



## THIRD WORLD APPROACHES to INTERNATIONAL LAW *Review*

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### **Making Race Speakable in International Criminal Law: Review of Lingaas' *The Concept of Race in International Criminal Law***

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The concept of race and the process of racialisation rarely feature in international criminal law discourse. Despite the field's diverse geographic representation and attempts to come to terms with political violence, there have been no systematic analyses of race, with one scholar describing race as 'the elephant in the room'.<sup>1</sup> The following book review, dealing with the speakability of race, highlights that such engagement is likely to be seen as contradicting the cosmopolitan aims of scholars and institutions of international criminal law. These cosmopolitan and inclusive aspirations often run in tandem with the field's 'racial blindness' and an 'anti-racist posture that refuses to "see" race' except where it is blatant, individualistic and overt.<sup>2</sup>

It is not surprising then that the continuities of neo/colonialism, as evidenced by the overrepresentation of Black, Brown and Muslim defendants from Africa at the International Criminal Court (ICC), has generally been downplayed, dismissed, or seen as a problem of Third World state propaganda and manipulation. This is despite scholarly and political critiques of international criminal law, and particularly of the ICC that centre on the prosecution of Black, Brown and Muslim racialized men and women.<sup>3</sup> In contrast to the silent treatment of race, DeFalco and Mégret rightly suggest that discussion of gender has been much more palatable for the field.<sup>4</sup>

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<sup>1</sup> Carola Lingaas, 'The Elephant in the Room: The Uneasy Task of Defining 'Racial' in International Criminal Law' (2015) 15:3 *International Criminal Law Review* 485.

<sup>2</sup> Randle C DeFalco and Frédéric Mégret, 'The invisibility of race at the ICC: lessons from the US criminal justice system' (2019) 7:1 *London Review of International Law* 55, at 56.

<sup>3</sup> Kamari Maxine Clarke, 'Affective Justice: The Racialized Imaginaries of International Justice' (2019) 42:2 *Political and Legal Anthropology Review* 244, at 247.

<sup>4</sup> DeFalco and Mégret (2019) 60.

What might explain this lack of serious engagement with, and mystification of, race in international criminal law? One explanation is that scholars tend to frame international criminal law in terms of state power and institutional legitimacy. This should not come as a surprise considering that the Rome Statute is itself state-centric in terms of how it constitutes the remedies to violence and the concept of accountability. Both are intimately tied to the role of the state and legal institutions. Furthermore, in the context of the colonial formations of the principle of sovereignty and continuing inequality in international relations, the dichotomy between powerful and weak states has remained a dominant and attractive lens for analysing jurisprudential developments, particularly [judicial deference to Western states](#). The problem is that, within this particular framing, issues of race and racism have been silenced and avoided as being remote and erroneous. Or issues of race and racism have been rendered entirely 'invisible'.<sup>5</sup> In what follows, I review the recent publication of *The Concept of Race in International Criminal Law* by Carola Lingaas.<sup>6</sup> Situating my review within the broader discourse of international criminal law, I start with an overview of the book's discussion of race, followed by a close review of its conceptual framework.

## **Race and international legal discourse**

Recently, a handful of scholars have started explicitly foregrounding race, or rather the act and process of *racialisation*, in analysing discursive aspects of international criminal law. Carola Lingaas addresses the significant absence of race-related scholarship in the field and provides a comprehensive analysis of race-making in the context of international crimes. The book focuses on the legal definition of the 'racial group' as referred to - but not defined - in the crimes of genocide, apartheid and persecution where judges are usually called upon to legally interpret issues of racial identification and membership. Lingaas employs the idea of the 'racial group' analytically to define and discuss the concept of race in international criminal law. How, then, does this account make race *speakable* in international criminal law? I turn to a discussion of the book's central premise and what I see as possible limitations of its conceptual framing from a postcolonial, Third Worldist perspective.

Lingaas goes beyond a state-centric approach to international criminal law to consider what role perpetrator perceptions play in the stigmatisation, destruction, and discriminatory treatment of a victim group (pp.3, 42). As the concept of race has evolved since the end of WWII away from scientific racism, Lingaas argues for an understanding of race as encompassing the 'imagining' of racial group membership (p.3). Race is a socially constructed identity whereby humans create and socially assign meaning to phenotypical

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<sup>5</sup> DeFalco and Mégret (2019) 56.

<sup>6</sup> Carola Lingaas, *The Concept of Race in International Criminal Law* (Routledge, 2019).

characteristics, thus giving those characteristics racialised value (p.32) Lingaas relies on mainstream social science for the basic idea - also found in mainstream biology - that race does not describe an objective reality. As Lingaas argues, 'race transcends biology and carries with it a metaphysical dimension, according to which a person's racial group membership is defined by a perception of his otherness' (p.2). As such, more than a physical or pre-given fact, racial identity is seen as the product of 'the outcome of a number of collective experiences involving the creation of binary pairs or opposites' (p.1). Once racial binaries are established, the perpetrator constructs the victim group within a hierarchy and hence a process of othering, thereby an assault on the victims is justified.

Accordingly, Lingaas recommends that courts adopt a purely subjective, perpetrator-based approach to the interpretation of the racial group. This is, in fact, the core argument of the book. What motivates this approach is the understanding that jurisprudence provides inconclusive protection for racialised victims of international crimes. Based on the ambit of the principle of legality, there is a need for international criminal law jurisprudence to catch up and expand the scope of such protection to cover what Lingaas calls the identity-based nature of crimes (p.5). Genocide, for example, is seen as a 'crime of identity' rather than a 'crime of hate' whereby the subjective process of othering is discernible in the *dolus specialis* and thus tied to the central element of the crime (p.45). Taking this approach further, the nature of the crimes of apartheid and persecution are similarly interpreted through the subjective lens. Essential to distinguishing the subjective and objective approach - which Lingaas traces through cases and statements of international organisations - is the 'definitional power' that the perpetrator holds over the victims (p.106).

Overall, one of the book's strengths lies in making race speakable. In particular, it shifts attention from the state as the central agent of international criminal law to an understanding of perpetrator agency and the role that racial othering plays in political and racialised violence. In doing so, it provides an important and useful explanation of how the process of othering unfolds and is made 'real' in the minds of perpetrators.

### **Making structures of racism *unspeakable***

From a Third World perspective however, the subjective definition of race largely misses the structural dimensions of how racialisation works, particularly in former and ongoing colonial contexts. Moreover, the subjective definition of race is largely predicated on the historical context of Europe and the tragedy of the Holocaust. Nazi Germany provides the general framework for the subjective concept of race which is by implication presented

as a universal experience that can be legally applied to define racial groups across different situations of atrocity (p.8). This omission arises by means of the emphasis that the analysis places on the crime of genocide, which dominates the analysis, but also the linking of race to the element of perpetrator intent. Lingaas rightly acknowledges the futility of demanding that 'all genocidal situations be compared with the Holocaust' (p.155), and while she does not necessarily compare genocidal situations and discusses these separately, the underlying sociological idea of race that frames the subjective definition of race is located geographically, historically and conceptually within the crimes of Nazi Germany (p.155).

Furthermore, Lingaas examines Nazi theories of race to develop a normative interpretation of perpetrator-based racial othering. Thus, if only by effect, the book is vulnerable to a Eurocentric interpretation of race. Essentially, European experience is both implicitly and broadly positioned as the central standard from which to analyse atrocities committed elsewhere in the world. Little consideration is given to the rich body of literature in law, socio-legal studies, history, literary studies and anthropology that situate the construction of race directly in colonialism and imperialism.<sup>7</sup>

From a TWAIL perspective, international criminal law literature typically orientates towards European experiences of violence and accountability based on the lessons of the Nuremberg Tribunal. At the same time, there is a deep silence around colonial atrocities experienced by local and Indigenous people in the Third World and the Global North.<sup>8</sup> The tragedy of the Holocaust remains unprecedented. However, it is necessary to recognise that it is both historically and geographically situated and that it also has colonial precursors and antecedents. Indeed, there is a need to question and subvert the Eurocentric positioning of international criminal law discourse, particularly as it fails to engage with atrocities committed in the context of colonialism including the [genocide of the Herero and Nama in southern Africa](#) that preceded the Holocaust as well as [genocide committed against Indigenous people](#).<sup>9</sup>

From Lingaas's viewpoint this Eurocentric blind spot may be explained by the fact that the emphasis on the history of genocide is supported by extensive case law and the crime's elevated status, whereas case law regarding persecution is more limited and, in the context

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<sup>7</sup> For example, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005); Patrick Wolfe, 'Settler Colonialism and the Elimination of the Native' (2006) 8:4 *Journal of Genocide Research* 387; Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015).

<sup>8</sup> Christopher Gevers, 'Africa and International Criminal Law' in Kevin Heller, Frederic Mégret and Sarah Nouwen et al (eds), *The Oxford Handbook of International Criminal Law* (OUP, 2020); A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004); Laurelyn Whitt and Alan W. Clarke, *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law* (CUP, 2019).

<sup>9</sup> Final Report of the Truth and Reconciliation Commission of Canada, V.1 *Summary Honouring the Truth, Reconciling for the Future* (2015); Supplementary Report of the National Inquiry Into Missing and Murdered Indigenous Women and Girls (2019).

of apartheid, non-existent. A broader problem perhaps is that the analysis is inextricably tied to the *legal* interpretation of racialised violence. As such, it may be too wedded to legal categories and narrow definitional problems to allow for a broader understanding of race. In this regard, the book's conceptual framing speaks to a problem within the discourse of international criminal law, namely where and how knowledge-making is located and produced. In particular, it triggers attention to the existence of a wider pattern of exclusion and marginalisation in international criminal law that tends to normalise Eurocentricity while allowing it to go mostly unchallenged.

For TWAIL scholars, the Other is central to the colonial formations and development of international law, as well as the historical representation of Third World states and peoples as 'savages', 'victims' and 'saviors'.<sup>10</sup> TWAIL scholarship links colonial legacies to structures of inequality and Eurocentricity that produce racial hierarchies.<sup>11</sup> As Sundhya Pahuja points out, 'a key insight of postcolonial theory has been the demonstration of how the formation of the "West" as an identity depends on the construction of an "other" by reference to which the West defines itself'.<sup>12</sup> Western knowledge structures alongside Eurocentricity remain vital for understanding how international criminal law denies cultural and linguistic genocide any legal status. Part of the problem as Michelle Burgis-Kasthala highlights is that international criminal law scholars rarely engage with TWAIL's aims and concerns.<sup>13</sup> Hence, the reproduction of racial blind spots persists.

In this context and returning to the book's conceptual framing, the subjective definition of race works to exclude Black, Brown, Muslim and Indigenous experiences of race. It also potentially excludes such experiences from the legal definition and scholarly discourse of race in international criminal law. While the book dedicates almost an entire chapter to the racial theories of Nazi Germany, it references colonialism and slavery only briefly in passing or as part of a specific understanding of colonialism based on perpetrator constructions of identity (pp.11,86). Colonialism is thus detached from its broader economic, racialised, institutionalised and political context. This is not surprising as many of the sources on which the analysis builds, come from mainstream social science as produced in institutions of the Global North. Of course, it would be a mistake to suggest that social science ignores the role of colonialism. However, no serious attempt is made in the book to explore disagreements over the precise foundations of when, where, and how

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<sup>10</sup> Anghie (2005); Makau Mutua, 'Savages, Victims, and Saviors: The Metaphor of Human Rights' (2001) 42 *Harvard International Law Journal* 201.

<sup>11</sup> Michelle Burgis-Kasthala, 'Scholarship as Dialogue? TWAIL and the Politics of Methodology' (2016) 14:4 *Journal of International Criminal Justice* 921, at 935.

<sup>12</sup> Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011) 28.

<sup>13</sup> Burgis-Kasthala (2016) 921.

race has been constituted.<sup>14</sup> In addition, the book relies heavily on scholarship specific to international criminal law; scholars who have worked in international organisations; and statements and reports of international organisations.

Critical scholars of race do not receive much of a mention in the book. At the same time, the work of Frantz Fanon, Edward Said, Patrick Wolfe, Stuart Hall, Linda Tuhiwai Smith, David Theo Goldberg, Shirley Tate, Sylvia Wynter, Charles Mills, Lila Abu-Lughod, Aileen Moreton-Robinson, Mahmood Mamdani and Hazel Carby, among others, seem instructive in addressing issues of race-making and the conditions that make racial domination both possible and viable.

The impact of the book's Eurocentric orientations cannot be dismissed as merely theoretical. Its particular orientations have normative implications that require caution in the adoption of a subjective approach to race. For instance, in making Europe the centre of knowledge and experience about race, the book presents the targeting of victims as being rooted solely or predominantly in group-based identity. This approach essentially constrains the analysis to a critique of identity politics in a manner that conflates the causes, conditions and effects of racialised violence. While group-based identity may be an important factor in understanding particular situations of atrocity, it fails to account for the underlying structural conditions and circumstances in which race is mobilised to construct a particular victim group as inferior.<sup>15</sup> Instead, the analysis slants towards an understanding of racialisation as an inevitable consequence of local and inter-group rivalry and, while it may be a collective process, is seen as limited to individual, intentional and overt violence. This particular way of looking at race makes the suggestion of contributing factors such as colonialism and related structures of violence largely unspeakable. The historical and continuing role that anti-Blackness, anti-Indigenous racism, land dispossession, resource exploitation, wealth inequality and capitalism have played in constructions of race and racist tropes are therefore left unaddressed. Additionally, the analysis misses the important role that international organisations have played in race-making following decolonization, including the role of international actors in creating an enabling environment for conflict and atrocities.<sup>16</sup>

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<sup>14</sup> Anghie (2005); Watson (2015).

<sup>15</sup> Mahmood Mamdani, 'Beyond Nuremberg: The Historical Significance of the Post-apartheid Transition in South Africa' (2014) 43 *Politics & Society* 61.

<sup>16</sup> Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, at 90-91.; Tor Kvever, 'International Criminal Law: An Ideology Critique' (2013) 26:3 *Leiden Journal of International Law* 701, at 718.; Kamari Maxine Clarke, 'The Rule of Law Through Its Economies of Appearances: The Making of the African Warlord' (2011) 18 *Indiana Journal of Global Legal Studies* 7, at 12.

According to a Third Worldist reading, racialisation, then, is not necessarily a universal experience. It is best understood as dependent upon the particular circumstances and conditions of its making. As Mahmood Mamdani reminds us, 'mass violence in African countries is not the outcome of inter-state conflict; it is in most cases the product of civil wars', suggesting that a one-size-fits-all approach, as presented in the book, is too restrictive.<sup>17</sup> How, then, should we approach the book's analysis in the context of the ICC's strong focus on atrocities committed in former European colonies in Africa? Should the underlying colonial context of particular crimes, where relevant, inform our understanding of race-making in international criminal law and, if so, how? Is there a danger that, in subjecting colonialism to legal interpretation, the broader context and specificities of colonialism will be flattened and erased due to the emphasis that international criminal courts place on individual responsibility and the rights of the accused? Moreover, is a subjective account of race useful for all contemporary situations of atrocity or is it useful in only a limited number of situations such as genocide and persecution where the defining element of the crime is the perpetrator's intent and thus the perpetrator's identification of the victim group?

A subjective interpretation of race may need to be adapted or supplemented directly by the views of victims so as to ensure that it does not exclude, suppress and homogenise racialised violence as experienced by oppressed groups in the Third World and the Global North. For example, Victor Kattan has recently observed, in the context of Palestine, that the exclusion of voices of the oppressed and Palestinian scholarship from the Prosecutor's request for a ruling on territorial jurisdiction could be part of a [wider trend in legal discourse](#) at the ICC. In particular, certain crimes such as the crime of apartheid, entailing institutionalised racial oppression, might require deliberate emphasis on victim understandings of racialised violence as well as, or alongside, an approach that ties the crime to the perpetrator's imagination. Indeed, one of the key problems of the subjective approach is that it does not provide space for victims' interpretations of racialised violence. The emphasis is squarely on an all-dominating perpetrator, which means that whether a racial group exists and how an individual victim or group of victims define their own membership in a group is irrelevant: the perpetrator is assigned full agency while victims lack the same. Consequently, *resistance* to institutionalised and systemic racial oppression, which is crucial both to understanding victim agency and protecting the rights of the accused, is given no attention in the book.

At the same time, the book leaves little room to understand how perpetrator identities shift over time and what factors shape the perpetrator's identity or contribute towards the shifting of his or her identity. At what point does a perpetrator begin to see the victim as

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<sup>17</sup> Mamdani (2014) 78.

an enemy other? Legal interpretation that draws on mainstream social science may be less equipped to answer this question than the book conveys, particularly given the importance of the principle of legality (p.3) and the narrow boundaries of legal interpretation in the context of fair trial rights (p.5). As such, it would have been useful for Lingaas to acknowledge the historical and conceptual limits of a subjective approach to race and, further, the limitations of law and legal interpretation in exhausting notions of race. Granted that contestation is always possible within certain legal limits, the suggestion that a single interpretation of the racial group should be universally applied to all situations, and for all crimes where race constitutes a legal element, should be adopted with caution, particularly if judges are to avoid entrenching Eurocentric biases in legal jurisprudence.

### **Concluding thoughts**

The issues I raise above have wider significance for international criminal law discourse and jurisprudence. Indeed, the book's provocations are both vitally important and engaging. However, when read as part of the broader discursive conditions of international criminal law, the book's conceptual framing makes race both *speakeable* and *unspeakeable* at the same time. International criminal law provides a means to discuss racialised violence by individuals. Yet simultaneously, it tends to suppress and obscure structural racism, in part due to a 'template' style of thought,<sup>18</sup> together with a strong focus on individual responsibility. What I suggest here is that international criminal law, as a legal liberal construct, is simply not designed to address structural and systemic violence in the first place. Moreover, where it intervenes in situations of structural violence, it tends to reproduce racial blindness and the politicisation of the Court as a colonial project. Once race is turned into a question of law, the danger is that it is invariably framed as a matter of proof and strict construction rather than a structure that needs to be understood and dismantled as such.

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<sup>18</sup> Mamdani (2014) 62-63.; Clarke (2011) 12.