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The Concept of Race in International Criminal Law by Carola Lingaas, Routledge, 2019

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Published in:
Nordic Journal of Human Rights

DOI:
[10.1080/18918131.2020.1829367](https://doi.org/10.1080/18918131.2020.1829367)

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Publisher's PDF, also known as Version of record

Publication date:
2020

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):
Fournet, C. (2020). The Concept of Race in International Criminal Law by Carola Lingaas, Routledge, 2019. *Nordic Journal of Human Rights*, 38(3), 246-249. <https://doi.org/10.1080/18918131.2020.1829367>

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The Concept of Race in International Criminal Law

by Carola Lingaas, Routledge, 2019, 292 pp, £120.00/\$155.00 (hardback), ISBN 978 1 13833 554 7

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To cite this article: Caroline Fournet (2020) The Concept of Race in International Criminal Law, Nordic Journal of Human Rights, 38:3, 246-249, DOI: [10.1080/18918131.2020.1829367](https://doi.org/10.1080/18918131.2020.1829367)

To link to this article: <https://doi.org/10.1080/18918131.2020.1829367>



Published online: 29 Mar 2021.



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BOOK REVIEW

The Concept of Race in International Criminal Law, by Carola Lingaas, Routledge, 2019, 292 pp, £120.00/\$155.00 (hardback), ISBN 978 1 13833 554 7

At the time of writing this review, in the summer of 2020, discussions and debates over the concept of ‘race’ have taken an important turn and the fight against racism a new momentum. When it comes to legal semantics, the use of the word ‘race’ is being contested, albeit fairly discreetly, in certain states. Some Green party members in Germany are calling for the removal of the term ‘race’ from the German Constitution.¹ In France, after an unfruitful attempt in 2013 to remove the term ‘race’ from all French legislation,² the *Assemblée nationale* adopted the removal of the word ‘race’ from the French Constitution back in 2018.³ There do not appear to be any such calls at the international level, in spite of the fact that international law – including international human rights law and international criminal law – does use the concept of ‘race’. It is possible that this absence of calls at the international level mirrors the absence of academic legal literature on the concept of ‘race’ in international law. In this context, the publication of Carola Lingaas’s book is not only extremely timely, but also fills a problematic gap in the scholarly literature, addressing – as its title indicates – the concept of ‘race’ in international criminal law, while turning, where relevant, to public international law and international human rights law. As a result, this book offers a very sound and all-encompassing analysis of the definitions of the crimes of genocide, apartheid and persecution under international criminal law.

The comprehensive approach adopted in Lingaas’s book constitutes one of its major strengths, leading to the duality of its possible use and to a potentially very wide readership. Not only is it an academic monograph in the sense that it offers a critical reflection based on analytical research, but it could also be used as a textbook. It is a thoroughly researched work, which meticulously explores all the relevant issues in a detailed and extremely well-exemplified fashion. It analyses all the relevant legal instruments, treaties and conventions, international customary law and general principles of law; it engages with all the relevant case law and judicial decisions as well as with scholarly doctrines; it delves into complex matters of legal interpretation of international criminal law, turning – where necessary – to public international law and international human rights law; and it critically discusses all the related issues, including those pertaining to disciplines other than law. In doing this, Lingaas demonstrates a perfect ability to discuss the issue of ‘race’ from a wide variety of angles, engaging with historical, sociological and legal works while simultaneously referring to judicial decisions, without any confusion in the thread of (legal) reasoning. Aside from being a work of use to any scholar interested in international criminal law, in the history and sociology of law, and/or in legal ethics, this book also provides a very complete study which would usefully complement any course on international criminal law and certainly trigger thought-provoking in-class discussions.

¹‘Greens Call for “Race” to be Removed from German Constitution’ *Deutsche Welle* (, 8 June 2020) <www.dw.com/en/greens-call-for-race-to-be-removed-from-german-constitution/a-53733161> accessed 31 July 2020.

²Assemblée nationale, ‘Proposition de loi tendant à la suppression du mot « race » de notre législation’, Texte adopté n° 139, 16 May 2013 <www.assemblee-nationale.fr/14/ta/ta0139.asp> accessed 31 July 2020.

³Constitution: l’Assemblée supprime le mot “race” et interdit la “distinction de sexe”, Public Sénat, 12 July 2018 <www.publicsenat.fr/article/politique/constitution-l-assemblee-supprime-le-mot-race-et-interdit-la-distinction-de-sexe> accessed 31 July 2020.

In this respect, and while the mere title of the book is already thought-provoking, it is worth noting that – perhaps contrary to what one might have expected – Lingaas deliberately chooses not to address replacing or removing the concept of ‘race’ in the terminology of international criminal law. As detailed below, she in fact argues and concludes.

Her conclusion notwithstanding, Lingaas makes the point throughout her book that the very concept of ‘race’ has no objective reality and that ‘... the assignment of victims to such a category [race] does not signify its objective existence’ (2; see also 141). This is a point I fully endorse, as the perpetrators of genocide, apartheid or persecution will indeed artificially create a ‘race’, which cannot exist in reality since the concept of ‘race’ is an inheritance of long-refuted anthropological theories,⁴ to target people for discrimination, segregation and/or destruction. A ‘race’ thus only exists in the minds of the perpetrators – a point that Lingaas makes while suggesting that judges adjudicating crimes against ‘racial groups’ also acknowledge the existence of a ‘race’, even if by definition it was artificially created. For her,

[t]he assignment of victims to a racial group cannot signify that it exists in reality, but rather that the perpetrators, *and consequently the judges*, assume it does. Thus, rather than looking for an objective legal reality, in our case, an ‘ideal’ racial group, the perpetrator’s perception of the victim group’s identity should be the point of departure for a legal classification of the victims. (141)

This is an intriguing formulation, as it seems to indicate that not only perpetrators but also judges assume that ‘races’ have an objective existence. It could nonetheless be argued that judges have no other choice than to employ the terms ‘race’ and ‘racial’ when interpreting and applying a law that explicitly resorts to those terms.

If Lingaas seems to accept the use of the terms ‘race’ and ‘racial’, she does note that they encounter definitional issues. For her, ‘[t]he definition of “racial” is problematic for the crime of persecution as it is for the crime of genocide or apartheid’ (206). Yet in the former the use of the word ‘racial’ is made in connection with ‘grounds’ for commission (206–8) and is thus expressly linked to the perpetrators’ mindset; this is similar to its use in the International Convention on the Elimination of All Forms of Racial Discrimination, where it is linked to ‘discrimination’. Its definition here might thus not be as problematic as for the crimes of genocide and apartheid, where the use of the term ‘racial’ is employed in direct conjunction with the victims, classified as a ‘racial group’ in spite of the fact that such group only exists in the minds of the perpetrators. How is the law supposed to objectively define a concept that has no material existence? Beyond this definitional obstacle, the very use of these terms puts the law in an impossible situation. Either it acknowledges the genociders’ fantasy by validating the artificial existence of a ‘racial group’, or it does not and thereby risks failing to recognise the specificity of the crimes of genocide and apartheid, which have at their core the artificial creation of a ‘race’ to be destroyed, racialising a predetermined group in order to eradicate it. Reflecting on the law of genocide, Coquiu noted that ‘[w]e can see these difficulties lexically condensed in the word genocide, which shows that the law is compelled to inherit the criminal language’.⁵

It is, however, possible that the way forward is suggested by Lingaas herself, even if she maintains that the concept of ‘race’ should be kept in the law and used in court. At

⁴This is a point also made in the book: see e.g. 64: ‘While in 1948 the concept of race was not perceived as problematic and therefore not further elaborated, nowadays the notion is highly controversial. Nearly seventy years later and with significant achievements in DNA coding, we know now that there are no biologically distinct human races.’

⁵Catherine Coquiu (ed), *Parler des camps, penser les génocides* (Editions Albin Michel 1999) 48: translation by the author. The original version reads ‘On peut voir ces difficultés se condenser en quelque sorte lexicalement dans le mot génocide, qui montre le droit forcé d’hériter du langage criminel’.

various points she turns to the concept of ‘otherness’ and to the process of ‘othering’. In fact, very early on in her study, she ‘... suggests a subjective definition of the racial group, one mirrored in the perpetrator’s intent and perception of his victims’ *otherness*’ (4, emphasis added). Later on, she explains that ‘[t]he perception of otherness, or, as it commonly is known, “othering,” is about marginalisation and creating a hierarchy around notions of difference’ and that ‘[t]he process of classifying and identifying the others, the aliens, is a precondition of genocide’ (40, 46). Why then couldn’t the law use this concept of ‘otherness’ rather than of ‘racial group’? ‘Otherness’ would allow the law to encapsulate the essence of the crime and integrate the criminal *modus operandi* without resorting to a concept devoid of any objective reality, that defies the reasonable mind and that can be harmful.

Further, since ‘race’ is deprived of all objective existence, unlike the process of ‘othering’, which can be materially characterised, it might seem incongruous to maintain it in the law, which is supposed to be objective. Not only this, but it is also not at all clear that the concept of ‘race’ in international criminal law has been useful in terms of prosecutions. If we take the law of genocide, which already protects national, religious and ethnic groups, it is not certain what the inclusion of ‘racial groups’ actually adds to the scope of protection. Could it not for instance be subsumed under ‘national groups’? This suggestion finds some credentials in the 1944 work by Richard Lemkin in which genocide was first defined: when presenting Lemkin’s definition of the crime, Lingaas explains that his ‘... study showed that different European subgroups like Germans, Poles, and Jews were understood as distinct racial groups. This conception was not uncommon at the time. Linguistically, the English “race” was used interchangeably with English “nation”’ (57). In this context, admittedly looking backwards to the time of the drafting of the Genocide Convention, the concept of ‘racial group’ seems redundant. Lingaas also shows that the case law has so far struggled with the concept, referring to the definition given by the International Criminal Tribunal for Rwanda in the *Akayesu* case as ‘inept and unsubstantiated’ and claiming that this ‘... shows the need for a more comprehensive interpretation of race for the crime of genocide’ (96). It could be claimed that this ineptness is symptomatic of the need to altogether drop the concept. Yet the fact that the case law has struggled with the definition of all four groups protected under the Genocide Convention is obviously not a valid reason for excluding these groups from the conventional sphere of protection. This would be neither reasonable nor desirable.

The option of removing the concept of ‘race’ from international criminal law is thus one that Lingaas explicitly rejects, arguing that ‘[b]y interpreting the element of race in a contemporary and legally correct manner based on the perception of a group’s differentness, the effectiveness of the law of genocide will be increased’ (102). But how is a concept that does not exist in reality to be ‘correctly’ interpreted? She adds that

... the concept of race can be used meaningfully, but not in reference to objectively distinct human races. Instead, the perpetrator’s perception of the victim group’s racial otherness will allow for the continued use of the category ‘racial group’, without having to revert to scientifically and morally doubtful human categories. (103)

With this conclusion, Lingaas goes back to the concept of ‘otherness’ discussed earlier and advocates for its use in conjunction with that of ‘racial group’ – a conclusion that still maintains the use of a heavily questionable concept in international criminal law. The book ends on a compelling note, however, worth reproducing here:

... this book encourages international prosecutors and the international judiciary to make increased use of the racial group category in its adjudication of crimes of genocide, persecution, and apartheid and hold accountable perpetrators who commit crimes against

ostensible racial groups. Because, for the perpetrator, race is real and the consequences of his racial thinking are equally real for the victims. (237)

No one can disagree with Lingaas on this point: the ‘race’ might not exist, but racism undoubtedly does. The definitions of the international crimes studied in this book – genocide, apartheid and persecution – were all adopted to fight extreme forms of racism. To this end, they integrated the concept of ‘race’, which is inherently racist. Yet, as Lingaas puts it, ‘[t]here is no apparent reason why race should be disregarded, since the law that contains the term remains valid’ (101). She is entirely correct; it is unlikely that the Genocide Convention or the Apartheid Convention will be revised and amended any time soon. In this context, Lingaas delivers a very robust analysis of what the law is and should undoubtedly be highly praised for that. Some readers might fundamentally disagree with her conclusions; some might fully endorse them; and some – a category to which I feel I belong – might want to discuss these issues with her. This has in fact already happened to me twice: the first time when I had the privilege to be a member of her PhD committee and thus the opportunity to engage with her during her superb defence; the second time when I read the monograph based on her thesis for the purposes of writing this brief review. One thing is certain: this important and thought-provoking book is a must-read and will not leave its readers indifferent.

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<https://doi.org/10.1080/18918131.2020.1829367>

