

## BOOK REVIEW

### **Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge, 2014)**

#### I INTRODUCTION

The imagery that is conjured up in my mind when I hear the word ‘torture’ in the context of international law includes the infamous ‘torture memos’ — the provocative set of legal opinions prepared in the USA in the context of the ‘War on Terror’.<sup>1</sup> It feels surprising to me that it is ten years since those documents were first subjected to intense discussions surrounding their release.<sup>2</sup> The substantial critical and scholarly engagement with the memos led Professor Fleur Johns to argue that there were four moods through which international legal scholarship responded to them: figuring torture, first, as a source of hope; second, as a deficiency awaiting correction and soliciting expertise; third, as an unbonding from (and rallying point for) community; and fourth, as an ambivalent call to conscience for the international legal profession.<sup>3</sup> Professor Johns’ argument is that the torture memos carry as much potential to affirm international law as to call it into question. In a not dissimilar way, Dr Ronli Sifris provides us, ten years on from that period with a book with the capacity to provide both of Professor Johns’ potentials for international law, but from an entirely different perspective on torture — from a feminist and human rights perspective.

Dr Sifris’s book’s very purpose is to take us beyond that ‘traditional’ way of thinking about torture, mostly so far discussed in the context of terrorism and war. Her book ‘challenges the view that torture only takes place within the traditional paradigm of interrogation, punishment or intimidation of a detainee’.<sup>4</sup> She persuasively argues that such a framework has been developed from a largely male experience and it needs broadening. In challenging and critiquing that characterisation, by including and also considering restrictions on reproductive freedom within the framework of torture, and cruel, inhuman and degrading treatment, her book provides international law with the potential to provide greater protection to women and to better reflect and include the lives and experiences of

- 1 George W Bush, ‘State of the Union Address’ (Speech delivered at the joint session of Congress, United States Capitol, 20 September 2011).
- 2 See, eg, Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York Review Books, 2004); Mark Danner, ‘The Red Cross Torture Report: What it Means’ (2009) 56(7) *New York Review of Books* 48; Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (Cambridge University Press, 2005).
- 3 Fleur Johns, ‘The Torture Memos’ in Fleur Johns, Richard Joyce and Sundhya Pahuja (eds), *Events: The Force of International Law* (Routledge, 2010) 260, 260–9.
- 4 Ronli Sifris, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture* (Routledge, 2014) 10.

women. If this broader characterisation is resisted then there are further grounds for scholars and practitioners to call international law into question.

## II THE GENDERED NATURE OF INTERNATIONAL LAW

Professor Hilary Charlesworth, one of the earliest writers on feminist approaches to international law,<sup>5</sup> initially developed in the early 1990s, has reflected upon the influence of feminist scholarship on mainstream thinking about international law. In an interview she noted that ‘male theorists barely acknowledge feminist scholarship’, with ‘feminists talk[ing] to one another’ picking apart articles and critiquing them ‘but the boys take absolutely no notice’.<sup>6</sup> She describes as dominant the view that ‘feminist scholarship is an optional extra, a decorative frill on the edge of the discipline’.<sup>7</sup>

This book challenges that view, arguing that an acceptance of the gendered nature of international law and international institutions is an ‘accepted part of the legal academy and there is now a sustained feminist presence in the international realm’.<sup>8</sup> Building on this premise, her book is not a ‘decorative frill’ but a highly developed and substantial argument for a transformation to occur in the conceptualisation of torture and cruel and inhuman and degrading treatment. In a highly detailed manner, the book documents how restrictions on women’s reproductive freedom may be viewed through the prism of torture and cruel and inhuman and degrading treatment. Dr Sifris’s contribution is part of a much broader discussion about the norms that are currently gendered in definition, interpretation and implementation. In writing this book, her scholarship is adding to the growing contributions of feminist conceptualisations of international human rights by ‘examining restrictions on reproductive freedom through the lens of the right to be free from torture and [cruel, inhuman and degrading treatment]’.<sup>9</sup>

## III THE STRUCTURE AND FRAMEWORK

This volume, which is part of the Routledge *Research in Human Rights Law* series, takes as its foundation the definition of torture in art 1 of the *Convention against*

5 See, eg, Hilary Charlesworth, Christine Chinkin and Shelley Wright, ‘Feminist Approaches to International Law’ (1991) 85 *American Journal of International Law* 613.

6 Stacey Fox and Karen Hall, “‘Favourite Footnote?’: Hilary Charlesworth on Feminism and International Law’ (2006) 12 *LIMINA: A Journal of Historical and Cultural Studies* 1, 1–8, quoted in Melissa H Conley Tyler, Emily Blizzard and Bridget Crane, ‘Is International Affairs too “Hard” for Women? Explaining the Missing Women in Australia’s International Affairs’ (2014) 68 *Australian Journal of International Affairs* 156, 170–1.

7 Tyler, Blizzard and Crane, above n 6, 171, quoting Hilary Charlesworth, ‘The Women Question in International Law’ (2011) 1 *Asian Journal of International Law* 33, 35.

8 Sifris, above n 4, 12.

9 Ibid 8.

*Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>10</sup> Dr Sifris reminds us that ‘the prohibition of torture is “different” from other international human rights norms because it is a jus cogens norm; it is binding on all States, irrespective of whether they have ratified a specific treaty prohibiting Torture’.<sup>11</sup> Using the definition to structure a significant part of the book, chapters three to eight examine in great detail each of the elements of the definition of torture and its application to restrictions on reproductive freedom.

For instance, the definition of torture in art 1 of the *Convention* requires the victim to be subjected to an ‘act [causing] ... severe pain or suffering, whether physical or mental’. Dr Sifris proceeds in chapter three to discuss this aspect of the definition in the context of restrictions on reproductive freedom. She divides the chapter into four parts, beginning with a brief discussion of the meaning of an *act*, arguing that both involuntary sterilisation and restrictive regulation of abortion can be categorised as an *act* depending on whether the other elements of the definition can be established. She then examines the meaning of ‘severe pain or suffering, whether physical or mental’ under art 1, drawing on medical and psychological literature, and applies this element to restrictions on reproductive freedom. This chapter also introduces the concept of the relative intensity of pain or suffering, and considers ‘severe pain or suffering’ in the context of restrictions on abortion. Involuntary sterilisation is also considered in this context. Dr Sifris concludes that the requirement under art 1 for an ‘act [causing] ... severe pain or suffering’ is frequently satisfied when there are restrictions on abortion and in the context of involuntary sterilisation procedures.

However, in order to establish that certain conduct amounts to torture under art 1 of the *Convention*, it is also necessary to demonstrate that severe pain or suffering was ‘intentionally inflicted’. Chapter four proceeds to consider this element of the definition in great detail. Here she acknowledges that neither restrictions on abortion nor involuntary sterilisation typically involves circumstances where severe pain and suffering is deliberately inflicted. However, drawing upon aspects of philosophical and domestic legal literature, she shows how, in both of those circumstances, intention can be established if intention is interpreted to encompass foresight of pain and suffering. She argues that severe pain and suffering is a foreseeable consequence of both restricting a woman’s access to abortion, and sterilising a woman without her full informed consent. Therefore both restrictions on abortion and involuntary sterilisation can involve the intentional infliction of severe pain and suffering.

Continuing with the definition of torture in art 1 of the *Convention*, it requires not only that an act that causes severe pain or suffering be intentionally inflicted on a person, but the pain or suffering is inflicted for one of the enumerated purposes (or at least a comparable purpose). These purposes include the extraction of information, punishment, intimidation, ‘or for any reason based on discrimination

10 Opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (‘the *Convention*’).

11 Sifris, above n 4, 8.

of any kind'. The first parts of this aspect of the definition accounts for most of the attention on torture revolving around detention and the 'War on Terror'. In chapter five, Dr Sifris illustrates how both restrictions on abortion and involuntary sterilisation procedures frequently constitute discrimination against women. She divides the chapter into two parts. The first focuses on the discriminatory nature of restrictions on abortion, examining the legal and social context of restrictions on access to abortion, before moving to consider in the second part the purpose and impact of laws restricting access to abortion services. The third part of this chapter focuses on involuntary sterilisation, exploring how involuntary sterilisation can be a form of discrimination and using case studies to illustrate this point.

The final element of the art 1 definition of torture is the requirement that the 'pain or suffering' in question 'is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'. Chapter six explores this requirement where, in order for a State to violate the prohibition of torture, there must be a link between State action and the pain or suffering experienced. This chapter begins by considering direct State responsibility. It argues that the requisite link with the State is present in the case of legal restrictions on abortion, and that involuntary sterilisation procedures that take place in public hospitals or are performed by State-employed medical personnel do meet this requirement. Turning to indirect State responsibility, Dr Sifris suggests that the Committee against Torture is embracing an approach to the 'public official' requirement in line with the 'due diligence' approach of the broader international human rights regime to the question of State responsibility for torture and cruel, inhuman and degrading treatment. Dr Sifris argues that a State may be held responsible for involuntary sterilisation procedures, even absent a direct link, where it has failed to exercise 'due diligence' and has failed to act to prevent, investigate or punish conduct that would otherwise amount to torture. Therefore, the 'public official' requirement under art 1 is met when a State fails to exercise 'due diligence' in relation to involuntary sterilisation procedures performed by private actors.

The question of 'powerlessness' is then examined closely in chapter seven. Dr Sifris explains that Manfred Nowak, the Special Rapporteur on torture from 2004 to October 2010, has asserted that this is an additional requirement even though it is not explicitly stated in the art 1 definition. Dr Sifris considers whether women who are legally denied access to abortion services or who are subjected to involuntary sterilisation procedures may be considered 'powerless' for this purpose. She argues that there are a range of factors that combine to render women powerless in the context of both restrictions on abortion and involuntary sterilisation. One example is the power of law and the power of the medical profession in that law and medicine, either separately or combined, frequently exercise their power so as to render women powerless in the context of both restrictions on abortion and involuntary sterilisation. In this chapter Dr Sifris's arguments draw on some scholarship from the discipline of sociology.

By carefully examining each of the aspects of the *Convention's* art 1 definition, Dr Sifris makes a powerful case that both restrictions on abortion and involuntary sterilisation procedures frequently fall within all of the elements of the definition of torture, as well as the additional requirement of 'powerlessness'. The final sentence of art 1 states that torture 'does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions'. This aspect is then examined in chapter eight, where Dr Sifris considers the most common interpretations of the lawful sanctions clause in order to determine whether restrictions on abortion or involuntary sterilisation procedures fall within this exclusion. After acknowledging the possibility that the lawful sanctions clause has no scope of application, she then asks us to assume that it does have a scope of application, if 'lawful sanctions' means lawful under international law. Ultimately, Dr Sifris concludes that restrictions on abortion and involuntary sterilisation procedures do not fall within the lawful sanctions exemption.

Moving beyond the art 1 definition, chapter nine turns to consider the meaning of art 16 of the *Convention*, requiring each State Party

to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in art 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

This chapter is divided into four parts. The first part considers the consequences of categorising conduct as torture or cruel, inhuman or degrading treatment. The second part contends that the fact that different consequences attach to torture in contrast to conduct categorised as cruel, inhuman or degrading treatment provides a key explanation for why it is necessary to consider whether restrictions on reproductive freedom constitute torture or cruel, inhuman or degrading treatment. In the third part, Dr Sifris proceeds to discuss the meaning of cruel, inhuman or degrading treatment, and delves into an analysis of the distinction between torture and inhuman treatment. In the final part, she considers the concept of degrading treatment.

In chapter 10, the final substantive chapter of the book, discussion returns to look at the proper characterisation of restrictions on reproductive freedom. Here she considers the approach of the Committee against Torture and the Human Rights Committee to the question of whether restrictions on abortion and involuntary sterilisation constitute torture or cruel, inhuman or degrading treatment. Dr Sifris concludes that whether restrictions on reproductive freedom constitute torture or cruel, inhuman or degrading treatment depends upon a given factual context. Further, the chapter addresses the concern that an expansive interpretation of the definition of torture may lead to a dilution of the concept of torture, and addresses the appropriateness of adopting a normative approach to the question of whether torture or cruel, inhuman or degrading treatment is the proper category for restrictions on reproductive freedom. The book ends with a final chapter 11 providing a summary of the arguments made and conclusions reached, and alerting us to possible directions for future research.

#### IV THE CONVERSATION BETWEEN REGIONAL SYSTEMS AND THE INTERNATIONAL SYSTEM

The second chapter of the book caught my own particular research interest in the way it highlights the importance of the links between public and international law and the transnational potential of law. This is achieved through providing an overview of the international and regional systems output regarding torture and cruel, inhuman and degrading treatment. So for instance, Dr Sifris begins this chapter by examining the treaties and customary international law covering torture. Then in the regional context she looks at Europe through both the *European Convention on Human Rights*<sup>12</sup> and the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*.<sup>13</sup> She then moves to America where the Inter-American system, like the international system and the European system, deals with torture through both general and specific measures. Next is Africa where art 5 of the *African Charter on Human and Peoples' Rights* prohibits torture and cruel, inhuman and degrading conduct, and the African Commission on Human and Peoples' Rights has passed a resolution on *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman and Degrading Treatment*. This chapter then examines the extension of the prohibition to encompass situations beyond the traditional detainee context by looking at the output of the Human Rights Committee, the Committee against Torture and the work of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment of Punishment. This thorough and global examination reminds us of the variety of contexts from which international law is developed and influenced. In doing so, Dr Sifris is able to show how the concept of torture has been extended beyond the traditional detainee context in many different settings and this also affirms how transnational conversations add to a more comprehensive understanding of law, and reinforces the importance of considering how law should be both fluid and contextual.<sup>14</sup>

#### V CONCLUSION

While the topic of 'torture' may conjure up for most people gruesome images, this book opens our collective minds to thinking more about the ways in which restrictions on human rights (in this case specific reproductive rights) can also be forms of torture. Just as the subject matter of the book forces us to rethink our views, so does the structural opening and closing of the book remind us that by

12 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

13 Opened for signature 26 November 1987, CETS No 126 (entered into force 1 February 1989).

14 Katharine Young and I develop this idea in a forthcoming volume on Gender in the series Kim Rubenstein and Thomas Pogge (eds), *Connecting International Law with Public Law* (Cambridge University Press) — see *Connecting International Law with Public Law*, Cambridge University Press <<http://www.cambridge.org/au/academic/subjects/law/public-international-law/series/connecting-international-law-public-law>>.

thinking outside traditional paradigms we can open up the potential of the force of international law.

Dr Sifris opens the book with a quote from Virginia Woolf's *A Room of One's Own* — 'This is an important book, the critic assumes, because it deals with war. This is an insignificant book because it deals with the feelings of women in a drawing room.'<sup>15</sup> Then, at the end of a highly dense and detailed analysis of law, Dr Sifris adds a final note, taking us to a dramatic scene from Margaret Atwood's novel *The Handmaid's Tale*, into a world in which 'a woman's worth is measured according to her reproductive capacity'.<sup>16</sup> In Atwood's harrowing novel, women who are able to bear children are 'handmaids' and belong to the men to whom they are assigned. Their sole function is to give birth and the women who are not able to bear children are known as the 'Unwomen'. While the story is fiction, Dr Sifris reminds us of how disconcerting it is because of the many parallels there are to the lived experiences of many women. By using the power of the novelist, Dr Sifris adds to the weight of her 'final word':

The control of women's reproductive autonomy remains a poison running through the veins of our society. Restricting a woman's reproductive freedom denies her humanity and her personhood; it deprives her of her dignity and her bodily integrity. It should be recognised for the cruel conduct that it is and should be labelled as torture or cruel, inhuman or degrading treatment.<sup>17</sup>

This poignant conclusion is an appropriate end to Dr Sifris's thoughtful, intricate and highly detailed analysis of all aspects of torture and cruel and inhuman and degrading treatment.

It is also fitting that in this volume commemorating 40 years of the *Monash University Law Review*, a book review of one of its own graduate's work, indeed one of its Supreme Court prize winners and a former Editor of the *Law Review*, who has returned to Monash to forge her own important academic career is within this edition. Dr Sifris's PhD scholarship is the foundation to the substance of this publication and it provides feminists and all people interested in including all lived experiences within international law's framework with an opportunity to affirm international law and human rights law's potential as a measure of hope for humanity.

KIM RUBENSTEIN

Professor and Director, Centre for International and Public Law, ANU College of Law, Public Policy Fellow, Australian National University

15 Sifris, above n 4, 1, quoting Virginia Woolf, *A Room of One's Own* (Hogarth Press, 1978) 111.

16 Sifris, above n 4, 271, citing Margaret Atwood, *The Handmaid's Tale* (Houghton-Mifflin, 1986).

17 Sifris, above n 4, 271.



