UNSC) referrals to the International Criminal Court (ICC), provided for in Article 13(b) of the Rome Statute, triggers the jurisdiction of the ICC over situations in states not party to the Statute. Because of the differences in the respective legal bases under international law – the UN Charter for the UNSC on the one hand, the Rome Statute for the ICC on the other – a myriad of legal issues arise out of this referral mechanism, particularly because it makes applicable the legal regime of the ICC to a state without its consent. The two UNSC referrals to date, the one concerning the situation in Darfur, Sudan in 2005¹ and that of Libya in 2011,² demonstrated such legal issues range from specific questions regarding the temporal scope of such referrals (are alleged crimes committed against migrants in Libya in 2017 covered by the referral of 2011?),³ to the applicable criminal law (are all crimes as defined by the Statute or only those attaining the level of customary international law applicable in these situations?). Another open question relates to exemptions for certain categories of nationals from states not party to the ICC contained in the referral (are they binding upon the ICC, thus preventing the ICC from exercising jurisdiction over such nationals?). While a few book-length treatments (in German) have analysed the relationship between the UNSC and the ICC generally,⁴ only one other monograph deals exclusively with the referral mechanism and its legal nature.⁵

The book under review takes a step back from dealing with only specific questions by analysing the legal nature, effects and limits of UNSC referrals in general. The book is divided into five chapters and structured around the three main legal issues as identified by the author: the sovereignty of states not party to the Rome Statute (1), the principle of legality (2) and the immunity of

¹UN Doc. S/RES/1593 (2005).

²UN Doc. S/RES/1970 (2011).

³See International Criminal Court, Office of the Prosecutor, Statement to the United Nations Security Council on the Situation in Libya, pursuant to UNSCR 1970 (2011) (8 November 2017).

⁴For German scholarship see J. Pichon, *Internationaler Strafgerichtshof und Sicherheitsrat der Vereinten Nationen: Zur Rolle des Sicherheitsrats bei der Verfolgung völkerrechtlicher Verbrechen durch den IStGH* (2011); R. Frau, *Das Verhältnis zwischen dem ständigen Internationalen Strafgerichtshof und dem Sicherheitsrat der Vereinten Nationen: Art. 13 lit. b) IStGH-Statut und der Darfur-Konflikt vor dem Gerichtshof* (Schriften zum Völkerrecht Band 192, 2010); M. E. Kurth, *Das Verhältnis des Internationalen Strafgerichtshofes zum UN-Sicherheitsrat: Unter besonderer Berücksichtigung von Sicherheitsratsresolution 1422 (2002)* (2006); D. Stigel, *Sicherheitsrat und Internationaler Strafgerichtshof: Zur Abgrenzung ihrer Kompetenzen nach der Charta der Vereinten Nationen und dem Römischen Statut* (Schriftenreihe Studien zum Völker- und Europarecht Bd. 41, 2008).

⁵See, G. M. Lentner, *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice* (2018).

State officials (3).⁶ In this review I will first provide an overview of the book, its main arguments and conclusions, and then discuss its findings and offer some criticism.

In the introduction, the author lays out the analytical framework that influenced this study. Galand invokes a comparative conflict of norms approach together with Roland Dworkin's concept-conception distinction, according to which 'we can agree on a concept but each of us will have our own conception of the same concept'.⁷ The book claims that there are two 'conceptions' of the 'concept' of an Article 13(b) referral: universal jurisdiction arising from the nature of the crimes (1) and jurisdiction based on the powers of the UNSC under Chapter VII (2).⁸

On this basis, Chapter 1 addresses the conceptions of Courts and their jurisdiction. Galand concludes that states delegate their jurisdiction to international tribunals, which remain 'bound to respect the same limits to its jurisdiction as the delegating State'.⁹ After discussing the historical examples of the Nuremberg and Tokyo Trials, the Nuremberg Principles and the work of the International Law Commission (ILC), the *ad hoc* tribunals and the ICC, he refers to four main views of the jurisdictional basis for the ICC in case of UNSC referrals¹⁰ but confines himself to describing the 'two conceptions', i.e., the basis for the ICC's jurisdiction being either universal jurisdiction or the UNSC's Chapter VII powers ('Chapter VII conception').¹¹ According to the former, the ICC is exercising universal jurisdiction through the *jus puniendi* of the international community (this seems also to be the view of the ICC).¹² According to the latter, it is the powers of the UNSC under Chapter VII of the UN Charter that serves as the jurisdictional basis for the ICC. In concluding the chapter, the author calls for the reader to reflect on which 'conception' to 'support, and to then visualize how this "conception" interacts with other norms of international law'.¹³ If a 'conception' 'misuses legal reasoning in order to avoid an irresolvable norm conflict, then this "conception" should be discarded'.¹⁴ The following Chapters analyse those conflicts.

Chapter 2, identifies issues relating to the powers of the UNSC under the Charter to make the Rome Statute applicable to a state not party to it through the lens of state sovereignty. He concludes that the Chapter VII conception is a viable legal basis for ICC jurisdiction.¹⁵ Key for this inference is the obligation of all UN member states to accept and carry out the decisions of the UNSC (Art. 25 UN Charter) and so the question turns to whether the UNSC referral falls within its powers under Chapter VII as quasi-legislative acts.¹⁶ Galand goes through the issue of the UNSC possessing a right to prescribe new criminal law when making the referral.¹⁷ He answers in the affirmative provided that 'such measure is case related, intended to be with concrete effects and temporary'.¹⁸ On the other hand, the author rejects the universal jurisdiction conception that relies on the premise of exercising the *jus puniendi* of the international community in that regard. This is because that is difficult to square with state sovereignty.¹⁹

Chapter 3 deals with the UNSC referral and the principle of legality, premised on the assumption that the crimes as defined in the Rome Statute depart from customary international law at

⁶A. S. Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (2018), 10.

⁷*Ibid.*, at 6.

⁸*Ibid.*, at 4.

⁹*Ibid.*, at 17 (footnote omitted).

¹⁰*Ibid.*, at 30.

¹¹*Ibid.*, at 31–45.

¹²*The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, A.Ch., 6 May 2019, para 115.

¹³Galand, *supra* note 6, at 46.

¹⁴*Ibid.*

¹⁵*Ibid.*, at 88.

¹⁶*Ibid.*, at 69–76.

¹⁷*Ibid.*, at 76–88.

¹⁸*Ibid.*, at 88.

¹⁹*Ibid.*, at 102.

least in some respects.²⁰ Following the ‘universal jurisdiction conception’, the crimes in the Rome Statute are seen as having been made universally applicable at the time of its entry into force²¹ and thus do not raise issues regarding the principle of legality. On the other hand, for the ‘Chapter VII conception’ Galand sees a problem in a referral with retroactive jurisdiction.²² This is because ‘the Rome Statute, as a multilateral treaty, binds its State parties only’,²³ and because the ‘Rome Statute’s substantive criminal provisions [become] applicable to the accused when the SC resolution is adopted and not before’.²⁴ According to Galand, this can be resolved through the invocation of Article 21(3) of the Statute, which allows the ICC to respect the principle of legality as part of international human rights law.²⁵

Chapter 4 follows with a thorough discussion of the status of immunity of state officials in UNSC referrals. This book was written before the Appeals Chamber decision on Al Bashir’s immunity,²⁶ but nevertheless offers a detailed treatment of the issue. In light of the Chapter VII conception, Galand concludes that the UNSC referral removed immunities by subjecting the referred situation to the legal regime of the Rome Statute.²⁷ With respect to the universal jurisdiction conception, immunity cannot be claimed because of the application of the Rome Statute, which does not recognize such immunities, that is only ‘triggered’ by the UNSC referral. For Galand, however, such reasoning is ‘on the edge of the international legal system as it currently stands’.²⁸

In the final chapter, Galand asks the question ‘what if Article 13(b) did not exist?’ to discuss the legal interrelationship between the UNSC and the ICC generally with selected implications, such as the scope of temporal jurisdiction.²⁹ Clearly, the UNSC cannot alter the Rome Statute³⁰ and he finds that without Article 13(b) the UNSC ‘could not have referred situations to the ICC, even if international peace and security demanded so’.³¹

The book thus discusses important issues arising out of the uncertain legal nature of UNSC referrals to the ICC. It also highlights some of the issues that have so far not been directly addressed in scholarship, regarding their specific legal basis, the resulting effects and limits. He deserves credit for the thorough engagement with the two divergent views, always with a view to find weaknesses in either position. However, there are some elements of Galand’s treatment of the matter that may not be all the way persuasive and invite critique.

First, for this reviewer the framing of the concept-conception is not easily understandable and seems to suggest that both approaches to UNSC referrals are equally valid. The author employs the concept-conception in order to:

show which conception is able to coherently deal with . . . other norms of public international law, including the law of treaties, the law of immunities and specialized fields such as international human rights law. The norm conflict approach shows to what extent each “conception” needs to be stretched in order to avoid or resolve a norm conflict with one or more of these legal barriers.³²

²⁰*Ibid.*, at 104–5.

²¹*Ibid.*, at 150.

²²*Ibid.*, at 151.

²³*Ibid.*, at 129.

²⁴*Ibid.*, at 130.

²⁵*Ibid.*, at 140–9.

²⁶The Court held that heads of state have no immunity under customary international law before international tribunals, see *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, A.Ch., 6 May 2019.

²⁷Galand, *supra* note 6, at 166.

²⁸*Ibid.*, at 200.

²⁹*Ibid.*, at 212.

³⁰*Ibid.*, at 214.

³¹*Ibid.*, at 222.

³²*Ibid.*, at 9.

It is, however, not clear what this and the so-called comparative conflict of norms approach means and what they add to the subsequent analysis. It would have helped the reader if that choice was explained more fully as the concept-conception distinction is derived from political philosophy where it is used in different contexts.³³

By looking through the lenses of norm conflicts, Galand focuses at times too much on describing how the different views can or cannot accommodate conflicts of norms that arise, preventing him from developing his own arguments. The result is that the book often lacks any definite answers to the issues discussed. For example, when looking at whether the exemptions from the ICC's jurisdiction for certain categories of nationals included in the two referrals to date are binding upon the ICC, he cites the views of some commentators and to the ICC's decision without further analysing the merits of the respective arguments.³⁴ It would have been interesting to know Galand's views on this as this exemption proved to be highly controversial in practice and its legal status remains unsettled.

The monograph could also have been more elaborate in some respects. While Galand shows analytical depth in his treatment of the issue of heads of state immunities, he states in connection with the termination of a UNSC referral by the UNSC without much further discussion that 'the SC may not terminate the Court jurisdiction *ratione temporis* in a subsequent resolution, as withdrawal of jurisdiction is not provided in the Rome Statute'.³⁵ This might be open for debate: could the ICC really proceed should a UNSC referral expressly terminate the Court's mandate? When the legal basis for the jurisdiction in this case is the UNSC referral, does not the ICC equally lose its only basis on which it may exercise jurisdiction? And might not the express provision of Article 16 of the Statute have any effect according to which no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months should the UNSC so decide under Chapter VII? It would have been interesting to know how this could be reconciled under the Chapter VII conception.

Ultimately, the book does a good job of engaging with and critically analysing the literature and jurisprudence. By looking at the different conceptions of the concept of UNSC referrals, the author goes into analytical depth and unpacks the various legal issues that arise when taking the one or the other position. These are the strongest parts of the book and Galand thereby produces a very valuable addition to the existing literature that sometimes overlooked certain implications of positions that have been taken.

As a whole, the mentioned minor shortcomings notwithstanding, the book is to be welcomed and valuable in that it highlights the importance of a thorough analytical discussion regarding the inter-relationship between the UNSC and the ICC. This topic has somewhat been neglected in scholarship for too long, and one hopes that this book helps in bringing those important questions to the attention of scholars, judges and other practitioners.

*Gabriel M. Lentner**

³³John Rawls, for example, distinguishes different conceptions from the concept of 'justice'. See J. Rawls, *A Theory of Justice* (1999), 5–6. See also R. Dworkin, *Law's Empire* (1986), 71.

³⁴Galand, *supra* note 6, at 75–6, 205–23.

³⁵*Ibid.*, at 212.

*Danube University Krems, Dr.-Karl-Dorrek-Strasse 30, 3500 Krems, Austria [gabriel.lentner@donau-uni.ac.at].