Torture in the Present of the Past: A Literary and Postcolonial Misreading of
Ireland v. UK and *Public Committee against Torture in Israel v. Israel*
through J. M Coetzee's novel *Waiting for the Barbarians*.

by

Afua Jonah (BA HONS)

A thesis submitted to the Faculty of Graduate and Postdoctoral Affairs in
partial fulfillment of the requirements for the degree of

Master of Arts

in

Legal Studies

Carleton University
Ottawa, Ontario

© 2013
Afua Jonah

Library and Archives
Canada

Published Heritage
Branch

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque et
Archives Canada

Direction du
Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 978-0-494-94324-3

Our file Notre référence

ISBN: 978-0-494-94324-3

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

Abstract

In this thesis, I examine *The Public Committee against Torture in Israel v. Israel* (1999) and *Ireland v. UK* (1978), two modern cases about torture in democratic societies. Based on the *Law as Literature* perspective of understanding legal texts through literary interpretations, analysis and criticism, I employ the literary methodology of ‘misreading’ to situate the two cases in the (post)colonial histories from which they derive, histories which are not present in the text of the cases. I rely on the depiction of torture as a colonial practice in J.M. Coetzee’s novel *Waiting for the Barbarians* to demonstrate how both cases deny and thereby reinforce the colonized subjectivity of the torture victims. In analyzing the two decisions, I compare how identities are discussed in relation to the courts’ decisions on whether interrogation techniques employed by state officials constituted acts of torture. In this thesis, I argue that understanding the colonial history is essential to understanding the dynamics and implications of the interrogation techniques as continuing acts of colonization.

Acknowledgements

I have been very fortunate to have Professor Diana Majury as a supervisor for my thesis. Her constant support, kindness, and guidance throughout this process were invaluable. Diana, I am grateful for all the evenings you stayed behind after work to accommodate me, and all the time and effort you put in the thesis. Thank you for giving me the skills and confidence to complete this thesis and for all the important lessons in between.

I am grateful to Professor Christiane Wilke, first for recommending me to this amazing program, and for introducing me to the resources that made this thesis possible as well as your commitment to making it better. Learning from you has given me a great sense of self and a better perspective on the events and issues that shape our world.

I thank Professor Brenda Carr -Vellino for sitting on my committee and for all the thoughtful comments and feedback. I also thank Professors Rueban Balasubramaniam, Betina Kuzmarov, Neil Sargent, and Trevor Purvis for helping me to hone my analytical thinking and for their kindness over the years.

To my family of friends: Charlotte, Racha, Christina, Dan, Anjelina and Adeola. You carried me through this process and have been there for me through all my ups and downs. You give me everything with no expectations and you are always there to listen. I could never thank you enough.

Getting to write this thesis side by side with Katarina, Mariam and Racha was a true blessing. I benefitted greatly from your honesty, passion, and intelligence. I remain inspired by you.

I thank mama and Kojo for their unconditional love and support. I also thank my Wofa Kwasi Panyin for setting me on the path to realize my ambitions.

Finally, I thank my dear Uncle, Sir Sam Jonah for having faith in my abilities and for his support over the years. Having such a positive influence and role model in my life mobilizes me to fight through any odds to reach my potential. Uncle, it is always a pleasure to learn from you; thanks for inspiring my journey.

Table of Contents

Introduction.....	1
i. Two Cases on Torture: <i>Ireland v. UK</i> and <i>Public Committee against Torture in Israel</i>	
ii. Logic of Comparison	
iii. The Debate on the Definition of Torture	
iv. Torture and the Doctrine of Necessity	
v. The Relevance of Colonization to the Decisions	
vi. Towards a (Post)colonial Misreading	
vii. (Post)colonial Theory and the Constitution of ‘Otherness’	
viii. <i>Waiting for the Barbarians</i> as a Lens into <i>Ireland</i> and <i>GSS</i>	
ix. Chapter Breakdown	
Chapter 1: Torture and Identities in <i>Waiting for the Barbarians</i>.....	25
i. Binaries as a Path to Torture in Coetzee’s Empire	
ii. Torture and Colonial Discourse in <i>Waiting for the Barbarians</i>	
iii. Third Party Representation	
iv. Conclusion	
Chapter 2: <i>Waiting for the Barbarians</i> as a Lens into the <i>GSS</i> Case	46
i. The Historical Context of the <i>GSS</i> Case	
ii. The Israeli Supreme Court’s Representation of Identities	
iii. The Court’s Ruling on the Legality of the Five Techniques	
iv. Misreading the Court’s Application ‘Necessity Defense’	
v. The Human Rights’ Organization on Identities and Torture	
vi. Conclusion	
Chapter 3: <i>Waiting for the Barbarians</i> as a Lens into the <i>Ireland</i> Case.....	71
i. Procedural History and Overview of <i>Ireland v. UK</i>	
ii. A Comparison of <i>Ireland</i> with <i>GSS</i>	
iii. The ECtHR’s Discussion of Identities	
iv. The Decisions on Detention, Internment and Discrimination	
v. The Decision on the Five Techniques	
vi. Conclusion	
Conclusion.....	91
i. An Overview	
ii. The Limits of my Thesis	
iii. Looking Forward	
Bibliography.....	97

Introduction

In *Torture and Modernity*, Darius Rejali recalls an experience that he had shortly after the Iranian Islamic Revolution of 1979.¹ Rejali is astounded that a police officer whom he describes as sophisticated, graceful and well educated, “felt no incompatibility between his civility and the [torture] practices of the...police.”² Rejali claims that torture had become a routine part of modern life in Iran and that it did not raise eyebrows anymore. Iranians had “recognized an interesting aspect of modern life, namely, that torture is an integral part of it.”³ In a review of Rejali’s book, Daniel Chirot challenges Rejali’s assertion that torture in twentieth century Iran was a reflection of its modernity; arguing that modern states simply do not torture: “If the growth of torture in twentieth century Iran and its changing forms are caused by efforts to modernize, why do we not torture in modern United States or Western Europe?”⁴

An emerging culture of security in recent years, especially after 9/11, has resurrected debates about the place of torture in modernity, particularly among states that identify as liberal democracies. Within academic and political discourses, there is much interest in whether these states have employed torture in the name of security and attempted to reconcile the practice with their identities as liberal states that conform to the rule of law. Pre-dating 9/11, there are two cases, *Ireland v. United Kingdom*

¹ Darius Rejali. *Torture and Modernity: Self, Society and State in Modern Iran*. (Colorado: Westview Press, 1994) at 4.

² *Ibid*

³ *Ibid* at 5.

⁴ Daniel Chirot “*Torture and Modernity Self, Society and State* by Darius Rejali.” *Journal of Contemporary Society* 23 (1994): 680.

(hereafter *Ireland*)⁵ and *Public Committee against Torture in Israel v. State of Israel*⁶ (hereafter *GSS*) that address torture in two states that identify with democratic values.

Ireland and *GSS* are often cited by scholars and critics in discussions about the place of torture in modernity. In these discussions, there is the tendency to overlook the fact that both cases emanate from (post)colonial societies. The one dimensional approach of discussing the cases as manifestations of torture in democratic states obscures connections that can be made between the colonized/colonial subjectivities of the victims and perpetrators of torture, and the courts' discussions of the practice. In this thesis, I demonstrate that the decisions of the two courts can be better understood by situating them in their historical contexts. I do so by addressing the following overarching research question: how do identities impact the courts' attitudes about torture in *Ireland* and *GSS*?

i. *Two Cases on Torture: Ireland v. UK and Public Committee against Torture in Israel*

In January 1978, following a lengthy (six year) legal process, the European Court of Human Rights (ECtHR) decided its first case *Ireland*.⁷ This case was initiated by the Government of Ireland (the applicant government) submitting an application to the European Commission of Human Rights (hereafter the Commission) in 1971. It alleged that the Government of the United Kingdom of Great Britain and Northern Ireland (hereafter the respondent government) had subjected individuals to torture and ill-

⁵*Ireland v. United Kingdom*, 23Er. Ct. H.R Ser (1976).

⁶ *Public Committee against Torture in Israel v. State of Israel*. HCJ 5100/94.

⁷Deirdre E. Donaghue. "Human Rights in Northern Ireland: *Ireland v. the United Kingdom*." *Boston College International and Comparative Law Review*, 3:2 (1980): 377.

treatment under emergency powers.⁸ These incidents were alleged to have happened during Operation Demetrius in which 342 individuals from the Irish Catholic communities were detained in centres across Northern Ireland.⁹ The application alleged that the emergency powers invoked by the respondent government violated several articles in the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the Convention)¹⁰ to which the respondent government was a “contracting party.”¹¹ In this thesis, I will be addressing the allegations of breaches of article 3, which prohibits torture and cruel and inhuman degrading treatment or punishment and how these alleged breaches are discussed in the context of article 15, which addresses states’ rights to derogate from conventional obligations when faced with national emergencies.

In regard to torture and the ill-treatment of detainees, the allegations concerned five “disorientation” or “sensory deprivation” techniques which were reported to have been used on fourteen detainees during interrogations.¹² The methods were: hooding, subjection to noise, sleep deprivation, the deprivation of food and drink and wall-standing in which detainees were forced to stand in a “stress position” over a long period of time.¹³ In January 1976, the Commission found that the five interrogation techniques constituted inhuman and degrading treatment, as well as torture. In March of 1976, the Irish

⁸ Application No. 5310171, Y.B. Eur. Conv. on Human Rights 76 (Eur. Comm. Of Human Rights) (decision on admissibility) (1972): 240

⁹ *Ibid*

¹⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*. Nov 4, 1950, Europ.T.S No.5; 213 U.N.T.S 221.

¹¹ *Ireland supra* note 5 at para 2.

¹² Irish Centre for Human Rights. “The Case of *Ireland v. UK*” [nuigalway.ie](http://www.nuigalway.ie) http://www.nuigalway.ie/human_rights/Projects/Project_Ireland/ireland_v_uk.html (accessed Sept 22, 2011).

¹³ *Ireland supra* note 5 at para 152.

government filed an application to the ECtHR asking the Court to confirm the findings¹⁴ of the Commission and to determine that two other allegations constituted violations of article 3.¹⁵ In its ruling, the Court agreed with the Commission that the five techniques constituted inhuman treatment and degrading treatment and were therefore in violation of article 3.¹⁶ However, the Court held that the five techniques did not “occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.”¹⁷ The Court also held that the extrajudicial means of internment and detention taken to address the emergency situation were in conformity with article 15 as they did not exceed “the extent strictly required by the exigencies of the situation.”¹⁸

In *GSS*, the Supreme Court of Israel was asked to determine the legality of five techniques similar to those at issue in the *Ireland* case. The methods were: violent shaking, sleep deprivation, the use of excessively tight hand and leg cuffs, the “frog crouch” which refers to consecutive, lengthy crouching on one’s toes, and the ‘shabach’ position in which detainees are tied to low forward tilting chairs over a period of time.¹⁹ The decision concerns nine individual petitions filed with the Court between 1994 and 1999. Two of these were public petitions, one filed by the Public Committee against Torture in Israel (hereafter PCATI) in 1994, and the other by the Association of Civil Rights in 1995. The remaining seven petitions were filed by these two organizations (mainly PCATI) on behalf of individuals who claimed to have been subjected to torture by the state.

¹⁴ The procedural history of the decision is discussed in chapter 3.

¹⁵ *Ireland supra* note 5 at 165.

¹⁶ *Ibid* at para 150.

¹⁷ *Ibid* at para 167.

¹⁸ *Ibid*

¹⁹ *GSS supra* note 6 at para 8-13.

The subject of the treatment of detainees in custody was in the public eye before the petitions were filed. Media reports revealed in 1977 that Israel's General Security Service (hereafter GSS) employed coercive tactics such as confinement in refrigerator cells, beatings, electric shock and repeated cold showers²⁰ when interrogating Palestinians who were suspected of terrorist activities. In 1980, publicity surrounding the deaths of two Palestinians in GSS custody resulted in human rights organizations reporting the alleged killing, maiming and psychological abuse of Palestinian detainees by the GSS. In response to these reports, the Israeli government established the Landau Commission of Inquiry in 1987 to examine the GSS' interrogation practices. Chaired by former president of the Israeli Supreme Court Moshe Landau, the commission held that by virtue of the criminal law defense of necessity in Israel's Penal Code, investigators were authorized to employ the five interrogation techniques.²¹

In 1990, following the Landau Commission's report, human rights activists including doctors and lawyers established an organization called the Public Committee against Torture in Israel (hereafter PCATI) with the mandate to advocate for all persons – Israelis, Palestinians, labor immigrants and other foreigners in Israel and the Occupied Palestinian Territories (OPT) – in order to protect them from torture and ill treatment by the Israeli interrogation and law enforcement authorities.²² According to the PCATI, by 1999, it had submitted about 70 petitions per year since 1991 to the Supreme Court on behalf of Palestinian detainees in an effort to outlaw the use of torture and inhuman and

²⁰ John T. Parry "Judicial Restraints on Illegal State Violence: Israel and the United States." *Vanderbilt Journal of Transnational Law*, 35 (2002):120.

²¹ GSS *supra* note 6 at para 16.

²² PCATI. "About PCATI" [stoptorture.org. http://www.stoptorture.org.il/en/odot](http://www.stoptorture.org.il/en/odot) (accessed November 13, 2011).

degrading treatment by Israeli security services.²³ None of these petitions were adjudicated prior to GSS. While the Court acknowledges that “a number of petitions dealing with the application of physical force by the GSS for the purpose of interrogation have made their way to this Court over the years,” it claimed that due to the government’s denial that the GSS employed physical means, petitioners withdrew their petitions.²⁴ Consequently, prior to 1999 when it decided to address six petitions that had been filed within the five preceding years, the Court had not ruled whether the ‘necessity defense’ authorized GSS interrogators to employ physical means.²⁵

In the GSS case, the Supreme Court determined the legality of torture and other coercive methods by addressing three overarching issues: the question of whether GSS investigators were authorized to conduct interrogations; whether the authority to interrogate authorized the potential use of physical means and if so, the circumstances that justified the use of those physical means. The Court held that the GSS had the power to interrogate terrorist suspects, even though it is expected that interrogations cause discomfort to the suspect in ways that infringe on their human dignity.²⁶ However, such interrogations ought to be fair and reasonable, meaning that they should be free of torture or any cruel, degrading or inhuman conduct.²⁷ Without specifying whether the methods in question constituted torture or inhuman or degrading treatment, the Court reiterated the “absolute” prohibition against torture in Israel. The Court held that the methods that had been employed were illegal because they “impinge[d] on the suspect’s dignity, his bodily

²³ Pacheco, Allegra ed & trans. “The Case against Torture in Israel: A Compilation of Petitions, Briefs and other Documents submitted to the Israeli High Court of Justice” Jerusalem: *The Public Committee against Torture in Israel* (1999): no pag.

²⁴ GSS *supra* note 6 at para 17.

²⁵ *Ibid*

²⁶ *Ibid* at para 22.

²⁷ *Ibid* at para 26.

integrity and his basic rights in an excessive manner.”²⁸ The Court rejected the GSS’ claim that the ‘necessity defense’ provided a general authorization of the methods in question, and held that the necessity defense only applies as a justification after the event. Therefore it would not be possible for the GSS to establish permanent directives dictating when and how the methods should be used. The Court left the necessity issue open, pointing out that in the event that the GSS investigators were indicted for employing the techniques, they could invoke ‘necessity’ as a defense.

ii. *Logic of Comparison*

Ireland and *GSS* are located within two legal and scholarly debates relating to torture in democratic states: first, the legal debate about what forms of violence constitute torture, and secondly, the ethical and legal debate about whether torture can ever be justified within countries that subscribe to the rule of law. Democratic states have constitutional norms that limit governments’ use of force.²⁹ The use of physical violence is not completely absent in the norms of these states, as it is held that minimal violence may be necessary to ensure law and order in society.³⁰ However, these states endorse only the bare minimum use of violence and absolutely draw the line at torture which is considered an extreme form of violence. The torture debates referred to above emanate from the presumed incompatibility of torture with the norms of democratic states, and its absolute prohibition under international law. These debates focus on whether certain forms of violence cross the line between the physical violence permitted by liberal states as cruel, inhuman or degrading treatment or punishment, and torture. If so, there is the

²⁸ *Ibid*

²⁹ Jinee Lokaneeta. “Torture Debates in the post-9/11 United States: Law, Violence, and Governmentality.” *Theory and Event*, 14:4 (2010).

³⁰ Michael Ignatieff. *The Lesser Evil: Political Ethics in an Age of Terror* (Princeton and Oxford: Princeton University Press, 2004), 17.

accompanying question of whether torture can be justified under any circumstances in such societies.

iii. *The Debate on the Definition of Torture*

Since torture is considered antithetical to democratic legal norms, democratic states that employ the practice attempt to redefine the category of pain-producing conduct in order to eschew the legal label of ‘torture.’³¹ The interrogation techniques employed by the two governments I analyze in this thesis were brought into the open in *Ireland* and *GSS*, making the definition of torture a central issue in each.

One reason I have chosen these two cases to review is that they have both been criticized for their failure to acknowledge the practices of security forces as torture. While the *GSS* decision has been praised as a potential model for preserving liberal ideals,³² it has also received criticism for the judges’ failure to define the five techniques as torture.³³ Similarly, the ECtHR’s ruling in *Ireland* that the five techniques did not constitute torture has been criticized by commentators and human rights organizations who suggest that the respondent government’s practices warranted the label.³⁴

One underlying premise of the debate on what forms of violence constitute torture is a commonly held belief that the term is ill-defined.³⁵ While the Convention distinguishes torture from other forms of violence, it does not provide additional directions as to which

³¹ Talal Asad “On Torture, or Cruel, Inhuman, and Degrading Treatment.” *Social Research* 65:4 (1996): 1094.

³² See Parry *supra* note 20.

³³ See for example, Tal Kastner, “The Language of the Law and the Tortured Body: The Public Committee against Torture in Israel v. The State of Israel,” manuscript on file with the author.

³⁴ See for example, Sonja Grover. *The European Court of Human Rights as a Pathway to Impunity for International Crimes* (New York: Springer, 2010), 49.

³⁵ Jeremy Waldron. “Torture and Positive Law: Jurisprudence for the White House.” *Columbia Law Review* 6 (2005): 1688.

forms of violence fall under which category. Therefore international tribunals have discretion to provide content to these definitions relative to the circumstances of a case. It is not my intention to insist on definitional precision. A precise definition would allow potential torturers to gauge how much violence they can impose, while skirting accountability under the legal definition.³⁶ I argue that the scope of torture is narrowly interpreted by the judges in both cases. The ECtHR in *Ireland* has been criticized for creating the impression that torture has a well defined scope (which does not include the five techniques), as opposed to the fact that the definition is based on the circumstances of a case and is determined through the subjective assessment of the Court hearing the case.³⁷ The Israeli Supreme Court has been criticized for failing to find that the interrogation techniques employed by the GSS constituted torture.³⁸

I have chosen the two cases to compare because they are often referenced. They are landmark cases in two democratic jurisdictions that demonstrate reluctance by courts to impose the label 'torture' where (I will argue) it was appropriate to do so. This is especially interesting in *Ireland* because it indicates that international institutions (in this case the ECtHR) not just democratic states, employ rhetoric of denial, refusing to designate interrogation practices as torture. In this thesis, I analyze the extent to which the cultural and historical backgrounds of the cases impact how torture is legally defined.

³⁶ *Ibid*

³⁷ Grover *supra* note 34.

³⁸ See for example, Kastner *supra* note 33.

iv. *Torture and the Doctrine of Necessity*

“Is torture so wrong that it is inexcusable no matter how high the stakes are?”³⁹

This is the central question debated in the literature on the use of torture by modern democratic states. This debate centres on the ‘absolute’ prohibition of torture in international law that is echoed in the laws of many democratic states. The Convention clearly states: “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”⁴⁰ Nonetheless, there are scholars who believe that in exceptional circumstances such as the presence of ‘a ticking time bomb,’⁴¹ torture is the lesser evil and should be employed in order to save lives. Notably, Alan Dershowitz rejects the absolute prohibition of torture, arguing that even though torture may be morally and constitutionally unacceptable in democratic states, the ‘empirical reality’ that it is ‘sometimes’ effective for acquiring evidence justifies using torture in those exceptional circumstances.⁴²

Jeremy Waldron challenges Dershowitz’s claim that torture should be permissible in exceptional circumstances, arguing that the various laws prohibiting torture are set up precisely to address the circumstances in which torture is likely to be most tempting.⁴³ He rejects the exceptionality of those circumstances that are said to warrant a breach of the prohibition of torture. Similarly, David Sussman suggests that legalizing torture to

³⁹Henry Shue. “Torture in Dreamland: Disposing of the Ticking Time Bomb.” *Journal of International Law*, 37 (2006): 231.

⁴⁰Alan Dershowitz. *Why Terrorism Works* (Connecticut: Yale University Press, 2002), 137.

⁴¹The ‘ticking time’ bomb scenario is discussed in the GSS case and will be analyzed later in this thesis.

⁴²Dershowitz *supra* note 40 at 141.

⁴³Waldron *supra* note 35 at 7.

address 'exceptional' circumstances will result in it becoming a normative practice.⁴⁴ According to Sussman, "torture that is resorted to as an emergency measure frequently becomes a permanent feature of a regime of terrorization for its actual or potential victims, an education in brutality for its perpetrators, and a corrosive that progressively dissolves the rule of law."⁴⁵ Sussman challenges the assumption that torture sometimes provides useful evidence by suggesting that it is a self-referential practice that produces the 'truth' that victims are guilty of the crimes they are accused of. He argues that pain inflicted on torture victims makes it such that victims are only interested in pleasing their torturers, which can result in victims expressing the will of their torturers by confessing to crimes that they may not have committed.⁴⁶

Other scholars such as Bob Brecher and Henry Shue have questioned the validity of the ticking time bomb premise which underlies many arguments justifying torture in liberal states. Shue argues that the ticking time bomb scenario is misleading in two ways: idealization and abstraction. He defines idealization as the "addition of positive features to an example in order to make the example better than reality, which lacks those features."⁴⁷ Abstraction is the "deletion of negative features of reality from an example in order to make the example still better than reality."⁴⁸ Ways in which the ticking time bomb scenario is idealized include the idea that the person to be tortured has the information that interrogators seek, the notion that they will divulge the 'information' in a timely manner (presumably before the time bomb detonates), and that only in rare,

⁴⁴ See for example, Bob Brecher. *Torture and the Ticking Bomb*. Massachusetts: Blackwell Publishing, (2007).

⁴⁵ David Sussman "What is wrong with Torture." *Philosophy & Public Affairs*, 38 (2005): 12.

⁴⁶ *Ibid* at 7.

⁴⁷ Shue *supra* note 39 at 231.

⁴⁸ *Ibid*

isolated cases is it necessary to torture.⁴⁹ On the other hand the ticking time bomb scenario is an abstraction because, if it is true that torture is only used in exceptional circumstances, it would be unrealistic to suddenly find competent torturers who have “the skills to make a man who planted a ticking bomb reverse the direction of his life and assist us in de-fusing his bomb.”⁵⁰ The ticking time bomb justification does not accord with the reality that torture is an institutional practice that requires intense training.⁵¹ Shue claims that idealization and abstraction combine to make the hypothetical scenario appear better than reality.⁵² It is therefore a misleading analogy from which to make conclusions about reality.⁵³

In comparing the *Ireland* and *GSS* cases, I am interested in the disparities in how ‘necessity’ is invoked in relation to the circumstances of the cases. As part of this exploration, I am also interested in how the identities of the torture victims are represented in these decisions as creating the conditions for the ticking time bomb scenario. I will examine how identities might have impacted the ruling on the interrogation methods in light of the concept of ‘necessity’ which emanates from the ticking time bomb scenario.

v. *The Relevance of Colonization to the Decisions*

I have also chosen *Ireland* and *GSS* to compare in this thesis because both cases emanate from conflicts described by Thomas Mitchell as “a subset of ethnic conflict known as settler conflicts.”⁵⁴

⁴⁹ *Ibid* at 237.

⁵⁰ *Ibid*

⁵¹ *Ibid*

⁵² *Ibid*

⁵³ *Ibid*

⁵⁴ Thomas G. Mitchell. *Native v. Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa* (Connecticut: Greenwood Press, 2000), 1.

...conflicts with their origin in a conflict between a settler population, which was part of a colonization effort, and a native population, which was resisting the colonization enterprise...The conflict endures because the settlers assimilated enough into the colony to consider themselves natives, but were different from the original natives, or at least belonged there rather than in the colonial metropole, however, not so much that they are accepted by the native population as indigenous – at least not on the settler’s terms.⁵⁵

The conflicts leading up to the two cases fit this characterization. The political violence in Ireland in the 1960s that resulted in the internment and ill-treatment of individuals leading up to the ECtHR’s decision was due to the enduring conflict between Northern Ireland’s Protestant and Catholic communities flowing from Britain’s colonial project in Ireland since the 16th century.⁵⁶ Around this time, Ireland was a British and Scottish colony,⁵⁷ and the British government, wanting to solidify its control over Northern Ireland, set up plantations that were inhabited by British and Scottish Protestants.⁵⁸ Over the years, the British-Protestant immigrants and their ancestors constructed towns, appropriated lands belonging to the Irish Catholics and moved the Catholics out of the better lands.⁵⁹ As the two culturally different communities developed, each revered separate traditions and had different aspirations.⁶⁰ The Protestant or Loyalist community envisioned itself as “an idealized vision of the British way of life and British liberty, symbolised by the union between the Crown and Northern Ireland”⁶¹ which the community believed it was protecting against destruction by an alien Irish state.⁶² Due to

⁵⁵ *Ibid*

⁵⁶ For further reading on the history of the Northern Ireland conflict see Michael Hughes, *Ireland Divided: The Roots of the Modern Irish Problem* (New York: St. Martin’s Press, 1994); James Mitchell “Social Violence in Northern Ireland.” *The Geographical Review* 69: 2 (1979); and Thomas Mitchell *Native v. Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa* (Connecticut: Greenwood Press, 2000).

⁵⁷ Mitchell *supra* note 54 at 1.

⁵⁸ Hughes *supra* note 56 at 2.

⁵⁹ *Ibid*

⁶⁰ Mitchell *supra* note 56 at 181-182

⁶¹ Hughes *supra* note 56 at 2.

⁶² *Ibid*

a successful armed revolt in 1922, most of Ireland became independent of the British with the exception of the six provinces of Ulster which wanted to remain under British rule, and later became Northern Ireland. With the Protestant community constituting the majority of the general population, it controlled the local government and answered to the British government, thus enabling the continuity of Great Britain's colonial domination. The political tensions between these two groups in Northern Ireland emanating from its colonial history lead to the *Ireland* decision.

The Israel-Palestine conflict is rooted in Israel's ongoing colonization of Palestine.⁶³ Palestine was mandated to the British Empire in 1917 after the fall of the Ottoman Empire. Thereafter, the British government introduced the Balfour Declaration with the intention to establish a national home for Jews in Palestine. This led to the migration of Jews to Palestine, from Europe and North America amidst political tensions and increasing anti-Semitism.⁶⁴ With Palestinians constituting the majority of the general population prior to these migrations, this population shift led to riots and general disturbances which were mediated by the British government until the end of the British mandate in 1948.⁶⁵ Entrusted with the question of Palestine in 1947, the United Nations attempted to partition the land into Israeli and Palestinian territories. The partition was rejected by the Palestinians who felt that it overlooked their history and awarded the

⁶³ The question of whether Israel is a colonial society or a postcolonial society is a point of contention among scholars. In this thesis I subscribe to the ideas of scholars who view the Israel-Palestine relationship as an ongoing colonial relationship. For further reading in support of this position see: Gregory Mahler and Alden Mahler. *The Arab-Israeli Conflict. An Introduction and Documentary Reader* (London and New York: Routledge, 2010); Benny Morris. *Righteous Victims: A History of the Zionist Arab Conflict 1881-1999* (New York: Alfred Knopf); and Ilan Pappé. *The Making of the Arab-Israeli Conflict. 1947-51*. (London and New York: I.B Taurus & Co Ltd, 1992).

⁶⁴ Pappé *supra* note 63 at 6.

⁶⁵ *Ibid*

majority of the land to the Israelis.⁶⁶ In 1948, a war ensued, which the Israelis won and they managed to seize the portion of the territory that had been awarded to the Palestinians in the partition, resulting in the Palestinian refugee problem. The colonial history of this territory following the war of 1948 has been the subject of (post)colonial studies, and underlies my discussion of *GSS*.

In comparing these two cases, I am interested in the extent to which these colonial relationships and settler conflicts might account for the parallels and differences in how torture is understood and reconciled in the two cases. While many academic sources discuss and compare the cases in light of the definition of torture and the decisions on the exemption laws, none have analyzed these cases in the context of their colonial backgrounds.

vi. *Towards a (Post)colonial Misreading*

The main battle in imperialism is over land, of course: but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative... The power to narrate, or to block other narratives from forming and emerging, is very important to culture and imperialism, and constitutes one of the main connections between them.⁶⁷

My discussion of the cases as part of the settler conflicts from which they emanate is situated in the field of (post)colonial studies. (Post)colonial studies or (post)colonialism is an intellectual movement that has become a major field of research and resulted in central debates in many academic disciplines.⁶⁸ This field of research is concerned with

⁶⁶ Mahler and Mahler *supra* note 63 at 10.

⁶⁷ Edward Said. *Culture and Imperialism* (New York: Vintage Books, 1993), 10.

⁶⁸ Robert Nichols. "Postcolonial Studies and the Discourse of Foucault: Survey of a Field of Problematization." *Foucault Studies*, 9 (2010): 111.

revisiting, acknowledging and critically interrogating the colonial past.⁶⁹ Robert Nichols explores two broad, overlapping designations for how the term has been used in Western academia: (post)colonial politics and (post)colonial theory.⁷⁰ (Post)colonial politics refers to the study of the emergence of imperial domination particularly in the early part of the 20th century and of the situation that colonized people find themselves in after formal colonization.⁷¹ This use of the term involves formal decolonization leading to the assertion of independent spaces of self-determination for people who were formerly colonized.⁷²

The second meaning of the term (post)colonialism is more concerned with the ongoing legacy of colonization than it is with formal decolonization.⁷³ It focuses on questions of identities, representation, hybridity, diasporas, etcetera.⁷⁴ While the prefix 'post' implies that colonization is a thing of the past,⁷⁵ (post)colonial theory is sustained by a critique of the continuities between the colonial past and what Derek Gregory has referred to as the 'colonial present.'⁷⁶ (Post)colonial scholars such as Leela Gandhi and Anne Orford have argued that in the aftermath of formal colonialization, there is the misconception that the colonial past can be left behind decisively, such that the tenacious hold that the colonial past has on the (post)colonial present is forgotten.⁷⁷ According to

⁶⁹ Leela Ghandi. *Postcolonial Theory: A Critical Introduction* (New York: Columbia University Press, 1998), 4.

⁷⁰ Nichols *supra* note 68 at 112.

⁷¹ *Ibid*

⁷² *Ibid*

⁷³ *Ibid*

⁷⁴ *Ibid*

⁷⁵ Anne McClintock, "The Angel of Progress: Pitfalls of the Term "Postcolonialism"" *Social Text* 31/32 (1992): 85- 86.

⁷⁶ Derek Gregory. *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden: Blackwell Publishing Ltd, 2004), 6.

⁷⁷ Anne Orford. *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003) 46.

these scholars, the post in post-colonial is inaccurate and serves to render the ongoing impacts and practices of colonialism invisible. My use of brackets around the post in (post)colonial is intended to reflect this problematization of the belief that these societies are post colonial.

Many (post)colonial scholars examine colonial texts such as novels, letters, history books, newspapers, censuses, legal documents, etcetera to “to explore the ways in which empire came to define the textual self-representation and narrative sensibility of metropolitan (European) culture.”⁷⁸ The use of (post)colonialism in this paper fits into the second meaning of the term described above, which refers to scholarship concerning the colonizers’ self-understanding and cultural representation in relation to its colonized subjects.⁷⁹

vii. *(Post)colonial Theory and the Constitution of ‘Otherness’*

For (post)colonial theorist Edward Said, the production of knowledge about colonised peoples is essential for enabling colonial relationships.⁸⁰ In *Orientalism*, Said focuses on how the West dominates, restructures and controls the East through ‘orientalism,’ in which the East (Orient) and its people are represented culturally as radically different (uncivilized, dangerous, inferior) from the West (Occident) and its superior people.⁸¹ Orientalism is described by Said as “a style of thought based upon the ontological and epistemological distinction made between the “Orient” and the

⁷⁸ *Ibid* at 49.

⁷⁹ Nichols *supra* note 68 at 115.

⁸⁰ Said *supra* note 67.

⁸¹ Edward Said. *Orientalism* (New York: Virginia Books, 1979), 3.

“Occident.”⁸² The basic distinctions between ‘East’ and ‘West’ are invoked in Western discourses as a starting point for representing the ‘Orient’ or East and its people in elaborate stories, novels, epics, political and social accounts, etcetera.⁸³ Said goes on to explain that the dichotomous distinctions made between the Orient and the Occident relate to power and domination: western culture gains its identity and strength by setting itself against the ‘Orient’ as a sort of surrogate, even underground self.⁸⁴ According to Said, without analyzing Orientalism as a ‘discourse’ in the Foucauldian sense, it is impossible to comprehend the systematic discipline by which Western culture is able to manage and produce the ‘other’ politically, sociologically, militarily, ideologically, scientifically and even imaginatively.⁸⁵ Nicholson suggests that Said’s acknowledgment of Michel Foucault in *Orientalism* firmly established Foucault as a central figure in (post)colonial theory.⁸⁶

In the *Archaeology of Knowledge*, Foucault introduces the notion of ‘discourse,’ through which he outlines his understanding of representation. He defines discourse as the following:

A body of anonymous, historical rules, always determined in the time and space that have defined a given period, and for a given social, economic, geographical, or linguistic area, the conditions of operation of the enunciative function...[Discourse] is not an ideal, timeless form that possesses a history; it is from beginning to end historical.⁸⁷

⁸² *Ibid* at 2.

⁸³ Said *supra* note 81 at 2-3.

⁸⁴ *Ibid* at 12.

⁸⁵ *Ibid* at 3.

⁸⁶ Nichols *supra* note 68 at 120.

⁸⁷ Michel Foucault. *Archaeology of Knowledge and Discourse on Language* (New York: Vintage Books, 1982), 117.

While ‘discourse’ is ordinarily used to describe a coherent body of speech,⁸⁸ in the Foucauldian sense, it is used to describe a group of interrelated texts that produce knowledge about their objects/subjects. According to Foucault, discourses “define not the dumb existence of reality, or the canonical use of vocabulary, but the ordering of objects.”⁸⁹ In this vein, Foucault’s idea of discourse is not just about language but practice as well, as it gives meaning to objects. The construction of objects within discourse is a result of the interplay between knowledge and power. According to Foucault, “power produces knowledge...power and knowledge directly imply one another...there is no power relation without the correlative constitution of a field of knowledge nor ... knowledge that does not presuppose and constitute...power relations.”⁹⁰ Stuart Hall suggests that all social practices entail meaning and since meanings constitute and influence our actions, all social practices have a discursive aspect.⁹¹ Foucault’s notion of discourse thus contributes to (post)colonial theory by making it possible to argue that the production of knowledge in social practices within (post)colonial societies reflects colonial authority. His ideas facilitate the study of colonization through the repetition of language and textual referents that are not necessarily ‘truth’ as they purportedly describe, but gain legitimacy from the colonial authority of the system of textual representation itself.⁹² In other words, the repetition of language from the colonial past into the ‘post’ colonial present indicates the persistence of colonial authority in the (post)colonial present.

⁸⁸ Hall, Stuart. “The West and the Rest: Discourse and Power.” *Race and Racialization: Essential Readings* ed. Tania Das Gupta (Toronto: Canadian Scholars Press, 2007) 291.

⁸⁹ Foucault *supra* note 87 at 48-9.

⁹⁰ Foucault Michel. *Power/Knowledge: Selected Interviews and Other Writings* ed. Colin Gordon (Sussex: Harvester Press, 1980) 27.

⁹¹ Hall *supra* note 88 at 74.

⁹² Nichols *supra* note 68 at 121.

Another aspect of Foucault's ideas about discourse that is significant in this thesis is his portrayal of torture as a discursive practice. To illustrate his ideas about knowledge production and power, one topic among many that Foucault explores is the interplay among discourse, power and the body. He understands the practice of torture as an exercise of power and the body as "the locus of the extortion of truth."⁹³ In *Discipline and Punish*, Foucault discusses how in pre-modern colonial settings, torture was conducted as a public spectacle on convicted criminals to restore the power of the sovereign by making audiences witness the truth of the sovereign's power.⁹⁴ He theorizes that interrogational torture in modernity which is often conducted in secrecy, shares with torture as a spectacle, the function of finding truth.⁹⁵ In both accounts, Foucault's estimation of 'truth' acquired through torture is that it is only reflective of the power that authorizes it, rather than the 'truth' that it purports to show, which is the same as his understanding of representation in discourse. This view of torture echoes the ideas of critics who reject torture as an effective mechanism for acquiring truth based on the idea that it is self-referential. I referred to these critics in my earlier discussion of the torture debates.

Based on the ideas of (post)colonial scholars outlined above, as well as Foucault's notion of discourse as it relates to representation and torture, I discuss *Ireland* and *GSS* in the context of colonization. This research aims to undertake the literary approach known as 'misreading' employed by some (post)colonial scholars. It involves breaching the

⁹³ Michel Foucault. *Discipline and Punish* (New York: Random House, 1995), 42.

⁹⁴ *Ibid* at 57-59.

⁹⁵ *Ibid* at 48-49. Cited by Patrick Lenta in "Legal Illegality: *Waiting for the Barbarians* after September 11." *Journal of Postcolonial Writing* 42: 1 (2006): 76.

protocols that govern legal scholarship in order to make legal texts “mean differently,” that is, making them tell different stories than are intended.⁹⁶

The methodological approach of ‘misreading’ emanates from an understanding of law as a cultural artefact: “not as rules and policies but as stories, explanations, performances, linguistic exchanges - as narrative and rhetoric.”⁹⁷ The academic interest in law’s rhetoric and narratives is part of a broader scholarly approach known as the “law and literature” movement which embraces two distinct forms of scholarship, namely, law *as* literature and law *in* literature.⁹⁸ The law *as* literature movement is committed to unpacking law’s narratives by making reference to methods of literary interpretation, analysis, and critique.⁹⁹ Law *in* literature analyzes works of imaginative literature containing legal themes or depicting legal practice.¹⁰⁰

It has been suggested that there is very little connection between these two strands of the scholarship and that they are neither analyzing the same material nor asking the same questions.¹⁰¹ I challenge this assumption by situating this research in both strands of the movement. I argue that even though colonization is not discussed in either of the two cases, they both discuss torture in the manner that the practice is understood in colonial contexts. In order to unpack the narratives produced in the cases, it is necessary that I discuss how torture is conceptualized and reconciled in colonial contexts. To do so, I

⁹⁶Orford *supra* note 77 at 38.

⁹⁷ Peter Brooks and Paul Gerwitz (*Law’s Stories: Narratives and Rhetoric in the Law*. Connecticut: Yale University Press, 1996), 3.

⁹⁸ Guyora Binder and Robert Weisberg. *Literacy Criticisms of Law* (New Jersey: Princeton University Press, 2000), ix.

⁹⁹ *Ibid*

¹⁰⁰ *Ibid*

¹⁰¹ Jane Baron. “Law, Literature and the Problems of Interdisciplinarity.” *Yale Law Journal*, 108 (1999): 1065.

rely on the depiction of the practice as a colonial mechanism in JM Coetzee's novel *Waiting for the Barbarians*.¹⁰² This contributes to law *in* literature, as I examine the legal practice of torture as it is portrayed in a novel, and to law *as* literature, since I rely on interpretations of the novel to assist me in misreading the two cases.

This misreading of the two cases is not an attempt to apply a work of literary imagination to actual facts. Rather, I read the novel as a 'metaphor' for the two cases. Lakoff and Johnson's ideas about the ways in which 'metaphor' structures our everyday thoughts is useful for thinking of the literary term as an analytical device. Their definition of the 'metaphor' as a way of comparing one thing in terms of another with the primary function of understanding¹⁰³ allows for the comparison of two domains (a novel and legal cases) that are not literally comparable in order to suggest a resemblance. The use of 'metaphor' in this paper is also a law *as* literature approach.

viii. *Waiting for the Barbarians as a Lens into Ireland and GSS*

J.M Coetzee's third novel *Waiting for the Barbarians*, published in 1980, explores themes that are critical to (post)colonial thought, such as colonial discourse, representation and the 'other.' The novel's setting, narration, and characterization provide insights useful for unpacking the narratives produced in the two cases. The novel's setting, a settler outpost, shares many commonalities with the contexts of both cases. In my discussion of the novel in chapter 1, I show that Coetzee strategically sets the novel in an indeterminate place and time, the purpose of which is to emphasize the continuities of colonial discourse in modernity. In the novel, colonial authority in modernity is manifested in how colonized subjects are represented and in their torture, justified as a

¹⁰² J.M Coetzee. *Waiting for the Barbarians* (London: Vintage Books, 2004).

¹⁰³ George Lakoff and Mark Johnson. *Metaphors We Live By*. (Chicago: University of Chicago Press, 1980), 36.

truth finding mechanism. Reading the novel as a lens through which to view the two cases enables me to shed light on how the courts' discussion of identities and torture relates to the colonial histories which are omitted from the decisions.

Another significant theme in the novel complementing the theme of the discursive representation of colonized subjects by their colonizers is the importance of self-representation. In neither the cases nor the novel are the torture victims given the agency of self-representation, instead, they to rely on others to speak on their behalf. The novel problematizes this issue by showing how it relates to colonization. Employing the novel as a lens into the cases led me to identify problems with how the victims are represented by these third parties.¹⁰⁴

ix. *Chapter Breakdown*

I had initially intended to structure this thesis around the themes of identities and torture, with a chapter on each theme that compared the two cases in relation to that theme. Due to the fact that the courts' discussion of identities and torture overlaps in both cases, structuring this thesis based on themes was problematic. Encountering this validated one of the underlying arguments that I seek to advance in regard to the two cases: that torture is justified and tolerated based on the identities of the torture victims. Instead of themes, the structure of this thesis is based on the primary documents analyzed – the novel and the two cases.

¹⁰⁴ I am limited to the GSS decision in my analysis of third party representatives as I do not have access to the original documents submitted by the Government of Ireland to the Commission. The documents might have provided a contrast in how the human rights organization conceptualized identities because the Government of Ireland would have been more aligned with the ideologies of the torture victims than PCATI would have been with the Palestinian torture victims.

In chapter one, I employ the (post)colonial theoretical framework discussed in this introduction in analyzing Coetzee's novel as a work of (post)colonial literature, thereby making the novel my theoretical framework for the purpose of misreading the two cases. In chapter 2, I apply the themes that I discuss in the novel to the Israeli Supreme Court's decision and analyze the documents presented by the main human rights organization that represents the torture victims in the case. In chapter 3, I discuss *Ireland*, drawing attention to similarities and differences between the two cases to show how comparing the two can make apparent factors relating to torture and colonized identities that may otherwise be invisible.

Chapter 1: Torture and Identities in *Waiting for the Barbarians*

In this chapter, I discuss the portrayal of the relationship between torture and identities in a modern context that embodies ongoing colonial relationships in the novel *Waiting for the Barbarians*. Through the novel's narrator and protagonist, Coetzee depicts the complex relationships between power and knowledge production, along with the relationships among torture, language and political agency. Ultimately, the novel portrays torture and colonization as sustaining and justifying one another. It shows how colonial power and discourse authorize torture, and how torture in turn produces 'knowledge' that legitimizes the means employed to sustain colonial power. As a work of post-colonial literature, *Waiting for the Barbarians* highlights the challenges of ascertaining 'truth' in (post)colonial discourse, using the 'truth' acquired through torture as a harrowing example of the malleability of the 'truth'.

The time and place in which the novel is set are unspecified. Coetzee states that he "just put together a variety of locales and made a lot of things vague with a definite intention that it shouldn't be pinned down to some specific place."¹⁰⁵ This comment was a response to critics who oversimplified the novel's allegorical meaning by narrowing the plot to South African politics.¹⁰⁶ Robert Penner takes a wider and more abstract approach to the novel. For him, the lack of geographic and temporal specificity underscores the novel's allegorical nature, creating a dialectic that addresses a range of topics including

¹⁰⁵ Robert Penner. "Sight, Blindness and Double-Thought in J.M Coetzee's *Waiting for the Barbarians*." *World Literature* 26:1 (1986): 35.

¹⁰⁶ Jennifer Wenzel. "Keys to the Labyrinth: Writing, Torture and Coetzee's Barbarian Girl." *Tulsa Studies in Women's Literature*, 15:1 (1996): 62.

the relationships between the colonizer and the colonized, man and woman, civilization and barbarianism in all applicable contexts.¹⁰⁷

The fact that Coetzee intends for the novel to be read as an allegory beyond the South African context makes me comfortable in applying it to the Northern Ireland and Israeli contexts. Analyzing the novel as (post)colonial literature, I see the lack of temporal specificity in the novel as Coetzee intentionally blurring the distinction between modernity and pre-modernity, between the colonial and the post-colonial, in order to emphasize the continuities between them.

Waiting for the Barbarians is set on an outpost of an unspecified 'Empire' that has grown into an agricultural settlement inhabited by three thousand of the Empire's citizens. The novel's narrator and protagonist is a nameless 'Magistrate' who oversees the affairs of the Empire at the outpost. The Magistrate's goal at the beginning of the novel is to live out the days before his pending retirement simply and quietly. This plan is disrupted when the Empire begins making plans in anticipation of a 'barbarian' attack. The Magistrate is sidelined in his duties by a Colonel named Joll and his men from the Empire's capital who are assigned the task of containing the barbarian threat to Empire. One mechanism that the Empire employs towards this goal is torture, which it justifies as a means of acquiring evidence to expose the barbarians in their plot to attack Empire. When Joll arrives on the frontier, he goes on expeditions and returns with barbarian captives whom he tortures and interrogates about their alleged plot against Empire. In the course of the narration, it becomes clear that the perceived barbarian threat is a way in

¹⁰⁷ Penner *supra* note 105.

which the Empire sustains itself, and that the dichotomies invoked by Empire to distinguish itself from these barbarians are ahistorical and exist only in language.¹⁰⁸

Soon after Joll returns from one of his expeditions, the Magistrate encounters one of his captives, a woman, begging in the streets. The woman is simply referred to as a 'barbarian girl' by the Magistrate throughout the novel.¹⁰⁹ She has been maimed and blinded by Joll and his men in their interrogations. The Magistrate brings the girl into his home, where he begins to ritually bathe her, and wash and massage her feet. He sleeps in her bed, yet to his own surprise he is unable to bring himself to have sexual relations with her. At the same time, the Magistrate probes the girl for answers regarding Joll's actions towards her. His questions are sometimes deflected but mostly met with silence. As the main barbarian character, the girl embodies the presence and symbolically the voice of her people who are also characterized by their silence. With an increasing interest in the barbarians and their history with the Empire, the Magistrate ultimately takes it upon himself to speak on their behalf, and becomes a misreader of Empire's discursive and torture practices. When the Magistrate eventually decides to return the girl to her people, he is detained by Joll and is later tortured for "treasonously consorting with the enemy."¹¹⁰

The rest of this chapter is divided into three interrelated parts. In part one I discuss how the Empire's self-realization as a "complete political and semiotic system"¹¹¹ is

¹⁰⁸ Ibid.

¹⁰⁹ Although she is clearly a woman, I will refer to her as the 'barbarian girl' in my analysis since it is what she is called in the book.

¹¹⁰ Coetzee *supra* note 102 at 77.

¹¹¹ David Attwell. "J.M. Coetzee and South Africa: History, Narrative and the Politics of Agency." (PhD dissertation, the University of Texas at Austin, 1991), 81.

contingent upon the construction of binaries between its citizens and the barbarians. I explain how these binaries enable Empire to dominate these barbarian ‘others’ thereby re-asserting its colonial occupation of the lands previously inhabited by the barbarians. In part two, I demonstrate how torture is employed to reinforce the Empire’s categorizations and how it is justified as a truth-finding mechanism based on these same categories. I discuss the novel’s portrayal of how Empire uses torture to sustain its colonial power by instilling fear among the barbarians. In part three, I discuss Coetzee’s problematization of the Magistrate as the one who speaks on behalf of the barbarians, based on his own colonial subjectivity and how his representation of the barbarians is impacted by it. I reflect on the themes of sight and silence to discuss the relationship between the barbarians and Empire in all three parts. These themes are used metaphorically to show that colonization dictates how Empire conceptualizes and reconciles identities and torture.

i. *Binaries as a Path to Torture in Coetzee’s Empire*

The themes of sight and blindness are introduced in the opening lines of the novel to demonstrate Empire’s self identification as a modern entity. The novel begins with the arrival of Colonel Joll from Empire’s capital. He is received by the Magistrate. The Magistrate expresses his fascination with Joll’s sunglasses, a new invention that he has not seen prior to meeting the Colonel. He describes Joll (and his sunglasses):

I have never seen anything like it: two little discs of glass suspended in front of his eyes in loops of wire. Is he blind? I could understand it if he wanted to hide

blind eyes. But he is not blind. The discs are dark, they look opaque from the outside, but he can see through them.¹¹²

The exchange between the Magistrate and Joll over the sunglasses positions readers to see the Empire represented by Joll as modern. Joll indicates that in the capital everyone wears sunglasses, emphasizing the Empire's adherence to modern standards. Even as Joll invokes Empire's modernity, he and his men arrive on horses, suggesting that the novel is set in pre-modern times, with modernity marked by sunglasses. As Olsen observes, "how can there be sunglasses, on the one hand, and no advanced military weapons or motors of any kind on the other?"¹¹³

The time period in which the novel is set is rendered highly ambiguous in order to challenge the Empire's invocation of modernity and civilization and to draw attention to the parallels between past and present as they pertain to Empire's practices. While sunglasses symbolize modernity, they also foreshadow Joll and the Empire's ethical blindness in their treatment of the barbarians, which the novel relates to its colonial past. Joll's modern sunglasses obscure Empire's colonial history and designate the landscape as unproblematically Empire's.¹¹⁴ However, the persistence of Empire's past in its 'modern' present is evident in the following assertion by the Magistrate later in the novel:

What has made it impossible for us to live in time like fish in water, like birds in the air, like children? It is the fault of the Empire! Empire has created the time of history. Empire has located its existence not in the smooth recurrent spinning time of the cycle of the seasons but in the jagged time of rise and fall, of beginning and end, of catastrophe. Empire dooms itself to live in history and to plot against history.¹¹⁵

¹¹²Coetzee *supra* note 102 at 1.

¹¹³Olsen, Lance. "The Presence of Absence: Coetzee's *Waiting for the Barbarians*." *Ariel*, 16:2 (1985): 50.

¹¹⁴Lenta *supra* note 95 at 72.

¹¹⁵Coetzee *supra* note 102 at 146.

The notion that Empire lives in history yet plots against it suggests that even as it attempts to erase its colonial past by insisting on its modernity and civilization, the same colonial mechanisms that Empire employed in the past persist in the present thereby making erasure impossible. The manner in which identities are discussed by Empire reflects the idea that the Empire continues to live in the past yet plots against it. As the story unfolds, it becomes apparent that Empire's colonial history authorizes how it conceptualizes and represents identities. Empire tries to negate that history so that the barbarian identity becomes a contemporary truth that justifies Empire's actions.

Joll's arrival to the frontier comes amidst stories of crimes perceived by Empire to be perpetrated by the barbarians. These include accounts of traders from Empire being attacked, a girl being raped, flooding of a field, increasing stock thefts and the disappearance of census officers who are later found killed and buried in shallow graves. Even though these crimes could have been committed by anyone, the Empire asserts that it was the barbarians. The stories reinforce Empire's pre-existing views of the barbarians.

According to the Magistrate:

Once in a generation without fail, there is an episode of hysteria about the barbarians. There is no woman living along the frontier who has not dreamed of a dark barbarian hand coming from under the bed to grip her ankle, no man who has not frightened himself with visions of the barbarians carousing in his home, breaking the plates, setting fire to the curtains, raping his daughters.¹¹⁶

These notions about the barbarians reflect the civilized/uncivilized, us/them binaries common to orientalist discourses.

The barbarians' silence reinforces the way in which they are represented by Empire. The barbarian characters (other than the girl) are not developed by Coetzee and

¹¹⁶ Coetzee *supra* note 102 at 9.

are depicted as existing only in relation to Empire, which renders them invisible. The barbarians, including the girl, are characterized by reticence in speech, usually only speaking when spoken to. The fact that the barbarian characters in the novel scarcely speak precludes them from providing any insight into their identities or from challenging how they are viewed and represented by Empire. The barbarians' silence fosters Empire's stories about them.¹¹⁷

Attributing these alleged crimes to the barbarians leads to the inflated notion that "the barbarian tribes of the north and west might at last be uniting."¹¹⁸ In response to this perceived threat, Empire heightens military presence on the frontier by sending officers to tour the frontier, strengthening garrisons and having military escorts accompany traders. During this period, officials like Colonel Joll from the Empire's Third Bureau of the Civil Guard: "guardians of the State, specialists in the obscurer motions of sedition, devotees of truth, doctors of interrogation"¹¹⁹ are seen on the frontier for the first time to ensure that "the world would stay steady on its course."¹²⁰

Reflective of Said's argument that the process of orientalizing the 'other' "has less to do with the 'Orient' than it has to do with 'our' world,"¹²¹ it becomes apparent that the manner in which Empire imagines the barbarians is based on its own need to define itself as civilized, and has little to do with the barbarians themselves.¹²² The idea that Empire relies on the barbarians as its constitutive 'other' through which it defines its

¹¹⁷ Maria Boletsi. "Barbaric Encounters: Rethinking Barbarism in C.P. Cavafy and J.M. Coetzee's *Waiting for the Barbarians*." *Comparative Literature Studies*, 44 (2007): 67.

¹¹⁸ Coetzee *supra* note 102 at 8.

¹¹⁹ *Ibid* at 9.

¹²⁰ *Ibid*

¹²¹ Said *supra* note 81 at 12.

¹²² Jane Poyner. (*J. M. Coetzee and the Paradox of Postcolonial Authorship*. Vermont: Ashgate, 2009), 55.

identity as a modern political system is evident when Colonel Joll and the Third Bureau begin their campaign against the barbarians. Colonel Joll's strategy for securing the Empire involves detaining barbarians and questioning them about their modes of operation for the 'upcoming' uprising. Soon after his arrival, he gathers men to go on an expedition to investigate the 'upcoming' barbarian revolt. Four days after Joll leaves for his expedition, some of his guards return to the outpost with prisoners and a letter from Joll asking for them to be held with "succeeding detainees incommunicado for [his] return."¹²³ When the Magistrate sees these prisoners he is angry because they are "fishing people" and it is "a waste of time bringing them here"¹²⁴ instead of tracking down thieves, bandits and invaders of the Empire. He interrogates the guards on whether anyone had explained to Joll the difference between "fishermen with nets and wild nomad horsemen with bows,"¹²⁵ that those two groups did not even speak the same language, and that the fishermen could not possibly be useful to Joll in his inquiries. A young lieutenant explains to the Magistrate that when he tried to tell Joll the difference between the two groups, Joll responded that "prisoners are prisoners,"¹²⁶ implying that they are all the same. Joll is unable to see that these fishermen do not pose a threat to Empire. Rather, he implies that since those individuals are not part of 'us,' that is, Empire's 'civilized' citizens 'they' are automatically part of the uncivilized barbaric 'other' that threatens Empire's security.

¹²³ Coetzee *supra* note 102 at 18.

¹²⁴ *Ibid*

¹²⁵ *Ibid* at 19.

¹²⁶ *Ibid* at 23.

Also reflecting this rigid us/them binary, a military conscript who claims to have been “trailed by a distance”¹²⁷ by barbarians is asked by the Magistrate if he is certain that it was barbarians following him. He responds with his colleagues concurring, “who else could they have been?”¹²⁸ The conscript evokes a certainty that if there is a threat, it must be from the barbarians. In both instances, officers of the Empire conflate ‘otherness’ with treachery which enables them to justify sanctioning any of these ‘others’ with interrogation and torture. The link between torture and identities is substantiated in these instances since these officers imply that any of these barbarians would be a reliable source of evidence against their fellow barbarians.

The novel links Empire’s representation of identities to colonization by suggesting that the binaries invoked to categorize identities by Empire are intended to erase Empire’s history of colonization and violence. When a young military conscript reveals to the Magistrate that there are rumours circulating within the military headquarters that there would be a general offensive against the barbarians “to push them back from the frontier into the mountains,”¹²⁹ the Magistrate insists that the barbarians would never allow themselves to be restricted to the mountains. The officer replies that the point of war is to force a choice on someone who would not make it otherwise. This leads the conscript to ask: “what are these barbarians dissatisfied about? What do they want from us?” The Magistrate replies that the barbarians “want an end to the spread of settlements across their land. They want their land back, finally.”¹³⁰ The Magistrate evokes the sense that the barbarians would be justified in waging war against the Empire

¹²⁷ *Ibid* at 52.

¹²⁸ *Ibid* at 53.

¹²⁹ *Ibid* at 52.

¹³⁰ *Ibid* at 54.

and feels guilty over the fact that their land was stolen from them. The Magistrate's claim that the barbarians want an end to the Empire's oppressive practices indicates that these practices are not a recent attempt to contain the barbarian threat as Empire would have its citizens believe, but practices that have been ongoing. Empire attempts to rewrite its history of colonization by omitting the history of its ongoing violence towards the barbarians from its discourses. This enables Empire to construct the barbarians as the threat.

ii. *Torture and Colonial Discourse in Waiting for the Barbarians*

The portrayal of interrogational torture and the discussions between Joll and the Magistrate reflect the arguments for and against torture as a means of acquiring evidence. Joll justifies torture as a truth finding mechanism, while the Magistrate remains sceptical that torture will produce reliable evidence implicating the barbarians. Immediately upon Joll's arrival at the outpost, two individuals, a boy and an old man, are detained at the local prison after an alleged raid on the Empire's livestock. Although these individuals claim to have had no involvement in the raid, the Magistrate finds them beaten and bruised. In an effort to get these prisoners released, the Magistrate tries to convince Joll that the barbarians do not pose a serious threat to Empire. Joll nonetheless insists on questioning the prisoners further, requesting guards to help him with 'the language.'¹³¹ Although it does not explicitly describe what happened, the novel implies that the 'questioning' came in the form of torture.

When the Magistrate sees Joll the next day, he decides to raise his concerns with torture as strategy of interrogation. What if, he asks, a prisoner complies with an interrogator and tells them the truth, but the interrogator is unconvinced that he has

¹³¹ *Ibid* at 3.

acquired full disclosure? How does one ever know that he is being told the truth? Joll responds that “there is a certain tone; a certain tone enters the voice of the man telling the truth.”¹³² When the Magistrate mockingly questions how one detects “the tone of truth,”¹³³ Joll’s response claims, as the Magistrate puts it, “that pain is truth.”

I am speaking of a situation in which I am probing for the truth, in which I have to exert pressure to find it. First I get lies you see – this is what happens – first lies, then pressure, then more lies then more pressure, then the break, then more pressure, then the truth. That is how you get the truth.¹³⁴

Joll asserts that torture is an effective mechanism for acquiring truth in his statement that “pain is truth.”¹³⁵ However, this equation calls into question the reliability of ‘information’ acquired through the practice.

Scholar Elaine Scarry argues that torture is a form of silencing that precludes the formation of any discourse other than the language of pain.¹³⁶ According to Scarry, “for the person in pain, so incontestably and unnegotiably present is it that ‘having pain’ may come to be thought of as the most vibrant example of what it is to ‘have certainty’...”¹³⁷ In other words, for Scarry, ‘pain is truth’ in the sense that it generates any information that will cease the application of pain to the body. This sentiment is reiterated by David Sussman who argues that torture is unreliable because victims try to comprehend the will of their torturers and will provide false information in hopes of ceasing their torture.¹³⁸ This is exemplified in the novel when the boy “confesses” that both he and the old man had been involved in the raid of the Empire’s livestock and that the barbarians were

¹³² *Ibid* at 5.

¹³³ *Ibid*

¹³⁴ *Ibid*

¹³⁵ *Ibid*

¹³⁶ Elaine Scarry. *The Body in Pain: The Making and Unmaking of the World* (New York: Oxford University Press, 1985), 6.

¹³⁷ *Ibid* at 4.

¹³⁸ Sussman *supra* note 45 at 30-32.

planning an armed revolt against the Empire in the spring. This confession by the boy, as Patrick Lenta suggests, may be considered truth in the Foucauldian sense “if truth is understood (contrary to its commonsensical understanding) not as the correct perception of reality achievable only in the absence of the distortions of power but as produced through the operations of power.”¹³⁹ By making the boy’s physical pain the source of ‘truth,’ torture produces the desired discourse that he and his tribesmen are evil barbarians who threaten the Empire. The ‘certainty’ extracted through torture circumvents the procedural demand for evidence under law.¹⁴⁰

The Empire’s identity as a legitimate political system is reinforced through the construction of the identity of the other as evil barbarians, an identity produced and reinforced through torture. Empire relies on this ‘truth’ of crimes committed as justification for use its use of violence against the barbarians. In one instance, Joll orders the word ‘ENEMY’ inscribed on the backs of a dozen barbarian men whom he brings back from one of his expeditions. He has the men whipped until the words are wiped off their bodies by blood and sweat. This action substantiates the link between the representation of identities and torture.¹⁴¹ This incident of torture, conducted as a spectacle for the Empire’s citizens, has been described as a dramatization of Foucault’s claim¹⁴² that public torture is meant to produce discourses of the sovereign’s power in colonial contexts as a display of the sovereign’s agency.¹⁴³ In this vein, the spectacular torture of these barbarians is a moment in which the sovereign is legitimized by bringing

¹³⁹ Lenta *supra* note 95 at 75.

¹⁴⁰ *Ibid*

¹⁴¹ Robert Spencer. “J.M. Coetzee and Colonial Violence.” *Interventions* 10 (2008): 174.

¹⁴² Lenta *supra* note 95 at 75.

¹⁴³ Foucault *supra* note 93 at 48-9.

into play the dissymmetry of power between itself and the barbarians.¹⁴⁴ The barbarian ‘enemies’ come to embody the ‘truth’ of Empire’s power, while the crowd is invited to participate (for instance a girl is invited to whip the barbarians) in the manifestation of the Empire’s power as a sign of allegiance to Empire.¹⁴⁵ The fact that Coetzee portrays both the colonial use of torture as a means of producing discourses of power, and its similar use in modernity as a mechanism for producing colonized subjects as the enemy, is another way in which he makes the temporal setting ambiguous and reinforces the elision between past and present. By showing that torture is based on the vilification of the ‘other’ in both modern and colonial contexts, the author effectively demonstrates that the modern use of the practice is based on Empire’s ongoing colonization of the barbarians.

iii. *Third Party Representation.*

“I have but one language – but that language is not mine.”¹⁴⁶

Elaine Scarry’s discussion of the relationship between physical pain and speech is useful for understanding the Magistrate’s character in *Waiting for the Barbarians*. Scarry theorizes that torture victims are usually so bereft of the resources of speech that they depend on those who are not in pain to talk about their suffering.¹⁴⁷ This notion is exemplified by the novel in the fact that the Magistrate is the one who speaks on behalf of the barbarians, who are characterized by their silence. The Magistrate protests the dehumanizing treatment by Joll and the Third Bureau. For instance, when Joll orders the spectacular torture of the 12 barbarian men he brings back to town from an expedition,

¹⁴⁴ *Ibid*

¹⁴⁵ Lenta *supra* note 95 at 176.

¹⁴⁶ Jacques Derrida. *Monolingualism of the Other: Or, The Prosthesis of Origin* .trans. Patrick Mensah (Stanford: Stanford UP, 1998), 93.

¹⁴⁷ Scarry *supra* note 136 at 35.

the Magistrate speaks out against their torture. When someone raises a hammer to strike one of the men, the Magistrate implores: “Not with that!... You would not use a hammer on a beast, not on a beast!...We are great miracles of creation! But from some blows this miraculous body cannot repair itself! Look at these men! *Men!*”¹⁴⁸ In protesting their torture, the Magistrate invokes the humanity of these men challenging their designation as simply ‘barbarians’. The Magistrate’s role as the ‘voice’ of the barbarians is also manifested in his scepticism that the barbarians pose a serious threat to Empire and his insistence that the barbarians simply want an end to imperial expansion on their land. Both of these factors challenge the categories and ‘truths’ of Empire’s colonial discourse. The Magistrate’s misreading of Empire’s categories is articulated in the following statement by him in response to Joll’s accusation that he does not take the barbarian threat seriously:

Those pitiable prisoners you brought in – are they the enemy I must fear? Is that what you say? You are the enemy Colonel! *You* are the enemy, *you* made the war, and *you* have given them all the martyrs they need – starting not now but a year ago when you first committed your filthy barbarities here!”¹⁴⁹

As an imperial citizen who benefits from Empire’s colonial domination, the Magistrate’s embodiment as “the voice” of the dominated is problematic. Even though he claims to be the “one just man”¹⁵⁰ in the Empire, when the novel begins, the Magistrate is complicit in the Empire’s practices. He is initially only concerned with how Joll’s intrusion in his management of the Empire’s affairs will affect his personal situation. Upon Joll’s arrival, the Magistrate who is getting ready to retire expresses his frustration with being embroiled in Joll’s practices:

¹⁴⁸ Coetzee *supra* note 102 at 117.

¹⁴⁹ *Ibid* at 125.

¹⁵⁰ *Ibid*

If I had gone on a hunting trip for a few more days, as I should have done, a visit up – river perhaps, and come back, and without reading it, or after skimming over it with an incurious eye put my seal on his report, with no questions on what the word *investigations* meant, what lay beneath it like a banshee beneath a stone – If I had done the wise thing, then perhaps I might now be able to return to my hunting and hawking and placid concupiscence while waiting for the provocations to cease and the tremors along the frontier to subside.¹⁵¹

Despite expressing resentment for Joll and his practices, the Magistrate understands that he is complicit in his actions: “I drink with him, I eat with him, I show him the sights; I afford him every assistance as his letter of commission requests, and more. The Empire does not require that its servants love each other, merely that they perform their duty.”¹⁵²

Although he is sympathetic to the barbarian prisoners who are brought in by Joll, the Magistrate watches them from a condescending distance and does not want them to stay long or return: “I hope ...that memories of the town with its easy life and exotic foods are not strong enough to lure them back. I do not want a race of beggars on my hands.”¹⁵³ His sympathy for the barbarians is soon overshadowed by disdain due to their “animal shamelessness,” “the filth, the, smell, the noise.”¹⁵⁴ This view of the barbarians reflects the “settlers’ litany of prejudice: that barbarians are lazy, immoral, filthy, stupid.”¹⁵⁵ The Magistrate claims he is afraid these ideas about the barbarians will be confirmed if they are allowed to mingle with Empire’s citizens, hence why he wants them to stay on the outskirts of the town, implying that he also holds these views of the barbarians.

¹⁵¹ *Ibid* at 9.

¹⁵² *Ibid* at 6.

¹⁵³ *Ibid* at 20 and Boletsi *supra* note 117 at 78.

¹⁵⁴ *Ibid* at 20-21 and Boletsi *Ibid*

¹⁵⁵ *Ibid* at 41 and Boletsi *Ibid*

The Magistrate's ambiguous role in the novel can be misread through the theme of sight. At the beginning when he discusses Joll's dark sunglasses, the Magistrate is concerned that he will see a reflection of himself in Joll's sunglasses, implying that he is no different from Joll.¹⁵⁶ This makes him reluctant to censor Joll's actions¹⁵⁷ as noted when he asks: "who am I to assert my distance from him..."¹⁵⁸ When the Magistrate sees the barbarian girl, she stares straight ahead with her vision at right angles from his approach. Her gaze gradually averts from the Magistrate as he gets nearer to her.¹⁵⁹ She tells the Magistrate, when he probes her for answers about what happened to her eyes, that Joll's men held hot metal tongs to them. Nonetheless, she claims that she is able to see peripherally and can see the Magistrate more clearly when she turns her gaze away from him.¹⁶⁰ The girl's visual aversion to the Magistrate can be read symbolically itself as a sort of misreading, wherein she refuses to embrace his self portrayal as the "one just man" in the Empire and sheds light on his subjectivity as a subject of Empire who aids and benefits from the Empire's practices.

Despite the Magistrate's reinforcement of Empire's 'othering' construction of the barbarians earlier in the novel, he is very concerned about how they are treated by Empire. This is apparent in his interest in the girl and in how he relates to the man and boy who are interrogated and tortured by Joll. However, his aversion to torture is not grounded in his understanding of Empire as a colonialist state or from his self-awareness of his colonial subjectivity. Rather, it is due to his belief that the Empire's practices are

¹⁵⁶ Coetzee *supra* note 102 at 6.

¹⁵⁷ Penner *supra* note 105 at 36.

¹⁵⁸ *Ibid*

¹⁵⁹ *Ibid*

¹⁶⁰ *Ibid*

uncivilized violations of the rule of law.¹⁶¹ His logic exemplifies the kind of empathy concerned not with the position of the sufferer, but with “the position of the humanitarian.”¹⁶² The Magistrate’s ideas about what the Empire *should* be, that is, a state that conforms to the rule of law, reinforces the Empire’s self-identification as a ‘civilized’ modern state. Thus, while he accuses Empire of plotting against its colonial history, he, at the same time, reinforces those discourses that are inconsistent with the history of colonization by positing the possibility of a contemporary humanitarian Empire.

The Magistrate is not oblivious to the implications of his subjectivity on his relationship with the barbarians. He states: “for I was not, as I liked to think, the indulgent, pleasure-loving opposite of the rigid Colonel. I was the lie that Empire tells itself when times are easy, he the truth that Empire tells when harsh winds blow. Two sides of imperial rule, no more no less.”¹⁶³ In his relationship with the barbarian girl, the Magistrate’s actions reinforce Joll and the Empire’s torture and colonial practices, something he is very conscious of. As the main barbarian character in the novel, the girl’s body bears the evidence of the violence that she and her people have endured at the hands of the Third Bureau.¹⁶⁴ As if to atone for her torture, the Magistrate embarks on a mission to ‘heal’ the girl’s body by ritually bathing her and massaging her feet and body. The girl is completely passive in the Magistrate’s exploration of her body, which reinforces the Magistrate’s perception of her as a combination of concubine and domestic.¹⁶⁵ The Magistrate’s ritualistic exploration of the girl’s body corresponds with the ritualistic

¹⁶¹ *Ibid* at 85.

¹⁶² Joseph Slaughter. “Humanitarian Reading.” *Humanitarianism and the Mobilization of Empathy* eds. Brown Wilson and Richard Wilson (Cambridge: Cambridge University Press, 2009), 94.

¹⁶³ Coetzee *supra* note 102 at 148–49.

¹⁶⁴ Lorena Russell. “*Waiting for the Barbarians*: Narrative, History and the Other” in *Exploration and Colonization* ed. Harold Bloom. New York: Infobase Printing (2010): 215.

¹⁶⁵ Penner *supra* note 105 at 37.

sexualisation and feminization that scholars¹⁶⁶ have associated with colonial exploration, a dynamic that the Magistrate seems to be conscious of:¹⁶⁷ “with this woman it is as if there is no interior, only a surface that I hunt back and forth seeking entry. Is this how her torturers felt hunting her secret?”¹⁶⁸ The fact that the Magistrates envisions himself reinforcing Empire’s colonial power makes it problematic that he speaks on behalf of the barbarians. Although the Magistrate feels guilty about Empire’s colonization, he is not capable of foregoing the benefits of colonial domination in the interest of the barbarians. The Magistrate understands the manner in which he represents the torture of the 12 barbarian men as limited:

Would I have dared to face the crowd to demand justice for these ridiculous barbarian prisoners with their backsides in the air? *Justice* once it is uttered, where will it all end? Easier to shout *No!* Easier to be beaten and made a martyr. Easier to lay my head on a block than to defend the cause of justice for the barbarians: for where can that argument lead but to laying down our arms and opening the gates of the town to the people whose land we have raped? The old magistrate, the defender of the rule of law, enemy in his own way of the State, assaulted and imprisoned, impregnably virtuous is not without his own twinges of doubt.¹⁶⁹

This assertion contains contradictory thoughts of fear, hope, and guilt. While the Magistrate is mindful that justice would be served if the barbarians exacted revenge on the Empire, he is afraid of this outcome and hopes that they do not actually show up. Despite his apparent feeling of guilt about Empire’s torture practices, he would not be willing to put an end to imperial rule for the sake of ending these practices. He asserts that “I was born here, I’ll die here, I’m not leaving.”¹⁷⁰ He puts off having to decide

¹⁶⁶ See for example, Anne McClintock *Imperial Leather: Race Gender and Sexuality* (New York and London: Routledge, 1999).

¹⁶⁷ Russell *supra* note 164 at 217.

¹⁶⁸ Coetzee *supra* note 102 at 47.

¹⁶⁹ *Ibid* at 118.

¹⁷⁰ *Ibid* at 164.

whether to give an account of Empire's practices "when the barbarian is truly at the gate, perhaps then I will abandon the locutions of a civil servant with literary ambitions and begin to tell the truth."¹⁷¹ He anticipates that eventually the Empire will be able to assimilate the barbarians: "[...]when the barbarians taste bread, bread and mulberry jam, bread and gooseberry jam, they will be won over to our ways. They will find that they are unable to live without the skill of men who know how to rear the pacific grain, without the arts of women who know how to use the benign fruit."¹⁷² Due to his inability to accept a possible end to Empire's colonial rule, the Magistrate limits his protests and criticisms of Joll and the Empire to the fact that they torture.

Coetzee's portrayal of the Magistrate as the voice of the barbarians has been criticized as a silencing of the subjugated in favour of those who have the power to represent them.¹⁷³ On the contrary, I read the silence of the barbarians as demonstrating the importance of self-representation, not a denial of political agency. Coetzee is portraying the silencing of the barbarians as well as the speaking on their behalf as a modern practice of colonization. I agree with Maria Boletsi in her suggestion that the 'waiting' in the novel's title alludes to the process of waiting for the other to speak for themselves without the intermediary of a third party.

In the barbarian girl, there is a promise of a voice that would be different from the Magistrate's.¹⁷⁴ She is silent whenever the Magistrate demands to know what Joll and his men did to her. When the Magistrate articulates his dehumanizing perception of her in

¹⁷¹ *Ibid* at 154.

¹⁷² *Ibid* at 169.

¹⁷³ See for example, Benita Parry. "Speech and Silence in the Novel of J.M Coetzee" *Writing South Africa: Literature, Apartheid and Democracy* eds. Derrick Atttridge and Rosemary Jolly (New York: Cambridge University Press, 1998), 149-65.

¹⁷⁴ Boletsi *supra* note 117 at 79.

saying that “people will say I keep two wild animals in my room, a fox and a girl” she shows her disapproval with a rigid gaze and the Magistrate apologizes.¹⁷⁵ On the way to returning the girl to her people, the Magistrate realizes his own short-sightedness pertaining to the girl.¹⁷⁶ When he sees her talking and joking with two of his soldiers by the campfire he states: “the banter goes on in the pidgin of the frontier and she is at no loss for words. I am surprised by her fluency, her quickness, her self-possession. I even catch myself in a flush of pride: she is not just the old man’s slut, she is a witty, attractive young woman.”¹⁷⁷ It is because the girl is able to speak that she can challenge the Magistrate’s limited view of her. By indicating that the girl is capable of speech outside Empire and the Magistrate’s colonialist discourses, Coetzee alludes to the possibility of the girl articulating ideas about Empire in a fashion that is not as limited as the Magistrate’s. In other words, if the girl were to speak for herself, she might bring to light how Empire ‘plots against history’ in its discursive and violent practices. On the other hand, her silence casts doubts about the Magistrate’s narrative authority.

iv. *Conclusion*

In this chapter, I have discussed the conceptualization of discourses on torture in a (post)colonial context which will underlie my (post)colonial misreading of *GSS* and *Ireland*. I have shown how in Coetzee’s *Empire*, torture is portrayed as based on the identities of the torture victims, emanating from the invocation of dichotomies between Empire and its ‘other’ to construct the other as a threat. Resonating with Foucault’s ideas about the relationship between discourse and power and the constitution of the subject

¹⁷⁵ Penner *supra* note 105 at 37.

¹⁷⁶ *Ibid*

¹⁷⁷ Coetzee *supra* note 102 at 68.

within discourse, the novel shows that ‘facts’ about identities reflect the authoritative voice and interests of those who have the power to produce knowledge about identities. In the novel, Empire’s representation of the ‘other’ as treacherous barbarians is due to its need for self-realization as a modern political entity, an identity which simultaneously both denies Empire’s colonial past and requires Empire to re-enact that past by further subjugating the colonized barbarians. The subjugation of the barbarians is accomplished through interrogational torture which produces ‘evidence’ that the barbarians are a threat to Empire. This ‘evidence’ is used to justify Empire’s violent acts against the barbarians, making torture self-referential. I have also emphasized the importance of self-representation through my discussion of the barbarians in relation to how they are understood and discussed by the Magistrate who reinforces the Empire’s colonial discourses even as he speaks out against their torture. The themes of sight and silence are used effectively by Coetzee to portray these issues.

. .

Chapter 2: *Waiting for the Barbarians* as a Lens into the GSS Case

Why isn't anything going on in the senate?

Why are the senators sitting there without legislating?

Because the barbarians are coming today.

What's the point of senators making laws now?

Once the barbarians are here, they'll do the legislating.¹⁷⁸

In this chapter, I discuss how torture is conceptualized in *GSS*, as well as by the human rights organization that speaks on behalf of the torture victims in the case. I reflect on the ambiguities in the language employed by the judges to demonstrate how they rationalize and condone torture. I argue that the identities and position of the judges in relation to the torture victims influence how they decide on the five interrogation techniques. I also analyze the language used by the PCATI in articulating the harm done to the torture victims. I argue that the language employed by the human rights organization reflects the organization's understanding of Israeli identity, the identity of the torture victims, and the organization's own identity and position in relation to those identities. I employ *Waiting for the Barbarians* as a lens to help unpack the narratives produced in the case about torture and identities, using the novel's themes of history, sight and silence.

i. *The Historical Context of the GSS Case*

Many historians have demonstrated that the Six Day War of 1967 marked an escalation of Palestinian land dispossession and Israeli occupation and settlement in

¹⁷⁸ C. P. Cavafy. *Collected Poems* trans. Edmund Keeley and Philip Sherrard (New Jersey: Princeton University Press, 1975), 18.

Palestine.¹⁷⁹ This war resulted in Israel annexing wide areas of land inhabited by Palestinians and produced about 325,000 Palestinian refugees.¹⁸⁰ The Israeli government also endorsed the building of settlements in the Occupied Territories. In the Occupied Territories, Israel created a regime based on separation and discrimination, which featured two systems of laws for Palestinians and Israelis on the same territory, in which rights depended on the national identities of inhabitants.¹⁸¹ In one system the government annexed settlements for Israeli citizens, granting those settlers the rights of citizens of a democratic state.¹⁸² In the other system involving Palestinians, the government established a system of military law in which Palestinians were systematically denied rights and self-determination.¹⁸³

The trauma of colonial occupation and renewed dispossession rejuvenated Palestinian nationalism in the Occupied Territories.¹⁸⁴ The commonplace experience of misery and oppression resulted in the strengthening of Palestinian resistance movements that ultimately resorted to political violence.¹⁸⁵ These events led to popular uprisings that broke out in Gaza and the West Bank in 1987 and again in 2000 which became known as the first and second Intifadas.¹⁸⁶ The Israeli government responded to these uprisings by imposing collective punishment on Palestinian residents of the Occupied Territories such

¹⁷⁹ See for example, Mahler and Alden Mahler *supra* note 63; Morris *supra* note 63; and Pappé *supra* note 62.

¹⁸⁰ Morris, *supra* note 63 at 253.

¹⁸¹ B'Tselem "Land Exploration and Settlement" b'tselem.org
<http://www.btselem.org/settlements> (accessed April 11, 2012).

¹⁸² *Ibid*

¹⁸³ *Ibid*

¹⁸⁴ Gregory *supra* note 76 at 94.

¹⁸⁵ *Ibid*

¹⁸⁶ *Ibid*

as curfews and closures, arbitrary arrests and detention, and the prevention of food convoys being sent to Palestinian refugee camps.¹⁸⁷

At the time that *GSS* was heard, the majority of historic Palestine remained under Israeli control. Negotiations for Palestinian state formation were initiated between the Palestinian Authority (also known as the Palestinian National Authority) and Israel in 1994, after the signing of the Oslo Agreement in 1993.¹⁸⁸ Many Palestinians were under the impression that the signing of the Oslo agreement was a step towards the establishment of a Palestinian state based on the 1967 borders.¹⁸⁹ However, it only provided “limited self-government with very limited administrative, security and legislative powers over *limited* areas in the West Bank and Gaza Strip.”¹⁹⁰ Israel continued to occupy large parts of East Jerusalem, the Gaza Strip and the West Bank. Internationally, Palestine was not recognised even though the Palestinian Authority governed parts of the West Bank and Gaza Strip.¹⁹¹ *GSS* thus concerns a state addressing the treatment of actors within (what is legally recognised as) its territory.

ii. *The Israeli Supreme Court’s Representation of Identities*

According to Neve Gordon, (studies indicate that) Palestinian victims from the Israel-Palestine conflict have been dehumanised in the Israeli media.¹⁹² They are “frequently represented as numbers; material losses are depicted as worthless; bombed

¹⁸⁷ *Ibid* at 9.

¹⁸⁸ Khan, Mushtaq H., Jūrj Juqmān, and Inge Amundsen. *State Formation in Palestine: Viability and Governance during a Social Transformation* (London: RoutledgeCurzon, 2004), 2.

¹⁸⁹ *Ibid*

¹⁹⁰ *Ibid*

¹⁹¹ For further reading on Palestine’s bid for statehood see Boyle Francis A. “Creation of the State of Palestine” *Eur. J. Int’l L.* 1: 301 (1990). Khan et al *supra* note 186. Crawford, James. “Creation of the State of Palestine: Too Much Too Soon.” *Eur. J. Int’l L.* 1: 307 (1990).

¹⁹² Gordon, Neve. “Rationalising Extra-Judicial Executions: The Israeli Press and the Legitimisation of Abuse.” *International Journal of Human Rights* 8:3 (2004): 306

civilian homes are often wrongfully described as terrorist barracks.”¹⁹³ Some media sources present one dimensional and distorted accounts of events in order to produce narratives that “disseminate and reinforce both the rationality and the morality” of human rights abuses.¹⁹⁴ In this analysis, I demonstrate that the *GSS* decision which appears to delegitimize torture on the surface also produces a dehumanizing narrative about the victims due to their identities as Palestinians which contributes to torture still being employed in Israel. This affirms Talal Asad’s claim that the modern ways of conceptualizing torture and victimhood are universal in scope but particular in prescriptive content.¹⁹⁵

GSS begins with an account of Israel as a contemporary democratic state. The Court affirms this identity by highlighting Israel’s membership in the international community and its endorsement of international treaties that prohibit the use of torture.¹⁹⁶ The Court presents Israel as a “democratic, freedom loving society”¹⁹⁷ and a “country subject to the rule of law and basic moral values.”¹⁹⁸ The entrenchment of rule of law principles in Israel’s constitution and the structures and functions of the different branches of government are emphasized as reflecting those of a contemporary democratic state.

Simultaneously, the decision gives an account of Israel’s “unceasing struggle for its security—indeed, its very existence”¹⁹⁹ against terrorist organizations that have set

¹⁹³ *Ibid*

¹⁹⁴ *Ibid*

¹⁹⁵ Asad *supra* note 31 at 1081.

¹⁹⁶ *GSS supra* note 6 at para 24.

¹⁹⁷ *Ibid* at para 21.

¹⁹⁸ *Ibid* at para 40.

¹⁹⁹ *Ibid* at para 1.

Israel's annihilation as their goal since it was first established.²⁰⁰ According to the Court, these terrorists "employ violent acts targeting civilians, in which "scores [of Israeli citizens] are murdered in public areas—in areas of public transportation, city squares and centers, theaters and coffee shops."²⁰¹ The decision states that:

The facts before this Court reveal that 121 people died in terrorist attacks between January 1, 1996 and May 14, 1998. Seven hundred and seven people were injured. A large number of those killed and injured were victims of harrowing suicide bombings in the heart of Israel's cities.²⁰²

No specifics are given of the individuals or groups who allegedly seek Israel's annihilation. They are implicitly depicted as cruel and merciless 'terrorists' who do not distinguish between men, women and children when perpetrating their violent acts. The Court's description of these alleged perpetrators suggests that they are an 'other' that is not 'Israeli;' however no details are provided on the identities of these others.

Waiting for the Barbarians provides insight as to why a court decision addressing the torture practices of a (post)colonial state would begin with the emphasis of that state as a democratic state that employs torture offensively to secure its borders from an unspecified threat. The novel shows that omitting the colonial history leading up to the discourse on torture completely alters the narrative about the practice. Empire's description of the torture victims as barbarians who threaten its sovereignty in conjunction with an absence of any specific information about these people, reinforces its self-portrayal as a modern state that adheres to the rule of law. This image of Empire overlooks the colonial past of which the barbarians are an integral part. It also overlooks

²⁰⁰ *Ibid* at para 1.

²⁰¹ *Ibid*

²⁰² *Ibid*

how torture is employed to regulate the actions of the barbarians, thereby enabling Empire to retain colonial power. The GSS Court's emphasis on Israel's democratic identity and its omission of its colonial history can be seen as the first step in a comprehensive narrative meant to justify Israel's ongoing colonial practices.

Against the background of Israel's struggle against terrorism, the judges proceed to give an account of the General Security Service, the torture victims, as well as of their own identities as decision makers in the case. The judges describe the GSS as the body responsible for fighting terrorism in Israel. In their daily measures they have prevented many attacks "including suicide bombings, attempts to detonate car bombs, kidnapping of citizens and soldiers, attempts to hijack buses, murders, and the placing of explosives."²⁰³ The judges note that in order to fulfill the function of preventing attacks, the GSS investigates those suspected of hostile activities, and that "in the context of these interrogations, GSS investigators also make use of physical means."²⁰⁴ The judges' description of the GSS can be misread through the novel, in which Joll and the Third Bureau are praised as the "unceasing guardian of the Empire."²⁰⁵ The heroic portrayal of the Third Bureau reinforced Empire's identity as a liberal state under attack by unsavoury barbarians while emphasizing the need for exceptional laws in addressing this threat. Similarly, the Court's portrayal of the GSS as effective and essential emphasizes the gravity of the threat that the so called terrorists pose for Israel.

The judges' introduction to their decision providing the background of the problem of terrorism in Israel portrays the torture victims as terrorists even though none

²⁰³ *GSS supra* note 6 at para 1.

²⁰⁴ *Ibid*

²⁰⁵ *Ibid*

of them had been convicted of terrorism prior to being sanctioned and tortured by the GSS. Thus, the Court undermines the underlying notion of due process that a person is innocent until proven guilty by a court of law.²⁰⁶ In its continuing representation of the torture victims, the Court discusses them as though they were convicted terrorists while portraying torture as an effective means for acquiring evidence to prevent terrorism. The Court accentuates certain facts while deemphasizing others²⁰⁷ in order to sustain this narrative. It portrays torture as a truth finding mechanism by emphasizing the post torture conviction of some of the victims and omitting information that would suggest that torture did not yield any 'evidence' to convict the rest of the victims.

According to the decision, petitioners Wa'al Al Kaaqua and Ibrahim Gaminat (petitioners in HCJ 5188/96) were detained by the GSS in June 1996 and petitioned the Supreme Court in July of the same year for an interim order prohibiting the use of physical means against them.²⁰⁸ The Court states that while the petitioners were granted the order, they had been released from GSS custody before the Court hearing.²⁰⁹ This is presumably because no evidence of wrongdoing was found against them, but this is not mentioned in the decision. The Court's description of petitioner Fouad Awad Quran, similarly implies the absence of wrongdoing. The Court simply describes the methods used against the petitioner, and states that no interim order was granted in his hearing because the state submitted that "at this stage of the interrogation, the GSS is not employing the alleged methods."²¹⁰ Unlike the other petitioners whom I discuss in the

²⁰⁶ Gordon *supra* note 192 at 318.

²⁰⁷ *Ibid* at 317.

²⁰⁸ GSS *supra* note 6 at para 3.

²⁰⁹ *Ibid*

²¹⁰ *Ibid* at para 6.

subsequent paragraph, the decision does not mention his involvement in any violent activities.

The Court's discussion of the petitioners who were not implicated in any wrongdoing through their interrogations is in stark contrast to those who are "found guilty" of committing crimes through these interrogations. Petitioner in HCJ 6536, Hat'm Abu Zayda appealed to the Court in October 1996 after being held in GSS custody for a month and being subjected to beatings, the Shabach, shaking, and sleep deprivation. According to the Court, when it ordered that the petition be heard, it was informed that the petitioner's interrogation had ended.²¹¹ The decision goes into a lengthy discussion about how the victim's interrogation resulted in his subsequent conviction and sentence of 74 months for being involved in the Hamas terrorist organization.²¹² The decision emphasizes that the victim: "both recruited for Hamas and also helped construct its terrorist infrastructure. The purpose of this infrastructure was to carry out the kidnappings of Israeli soldiers as well as execute other terrorist attacks on Israeli security forces."²¹³ In a similar vein, the Court asserts, in its discussion of the petitioner Abd al Rahman Ismail Gaminat, that "his interrogation revealed that he was involved in numerous terrorist activities, which resulted in the deaths of many Israeli citizens. He was instrumental in the kidnapping and murder of Sharon Edry."²¹⁴ In addition, the Court details his alleged involvement and conviction in the "bombing of Cafe 'Appropo' in Tel Aviv, in which three women were murdered and thirty people were injured." It also states that, due to the dismantling and interrogation of the terrorist cell which the victim

²¹¹ *Ibid* at para 4.

²¹² *Ibid*

²¹³ *Ibid* at para 5.

²¹⁴ *Ibid*

belonged to, a bomb was found in the petitioner's village identical to the one used to bomb Café Appropo.²¹⁵ The Court reiterates the GSS' claim that "it was only as a result of the interrogation"²¹⁶ that the victim revealed "crucial information" that was "essential to safeguarding national and regional security and preventing danger to human life."²¹⁷

Waiting for the Barbarians enables us to see that the Court's elaborate discussion of the violence alleged to have been committed by the petitioners not only undermines their claims as victims of torture, it implicitly endorses the view that physical means can be effectively used to extract evidence. The Court's treatment of the absence of conviction as irrelevant and conviction as warranting detailed description of the 'crimes' committed is an implicit justification of the interrogation techniques as truth finding mechanisms. The Court's discussion has parallels with Joll's implication of the barbarians in crimes and his endorsement of interrogational torture as a means to ascertain these crimes. It is a circular process whereby the individual is given the label 'terrorist' or 'barbarian' to justify torturing them in order to verify whether they have been rightfully assigned those labels. These parallels lead me to misread the case by situating this discourse about the connection between torture and identities in the colonial history underlying the decision, just as Coetzee misreads Empire's discourses through the novel.

Part of the Court's narrative about the threat of terrorism in Israel includes a discussion of their own identities as judges deciding the case, and the stakes of their decision. While contending that although "from a legal perspective, the road before us is

²¹⁵ GSS *supra* note 6 at para 5.

²¹⁶ *Ibid*

²¹⁷ *Ibid*

smooth,”²¹⁸ the Court asserts that ruling on the legality of these petitions “weighed heavily” on them, due to their identities: “We are [...] part of Israeli society. Its problems are known to us and we live in its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh realities of terrorism in which we are, at times, immersed.”²¹⁹ By bringing their own identities to light in the decision, the Court alludes to its responsibility to protect Israeli society from terrorism and its own investment in that protection. This is apparent when the Court states that “it is also our duty to fight the growing crime rate which destroys the good in our country.”²²⁰ Despite the judges’ discussion of how the decision is complicated by their duty to protect Israel, the judges insist that they made the decision “according to our purest conscience,”²²¹ not based on their position as Israeli citizens and their awareness of the implications of the decision in the fight against terrorism. However, I argue that by discussing the judge’s own identities as Israeli citizens, the Court positions itself as part of the “us” (a democratic Israel) in the “us” versus “them” binaries that it produces between Israel and its ‘others.’

From the Court’s description of identities, I argue that the judges “tailor the ‘facts’ to the requirements of the story they wish to convey through the inclusion and exclusion of information, the suppression and subordination of certain events and the highlighting of others, [and] characterisation.”²²² This narrative about identities shapes how the Court rules on the five techniques.

²¹⁸ *Ibid* at para 40.

²¹⁹ *Ibid*

²²⁰ *Ibid* at para 22.

²²¹ *Ibid* at para 40.

²²² Gordon *supra* note 192 at 307.

iii. *The Court's Ruling on the Legality of the Five Techniques*

When determining whether the use of the five interrogation techniques employed by the GSS was permissible under the 'necessity' defense clause, the Court first addresses the question of whether interrogations in general are permissible in Israel. The Court's definition of 'interrogation' as "an exercise seeking to elicit truthful answers, as opposed to the mere asking of questions as in the context of an ordinary conversation" suggests, even before it determines that the practice is legal, that interrogators would be acquiring valuable evidence through this practice. The Court states that interrogations infringe on suspects' freedoms and dignities, even if physical means are not employed.²²³ Therefore, "an administrative body, seeking to interrogate an individual [...] must point to the explicit statutory provision which legally empowers it" since interrogations are not permitted in the absence of clear statutory authorization.²²⁴

Even though the Court acknowledges that "a specific statutory provision authorizing GSS investigators to conduct interrogations does not exist,"²²⁵ the Court extends a criminal law procedural article to confirm the GSS' interrogative power. The article states:

A police officer, of or above the rank of inspector, or any other officer or class of officers generally or specially authorized in writing by the Chief Secretary to the Government, to hold enquiries into the commission of offences, may examine orally any person supposed to be acquainted with the facts and circumstances of any offence in respect whereof such officer or police or other authorized officer as aforesaid is enquiring, and may reduce into writing any statement by a person so examined.²²⁶

²²³ GSS *supra* note 6 at para 18.

²²⁴ *Ibid*

²²⁵ *Ibid* at para 20.

²²⁶ *Ibid*

According to the Court, the Minister of Justice “particularly authorized the GSS to conduct interrogations regarding the commission of hostile terrorist activities.”²²⁷ It states that by virtue of this authorization, “GSS investigators are tantamount to the police in the eyes of the law.”²²⁸ By equating GSS officers with police officers in this context, the Court aims to show that the interrogations resulting in the use of the five techniques were within the confines of the rule of law.

Pertaining to the GSS’ ability to employ the interrogation techniques, the Court posits that there is a clash of values in setting rules on the use of physical means during interrogation. On one hand there is the need to preserve the “human image;” on the other hand, there is the need to fight terrorist attacks. In navigating this balance, the Court discusses Israel’s democratic identity by saying that “a democratic, freedom loving society does not accept that investigators may use any means for the purpose of uncovering truth.”²²⁹ In order for the five techniques to be legal, they must meet the standards for a “reasonable interrogation,”²³⁰ meaning they must reflect “a degree of reasonableness, straight thinking and fairness.”²³¹ As to whether the five techniques met these standards, the Court states that under international law treaties to which Israel is a signatory, a reasonable interrogation is “necessarily one free of torture, free of cruel inhuman treatment, and free of any degrading conduct whatsoever” and that these prohibitions are “absolute” with no room for exceptions or balancing.²³²

²²⁷ *Ibid* at para 20.

²²⁸ *Ibid*

²²⁹ *Ibid* at para 22.

²³⁰ *Ibid*

²³¹ *Ibid*

²³² *Ibid* at para 23.

In deciding whether the methods employed meet the standards for a “reasonable interrogation,” the Court rules that:

All these methods do not fall within the sphere of a “fair” interrogation. They are not reasonable. They infringe on the suspect’s dignity, his bodily integrity and his basic rights in an excessive manner. They are not to be deemed to be included within the general power of conducting interrogations.²³³

Despite ruling that the five methods are illegal, the decision does not specify whether they constitute torture or cruel and inhuman punishment. Instead, the Court resorts to the term ‘violence,’ asserting that “violence directed at a suspect’s body or spirit does not constitute a reasonable interrogation practice.”²³⁴ In implicit justification of its failure to designate the interrogation methods as torture, the Court cites the ECtHR’s decision in *Ireland*. It emphasizes how in that decision, it was held that although the similar interrogation techniques constituted inhuman and degrading treatment or punishment, “these methods did not constitute torture.”²³⁵

The failure to address the interrogation techniques as torture in *GSS* can be misread through *Waiting for the Barbarians*. When Joll brings in his barbarian prisoners and tortures them, he never refers to their treatment as torture but rather downplays the methods as “investigation,” making torture appear justifiable and in conformity with the rule of law. In *GSS*, the Court’s failure to label the five techniques as torture, plus the depiction of the techniques as mechanisms for acquiring evidence, serve to make the methods appear in conformity with the rule of law, even while they are found to be illegal.

²³³ *Ibid* at para 27.

²³⁴ *Ibid* at para 23.

²³⁵ *Ibid*

iv. *Misreading the Court's Application of the 'Necessity Defense'*

The connection between torture and identities is apparent in the Court's discussion of the 'necessity defense.' The 'necessity defense' becomes relevant in the case when the Court addresses the question of whether the GSS' authority to conduct interrogations in general gave it permission to employ the five illegal techniques. The Court notes that the state answers this question in the affirmative. The GSS believed that despite the lack of explicit legislation authorizing the interrogation techniques it derived the authority to employ them from the criminal law defence of necessity in section 34(1) of Israel's Penal Code:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.²³⁶

The Court analyses the GSS' claim that it was only in the absence of other alternatives and in circumstances where it was essential to save human lives, that those techniques were employed. The GSS, according to the Court, believed that society was "choosing the lesser evil"²³⁷ by allowing the use of the five techniques in certain circumstances. The GSS argues that not only are these methods legal in these circumstances as they help in "fighting terrorism, it is *our* moral duty to employ the means necessary for this purpose."²³⁸ Although the Court is discussing the GSS' claims, the necessity argument resonates with its own earlier assertions about Israel's security struggles and the important role of the GSS. In using the term 'our' to describe the GSS' assertion about

²³⁶ *Ibid* at para 33.

²³⁷ *Ibid*

²³⁸ *Ibid* [emphasis added].

its moral obligation to secure society, the Court alludes to its own responsibility as an Israeli court to contribute to this commitment.

The GSS presented the ticking time bomb scenario as a basis for the necessity defense. The Court describes the ticking time bomb hypothetical as follows:

A given suspect is arrested by the GSS. He holds information regarding the location of a bomb that was set and will imminently explode. There is no way to diffuse the bomb without this information. If the information is obtained, the bomb may be neutralized. If the bomb is not neutralized, scores will be killed and injured. Is a GSS investigator authorized to employ physical means in order to obtain this information?

According to the Court, the GSS claimed that in situations such as the ticking time bomb scenario, “there is no obstacle preventing the investigators’ superiors from instructing and guiding [interrogators] with regard to when the conditions of the necessity defense are fulfilled and the proper boundaries in those circumstances.”²³⁹ This, according to the GSS, gave it the authority to have permanent directives with respect to the use of the five techniques.²⁴⁰

In response to the GSS’ position, the Court states that “we are prepared to assume –although this matter is subject to debate – that the necessity defense is available to all, particularly, an investigator acting in an organizational capacity of the State in interrogations of that nature.”²⁴¹ Furthermore, the Court also states that it is prepared to accept “although this matter is equally contentious – that:”

[T]he “necessity” exception is likely to arise in instances of the ticking time bomb, and that the immediate need (“necessary in an immediate manner” for the preservation of human life) refers to the imminent nature of the act rather than that of the danger. Hence the imminence criteria is satisfied even if the bomb is set to explode in a few days, or perhaps even after a few weeks, provided the

²³⁹ *Ibid*

²⁴⁰ *Ibid*

²⁴¹ *Ibid* at para 34.

danger is certain to materialize and there is no alternative means of preventing its materialization.²⁴²

Because it believes that the necessity defense may apply in ticking time bomb situations, the Court accepts that “‘if a GSS investigator – who applied physical interrogation methods for the purpose of saving human life – is criminally indicted, the ‘necessity defense’ is likely to be open to him in the appropriate circumstances.”²⁴³ This opening of the door to the necessity defense is followed by an assertion that it is not the criminal liability of GSS interrogators that is at issue in this case, nor the value of evidence acquired as a result of the application of the five techniques. This is not a case about the application of the necessity defense, rather, the decision is meant to address whether it is possible for the GSS to establish permanent directives on interrogative techniques that may be deployed under conditions of necessity.²⁴⁴ On this question, the Court decides in the negative. Necessity can only be determined after the fact and cannot be invoked to set up permanent directives for using the interrogation techniques. Some commentators have compared this interpretation to cases of self-defense as interrogators are required to make autonomous decisions to break the law (against the prohibition on torture) and have a court determine whether the breach was in accordance with the law.²⁴⁵

In stating that GSS interrogators can invoke the ‘necessity defense,’ the Court leaves open the possibility that interrogators who have tortured would be able to avoid conviction, despite the ruling that the ‘necessity defense’ does not legitimize the use of the techniques. Also, in saying that the decision is not about the quality of evidence

²⁴² *Ibid*

²⁴³ *Ibid* at para 34.

²⁴⁴ *Ibid* at para 35

²⁴⁵ Itamar Mann and Omer Shatz. “The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987 – 2009.” *Unbound :Harvard Journal of the Legal Left* 6 (2010): 59.

attainable through the use of the interrogation methods, the Court manages to avoid the fact of the unreliability of the interrogation techniques.

The fact that the ticking time bomb scenario derives from a fictional source²⁴⁶ delegitimizes the Court's logic for making the 'necessity defense' available to interrogators who employ the five techniques. As Henry Shue suggests, the ticking time bomb scenario is "superior to reality and thereby a disastrously misleading analogy from which to derive conclusions about reality."²⁴⁷

v. *The Human Rights Organization on Identities and Torture*

In chapter one, I analyzed the Magistrate as the novel's narrator and demonstrated how he reinforced the Empire's colonial discourses, despite his consciousness of the colonized subjectivity of the barbarians. Readers can see the Magistrate's own misreading of Empire's discursive practices and the implications of colonization in Empire's torture of the barbarians. In my discussion of the novel, I demonstrated that the Magistrate was not mobilized to act based on his understanding of the barbarians and their relationship to Empire, but rather based on his own subjectivity as an imperial citizen. Coetzee's portrayal of the Magistrate allows readers to question his narrative position as well as his role as the one who speaks on behalf of the barbarians in the novel.

The discrepancies between the Magistrate's narration and his actions in the novel, combined with the novel's themes of sight and silence inform my methodological approach to misreading PCATI in this section. In addition to analyzing the Court documents submitted by the organization in its defense of the torture victims, I discuss

²⁴⁶ The "ticking time bomb scenario" was created by French author Jean Larteguy in the novel *Les Centurions*.

²⁴⁷ Shue *supra* note 39 at 231.

publications by the organization related to the case that were released to the public both prior to and after the decision. There are discrepancies between the way in which PCATI discusses the torture victims in its publications and the way it presents them in Court documents. Using the novel as a lens, I argue that the organization evokes an understanding of the colonized subjectivity of the torture victims in its publications while weighing the impact of torture on Israel's identity as a democracy. In court documents, where a discussion of the colonized subjectivity of the torture victims could have provided an alternative discourse from how the Court presents the victims' identities, the organization silences these colonial identities. *Waiting for the Barbarians'* themes of sight and silence applied to the organization's documents bring to light the fact that the torture victims are invisible and do not have a voice. They are spoken for by the human rights organization and at the same time rendered invisible by the organization.

In a publication entitled "The Case against Torture in Israel,"²⁴⁸ released in May 1999, prior to the Supreme Court's final hearing on the case, PCATI published a compilation of the legal documents submitted to the Court. These include translations of the original petitions and briefs, as well as a discussion of the organization's mandate and advocacy for torture victims in Israel. I treat the court documents as separate from the additional commentary in order to emphasize discrepancies in how the organization discusses identities in the court documents versus its general publications. Also in "Ticking Time Bombs," a 2007 publication that documents the experiences of torture victims in Israel, the organization discusses its role in Israeli society and its view of the prevalence of torture in Israel. Although this document was published years after the

²⁴⁸ Pacheco *supra* note 23.

decision, it provides insight into how PCATI conceptualizes identities in relation to torture in Israel.

Like the Magistrate in *Waiting for the Barbarians*, PCATI demonstrates an awareness of the colonial history that underlies the decision; however, this consciousness is only apparent when the organization addresses the public in its publications as opposed to the documents it submitted to the Supreme Court. In its publications, the organization identifies “Palestinians and non-Jewish prisoners”²⁴⁹ as the overwhelming majority of victims of torture by the GSS. According to PCATI, since the founding of the State of Israel, the GSS had tortured “tens of thousands of Palestinians and other persons suspected of hostile activities against the state.”²⁵⁰ It explains that the GSS justifies its torture practices by the argument that “effective interrogation is inconceivable”²⁵¹ without physical pressure. The organization explains that this notion that employing physical means can result in effective interrogations emanates from an understanding of Palestinians as sources that had to be coerced to produce evidence necessary for saving lives.²⁵² PCATI traces the history of the ticking time bomb scenario which was originally a literary concept developed by the French author and journalist Jean Larteguy in *Les Centurions*, which deals with the French occupation of Algeria.²⁵³ PCATI comments that the French occupation in Algeria “was no less brutal than the Israeli occupation of

²⁴⁹ *Ibid*

²⁵⁰ *Ibid*

²⁵¹ *Ibid*

²⁵² *Ibid*

²⁵³ Hoffstater, Noam. “‘Ticking Bombs’: Testimonies of Torture Victims in Israel” *Public Committee against Torture in Israel* (2007):11.

Palestinian territory”²⁵⁴ thereby alluding to Israel’s colonial identity and implicitly, the colonized subjectivity of these Palestinian torture victims.

While discussing the colonized subjectivity of the torture victims in these public documents, PCATI emphasizes Israel’s democratic identity and the implications of *GSS* on this identity. In “The Case against Torture in Israel” PCATI explains why it believes that the pending decision is important. It emphasizes the “great interest inside Israel and among the international community regarding the outcome of this petition”²⁵⁵ and that the outcome of this decision will resonate “among all democratic countries regarding the continued prohibition of torture during interrogations of suspects...”²⁵⁶ The organization reiterates the implications of torture (and the decision) on Israel’s democratic identity in its later publication “Ticking Time Bombs.” It states:

When the nations of the world decided in the wake of the world wars of the last century to prohibit the use of torture absolutely and with no reservations, this was an attempt to denote an ethical boundary between the nations of the world and the old, cruel, racist, and indiscriminately murderous world – to declare that there are deeds that democracies and decent people do not commit [...] A state that views itself as a democracy committed to the protection of human rights cannot allow torture that is derived from the darkness of the Middle Ages.²⁵⁷

In addition to emphasizing Israel’s democratic identity, PCATI discusses how PCATI itself forms part of that identity and displays a commitment to helping retain the image of a democratic state. “The Case against Torture” begins with a description of the human rights organization and its functions in Israel. It describes itself as an “Israeli non-profit organization”²⁵⁸ founded in 1990 that is dedicated to “abolishing torture and all

²⁵⁴ *Ibid*

²⁵⁵ Pacheco *supra* note 23.

²⁵⁶ *Ibid*

²⁵⁷ Hoffstater *supra* note 253 at 11.

²⁵⁸ Pacheco *supra* note 23.

cruel, inhuman and degrading treatment and punishment in Israel through legal and educational means.”²⁵⁹ The publication states that as of 1991, the organization had attempted to pressure the Israeli Supreme Court to criminalize torture and all other cruel and inhuman treatment and punishment.²⁶⁰ As of 1999 it had submitted 70 petitions per year against the Israeli Security Service, and as a result of its efforts “the High Court today is currently deliberating the most seminal torture case on its docket, one which is expected to determine the fate of torture in Israel.”²⁶¹ By emphasizing its own membership in Israeli society, the organization appeals to the democratic values that Israel identifies with, in order to show how those values are compromised by torture. While this may be a conscious strategic decision, the Magistrate’s role in *Waiting for the Barbarians* enables me to misread this approach to suggest that the organization “plots against history” by focusing on contemporary ideals divorced from its own colonial history and the colonized subjectivity left behind.²⁶² This will be apparent in my discussion of how PCATI constructs identities in its court documents.

In court documents, there is no reference to colonization whatsoever, nor is there reference to the torture victims being Palestinians. The organization refers to each petitioner by name and sometimes references their hometowns. It employs legal terms like ‘petitioner’ and ‘interrogatees’ when referring to the victims. Unlike the publications, no reference is made either implicitly or explicitly to the relationship between torture and the identities of the torture victims. The possibility that these individuals came under the GSS’ scrutiny because they were Palestinian is never acknowledged. By silencing the

²⁵⁹ *Ibid*

²⁶⁰ *Ibid*

²⁶¹ *Ibid*

²⁶² Neve Gordon “Human Rights as a Contingent Foundation: The Case of Physicians for Human Rights” *Journal of Human Rights*, 5 (2006):166.

identities of the torture victims, PCATI reinforces the Court's silencing of the victims by simply referring to them as terrorists. This approach is reflective of the critique that human rights discourse is "narrow and self-serving, alongside a process of self-restriction, whereby rights groups themselves limit their discourse so that it fits, more or less, within the frontiers of the hegemonic worldview."²⁶³

In *Waiting for the Barbarians*, the Magistrate states that he limits his demands for justice for the barbarians because otherwise it would lead to "laying down our arms and opening the gates of the town to the people whose land we have raped."²⁶⁴ He acknowledges that even though he is a "defender of the rule of law, enemy in his own way of the State"²⁶⁵ he has "twinges of doubt"²⁶⁶ about this possible outcome. His aversion to torture was due to the belief that Empire's torture practices conflicted with its identity as a modern, democratic state that subscribed to the rule of law. He reinforces Empire's self-identification as a modern, (post)colonial state, thereby plotting against Empire's colonial history. I demonstrated that the Magistrate avoided taking any actions that would imply ending Empire's colonial domination, as he was conscious of what that would mean for his own position as an Empirical subject who benefits from colonization, as well as for Empire as a whole.

The claim that PCATI reinforces the Court's portrayal of Israel as a democratic state is apparent in how the organization articulates its objections to the GSS' torture practices in court documents. They draw a line between Israel and the GSS that would enable the Court to find that the GSS engaged in torture without tarnishing the state of

²⁶³ Gordon *supra* note 262.

²⁶⁴ Coetzee *supra* note 102 at 118.

²⁶⁵ *Ibid*

²⁶⁶ *Ibid*

Israel with the finding. The organization's public petition to the Israeli Supreme Court begins with a description of the GSS that casts a shadow on the heroic image of the institution that the Court portrays. PCATI describes the GSS as operating in the "State of Israel and in the Occupied Territories without having been established by any law and without it having been granted secondary authority regarding searches, detention and interrogation."²⁶⁷ It proceeds to say that the GSS has operated in this manner since Israel "declared its independence" when all the authorities of the Israeli state tolerated these extra-legal measures. Unlike the Court, the organization unambiguously labels the interrogation methods employed by the GSS as torture, stating that "moderate physical pressure which causes bodily pain and is designed to extract a confession from a suspect falls within the parameters of the definition of torture..."²⁶⁸ It then goes on to note how many international laws and treaties absolutely prohibit the practice and the fact that "all the cultured nations of the world"²⁶⁹ accept these prohibitions. By discussing the illegality of torture in the context of Israel's democratic identity, the organization presents torture as though it were an aberration, rather than a practice that is part of a continual process of colonization.

The organization's identification with Israel is also clear in its court documents. In the petitions presented to the Israeli Supreme Court, PCATI continues to emphasize its membership in Israeli society while discussing the organization's efforts to hold Israel accountable to the rule of law. In one petition for example, the organisation states that it

²⁶⁷ Pacheco *supra* note 23.

²⁶⁸ *Ibid*

²⁶⁹ *Ibid*

hoped to test the GSS' authority and its use of extra-judicial measures ²⁷⁰ by invoking "the top of *our* legal ladder, the Basic Law: Human Dignity"²⁷¹ which is central to the foundation of Israel's legal system.²⁷² It stresses that the fact that the GSS violates these fundamental principles by harming the bodies and dignities of persons is "a constitutional disgrace which undermines the integrity of the legal system and *challenges its right to exist*."²⁷³ The organization's claim that Israel's right to exist is challenged is not based on, or linked to its colonial practices, but rather on the fact that torture undermines fundamental democratic principles. By critiquing the GSS' torture practices, it demonstrates a commitment to preserving the image of a democratic state that adheres to the rule of law. This is apparent in the organization's claim that its standing in this petition derives from its status a 'public petitioner' "appealing and pointing out to this Honourable Court, illegal behaviour by an authority in the government and requesting the Court to correct this disgrace..."²⁷⁴

PCATI's discussion of its identity as an Israeli organization is comparable to the Magistrate's consciousness of his own subjectivity as a citizen of Empire. PCATI's concern for how Israeli identity is negatively impacted by the practice of torture under its auspices overlooks the colonial history underlying the torture and in so doing reinforces colonial domination. By referencing his own identity as a subject of Empire, the Magistrate positions himself as part of the 'us,' that is the modern state whose democratic identity must be protected. Like the Magistrate; PCATI is vested in the image of Israel as a democratic state that is (or should be) incapable of inflicting torture. It focuses solely on

²⁷⁰ *Ibid*

²⁷¹ *Ibid* [emphasis included]

²⁷² *Ibid*

²⁷³ *Ibid* [emphasis included]

²⁷⁴ *Ibid*

how this image is compromised by torture in its court documents, as opposed to the ongoing colonial history that challenges the image of Israel as a democratic state. The colonial history that lives on into the present and that constructs Palestinians as potential terrorists and justifies their interrogation in the name of the security of the colonizer would expose the state of Israel as a potential torturer. As in *Waiting for the Barbarians*, the colonial history must be erased (by making the identity of the torture victims invisible and silent) if the state of Israel is to retain its image as a 'modern' democratic state.

vi. *Conclusion*

My overarching goal in this chapter has been to address the fact that colonization, which is an underlying factor in the violence in Israel that leads to the GSS decision, is not mentioned by any of the parties in the case. I have argued PCATI and the Court both emphasize the identity of Israel as a democratic state that conforms to the rule of law, and in positioning themselves as part of Israeli identity, they both invoke a sense of their responsibility to act in Israel's interest. The primary difference between the Court and PCATI is that while the Court employs an ambiguous language that implicitly endorses the idea of torture as a truth-finding mechanism and the torture victims as a legitimate source of truth based on their unacknowledged identities, the human rights organization unambiguously labels the interrogation methods as torture and condemns them. The torture, however, is seen as an aberration rather than a continuation of colonial domination. By invoking Israel's identity as democratic, modern and law abiding and failing to provide an account of the identities of the torture victims that challenge this image, both the Court and PCATI limit the victims' political agency and to different degrees perpetrate their colonial domination.

Chapter 3: A Misreading of *Ireland v. UK*

“The new men of Empire are the ones who believe in fresh starts, new chapters, clean pages; I struggle on with the old story, hoping that before it is finished it will reveal to me why it was that I thought it worth the trouble.”²⁷⁵

In this chapter I address the European Court of Human Right’s decision *in Ireland v. UK* regarding the use of five interrogation techniques: wall standing, hooding, subjection to noise, sleep deprivation, and the deprivation of food and drink. As in my discussion of the *GSS* decision in the previous chapter, I examine how torture is conceptualized in relation to the ECtHR’s discussion of identities. Using *Waiting for the Barbarians* as a lens, I compare the two cases to unpack narratives in each case that may otherwise be invisible. Unlike my discussion of the human rights organization in chapter two, I am unable to discuss how the applicant government presents the identities of the torture victims as a basis of for this comparison due to a lack of access to the original documents submitted by the Irish government.

i. *Procedural History and Overview of Ireland v. UK*

In 1969, the British army was brought to Ireland by the respondent government to assist the Royal Ulster Constabulary (RUC), which was the main security force in Ireland, in countering a terrorist campaign led by the Irish Republican Army.²⁷⁶ In 1971, the government of Northern Ireland, upon the recommendation of the British government, began interning members of Irish Catholic communities, as part of the effort

²⁷⁵ Coetzee *supra* note 102 at 26.

²⁷⁶ Donaghue *supra* note 7 at 389.

²⁷⁶ *Ibid* at 390.

to address terrorism.²⁷⁷ Under emergency powers, 2,350 Catholics were arrested and interned on August 9, 1971. Of these, 1600 were released within 48 hours after interrogation.²⁷⁸ Reports of ill treatment in the internment centres began circulating days after the initial arrests, with detainees alleging that they had been subjected to physical violence, including the use of the five techniques noted above.²⁷⁹ The government of Northern Ireland admitted that the five techniques were taught to the RUC by the English Intelligence Centre at a seminar held in 1971.²⁸⁰

The UK government responded to the allegations of ill-treatment by establishing the Compton Committee in August of 1971 to investigate.²⁸¹ Due to a lack of compliance by detainees, the Compton Committee's report was mostly based on hearsay.²⁸² It nonetheless reported that the techniques employed by the RUC constituted ill-treatment, but failed to specify that the treatment was torture or inhuman and degrading treatment. Additionally, the Committee attempted to justify the use of the techniques by suggesting that the information acquired through the interrogations enabled the state to save human lives. A subsequent committee established by the government known as the Parker Committee held by majority that there was no reason to suspend the use of the interrogation techniques on moral grounds and that they could be justified "with the highest standards of our society."²⁸³ However, the minority report held that the methods could not be justified by national emergency laws. It stated that the continued use of the interrogation would jeopardize Northern Ireland's reputation internationally and have a

²⁷⁷ *Ibid*

²⁷⁸ *Ibid* at 391.

²⁷⁹ *Ibid*

²⁸⁰ *Ireland supra* note 5 at para 97.

²⁸¹ *Ibid* at 99.

²⁸² *Ibid* at para 13.

²⁸³ *Ibid* at para 101.

negative impact on the international movement to protect human rights.²⁸⁴ On the day that the Parker Report was released in January of 1972, the UK Prime Minister made the declaration that the five techniques would no longer be used as an aid to interrogation.²⁸⁵

In December of 1971, the Republic of Ireland commenced the legal process that would eventually make its way to the ECtHR. The ECtHR operates within the framework of international law, which is a system of rules and norms that regulate the actions of states and other entities that are recognised as having international character, in their relationships with each other. The European Convention of Human Rights was established in 1950 to implement and enforce rules that ensure respect for human rights in the European community, as those rights are outlined in the Universal Declaration of Human Rights.²⁸⁶ The Commission and the ECtHR monitor state adherence to the Convention. Cases involving human rights abuses must first be heard by the Commission which has to determine whether the application is admissible.²⁸⁷ After an application is determined to be admissible, the Commission must attempt to facilitate a 'friendly settlement' of the problem. If it is successful, the Commission writes a report with the details of the settlement and sends it to the Committee of Ministers of the European Council and to all the parties involved.²⁸⁸ If a friendly settlement is not reached, the Commission must compile a report of the facts and note whether it believes that those facts amount to a breach of the Convention by the respondent government.²⁸⁹ This report

²⁸⁴ Donaghue *supra* note 7 at 394.

²⁸⁵ Ireland *supra* note 5 at para 37.

²⁸⁶ Donaghue *supra* note 7 at 380.

²⁸⁷ *Ibid* at 383.

²⁸⁸ *Ibid* at 384.

²⁸⁹ *Ibid*

is also sent to the Committee of Ministers and to all the parties involved, but is not made public.²⁹⁰

In the event that a friendly settlement is not reached, the case can be referred to the ECtHR which then serves an appellate function.²⁹¹ The dispute may be referred to the Court by the Committee of Ministers or by the dissatisfied state for a judicial resolution if the state is subject to the compulsory jurisdiction of the Court as a signatory state or if it gives consent to be adjudicated by the Court.²⁹² A decision rendered by the Court is final and binding upon the concerned parties. After a decision is made by the Court, it is sent to the Committee of Ministers which ensures that it is executed.

The application by the Irish government alleged that the UK government violated the Convention in the following ways: (1) The subjection of individuals in state custody to the five techniques constituted an administrative practice (as opposed to individual cases) in violation of article 3 (the right to freedom from torture and inhuman and degrading treatment or punishment).²⁹³ (2) Employing internment without trial and detention under emergency powers as an administrative practice, thereby violating articles 5 (the right to liberty and security of the person) and 6 (the right to a fair trial) in the context of article 15 (the right of a state to derogate from its Conventional obligations when faced with a public emergency) of the Convention.²⁹⁴ (3) The UK government's exercise of the extrajudicial measures were conducted with discrimination since only members of the Catholic community were detained and was therefore in violation of article 14 (the right

²⁹⁰ Donaghue *supra* note 7 at 384.

²⁹¹ *Ibid*

²⁹² *Ibid*

²⁹³ Ireland *supra* note 5 para 145.

²⁹⁴ *Ibid*

to equality and non discrimination) in relation to articles 5 and 6.²⁹⁵ (4)The administrative practices highlighted in the application also violated article 1, which emphasizes a state's duty to secure Conventional rights and freedoms.²⁹⁶

The Commission adopted its report on the Irish government's application in January of 1976. The report was divided into parts: the issues concerning detention without trial; the issues concerning the treatment of detainees; and the duty to protect human rights with respect to the allegations of violations.²⁹⁷ The Commission held that: (1) the interrogation techniques constituted torture and inhuman and degrading treatment or punishment, and thereby violated article 3. (2) In regard to the deprivation of liberties in the context of a state's right to derogate, the Commission held that although the restriction of liberties was in violation of article 5, the measures were "strictly required by the exigencies of the situation"²⁹⁸ therefore permitted under derogation. (3) The Commission did not find that the UK government discriminated against the Catholic community in the application of extrajudicial measures based on the circumstances.²⁹⁹ (4)The Commission did not find that article 1 had been violated based on their interpretation that article 1 did not constitute a separate liability for states that are parties to the Convention.³⁰⁰

The Irish government was not entirely satisfied with the report and logged an application with the ECtHR in March of 1976. The government of Ireland asked the Court to review the report of the Commission and to confirm the Commission's opinion

²⁹⁵ *Ibid*

²⁹⁶ *Ibid*

²⁹⁷ *Ibid* at para 146.

²⁹⁸ I discuss this standard in more detail when I discuss how the ECtHR comes to its decision.

²⁹⁹ This decision is further analyzed in my discussion of the ECtHR decision.

³⁰⁰ *Ireland supra* note 5 at para 146.

that the respondent government had breached the Convention by employing torture. It also asked the Court to address the allegations of ill-treatment that the Commission did not deem either torture or inhuman or degrading punishment.

Before the ECtHR, the UK did not contest the Commission's finding that the five interrogation techniques constituted torture and were therefore in breach of article 3. It also assured the Court that it had taken measures to ensure that the five techniques would not be reintroduced.³⁰¹ The respondent government requested that the Court not rule on these uncontested findings. It stated that although the ECtHR had the jurisdiction to rule on the case, the Court also had the power to refuse to do so.³⁰² The respondent government argued that the objective of the application had been accomplished and it would be pointless for the Court to re-affirm the Commission's decisions because they were uncontested.³⁰³ Additionally, the UK government argued that the breaches had been widely publicised and did not create problems of interpretation or application of the Convention.³⁰⁴ Despite the fact that the respondent government did not contest the Commission's decision that the interrogation techniques constituted a practice of torture, the Court held that it was not bound by the Commission's decision and proceeded to provide its own ruling on the five techniques, as well as the questions concerning detention, internment and discrimination.

ii. *A Comparison of Ireland with GSS*

In comparing *Ireland* with the *GSS* decision, I draw parallels and point out differences between how each Court constructs the relationship between identities and

³⁰¹ *Ibid* at para 147.

³⁰² *Ibid* at para 152.

³⁰³ *Ibid*

³⁰⁴ *Ibid*

torture in general, and the interrogation techniques in particular. I argue that the identities and the position of the judges in relation to each case accounts for the similarities and differences between the two decisions. Whereas *GSS* was heard within the jurisdiction of the perpetrators of torture, *Ireland*, which was filed by Ireland against the United Kingdom, involves two states addressing the treatment of individuals having national and political ties to both states. The case was decided by a court outside of the jurisdiction of the perpetrators of the torture.

The identities of the judges in relation to the two cases are also different. The judges in *GSS* are all Israeli citizens, whereas the judges in *Ireland* are from various European countries. One judge named P. O'Donoghue was of Irish nationality and another, Sir Gerald Fitzmaurice was from Great Britain.³⁰⁵ The rest of the judges were from countries that were not directly involved in the case. This is one significant difference between the two cases. Since the identities of the majority of the judges of *Ireland* are not as directly connected to the case as the identities of the judges in *GSS*, there is no discussion of the implications of the judges' identities on the decision. This difference in judicial connection to the state whose actions are challenged does not give rise to a difference in approach, only a difference in explicitness. I argue that, while the Israeli Supreme Court appeals directly to a civilized national identity while silencing Israel's colonial history, the ECtHR indirectly appeals to a civilized identity by positioning the United Kingdom as a civilized modern state. This image of the United Kingdom as a modern civilized state as opposed to a colonizing state, impacts how the ECtHR conceptualizes identities in relation to the five techniques.

³⁰⁵ *Ibid* at para 4.

iii. *The ECtHR's Discussion of Identities*

Since *Ireland* is an international case filed by Ireland against the United Kingdom, the ECtHR gives a historical background to the decision that demonstrates how the torture victims relate to both Ireland and the UK. Similar to how the *GSS* case opens with an account of Israel's struggle with terrorism the ECtHR's decision opens with an account of Ireland's struggle with terrorism. The Court notes that "the tragic and lasting crisis in Northern Ireland lies at the root of the present case."³⁰⁶ Unlike the *GSS* case in which the only details provided are vague descriptions of the harm done to Israeli citizens, the ECtHR's description of the violence in Northern Ireland includes specific timelines, quantitative data and descriptions of specific moments affecting all parties to the conflict. The ECtHR notes that over 1,100 people had been killed, over 11,500 injured and more than £140,000,000 worth of property destroyed through civil disorders and terrorism.³⁰⁷ This assertion is immediately followed by a definition of 'terrorism' as "organised violence for political ends," which points to the perpetrators of the violence as political actors, rather than just unsavoury 'terrorists,' as they are referred to in the Israeli case.

In a section labelled the "social, political and constitutional"³⁰⁸ background to the case, the ECtHR provides historical context to the decision. It explains that prior to the year 1922, the entire island of Ireland constituted part of the United Kingdom. Following legislation endorsing Irish self-government in 1937, the majority of Ireland became what is now known as The Republic of Ireland. Six counties of the province of Ulster opted to

³⁰⁶ *Ibid* para 11.

³⁰⁷ *Ibid* at para 14.

³⁰⁸ *Ibid*

remain part of Great Britain. They formed what is now known as Northern Ireland and had a separate government of their own, until the British resumed “direct rule” in 1970.³⁰⁹ The Court notes that “Northern Ireland is not a homogeneous society...[I]t consists of two communities divided by deep and long-standing antagonisms.”³¹⁰ Two-thirds of the general population, referred to as Protestant, Unionist or Loyalist, descended from settlers who migrated to Northern Ireland from Britain in the seventeenth century.³¹¹ The other third of the population was the Catholic, Republican or Nationalist community. The decision continues that the antagonism between the two groups is “based both on religion and on social, economic and political differences. In particular, the Protestant community has consistently opposed the idea of a united Ireland independent of the United Kingdom, whereas the Catholic community has traditionally supported it.”³¹²

After describing the historical identities of the parties, the Court proceeds to give an account of the history leading up to the decision. It describes the events in Northern Ireland as a series of riots and sectarian violence that developed in the late 1960s and escalated into a series of bombings between 1970 and 1971. The Court’s account of the crisis in Northern Ireland suggests that it was police and Protestant resistance to civil rights campaigns by the Catholic community that ignited violent bombings by the IRA. The IRA is described by the Court as a “clandestine organization with quasi-military dispositions” which was formed during “the troubles” leading up to the partition of the Republic of Ireland.³¹³ The IRA, according to the Court, “neither accepts the existence of Northern Ireland as part of the United Kingdom nor recognises the democratic order of

³⁰⁹ *Ibid* at para 15.

³¹⁰ *Ibid*

³¹¹ *Ibid*

³¹² *Ibid*

³¹³ *Ibid* at para 16.

the Republic.”³¹⁴ According to the Court, the differing aspirations of the two communities made the divisions between the main political parties primarily about whether Northern Ireland should remain part of the United Kingdom.³¹⁵

Despite this detailed account of the historical identities of the Catholic and Protestant communities in Northern Ireland, colonization is never explicitly mentioned in the decision. When the Court states that “the whole of the island of Ireland formed part of the United Kingdom”³¹⁶ prior to 1922, it does not qualify this relationship by elaborating on the colonial nature of it. Although the ECtHR mentions that the Free Irish State was set up to give two-thirds of Ireland “self-governing status,” no reference to colonization is made.³¹⁷ The Court’s description that the Protestant settlers “emigrated in large numbers from Britain to Northern Ireland during the seventeenth century”³¹⁸ fails to mention the fact that this migration was a step in a comprehensive scheme that was meant to solidify England’s control over Ireland and to “civilize the wild and dangerous Irish native.”³¹⁹ It does not mention the fact that in the years subsequent to these migrations, the British-Protestant immigrants and their descendants constructed towns, appropriated property that belonged to the Irish Catholic natives and forced the native Irish out of the better lands.³²⁰ Even though the ECtHR clearly states that the different aspirations of the two communities as they pertain to Northern Ireland’s membership in British Commonwealth underlies the conflict leading up to the case, the fact that the Court omits ‘colonization’

³¹⁴ *Ibid* at para 16

³¹⁵ *Ibid* at para 18.

³¹⁶ *Ibid* at para 13.

³¹⁷ *Ibid*

³¹⁸ *Ibid* at para 15.

³¹⁹ Hughes *supra* note 63 at 2.

³²⁰ Mitchell J *supra* note 54 at 181-182.

from the discussion “plots against history” in that it omits the critical fact that colonization is the underlying source of the violence leading up to the decision.

In addition to the omission of the UK’s role as colonizer as a factor in the conflict, nowhere in the decision does the court give an account of the state violence employed against the Catholic community, or of the actions by the state that contributed to an escalation of violence. When the Court attributes IRA violence to resistance to the Catholic civil rights movements by Loyalists, it omits the fact that the government deemed the civil rights movement a direct threat to the legitimacy of the state itself.³²¹ The state responded to civil rights marches by making them illegal, breaking them up by force, or failing to protect peaceful Catholic protesters from violent Loyalist groups. The state called upon the RUC to provide a hard-line military response to these peaceful protests as it conflated the civil rights movement with the IRA.³²² None of the events involving state violence are documented in the historical account given by the Court, even when these events happened within the time frame of the riots described in the decision. For example, the Court discusses how in 1972 there had been “1,130 bomb explosions and well over 2,000 shooting incidents. 158 civilians, 58 soldiers and 17 policemen had been killed and 2,505 civilians, 306 soldiers and 107 RUC members injured,”³²³ resulting in a rise in the number of people detained who were all suspected to be in the IRA. Historically, we know of state violence that would account for some of these statistics, but the Court’s description makes it appear as though the IRA was solely responsible for these casualties. For example, in what is commonly referred to as Bloody

³²¹NiAolain, Fionnuala. *The Politics of Force: Conflict Management in Northern Ireland*. (Belfast: Blackstaff Press, 2000), 11.

³²² *Ibid*

³²³ *Ireland supra* note 5 at para 48.

Sunday, British soldiers shot dead 13 and wounded 15 unarmed civilians who were protesting internment without trial.³²⁴ This incident happened in 1972 and was commonly discussed in the media, but there is no account of it whatsoever in the decision.

The ECtHR's historical account is more nuanced than the Israeli Supreme Court's; it portrays the torture victims as political actors rather than as 'terrorists' who employ violence simply to inflict suffering. However, the Court does portray IRA violence as disproportionate to the events that gave rise to them (such as the resistance of Protestants to Catholic civil rights) since it does not give an account of the state violence that the IRA resisted through violence. By failing to problematize state violence in the decision, the Court constructs the identity of Northern Ireland as a civilized European state that employs violence legitimately when its sovereignty is threatened. It reinforces the civilized/barbarian binary common to colonial discourse, in a similar way that Empire legitimizes its use of violence by constructing the barbarians as a threat to its sovereignty. The Court's portrayal of the IRA as politically motivated does not preclude the undermining narrative of a civilized state responding to an internal threat by employing legitimate violence and extrajudicial methods.

Since the Convention against torture does not allow for any exceptions to the prohibition on torture or inhuman and degrading treatment or punishment, the option to discuss the 'emergency' situation as an exception to article 3 is not available to the judges in *Ireland*. Unlike the GSS case where necessity is discussed in relation the interrogation techniques, ECtHR's discussion of whether article 15 permitted the UK government to introduce internment and detention to address the violence in Ireland is independent of

³²⁴ Walsh P.J Dermot. *Bloody Sunday and the Rule of Law in Ireland*. (New York: Palgrave, 2000), ix.

the Court's discussion of the legality of the five techniques. I have therefore structured my analysis of the Court's decision based on these two subjects.

iv. *The Decision on Detention, Internment and Discrimination*

According to the Court, the substance of the Ireland government's arguments concerning detention, internment and discrimination, was that the UK government violated article 5 (the right to liberty and security of person) of the Convention because it did not meet the requirements of article 15. Article 15 of the Convention states that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.³²⁵

The Court rules that the existence of a public emergency was "perfectly clear" from the facts of the situation in Northern Ireland.³²⁶ It decides that a state is given a "margin of appreciation" to determine whether "the life of its nation" is threatened by the existence of a public emergency, and that the ECtHR has a limited power of review of this aspect.³²⁷ The Court decides that the UK government did not exceed the "the extent strictly required by the exigencies of the situation" because the exercise of special powers was directed at the IRA which had played a "considerably subversive" role in the history of Ireland.³²⁸

When the Court considers whether the respondent government discriminated against the Catholic community thereby breaching article 14 of the Convention, it holds

³²⁵ *Ireland supra* note 5 at para 203.

³²⁶ *Ibid* at para 206.

³²⁷ *Ibid*

³²⁸ *Ibid* at para 212.

that there was no discrimination despite the disparity in the treatment of the two communities. According to the ECtHR, the exclusive focus on the Catholic community was intended to eliminate “the most formidable organization”³²⁹ and that the means employed by the respondent government did not appear disproportionate in terms of addressing the crisis in Northern Ireland. The Court justifies this differential treatment by explaining that when the respondent government was discussing whom to intern, the possibility of interning Loyalists was mentioned in the preparatory stages.³³⁰ It was apparent to the security forces that there were some Loyalist/Protestant terrorist activities in 1971.³³¹ However, the Court notes that the security forces decided not to detain and intern any Loyalists because there was “no army or police intelligence then available which indicated that any organisation other than the IRA had been actively engaged in bombing and killing in the very recent months.”³³² The decision explains that the reason Loyalist/Protestant violence was deemed less of a threat by the respondent government was that “it was in the main directed against the Catholic community and not the State or the security forces”³³³ and was perceived as being sporadic and on a small scale, whereas the IRA’s violence was a “highly organised, politically motivated campaign designed to overthrow the State.”³³⁴

By emphasizing the large proportion of IRA violence in relation to the small proportion of Loyalist violence while omitting state violence against Catholics altogether, the ECtHR discounts the violence against the Catholic community, thereby reinforcing

³²⁹ *Ibid* at para 230.

³³⁰ *Ibid* at para 37.

³³¹ *Ibid*

³³² *Ibid*

³³³ *Ibid*

³³⁴ *Ibid*

their marginal position. On the other hand, it produces a narrative that portrays the Catholic community as a powerful danger that needed to be contained by the extrajudicial measures of detention and interrogation. As such, the decision is a reinforcement of the marginal position of Catholics. This is because it overlooks the violence employed by the state against Catholics. This violence which is employed to maintain colonial power in modernity is seen as legitimate violence necessary to protect the sovereignty of the state. By not acknowledging the extent to which colonization contributed to the violence, the decision precludes narratives questioning the state's legitimacy in relation to Catholic self-determination.

v. *The Decision on the Five Techniques*

The Court's decision on the interrogation techniques begins with an account of the victims that includes details of where they were held and the methods they were subjected to. According to the Court, 12 people arrested in August of 1971 and two people arrested in 1972 were singled out and detained at one or more unidentified holding centres where they were subjected to "interrogation in depth" involving the combined application of the five techniques.³³⁵ While there were other complaints of ill-treatment from other detainees, only these fourteen were subjected to the five techniques, according to the Court. These victims are not named and according to the Court "in order to protect the identity of certain persons, notably witnesses, the published version of the Commission's incorporated changes to the original text; these changes mainly took the form of designating such persons by letters and/or figures."³³⁶ In spite of the fact that the

³³⁵ *Ibid* at para 96.

³³⁶ *Ibid* at para 94.

victims are not identified, it is clear from the Court's description that they were all members of the Catholic community. Unlike the *GSS* decision where the post-torture convictions of the victims are discussed to suggest that the techniques were effective for implicating some of the victims as terrorists, the ECtHR's discussion does not include any accounts of convictions. The omission of the names of the victims has no significance to how they are understood in the case, in contrast to *GSS* where the omission of the victims' identities as Palestinians alters the entire narrative about the relation between torture and identities.

Concerning the legality of the techniques, the Court held that the Convention "prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct."³³⁷ According to the Court, the techniques were applied in combination, with premeditation and for hours at a time.³³⁸ As such they caused "if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation."³³⁹ These effects place the five techniques within the meaning of inhuman treatment under article 3. Furthermore, the Court adds that they are also degrading because they were used to incite feelings of fear, anguish and inferiority capable of humiliating and debasing the victims and potentially breaking their physical and moral resistance.³⁴⁰

When determining whether the five techniques constitute torture, the Court states that in order to make this determination, it must have regard to the distinction between

³³⁷ *Ibid* at para 163.

³³⁸ *Ibid* at para 167.

³³⁹ *Ibid* at para 96.

³⁴⁰ *Ibid*

torture and degrading and inhuman punishment embodied in article 3. It states that from its point of view, the distinction between the categories derives from “a difference in the intensity of the suffering inflicted.”³⁴¹ In determining whether the techniques constituted torture, it states that while there exists “violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States”³⁴² it was the intention of the Convention to attach a “special stigma” to the definition of ‘torture.’³⁴³ The intended definition was to address “deliberate inhuman treatment causing very serious and cruel suffering.”³⁴⁴ As such the Court holds that:

Although the five techniques, as applied in combination, undoubtedly amounted to inhuman and degrading treatment, although their object was the extraction of confessions, the naming of others and/or information and although they were used systematically, they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.³⁴⁵

The fact that the Commission rules that the techniques constitute torture and the Court does not is a demonstration of Asad’s claim that torture and inhuman and degrading treatment can overlap or substitute for one another.³⁴⁶ The ECtHR does not label the five techniques as torture because, similar to the judges in *GSS*, the majority of the judges in *Ireland* regard torture as something unimaginably cruel that is qualitatively different from mundane state violence. The majority evokes the sense that Northern Ireland’s modern European identity renders it incapable of inflicting torture, so they opt to label it as actions of inhuman and degrading treatment instead. This idea resonates with Talal Asad’s assertion that the modern commitment to prevent pain and suffering

³⁴¹ *Ibid*

³⁴² *Ibid*

³⁴³ *Ibid*

³⁴⁴ *Ibid*

³⁴⁵ *Ibid*

³⁴⁶ Asad *supra* note 31 at 1081.

often conflicts with other commitments such as the duty to maintain a state's interests.³⁴⁷

In the context of the ECtHR in *Ireland*, I argue that the Court's interest in portraying Ireland as a modern democratic state, given its membership in the civilized European community, accounts for the failure to label the interrogation techniques as torture.

Judge O'Donoghue, along with Judges Zekia, Evrigenis and Matscher dissented from the majority opinion that the five techniques did not produce suffering that amounted to torture. The opinions written by the dissent indicate that torture was discussed elaborately in the context of Ireland's modernity. Judge O'Donoghue, for instance, wrote that the majority "was not bound to regard torture as only present in a medieval dungeon where the appliances of rack and thumbscrew or similar devices were employed."³⁴⁸ The dissenting opinions in the case show the extent of the discussion of torture in modernity, and point to the possibility of the majority being unable to see the five techniques employed as modern practices of torture that are inflicted by a modern, civilized European state. The dissents reflect Asad's claim that "the category of torture is no longer limited to applications of physical pain: it now includes psychological coercion in which disorientation, isolation, and brainwashing are employed."³⁴⁹ Judges Zekia and O'Donoghue held that torture did not have to be as extreme as described by the majority, and that the pain suffered by the victims in the case was in fact the result of torture.³⁵⁰ Judge Matscher accepted the Court's definition of torture, but argued that it should be broadened to include psychiatric suffering into the concept of physical pain in order to

³⁴⁷ *Ibid* at 1083.

³⁴⁸ *Ireland supra* note 5. Separate opinion of Judge O'Donoghue: para on article 3.

³⁴⁹ Asad *supra* note 31 at 1081.

³⁵⁰ *Ireland*. Separate opinions of judges Zekia: para A-C, and O'Donoghue.: para on article 3.

define the interrogation techniques as torture.³⁵¹ Judge Evrigenis employed the Commission's definition by holding that Article 3 broadens the protection of human beings from violence and must be read to include modern, sophisticated methods of producing suffering in addition to outmoded methods of inflicting acute pain.³⁵²

Despite the fact that the decision fails to define the interrogation techniques as torture, it is significantly stronger than the *GSS* decision in terms of denouncing the interrogation techniques employed by state officials. *Ireland* states explicitly that the five techniques constitute inhuman and degrading treatment or punishment which are also absolutely prohibited under article 3 of the Convention, whereas the *GSS* Court does not define the techniques as either torture or inhuman and degrading treatment or punishment. As noted in chapter 2, the Israeli Supreme Court defines the interrogation techniques simply as 'violence'³⁵³ that is prohibited under the law. The fact that the Convention does not make it possible to apply exceptions to the prohibition on torture also makes *Ireland* stronger than the *GSS* decision in terms of protecting human rights. *Ireland* provides ongoing human rights protections by labelling the interrogation techniques as inhuman and degrading treatment. The *GSS* decision leaves open the possibility for GSS members who have tortured to avoid conviction by invoking the 'necessity' defense. The Israeli Supreme Court applies Israeli criminal law which would allow the necessity defence to be put forward by anyone employing those techniques.

³⁵¹ *Ibid* separate opinion of Judge Matscher: para 1-2.

³⁵² *Ibid* separate opinion of Judge Evrigenis: para on article 3.

³⁵³ Kastner, *supra* note 33 at 29.

Conclusion

In this chapter, I have argued that the ECtHR in *Ireland* gives a more nuanced account of the historical identities of the perpetrators and victims of torture than is given by the Israeli Supreme Court in the *GSS* decision. It also provides better safeguards from torture and cruel and inhuman treatment or punishment. However, the similarities in the language between the two cases point to the limits of the *Ireland* decision, demonstrating how it also reinforces colonial discourses on identities in relation to torture.

Conclusion

“Stories matter. Many stories matter. Stories have been used to dispossess and to malign. But stories can also be used to empower and to humanize. Stories can break the dignity of a people but many stories can also repair that broken dignity.”³⁵⁴

i. An Overview

On the surface, both *Ireland* and the *GSS* decisions appear to protect the rule of law by reinforcing the prohibition of torture in democratic states while providing checks on executive power.³⁵⁵ In Israel, information gathered by human rights organizations, journalists and lawyers suggests that despite the decision, torture continues to be used as an aid to interrogations by government institutions.³⁵⁶ This fact called for a closer look at *GSS* to determine whether the decision is as uncompromising on the prohibition on torture as it appears to be on the surface. Through a comparison of *GSS* with *Ireland*, I have argued that there are gaps in the “elegant rhetoric of rights”³⁵⁷ employed by the Israeli Supreme Court that may contribute to the continued practice of torture in Israel. The ruling on the post-factum availability of the ‘necessity defense’ to *GSS* interrogators fails to provide a strong disincentive for torture. While I have shown that *Ireland* provides better safeguards against torture, I have also argued that both cases produce narratives that reinforce the marginal positions of people who are deemed as ‘others’ in their respective (post)colonial contexts.

³⁵⁴Chimamanda Adichie. “The Danger of a Single Story” *TED Ideas Worth Spreading* July 2009 http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story.html

³⁵⁵ Mann and Shatz *supra* note 245.

³⁵⁶ *Ibid*

³⁵⁷ *Ibid*

Both *Ireland* and the *GSS* cases consider whether the five techniques employed by security forces in each context are legal. In response to this question, the ECtHR uses international law as the standard, while the *GSS* decision invokes both domestic and international law. Both courts rule that the techniques violate human dignity and are therefore illegal. In *GSS*, torture is discussed as a practice that is absolutely condemned in Israel due its infringement on human dignity. However, the court does not provide a definition of torture or discuss the five techniques in relation torture, so it is not specified whether the five techniques constitute torture or inhuman or degrading treatment or punishment. The Israeli Supreme Court depicts torture as something that Israel, as a civilized modern state is incapable of.

In contrast, the ECtHR discusses torture as well as inhuman and degrading treatment or punishment in relation to the five techniques. It bases its ruling that the techniques are illegal on the fact that they constitute inhuman and degrading treatment. However, the ECtHR states explicitly that the severity of the interrogation techniques is not enough to put them in the category of torture. Using the Israeli Supreme Court's discussion of Israel's civilized identity as a lens I have argued that the ECtHR's decision that the techniques did not constitute torture similarly emanates from the Court's appeal to the UK government's civilized identity. Nonetheless, the fact that the ECtHR defines the interrogation techniques as inhuman and degrading treatment makes the ruling that they are illegal a more useful precedent under international law.

One important difference between the two cases that I have addressed relates to the suspension of the rule of law in the face of public emergencies. In *GSS*, the hypothesis of the ticking time bomb is discussed in relation to whether Israeli law

authorized the use of the five techniques and whether that authorization meant that there could be directives put in place dictating the use of the techniques. Although the Court answers both of these questions in the negative, it leaves the ‘necessity defense’ available to interrogators that have tortured, therefore providing a loophole for them to escape accountability. In contrast, because international law precludes all exceptions to the prohibition on torture, there is no discussion of ‘necessity’ in relation to the interrogation techniques in *Ireland*. However, the Court weighs whether the crisis in Northern Ireland justified the UK government’s derogation from the rights to fair trial and security of the persons, as well as the right to non-discrimination. The Court rules that the UK government did not exceed the limits to derogation imposed by article 15, and that the emergency situation justified derogation.

The theme of sight in *Waiting for the Barbarians* provided a lens for thinking about how the judges discuss identities and torture in both cases. Colonel Joll’s investment in Empire as a modern, civilized state makes him ethically blind to the plight of the barbarians while they are being tortured. Instead, he views torture as a necessity for protecting Empire from the savage barbarians and dismisses it as ‘investigations.’ It was based on this perception from the novel that I situated my argument that the judges’ appeal to civilization in both cases precluded them from discussing the five interrogation techniques as torture. It also underlies my argument that the Israeli Supreme Court’s ruling on the application of the necessity defense indirectly endorses torture as a truth finding mechanism. The themes of sight and silence also enabled me to demonstrate the value in questioning the representation of individuals who are not visible to speak for themselves, even if these individuals are represented by well meaning parties such as

human rights organizations, as demonstrated in my analysis of the *GSS* case. This is especially apt in (post)colonial societies where the identities of the colonizing states are sustained by how these states represent the colonized. In this thesis, I have demonstrated that employing literary texts can help misread colonial discourses produced through law, while making it possible to restore the dignity of the colonized subjects whose identities are misrepresented in these stories.

ii. *The Limits of my Thesis*

I have criticised the language employed by the judges in both cases as well as that of a human rights organization that advocated for the torture victims in the *GSS* decision. I have explored the limits of their advocacy as a basis for emphasizing the relevance of colonization in that language. While I have criticised the human rights organization in *GSS* for reinforcing colonial discourses on identities and torture, I have not extensively discussed any underlying factors that may explain the important omissions discussed in this thesis. For instance, Neve Gordon discusses how “local ideological forces affect the activities of human rights organizations and help determine our conception of human rights.”³⁵⁸ He explains that rights groups strategically tailor their language to appeal to the organizations that they engage. So for example, an organization like PCATI would employ the language of the courts in advocating for torture victims. I believe that factors such as these can be explored to substantiate the claim advanced in this thesis, that law itself is a discourse that reinforces hegemonic practices such as colonization, since censorship comes with its own implications of power. These legal constraints shed light on a benefit of law and literature. Literature

³⁵⁸ Gordon *supra* note 262 at 163.

makes it possible to tell the untold stories of law, since law “institutes its identity as an authoritative and autonomous science through a denial of its fictionality.”³⁵⁹

iii. Looking Forward

My interest in the *Ireland* and the *GSS* cases was sparked by the range of scholarly and cultural texts following the United States’ and international community’s response to the 9/11 attacks. I was particularly interested in the (re)definition of certain categories and individuals to legitimize these responses. In November 2001, then U.S President George W. Bush declared that the September 11 attacks were so grave that they constituted acts of war, and that his administration was legally authorized to detain without trial any members of Al Qaeda or persons posing a threat to the U.S’ national security as ‘enemy’ or ‘unlawful’ combatants.³⁶⁰ The Bush administration also stated at the time that the laws of war provided in the Geneva Convention were inapplicable in those circumstances and sought to deny prisoner of war status to all Taliban and Al Qaeda members in custody. These legal (re)definitions and implementations of laws of exception were manifested in the Guantanamo Bay Naval Base, which has been labelled by many commentators as a ‘legal black hole’³⁶¹ where neither international law nor U.S constitutional laws were applicable to detainees, and also in the Abu Ghraib detention centre in Afghanistan. In both centres, detainees were subjected to torture, which was dismissed as an aberration in the case of Abu Ghraib and redefined as “enhanced interrogation” in the case Guantanamo. Discussions of torture in the post 911 context led

³⁵⁹ Lenta, Patrick. “Law and Literature: A Genre Resi(gh)ted” *Journal of South African Law* 419(2002): 420.

³⁶⁰ Paust J. Jordan . “War and Enemy Status after 9/11.” *Yale Journal of International Law*. (2003): 325.

³⁶¹ See for example, Lopez H. Hernandez: “Guantanamo as a ‘Legal Blackhole’: A Base for Explaining Space, Markets and Culture.” *University of San Francisco Law Review* 45 (2010): 141-214.

me to consider the broader question of the existence of torture in democratic states and the attempts to reconcile it with the values of those states. This led me first, to the *GSS* case and then to the *Ireland* case; both of which are often cited in discussions on torture in democratic states.

Misreading *Ireland* and the *GSS* decisions against their historical backgrounds has positioned me to revisit and analyze discourses on the war on terror in a different light. Did the War on Terror begin with ‘terrorists’ attacking the United States as it is often portrayed, or is there a history of hegemony that must be brought to light to get a full picture of the war, the identities of these terrorists, and the exceptionalism that resulted in torture being employed on them? An extension of this project would make comparisons between these two decisions and court decisions addressing torture in the American context. I would employ cultural texts depicting the fact that throughout American history, the identities of those who are deemed America’s enemies have been “molded into strikingly different shapes for different practices of violence”³⁶² in order to misread the exceptionalism that is invoked to justify torture.

³⁶² Wilke, Christiane. “Law’s Enemies: Enemy Concepts in U.S. Supreme Court Decisions.” *Studies in Law, Politics, and Society*, 40 (2007):42.

Bibliography

- Adichie, Chimamanda "The Danger of a Single Story" TEDGlobal 2009 Conference, Oxford, UK, 21-24 July 2009. Online audio clip. TedGlobal2009. Accessed 10 September 2012. http://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story.html.
- Application No. 5310171, (1972) Y.B. Eur. Conv. on Human Rights 76 (Eur. Comm. Of Human Rights) (decision on admissibility).
- Asad, Talal. "On Torture, or Cruel, Inhuman, and Degrading Treatment." *Social Research*, 65 (1996) 1081-1109.
- Attwell, David. "J.M. Coetzee and South Africa: History, Narrative and the Politics of Agency." PhD dissertation, the University of Texas at Austin, 1991.
- Baron, Jane. "Law, Literature and the Problems of Interdisciplinarity." *Yale Law Journal*, 108 (1999): 1059-85.
- Bhabha, Homi. "The other question: Difference, discrimination, and the discourse of colonialism." *Screen* 24(1984): 18-36.
- Bilsky, Leora. *Transformative Justice: Israeli Identity on Trial*. Michigan: The University of Michigan Press, 2004.
- Binder, Guyora, and Robert Weisberg. *Literary Criticisms of Law*. New Jersey: Princeton University Press, 2000.
- Boletsi, Maria. "Barbaric Encounters: Rethinking Barbarism in C.P Cavafy and J.M Coetzee's *Waiting for the Barbarians*." *Comparative Literature Studies*, 44 (2007): 67-96.
- Brecher, Bob. *Torture and the Ticking Bomb*. Massachusetts: Blackwell Publishing, 2007.
- Brooks Peter and Gerwitz Paul. *Law's Stories: Narratives and Rhetoric in the Law*. Connecticut: Yale University Press, 1996.
- B'Tselem "Land Exploration and Settlement" [b'tselem.org](http://www.btselem.org)
<http://www.btselem.org/settlements> (accessed April 11, 2012).

- Calvert, Michelle. "The Body as Topos: The discursive mapping of the feminine subject in selected works of Canadian Art and Literature." Master's thesis, Carleton University, 1991.
- Cheng, Sinkwan. "Civilization and the Two Faces of Law: J.M. Coetzee's *Waiting for the Barbarians*." *Cardozo Law Review*, 24 (2002-2003): 2349-70.
- Chiot, Daniel. "Torture and Modernity Self, Society and State by Darius Rejali." *Journal of Contemporary Society* 23 (1994): 678-680
- Coetzee, J.M. *Waiting for the Barbarians*. London: Vintage Books, 2004.
- Cohan, John Alan. "Torture and the Necessity Doctrine." *Valparaiso University Law Review*, 41:4 (2007): 1591-1612.
- Colby, Elbridge. "How to Fight Savage Tribes." *AJIL*, 21 (1927): 279-88.
- Convention for the Protection of Human Rights and Fundamental Freedoms*. Nov 4, 1950, Europ.T.S No.5; 213 U.N.T.S 221.
- Coundouriotis, Eleni. "The Dignity of the "Unfittest:" Victims' Stories in South Africa." *Human Rights Quarterly*, 28 (2006): 842-867.
- Cover, Robert. "Nomos and Narratives": *The narrative Violence and the Law Essays of Robert Cover* eds. Martha Minow, Michael Ryan and Austin Sanat. Michigan: The University of Michigan Press, 2010.
- Crawford, James. "Creation of the State of Palestine: Too Much Too Soon." *Eur. J. Int'l L.* 1 (1990): 1153-1208.
- Crocker, Thomas, P. "Still Waiting for the Barbarians: What is New About Post September 11. Exceptionalism? *Law and Literature*, 19:2 (2007).
- Dershowitz, Alan. *Why Terrorism Works*. Connecticut: Yale University Press, 2002.
- Donaghue, Deirdre E. "Human Rights in Northern Ireland: *Ireland v. the United Kingdom*." *Boston College International and Comparative Law Review*, 3:2 (1980).
- Dubois, Page. *The Slave's Truth. The Phenomenon of Torture. Readings and Commentary* ed. William F. Schulz. Philadelphia: University of Pennsylvania Press, 2007.
- Foucault, Michel. *Discipline and Punish*. New York: Random House, 1995.

- . *Power/Knowledge: Selected Interviews and Other Writings*. Ed. Colin Gordon. Sussex: Harvester Press, 1980.
- . *Archaeology of Knowledge and Discourse on Language*. New York: Vintage Books, 1982.
- Ghandi, Leela. *Postcolonial Theory: A critical Introduction*. New York: Columbia University Press, 1998.
- Gordon, Neve. "Rationalising Extra-Judicial Executions: The Israeli Press and the Legitimisation of Abuse." *International Journal of Human Rights* 8:3 (2004): 305-24.
- . "Human Rights as a Contingent Foundation: The Case of Physicians for Human Rights" *Journal of Human Rights*, 5 (2006): 163-84.
- Gregory, Derek. *The Colonial Present: Afghanistan, Palestine, Iraq*. Malden: Blackwell Publishing Ltd, 2004.
- Gross, L., Michael. "Regulating Torture in a Democracy: Death and Indignity in Israel." *Polity*, 36 (2004): 367-88.
- Grover, Sonja. *The European Court of Human Rights as a Pathway to Impunity for International Crime*. New York: Springer, 2010.
- Gur-Arye, Miriam. "Can the War on Terror justify the Use of Interrogation? Reflections in Light of the Israeli Experience." *Torture: A Collection* ed. Sanford Levinson. New York: Oxford University Press, 2004: 183-98.
- Hall, Stuart. "Foucault: Power, Knowledge and Discourse." *Discourse, Theory and Practice: A Reader*, 72 (2001): 72-81.
- . "The West and the Rest: Discourse and Power." *Formations of Modernity* eds. S. Hall and B. Giebsen. Oxford: Polity Press, 1992.
- Hannah, Matthew. "Torture and the Ticking Bomb: The War on Terrorism as a Geographical Imagination of Power/Knowledge." *Annals of the Association of American Geographers*, 96 (2006): 622-40.
- Hernandez L. Enersto: "Guantanamo as a 'Legal Blackhole': A Base for Explaining Space, Market and Culture." *University of San Francisco Law Review* 45 (2010): 141-214.
- Hoffstater, Noam. "Ticking Bombs: Testimonies of Torture Victims in Israel." *Public Committee against Torture in Israel*, (2007).

- Home, Robert. "An 'Irreversible Conquest'? Colonial and Postcolonial Land Law in Israel/Palestine." *Social and Legal Studies*, 12:3 (2003): 291-310.
- Hughes, Michael. *Ireland Divided The Roots of the Modern Irish Problem*. New York: St. Martin's Press, 1994.
- Hunt, Alan. "Foucault's Expulsion of Law: Toward a Retrieval." *Law and Social Inquiry*, 17:1 (1992): 1-38.
- Ignatieff, Michael. *The Lesser Evil: Political Ethics in an Age of Terror*. Princeton and Oxford: Princeton University Press, 2004.
- Irish Centre for Human Rights. "The Case of *Ireland v. UK*" [nuigalway.ie http://www.nuigalway.ie/human_rights/Projects/Project_Ireland/ireland_v_uk.html](http://www.nuigalway.ie/human_rights/Projects/Project_Ireland/ireland_v_uk.html) (accessed Sept 22, 2011).
- Jelin, Elizabeth. *State Repression and the Labors of Memory*. Minneapolis: University of Minnesota Press, 2003.
- Jolly, Rosemary, Jane. "Territorial Metaphor in Coetzee's '*Waiting for the Barbarians*'." *Ariel* 20 (1989) 69-70.
- Kastner, Tal. "The Language of the Law and the Tortured Body: The Public Committee against Torture in Israel v. The State of Israel," manuscript on file with author.
- Kennedy, David. "The International Human Rights Movement: Part of the Problem?" *Harvard Human Rights Journal*, 15 (2002): 245-67.
- . *The Dark Sides of Virtue: Reassessing International Humanitarianism*. New Jersey: Princeton University Press, 2005.
- Khan, Mushtaq H., Jūrj Juqmān, and Inge Amundsen. *State Formation in Palestine: Viability and Governance during a Social Transformation*. London: Routledge Curzon, 2004.
- Khan, Ummni. "Putting a Dominatrix in her Place: The Representation and Regulation of Female Dom/Male Sub Sexuality." *Canadian Journal of Women and the Law*, 21 (2009): 143- 75.
- Lakoff George and Mark Johnson. *Metaphors We Live By*. Chicago: University of Chicago Press, 1980.
- Lenta, Patrick. "Legal Illegality: *Waiting for the Barbarians* after September 11." *Journal of Postcolonial Writing*, 42: 1 (2006): 71-83.
- . "Law and Literature: A genre Resi (gh)ted" *TSAR*, 3 (2002): 419-35

- Lokaneeta, Jinee. "Torture Debates in the post-9/11 United States: Law, Violence, and Governmentality." *Theory and Event*, 13: 1 (2010).
- Mahler Gregory and Mahler R.W Alden. *The Arab-Israeli Conflict. An Introduction and Documentary Reader*. London and New York: Routledge, 2010.
- Mann, Itamar and Omer Shatz. "The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009." *Unbound: Harvard Journal of the Legal Left* 6 (2010): 59-110.
- Martin, Richard, G. "Narrative, History, Ideology: A Study of "Waiting for the Barbarians" and Burger's Daughter." *Ariel*, 17(1986):3-21.
- McClintock, Anne. *Imperial Leather: Race Gender and Sexuality*. New York and London: Routledge, 1999.
- . "The Angel of Progress: Pitfalls of the Term "Postcolonialism"" *Social Text* 31/32 (1992): 84-98.
- Megret, Frederic. "From 'Savages' to 'unlawful combatants': A Postcolonial look at International Law's 'Other'." *International Law and its Others* ed. Anne Orford New York : Cambridge University Press, 2006: 265-318.
- Mertus, Julie and Kristin Rawls. "Crossing the Line: Insights from Foucault on the United States and Torture" in *Discipline and Punish in Global Punishment: Illusions of Control* .ed Janie Leatherman. New York: Palgrave MacMillan, 2008.
- Mitchell, James. "Social Violence in Northern Ireland." *The Geographical Review* 69: 2 (1979): 179-701.
- Mitchell, Thomas, G. *Native v. Settler: Ethnic Conflict in Israel/Palestine, Northern Ireland and South Africa*. Connecticut: Greenwood Press, 2000
- Morris, Benny. *Righteous Victims: A History of the Zionist Arab Conflict 1881-1999*. New York: Alfred Knopf, 1999.
- NiAolain, Fionnuala. *The Politics of Force: Conflict Management in Northern Ireland*. Belfast: *Blackstaff Press*, 2001.
- Nichols, Robert. "Postcolonial Studies and the Discourse of Foucault: Survey of a Field of Problematization." *Foucault Studies*, 9 (2010): 111-44.
- Olsen, Lance. "The Presence of Absence: Coetzee's "Waiting for the Barbarians." *Ariel*, 16:2 (1985): 48-56.

Orford, Anne. *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*. Cambridge: Cambridge University Press, 2003.

Pacheco, Allegra ed & trans. "The Case against Torture in Israel: A Compilation of Petitions, Briefs and other Documents Submitted to the Israeli High Court of Justice" Jerusalem: *The Public Committee Against Torture in Israel*, (1999).

Pappé, Ilan . *The Making of the Arab-Israeli Conflict. 1947-51*. London and New York: I.B Taurus &Co Ltd, 1992.

Parry, Benita. "Speech and Silence in the Novel of J.M Coetzee" *Writing South Africa: Literature, Apartheid and Democracy* eds. Derrick Attridge and Rosemary Jolly. New York: Cambridge University Press, 1998: 149-65.

Parry, John, T. "Judicial Restraints on Illegal State Violence: Israel and the United States." *Vanderbilt Journal of Transnational Law*, 35:73, (2002): 73-149.

Paust J. Jordan . "War and Enemy Status after 9/11." *Yale Journal of International Law*. (2003): 325-35.

PCATI. "About PCATI" [stoptorture.org. http://www.stoptorture.org.il/en/odot](http://www.stoptorture.org.il/en/odot) (accessed November 13, 2011).

Penner, Dick. "Sight, blindness and double-thought in J.M. Coetzee's *Waiting for the Barbarians*." *World Literature Written in English*, 26:1 (1986): 34-45.

Rao, Anupama. "Problems of Violence, States of Terror: Torture in Colonial India." *Interventions*, 3:2 (2001): 4125-33.

Razack, Sherene, H. *Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism*. Toronto: University of Toronto Press, 2004.

Rejali, Darius. *Torture and Modernity: Self, Society and State in Modern Iran*. Colorado: Westview Press, 1994.

Russell, Lorena. "Waiting for the Barbarians: Narrative, History and the Other" in *Exploration and Colonization* ed. Harold Bloom. New York: Infobase Printing, 2010: 213-24.

Said, Edward. *Culture and Imperialism*. New York: Vintage Books, 1993.

---. *Orientalism*. New York: Virginia Books, 1979.

Scarry, Elaine. *The Body in Pain: The Making and Unmaking of the World*. New York: Oxford University Press, 1985.

- Shue, Henry. "Torture in Dreamland: Disposing of the Ticking Time Bomb." *Journal of International Law*, 37 (2006):231-40.
- Slaughter, Joseph. "Humanitarian Reading." *Humanitarianism and the Mobilization of Empathy* eds. Wilson Brown and Richard Wilson. Cambridge: Cambridge University Press, 2009: 88-109.
- Spencer, Robert. "J.M. Coetzee and Colonial Violence." *Interventions*, 10:2 (2008): 173-87.
- Spjut, R. T. "Torture under the European Convention on Human Rights." *American Journal of International Law* 73 (1979): 267-72.
- Sussman, David. "Defining Torture." *Case W. Res. J. Int'l L*, 37 (2005): 225-30.
- . "What is Wrong with Torture." *Philosophy & Public Affairs*, 38 (2005): 1-33.
- Toope, Stephen. "Fallout From '9-11': Will a Security Culture Undermine Human Rights?" *Saskatchewan Law Review* 281 (2002): 281-98.
- Valdez-Moses, Michael. "The Mark of Empire: Writing, History, and Torture in Coetzee's *Waiting for the Barbarians*." *The Kenyon Review*, 15 (1993): 115-127.
- Waldron, Jeremy. "Torture and Positive Law: Jurisprudence for the White House." *Columbia Law Review*, 6 (2005): 1681-1750.
- Walsh P.J Dermot. *Bloody Sunday and the Rule of Law in Ireland*. New York: Palgrave, 2000.
- Wenzel, Jennifer. "Keys to the Labyrinth: Writing, Torture and Coetzee's Barbarian Girl." *Tulsa Studies in Women's Literature*, 15:1 (1996): 61-71.
- Wilke, Christiane. "Law's Enemies: Enemy Concepts in U.S. Supreme Court Decisions." *Studies in Law, Politics, and Society*, 40 (2007): 41-77.
- . "Enter Ghost: Haunted Courts and Haunting Judgements in Transitional Justice." *Law Critique*, 21 (2010): 73-92.

Cases:

- Ireland v. United Kingdom*, 23Er. Ct. H.R Ser (1976).
- Public Committee against Torture in Israel v. State of Israel*. HCJ 5100/94.