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Objects of Salvation, Subjects of Law:0The Native Subject and the Refugee Camp

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This paper threads together two events in order to think aspects of 'the political', of 'justice' and of 'citizenship' in South Africa, and more broadly in contemporary Africa. Doing right today, more than any other period in postcolonial Africa, is defined, I would suggest by two hegemonic post Cold War imperatives. From the vantage point of one imperative, Africa is the deviant *subject* of law. From another contemporaneous vantage point, Africa is the *object* of care derived from a politics of pity. For example, Law, as in the progressivist teleology of international law embodied in the ICC, regards politics as something to be disciplined. If 'politics' is suspect and national, prosecutorial justice is considered pristine, international and civilizing. In other words, international law is without politics. But we might add, not without violence, witnessed by the legitimation of external military intervention . As Hobbes said long before would Foucault remind us, the covenant without the sword would be mere words. . The second imperative, of Africa as the object of care, is one with a longer contemporary provenance, but is today, we might say, at its apotheosis. Symptomatic of the humanitarian imperative, is the preponderence of NGO's on the continent dispensing biopolitics. In both instances, I am interested in how we might think 'the political' as it might be thought at the interstices of three relational subject positions which demarcate the site of displacement as a sight of suffering and pain, these being the Bantustan, the township, and the refugee camp.

These last few years I have being working on two broad research projects. The first has been an attempt to rethink the relationship between law and the political violence of late apartheid, and to consider how we think this violence, mediated through the Truth and Reconciliation Commission (TRC), and the discourse of human rights. The second broad project has been a study of how we think xenophobic violence we have seen in South Africa, most pronounced in May of 2008. A violence made scandalous by the photograph of the killing and setting alight of a Mozambican migrant worker, Alfred Nehamuave which ran on the front pages of almost every newspaper in the country. And a violence that produced the rows and rows of white tents that we know as the refugee camp. Camps that the South African government were quick to want to dismantle. If the first instance offers an insight into the the political effects of an account of the law which disavows the political, then the second instance offers an insight into how we think humanitarianism and politics.

There are two assumptions I proceed from . Firstly, the dominant account of both instances of violence, mediated through law, are inadequate, but suggest less the need for a theory of violence, than a theory of politics. So I am interested in thinking this violence 'politically' and attempting to think these temporally distinct moments—a moment during apartheid, and a moment after apartheid—together. To explore a continuity in the ways in which pain and suffering invoke a certain kind of political subject. Secondly, I am interested in a politics of effect rather than design. In how the ways in which discourse and normativy intersect: in how we come to right a wrong might produce, and reproduce certain notions of justice, or limit the ways in which we might think of justice. A notion of justice that relies on what Valentine Mudimbe has called the secularized theologies of salvation.[1]

Both instances of violence of which I speak have been framed as violations of human rights, in other words, within a juridical rights based discourse. Hannah Arendt drew our attention to the "perplexities" of human rights when she observed that this very recourse to human rights, which transcended membership of a national political community, could only be accessed through membership of that community in the first instance[2]. In other words, one had to have the right to have human rights. A right that could only be granted and enforced through a nation-state. Arendt also argued that the appeal to human rights resonated uncannily with an appeal for the rights of animals, rendering the human without speech. The French philosopher Jacques Ranciere has more recently suggested that Arendt's critique of human rights 'depolitices' human rights[3]. Ranciere offers instead a more tactile configuration which opens up the spaces for a politics, of what Ranciere calls dissensus produced through a process of political subjectivization.

Mindful of this critique, I think its worth thinking about these instances of violence in relation to a legacy of rights on this continent: lets recall that for the political subject of colonial modernity, rights belonged to non-natives, not natives. And non-natives were races.

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[1] Mudimbe, V (1988) The Invention of Africa, Gnosis, Philosophy and the Ordre of Knowledge, Indiana: Indiana University Press. One might also describe this as the trilogy of the victim, the perpetrator and the saviour. Mahmood Mamdani has specifically drawn attention to the politics of the 'saviour' in his study of the Save Darfur movement. Cf. Mamdani, M (2009) *Saviours and Survivors.* Cape Town: HSRC Press

[2] Arendt, H (1973) *Origins of Totalitarianism,* Harcourt: Shocken

[3] Ranciere, J Who is the subject of the Rights of Man, *The South Atlantic Quarterly - Volume 103, Number 2/3, Spring/Summer 2004*

If the military camp of national liberation produces the guerilla, the cadre, or for the settler colonial state, the 'terrorist', in other words a target to be destroyed in war, the apartheid township produced the reluctant rural subject resistant to becoming a Bantustan foreigner; then the refugee camp produces another kind of subject: the victim, a target that should not be made to die, but the subject that must be made to live. In other words, the object of care. The camp, like the townships in this sense is a site of displacement, and the site of pain and suffering.

Law and Apartheid

In this section of the paper, I describe an autobiographical narrative of law in relation to apartheid violence. I do so in order to draw attention to an account of law which renders apartheid as its exceptional violence rather than as an everyday legality, which also happened to be declared a crime against humanity.

If you recall, the declaration of apartheid as a crime against humanity in 1965 described four key features that rendered apartheid as a crime against humanity: its desire to denationalize the majority, to make them foreigners and migrants, secondly, to deny political participation, thirdly to deny the majority self-determination and lastly, its crime was to transact the previous three elements through brute and systematic use of force. In other words, the resolution emphasized sovereignty and its denial. Its focus was on the colonial features of apartheid. Force itself was considered as the consequence of the latter, as the result of the colonial policies were to be implemented. In contrast to this view, a particular kind of critique of apartheid evolves to take a different view on the wrong of apartheid. It takes 'racial discrimination' rather than self-determination and the right to sovereignty as key focus. And it comes to focus on force—its victims and its perpetrators—as the most visible wrong of apartheid. This critique of apartheid I describe as a human-rights derived critique, and it is the hegemony of this critique during the latter years of the anti-apartheid struggle that, I would contend, comes to frame the way in which the TRC comes to interpret its mandate. The result is, as Mahmood Mamdani has argued, is we have come to a conclusion that there were 22 000 victims, of gross violations of human rights committed under apartheid, a rather small number in proportion to the millions who were victims of the colonial features of apartheid, the features that targeted collective identities, through race and ethnicity, rather than

individual victims of exceptional violence[4]. It is often overlooked that the Population Registration Act of 1950 did not just divide South Africa into the taxonomic categories of race, it divided the population by ethnicity too[5]. Black South Africans were to be ethnic subjects, whilst the rest would be racially classified. Ethnic groups lived under customary law, and races lived under civil law. Races had access to rights in the civil realm of civil society. Subjects, in the most ambitious dreams of apartheid's proponents, would not be South African citizens, but rather belong politically to the homelands, and therefore would not have access to civic rights. They could live in white South Africa, but they could not belong there, nor have rights there. In his 1964 book on the Pondoland Revolt, Govan Mbeki, the Eastern Cape intellectual, political prisoner and senior ANC leader, set out the challenge for the South African state with remarkable clarity:

> "The problem was plain—apartheid had to find a new way to administer Africans, because the pressure for more rights was growing too strong a challenge…The traditional system in South Africa had been one of direct rule: White government officials sat over Chiefs. Everyone knew that the Commissioner was the boss. Yet now the White government official has become too visible and accessible a target for anti-government action. The need was clearly to devise a system under which the Africans appeared to be managing their own affairs. This, too, of course, was nothing new. Indirect rule had been carefully evolved by Lord Lugard for the British colonies in Africa; Nigeria and the former Gold Coast had been governed this way".

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5 Mamdani,M (2002) Amnesty or Impunity? A preliminary critique of the TRC, Diacretics Volume 32, Number 3-4, Fall-Winter 2002

[5] Section 5(1) notes that 'Every person whose name is included in the register shall be classified by the Director as a white person, a coloured person or a native, as the case may be, and every coloured person and every native whose name is so included shall be classified by the Director according to the ethnic or other group to which he belongs. Section 7(1) notes that 'There shall, in respect of every person whose is included in the register, *other than native*, be included in the register the fol, lowing particulars and no other particulars…', and it then lists a series of categories including age, sex, date of birth and so on. Section 7(2) in a separate subsection sets out the provisions for those defined as 'natives': 'There shall be in respect of every native whose name is included in the register, be included the following particulars…' and it then sets out a similar list, with a few additions: it adds 'his citizenship, or nationality, *the ethnic or other group and the tribe to which he belongs*.' (emphasis added) (Brookes 1968:19-20).

Delivering first Ernie Wentzel Memorial Lecture in 1987[6], the senior South African advocate, Sydney Kentridge Q.C, dwelt at length in the opening of his talk on the ethics and ideological beliefs that the late Ernie Wentzel had come to stand for. Wentzel, he noted, 'held strong beliefs about the law and about the society in which he practiced law…He detested racism, white or black, and he detested Fascism, whether of the left or the right. Above all', noted Kentridge, 'he believed in individual rights and individual choices'. Holding these beliefs, recalled Kentridge, would mean that it was 'inevitable' that Wentzel would become an 'opponent' of the government, and 'inevitable too, that in his profession he should be a forceful defender of the victims of government policies' (1987: 11). This inevitable conflict and oppositional stance would lead to a three month spell of detention without trial for the Advocate who opposed the laws of the government, during the 1960 State of Emergency.

In this recounting of the life of Ernie Wentzel, a life held up as exemplary for its principled, unwavering and courageous defense of the law, Kentridge, who viewed himself no doubt as sympathetic and following in the vein of Wentzel' example of what law should do and be, was upholding a certain normative conception of what it meant to be a lawyer. This was a question of deep deliberation amongst a minority of lawyers and judges in South Africa, articulated as: what would their 'role' be in such a context?[7] As we saw, Wentzel was lauded for not being an 'ideological figure', he eschewed the political, whether of the right or the left. His vision of the law is neither of place nor time, neither partisan nor parochial,

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[6] Kentridge, S (1987) 'Law and Lawyers in a Changing Society', *The First Ernie Wentzel Memorial Lecture*, Johannesburg: Center for Applied Legal Studies. Sidney Kentridge became a senior counsel in 1965 in South Africa, and was a defence lawyer in some of the most significant political trials, including the Treason Trial (1958-1961) and later represented the family of the late Black Conscious leader, Steven Bantu Biko, at the inquest into his death in police custody in 1977. Thereafter Kentridge practiced law as member of the English Bar, and was appointed Queens Counsel in 1984.He served as a Judge in Botswana and an acting Justice in the Constitutional Court of postapartheid South Africa. This biographical information taken from website of the Presidency of the Republic of South Africa on the occasion of a national order of merit to Kentridge for his role as an anti-apartheid lawyer: **http://www.thepresidency.gov.za/orders_list.asp?show=395**, accessed on 01/05/2010.

[7] Cf Steytler, N.C (1987) 'Criminal Justice and the Apartheid State', in Rycroft, A.J, et al. *Race and the Law in South Africa*, Cape Town: Juta and Co; Adam, H (1988) 'Engineering Compliance: The Management of Dissent in South Africa', in Hund, J. ed. *Law and Justice in South Africa*, Johannesburg & Cape Town: Institute for Public. Interest Law and Research; Friederichs, D.O (1990) 'Law in South Africa and the Legitimacy Crisis', *International Journal of Comparative and Applied Criminal Justice*, vol. 14, no.2; Wacks, R (1984) 'Judges and Injustice', *South African Law Journal*, no. 101

but is presented as universal, underpinned by the dictum of neither fear nor favour, committed only to itself and the imperatives imminent to this. Of course Wentzel, and Kentridge, were drawing on a particular sensibility here that is central to our understanding of the modern state

that derives from an understanding of law as, in its Kantian formulation, 'the highest form of reason'. It is also an understanding of law as a civilizational marker that embodies within it rights that derive from a distinct but dialogical relationship between 'natural rights', and 'positive law', upon which social contract theory as the foundational 'myth' of the modern state rests. This is most starkly exemplified for example in key texts of Enlightenment thinkers like Thomas Hobbes' in *Leviathan* [1651] (1986), and John Locke's *Two Treatise of Government* [1689] (1993) as rationales for the emergence of the modern regime of sovereign law.[8] It is the writings of the latter in particular, that have come to be seen as canonical to the foundations of liberalism.

This account of law and the modern state takes the autobiography of an evolutionary narrative at its face value for now, and brackets, to the extent that it is possible, the entanglements and complicated relationship between liberalism, colonialism and empire. What is crucial though is that the tension between the universal claims of liberalism and its particular, and now well documented, categorical exclusions, are central to the anxiety that motivates the human rights lawyers, particularly in the South African iteration of modernity. In a different context, Uday Singh Mehta (1999) has argued for a distinction between a notion of

[8] Thomas Hobbes and John Locke, as well as Jean Jacques Rousseau are taken to be amongst the most important Enlightenment theorists of a form of government based on the idea of natural rights, drawing on the earlier writings of Hugo Grotius (1583-1645) and Samuel von Pufendorf (1632-1694). Noting a distinction between different national conceptions of the natural rights concept, Waswo (1996), in his account of the American genealogy of the concept, as distinct from the British, argues that the early Puritans accepted that it was 'natural' that 'men' would seek liberty, but they also saw that it contained a threat. Writing in 1630, John Winthrop was to make a distinction between two forms of liberty. The first he described as natural and the second as 'civic' or 'federal': 'The First is common to man with beast and other creatures..the exercise of this liberty makes men grow more and more evil and in time to be worse than brute beasts: *omnes sumus licentia detoriores*. The other kind of liberty I call civil or federal; it may also be moral, in reference to the covenant between God and man, in the moral law…This liberty is the proper end and object of authority and cannot subsist without it'. (Waswo, R (1996) 'The formation of Natural Law to Justify Colonialism 1539-1689, *New Literary History*, vol. 27, no. 4, pp743-749. See also Hussain, N (2003) *The Jurisprudence of Emergency: Colonialism and the Rule of Law*: Ann Arbor: University of Michigan Press.

empire and colony that is worth bearing in mind. On the one hand we may refer to a history of imperial rule, which describes a practice and rationality that exterminates aboriginal populations[9]; at the same time, as Mehta argues, there is also a liberal notion of empire which is predicated on various assumptions of 'tutelage' and kinship. It is this notion of colonialism that seeks views the native population as the target of interventions to re-arrange cultures, and identities towards an image of progress and civilization. It is this latter teleological sensibility that I am concerned with here in relation to a view of law, more particularly in the attendant legal subject-citizen that arises from the political community founded on these social evolutionist liberal principles. In it resides a triumphalist and self-vindicating legal narrative that absorbs its paradoxes, contestations and violence over time. But as Mehta notes, the work of criticism is to render visible and think through the implications of these paradoxes and tensions: "The facts of political exclusion- of slaves, of women, and of those without sufficient property to exercise either suffrage or real political power- over the past three and a half centuries must be allowed to embarrass the universalistic claims of liberalism" (Mehta, 1999: 76).[10]

For Hobbes, as we know, the state of nature is one in which 'men' find themselves if not in war, then in the permanent *disposition* towards war, where the condition of 'man' is said to be 'solitary, nasty, and brutish'. This violence lacks a legal-moral character since it is without a normative boundary for the subject to be within or to transgress. It is only with the arrival of an exterior and common law that such a character can be given to both the disposition and more particularly, the action, which now has a line over which to traverse, with consequences: 'till they know not a law that forbids them: which till Lawes be made they cannot know; nor can any Law be made, till they have agreed upon the Person that shall make it' (1986: 187).

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[9] An example of this invocation of Empire can be found in Sven Lindqvuist's (1992) *Exterminate the Brutes, One Man's Odyssey into the Heart of Darkness and the Origins of European Genocide,* New York: the New Press

[10] The paradoxes between universal claims have been articulated in various forms. In the moment of imperialism, which exterminates the colonial subject, there are the famous debates on the right to *imperium* and *dominum* (Grovogui, 1996, pp 17-25). For the latter paradoxes, see also Grovogui, S (1996) *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law*; Mommsen, W. J & De Moor, J. A. eds. (1992) *European Expansion and Law: The Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asia,* Oxford: Berg; Ann Stoler, "Making Empire Respectable: the Politics of Race and Sexual Morality in 20th c. Colonial Cultures," *American Ethnologist* (16:4): 634-660; Ann Stoler, "Rethinking Colonial Catgories: European Communities and the Boundaries of Rule," *Comparative Studies in Society and History* 31:1 (January 1989): 134-161

The redeeming feature of human beings, in this schematic metaphysics of the shift from the 'state of nature' to political society, is the endowment of 'reason'. Through the capacity to reason, two imminent ideas are revealed: the disposition towards a condition of 'liberty' is considered a natural right; secondly, the exercise of that liberty, understood in its negative sense as the 'absence of external impediments' undermines, through the insecurity that arises out of the equal right to wage private war, the first right (1986: 189). In other words, it negates the freedom to be free. This Right of Nature, *Jus Naturale* brings into being therefore a general state of insecurity, based on the exercise of private reason, leading to the condition of 'man as nasty, short and brutish'. And it is from the private reason of liberty that law as obligation emerges. Law is therefore at odds with Natural rights, argued Hobbes, 'like obligation is at odds with Liberty'. The distinction between *Jus* (Right) and *Law* (Obligation) is the basis of a form of sociality through which the 'individual' can protect and enjoy the rights that are put into question in the absence of a 'common law'[11]: As Hobbes describes it:

'That a man be willing when are so too, as farre forth, as for Peace, and defence himselfe he shall think it necessary to lay down his right to all things, and be contented with as much liberty against other men, as he would allow only against himself'. (Hobbes, 1986: 188-190). In this reworking of the Biblical injunction 'doing unto others', it is the self that is placed at the center of the 'motivation' for the transfer of absolute rights to the sovereign. Reasonable men would thus see that they had to give up some of their rights to everything and to protect themselves in order to live in Peace, not War. However, because men are governed by the 'Passions', they would revert to their natural ways if they saw advantage in a situation. Hence the

[11] The Enlightenment formulation of a natural law tradition, out of which this conception of justice arises, draws on a number of historical precursors. In the genealogy of the concept in the West, it is to Aristotle that we most often turn, although there is some dispute about this. Cf. Charles H. McIlwain (1932) *The Growth of Political Thought in the West: From the Greeks to the End of the Middle Ages*, New York, pp. 114-15 Particularly, it is to Aristotle's distinction between *distributive* and *corrective* justice, the latter arising from a pre-given sense of right, which lends itself to a historically transcendent conception of law and right in the *Nichomachean Ethics* and *Politics* and *Rhetoric*. Cf Leo Strauss's (1987) *Natural Right and History,* Chicago: University of Chicago Press. Plato's conception of natural law entered the mainstream of Western legal thought through the Aristotelian commentary on the *Republic* by the Andalusian Muslim polymath Ibn Rushd (Averroes), as well as through the writings of Thomas Aquinas. Cf. Corbin Henry (1993) *History of Islamic Philosophy, Translated by Liadain Sherrard, Philip Sherrard,* London; Kegan Paul, pp. 39.

need to not only agree by word, but also to agree by action to transfer their natural rights to an Authority, for: 'Covenants, without the Sword, are but Words, and no strength to secure man at all' (Hobbes, 1986: pp192, 201-202). This 'covenant', in the form of the 'social contract', is therefore to be protected by the threat of force, and mediates the relationship between the Authority, 'the commonwealth' or state, and the 'citizen' as the embodiment of rights and obligation, and allows for the distinction to be made between that which is legal and that which is illegal: '…whatever I lawfully Covenant, I cannot lawfully break' Hobbes was to note. (1986: 198). The making of a covenant, the agreement to be governed in actions by a common Law therefore creates 'obligations', and creates 'injustice' as *Sin Jure* (1986: 191):

"And in this law of Nature, consisteth the Fountain and Originall of JUSTICE. For where no Covenant has preceded, there hath no Right been transferred, and every man has right to every thing; and consequently no action can be Unjust. But when a Covenant is made, the to break it is *Unjust*: And the definition of INJUSTICE , is no other than the not Performance of the Covenant. And whatsoever is not Unjust, is Just' (Hobbes, 1986: 202).

Justice and injustice are therefore premised on the upholding of the laws of the covenant. More so, for Hobbes, as I have noted above, the basis of these laws of the covenant, if they are to not be mere 'words', must have behind them the capacity of force: "Therefore, before the names of Just, and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants, by the terror [sic] of some punishment, greater benefit they expect by the breach of their covenant." (Hobbes, 1986: 202). The very naming of justice itself is therefore, in this genealogy, premised on the existence of the creation of security through the ordering of violence, not as arbitrary, private and random, but as public, regularized and knowable, through law, and therefore, administered as the upholding of rights or the righting of wrongs, under the newly inaugurated name of "justice".

Later, Locke, in the *Two Treatises of Government* [1689] (1993), was to take the social contract theory as the basis of government, further. Drawing on a more optimistic view of the state of nature, where violence was present in potential rather than manifestation, and in disagreement with Hobbes's (and Robert Filmer's) centralized common-wealth despot of the *Leviathan*, Locke argued that accepting a

centralized all powerful sovereign 'is to think that men are so foolish that they care to avoid what mischiefs may be done them by polecats or foxes, but are content, nay think it safety, to be devoured by lions' (1993: 53). As an alternative, Locke proposed a separation of powers within the commonwealth, with the Legislative and Executive functions bound by the rules upheld by the Judiciary. What Locke shared with Hobbes was the belief that the common-wealth, or government, was created not to protect its own interests, but through an imminent revelation of reasoned access to knowledge, which would allow for the exercise of pre-political natural rights, in his case, the right to life, to liberty and to property through a common law. These rights—to life, liberty and property, are God-given rights, and are knowable and discernable to those with the capacity for reflection and reason[12]. Again, like Hobbes, it is reason—and therefore the assumption of the possession of the capacity to reason-- that reveals the existence of natural rights, not dependent on time and space, but 'writ in the hearts of all mankind' (1993: 86)[13]. As he was to argue, drawing on Christianity, 'God, who hath given the world to men in common, hath also given him reason to make use of it to the best advantage of life and convenience (1993: 127). There is an important caveat of course to note here: not all possess the capacity to reason. He *qualified* the statement, by remarking that whilst God had indeed given the 'world to men in common', this should not be taken to mean he meant for it to remain in common or uncultivated: 'He gave it to the use of the industrious and rational, (and labour was to be his title to it) (1993: 131).

The conception of an independent judiciary, it is argued, arises from this conception of law, which creates a distinction between law and the realm of politics. Natural law, in its secularized version, makes claim to a set of rights against which the realm of the political give form, are judged by, and have to conform to. These are

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[12] In the genealogy of natural law, the Enlightenment interpretation is distinguished from the Medieval and Christian conception of *jus gentium* by the status of natural law in relation to obligation and compliance, which derives from a general acceptance, rather than a rule or force. This is taken up in modern law as "the general principles of law recognized by civilized nations" (see for example the *Statute of the International Court of Justice*, art. 38), from the Latin principle of *ius cogena erga omnes*, transl. "law that is compelling in relation to everyone", or "higher law" or "fundamental human rights" cf. Hart, H.L.A (1994) *The Concept of Law*, 2nd ed. Oxford: Clarendon Press] but from 'positive' law. Aquinas argued that whilst the positive legal system 'derived from natural law', these only carry legal force as part of a posited system: *ex sola lege humana vigorem habent*: ST I-II, q.95.a3 cf. John Finnis (1980) *Natural Law and Natural Rights*, Oxford: Clarendon Press; Lon Fuller (1969) *The Morality of Law,* New Haven and London: Yale University Press.

[13] According to Carlyle this finds its way into Christian doctrine on natural law through Cicero, cf. A.J. Carlyle (1927) *A History of Medieval Political Theory in the West*, vol. 1, p. 83.

constituted as 'fundamental' rights, which judicial interpretation exercises sovereignty over. Whilst evident in Greece and the uncodified rules of the Roman Republic, in its modern form Locke and more particularly, the French philosopher Montesquieu, provide the intellectual authority for the idea of a separation of powers.[14]

I am not casting aspersions at those who did and do use the law to protect and keep open the legal space for black subjects to exist in white South Africa or protect migrant refugees. Nor I am casting doubts on the ethics or political imperative to catalogue and document in order to provide legal evidence of human rights violations. What I am interested in are the ways in which subjects are constituted, both as victims—and as saviours—and how these come to have political effects that might be quite unforeseen or unintended or contingent, and yet come to shape the outcomes or terms on which, in this case, a wrong comes to be righted. The recourse to human rights during the anti-apartheid struggle, articulated within the legal realm, comes to make it entirely thinkable to constitute apartheid, at the TRC as a series of individualized wrongs, committed against individuals by individuals.

Kentridge's focused his subsequent comments on the increasingly pernicious effects of racialized segregation, and the willingness of the majority of judicial appointees to accept the political nature of the appointments, as well as the legislation they were implementing. Taken as an example of a sentiment, Kentridge's speech also describes a certain legal sensibility, and an argument within South African jurisprudence that emerged in opposition to the all encompassing legislative framework of the apartheid state from 1948 onwards, and from which the emergence of the recourse to human rights law in South Africa drew its vigor[15].

In 1972 the Legal Commission of the Study Project on Christianity in Apartheid Society (Spro-Cas), released a report, titled '*Law, Justice and Society*'[16]. The

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[14] Cf. Montesquieu, C [1777] (1989) *Spirit of the Laws*. Eds. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone. Cambridge Texts in the History of Political Thought. Cambridge: Cambridge University Press; Althusser, L (1972) *Politics and History: Montesquieu, Rousseau, Marx*, UK: New Left Books; G. Balandier (1970) *Political Anthropology*, Random House, p 3; Shklar,J (1989). *Montesquieu*, Oxford and New York: Oxford University Press.

[15] It was also a debate presented as a case of the particularity of Afrikaner nationalism's understanding of law as moral communal values, contrasted with the more universalist and 'progressive' orientation of liberal English-speaking white South African's and the legal tradition they sought to protect. Cf Lewin, J (1963) *Politics and Law in South Africa,* London: Merlin Press

[16] Randall, P ed. (1972) *Law, Justice and Society: Report of the Legal Commission of the Study Project on Christianity in Apartheid Society*, Johannesburg: Spro-Cas Publication no. 9

report comprised a series of individually authored papers, described by the Commission's Secretary, John Dugard, as an attempt to 'create an awareness on the part of the legal profession and the lay public of the incompatibility of apartheid's legal order with the ethical principles upon which Western legal systems are based' (Randall, 1972: 2). John Dugard has become one the most eminent South African scholars and advocates of human rights, with a growing international prominence[17]. Spro-Cas itself was a project that had its origins however not only in the legal fraternity, and was funded by the South African Council of Churches and the Christian Institute of South Africa.

The Spro-Cas Legal Commission's report converges two universalizing ethical domains: a Christian ethic, premised on the normative question of whether apartheid was consistent with being a Christian, and a secular legal ethic, premised on whether apartheid was consistent with the progressivist ideals of Western law[18]. The opening paragraph of the report gives a genealogy of South African common law, as derivative of a 'blend of principles'. These derive from Roman-Dutch law, as well as principles of English common law. But it also notes that this law is 'not merely a product of the legal genius of Rome and the Netherlands and the experience of English law: it is also the product of Judaeo-Christian philosophy, the legal manifestation of Western Christian civilization. The South African common law reflects the ethical values of Western society in its detailed body of laws and customs, promoting, through the instrument of the law, respect for the individual—his life, liberty, family and basic freedoms—and equality before the law.' (Randall, 1972: 3).

In this narrative of the location of the historical and cultural filiality of law, we are beginning to see the image of a certain conception of the role of law, its genealogy and its legal subject. In other words, it is a narrative of where the law that

[17] Besides his copious writing on apartheid and human rights law, Dugard has served as an ad hoc Judge on the International Court of Justice and as a Special Rapporteur for both the former United Nations Commission on Human Rights and the International Law Commission. More recently he has been, in the latter capacity, investigating human rights violations, as well as the colonial and apartheid features of the Israeli occupation of the Palestinian territories of the West Bank, and Gaza in particular. For his views on the apartheid features of Israeli occupation, a transcript of a lecture is accessible at http://www.thejerusalemfund.org/ht/d/ContentDetails/i/5240 accessed 03/07/2010.

[18] Whilst some might suggest an incompatibility between this secular and religious convergence, Alain Supiot (2007) has argued convincingly that these are historically entwined domains of a modern rationality.

we value comes from, how it evolves, and where it places those who remain faithful to it, both ethically, but also within a geo-spatial imaginary. Its unstated premise is that this is a version of law that is in Africa but not of Africa. This is described as the 'heritage' that had to be defended (Randall, 1978: 3). At its normative core is a rights bearing individual, a familiar figure embodied in liberalism's political subject. The Legal Commission report is concerned principally therefore with how the policies of the government's legislation and its practices impacted on the universal enjoyment of these 'Judeo-Christian' values by individual citizens. Do all citizens enjoy their individual rights, are they free and equal, and do they have unfettered access to the law? This narrative of law embeds itself firmly therefore in a 'Western' genealogy and at the same time ascribes to this particularity a universal purchase.

There is an important divergence that comes into existence, which I wish to note at this point. The UN declaration on apartheid as a crime against humanity highlighted four aspects: denationalization, political participation, self-determination and lastly, force. In contrast to this view, the South African human rights-derived critique of apartheid evolves to take a different view on the wrong of apartheid. In its view takes 'racial discrimination' rather than self-determination and the right to sovereignty are the key feature. It comes to focus on force—its victims and its perpetrators—as the most visible wrong of apartheid. The idea of a 'white South Africa', surrounded by 'homelands' for the various 'tribes', would require a violence of immense scale- the forced removals and relocations, the control and regulation of movement, the policing of boundaries; all of which, if the regime was to be a bastion of 'Western civilization', would be done through law. A series of laws were placed on the statute books, which had a three fold aim: to creation a nationally applied and imposed singular order of law which legally classified the population by race and ethnicity; to create the legal framework for two modes of political authority, one for natives and one for race groups; and to create the legal framework for the ethically and racially ordered provision of social life and social welfare. At the interstices of this bifurcated zones of belonging and exclusion, where those who sort to make the case for the universal, from various foundational claims- religious, moral, ideological, political, ethical and legal. It was for this latter group in particular, that a recourse to human rights would appeal, since it could make visible, and bring into question the developmental claims of the Nationalist Party-led government after 1948 by demonstrating the systematic and widespread nature of the violations the

implementation of these policies had on the individual *as a subject of suffering*, in other words, as a victim. The tension here for human rights lawyers is that modern legal rights rest on the metaphysically derived notion of a set of rights which are immanent and pre-political. These are translated in thought, through concepts and mythologies (and secularized) as the foundations of modern positive law. There is the law that is (sacred, divine, God-given) and there is the law that emerges from the labour of thought as the product of reason, the law that is not 'natural' but human—positive law. When human rights lawyers endeavour to critique the legality of the apartheid state and its laws, how would they pit one form of positive law against another?

The electoral victory of the Nationalist Party in 1948 brought to a colonial and segregationist history a refinement of the idea of what Partha Chatterjee has called 'the rule of colonial difference'- the permanence and radical otherness of the native which required a different path to self-improvement and development, via the structures of tradition and custom. It was in this context that the rise to hegemony in the mediation of pain and suffering of human rights law and the figure of the human rights lawyer must be located. In its institutional forms, a related mediating institution between the (white) lawyer-- the 'bridge builder'-- and the (black) subject of apartheid is the 'Advice Office' or the Advice Bureau. An illuminating example of this is the formation and history of the non-governmental organization, the Black Sash, and the issues that it took up[19]. In this realm, 'racial discrimination' became the dominant marker of what apartheid was about. Race was seen in this rationality as the grounds upon which individuals were denied the universal by their place in the epidemiological taxonomy, and which condemned them to their particularity. They were thus excluded from liberalisms' universal capaciousness. To correct this exclusion the modern political subject could make civil claims through law. More precisely, claims could be made through the mediating figures of law – those considered citizens with rights, on behalf of those considered non-legal, or precariously legal persons subjects lacking in rights. This mode of critique establishes then an idiom, and a style of evidentiary practice that requires not only a corporeal subject of suffering, but also a empirically verifiable corporeal agent of pain, a perpetrator, which a skillful lawyer could bring into the same orbit with the victim

[19] BC 668 (B1.1), Manuscripts and Archives Department, University of Cape Town Libraries.

by linking the two in order to demonstrate culpability. It is this genealogy of speaking about pain and suffering that comes to hegemony through its capacity to speak, as racial citizens, in a language and in a way that frames the wrong of apartheid—as racial discrimination—and which finds a global traction in and through a universalized liberal subject as its index.

By the late 1970s the major political challenge facing the apartheid state, post the 1976 uprisings, is that the project of apartheids grand plan to denationalize the native subject was brought into crisis. State reform measures in the period thereafter seek to address this challenge through a reconfigured conception of local government designed to co-opt a layer of black urban leadership in townships. Importantly, and with significant consequences for the counter-insurgent aims underpinning the hopes of the state, the regulation of black life under this reformed local government system could not distinguish and demarcate the residential life of black South Africans along ethnic lines *within* South Africa, as it did in the homelands. Urban African townships were a heterogeneous mix (this is not to say that socially there were not ethnicized spatial enclaves within townships decided on by Africans themselves). The state had to contend now with a spatial mode of control in its regulation of life in African townships. It had to govern native life through the corporatized identity of blackness, rather than its preferred taxonomic classification of Africans as multiple ethnicities, as it did under customary law stipulations in Native Authorities. This forced it to shift slightly from its imaginary of the bifurcated vision of apartheid, divided between racial citizens and ethnic subjects, and a country of multiple minorities. It had to also therefore find an alternative mode of regulation and control, of law and order, if it could not hope to govern urban African life through the 'decentralized despotism' of the Chief . It was conceding the legitimate the right of Africans to be resident in 'white South Africa', rather than enforcing their status as temporary sojourners, and therefore permanent potential criminals for being merely present in an urban setting. The precarious urban native subject ultimately, and politically, makes a claim not to be constituted as a victim who's pain and suffering is mediated by the citizen who can access legal claims. In other words, for the human rights lawyer, the urban native subject is the refugee, the person who does not have the right to have rights. For the urban black subject, the political act makes a different demand- the demand to make residency the grounds

for citizenship. This is the paradigmatic politics of the township, to transform precariousness into permanence. Insecurity into belonging. Refugee into citizen.

The Refugee

When the picture of the killing of Ernesto Nhamuave ran on Monday morning in the daily papers, the caption, and the accompanying story was silent on what happened after. A reporter recalled a panicked resident warning police that 'Shangaans are being attacked'. We were told that 'one plump woman… could not contain her laughter…and regaled her audience with details of the event'. This reaction to the photograph, which brought laughter to some, and horror to others, marked a disjuncture in how we imagined 'the nation', and ruptured certain conceptions of it.

The picture caused what we might describe as a "scandal". Its scandal was out in the open for all to see: refugees, the most vulnerable people on this continent, were being attacked, and killed by the poor of South Africa's townships, who too are counted as amongst the most vulnerable on this continent. Here we were not exceptional. Modern economies, globalization and colonial empires have moved goods, capital and people for centuries, giving rise to tensions and animosities. Throughout colonized Africa, indigeneity has become a politicized matter. The colonial state distributed rewards and punishment along these lines, turning where you came from into a political issue. In his reflections on violence after colonial rule, written in 1963, Frantz Fanon observed with prescient foreboding clarity: "The colonized man will first manifest this aggressiveness which has been deposited in his bones against his own people… the colonized man is an envious man'. Without a meaningful decolonization of the society which benefits all, Fanon warned, this envy in the post-independence period turns on outsiders: 'From nationalism, we have passed to chauvinism, and finally to racism. These foreigners are called on to leave, their shops are burned, their street stalls wrecked…We observe a permanent seesaw between African unity, which fades quicker and quicker into the mists of oblivion…'

I was part of a research team hastily assembled to look into the matter[20]. An aspect of the reporting shared by elites, from business leaders, to many in the state, to NGO's was the outrage at what had happened. This took various forms. Yet, all

[20] Human Sciences Research Council (2008)

implored South Africans to embrace fellow Africans and to seek unity in this thriving diversity. The newspaper reports, and here not the tabloids, but the mainstream press, all carried stories on the attacks bannered under headlines such as mob nation, describing the perpetrators as thugs, hooligans and barbarians.

If we were going to understand what was going on, we would need to understand the subjectivity out of which this violence was emerging. One of the communities we conducted fieldwork in is was Imizamo Yethu in Houtbay. A small but growing informal settlement on the slopes of the mountain, IY, as it is known, comprises of Namibians, Mozambicans, Zimbabweans, Chinese traders, Malawians and South Africans, mostly Xhosa-speakers descendent from the Eastern Cape. Its demographics and geography give it the character of a microcosm of South Africa at large in some ways. If we started with the notion of an US and Them as the dividing line, it quickly became apparent that we are dealing with multiple US and Them's. The Us of South Africans of African descent making permanent their residence in this increasingly formalizing informal settlement. The them of foreign Africans who were both economic migrants and political refugees, trying to make a living and seeking peace away from troubled homes. There was the Us of the white Houtbay community of middle and upper-class folk. There was the Them of the entire IY community whom the former would rather have removed from the pristine picturesque valley because the latter gives their exclusive area increasingly the look of a Brazilian favela. Then there was the Us of the older so-called Coloured fishing community. And so on.

IY has not had any physical violence, but shops werelooted that are owned by foreign nationals. We found out that IY has a vibrant community life, and that its Development Forum is very active. A range of political organizations operate there, and there are two very active Community Development Workers, who also happen to be officials of the ruling party. The Community Development Forum worked closely with the Station Commander of the Hout Bay police station, a very innovative female officer who was turning he police station a community center of sorts.

We found out very quickly that the CDW's were quite angry. They were angry not at foreign nationals. They were angry that two years of community work to build relations between the locals and foreign nationals is being undone by a very vocal and insistent group of residents in Houtbay. They were angry that the white residents of Hout Bay, hearing the stories about attacks on foreign nationals, went to

the Hout Bay police station, and pressurized the police to escort foreign nationals out of the area, to get them to evacuate the area. They were angry that these residents showed up at the entrance to IY and removed the foreign nationals, many of whom were in their employ. They are angry that all of this was done without consulting them. And once the foreign nationals were evacuated, the looting of shops begun.

Now, this story is a small one. But I think it is instructive. And it is recurring. In the most recent stories of impending attacks, the CDW's and some researchers doing field work have describe how some NGO's, and some young mostly white activists, and residents from the area, are arriving in the area with posters and placards, imploring the residents of IY to say no to Xenophobia, and to embrace tolerance, diversity and other Africans. Again the locals are not consulted. Good intentions are no doubt behind the actions but in the rush to find solutions and to act, the nature of a problem can be assumed rather than probed. And its manifestation can be assumed to be the problem itself rather than being viewed as a symptom. I also have in mind the German political theorist, Hannah Arendt, who noted that :

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as 'inalienable' those human rights which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation of the rightless themselves (Arendt 1968: 278).

There is a disjuncture between what Arendt describes as the rightless themselves, and those most prosperous. But lets adapt Arendt to speak to our condition, to say that we are not talking about the rightless in this instance, but different ways in which rights are being engaged, claimed and protected. And that rather than between a first world and a third world, or a colonized and colonized, or developed and underdeveloped as different entities, were are talking about geographically proximate but economically, socially and culturally distinct communities of apartheid within the same state. In this Manichean world, some are asserting and claiming their rights themselves. And some are asserting and claiming rights on behalf of others, mediating between these worlds. There is therefore, with repetition and differece, what we might call the judicialization of political discontent in South Africa. That is to say, the addressing of political demands and discontent has corralled politics, after the end of apartheid, into legal channels and

constitutional discourses. The expression of political discontent through judicial mechanisms is an indication, some might say, of the perceptions of the efficacy, transparency and trust in these mechanisms to successfully mediate and regulate the power of the government in relation to the sovereignty of the constitution, which contains the fundamental rights to which all citizens are now equally entitled in post apartheid South Africa. This, at its core, is the vision of citizenship which liberal democracy holds dear. In historical context, these are significant developments which are not to be undervalued in any way. However, they put into play a set of practices that have important implications for how democracy is lived.

It seems to me, that we also have individuals and communities asserting and claiming certain rights, increasingly not only through legal and acceptable ways, but also through ways which we have labeled as criminal, as thuggery, and as hooliganism. In the focus groups it was apparent that there was widespread discontent in informal settlements about a range of welfare based promises that are either slow in the offing, or mysterious and opaque. The provision of housing is not fast enough, and where there is new housing settlements there appears to be irregularities, and so on. There is a lack of jobs, and job creation seems non existent. There was a lack of consultation, and party branches were weak and instrumentalized around elections. There is a general sense of being ignored. And when the violence broke out, the response by the political elites, the NGO's, the charities and middle class, mostly white society, was to visit and take care of the foreign nationals and ignore or admonish the locals. We were told this further enraged local sentiments towards foreign nationals.

Almost a year later, there was another picture on the front page of the Cape Times. There were flames, there was anger, there was violence. Yet consider the difference in response to that picture, and this picture of May 2008. The day after the May 2008 story, the newspapers, were filled with articles about it. But now there was nothing. No scandal, no outrage, no NGO, nor charity, nor state, no middle class mobilizing. This violence, protesting the lack of services, has become so normalized for the middle classes, that it did not mobilize us into sympathy nor empathy.

I think there is something worth reflecting on here. When do certain violations of rights or lack of fulfillment of rights become scandalous and when do they not? Currently the mainstream media is dominated by the debate on the media and free speech and there is an outpouring of alarm around it. Rightly or wrongly it

is a scandal of sorts for a very small but vocal minority. Even though I suspect for the vast majority of South Africans there is indifference. And when we talk about violence, threats, and animosity towards foreign Africans, we are talking about something that too has taken on the proportions of a scandal and commands attention, energy and action. We talk about addressing xenophobia through the injunction to tolerance, through the allocation of citizenship rights, through the language of diversity and community, through the protection and upholding of human rights. And this is all good and well. But I am doubtful about the efficacy of this response if it is designed and intended to address the violence. It seems to me that an exclusive focus on human rights or an appeal to embrace otherness, tends to either not resonate with the potential perpetrators, or to increase the animosity towards the very victims of potential violence.

If you look at the images of many are young men. And we know that informal settlements are the location. We now know that two thirds of South Africa's unemployed are under the age of 35, and that 75% of those unemployed young people, mostly men, are neither studying nor working and have never had a job in the formal economy. Some people have been saying for a while that this is the fundamental ticking time bomb. Well, if you look at who the main looters of stores are , the main constituency from which those carrying out violence, it is mostly young men…the ranks of the unemployed and formally lacking in education. Many of whom have given up looking for jobs.

The violence towards foreign nationals is our scandal; manifest and appalling. But we must ask ourselves, what rights should we be asserting on the terrain of politics, as the object of political struggle, and political contestation? A question to be explored is why is it that the structural violence, this violence that condemns many unemployed, those lacking in formal education or job prospects, a violence that assaults dignity, imagination and hope, why is that violence not the scandal that mobilizes the middle classes, the suburbs, the bulk of NGO's, the media into action? Is it not an abdication to leave that to the State, and bemoan its efficiency, but not mobilize politically around it? As Samuel Moyn has argued,

"The ideological ascendancy of human rights in living memory came out of a combination of separate histories that interacted in an unforeseeable explosion. Accident played a role, as it does in all human events, but what mattered most of all

was the collapse of prior universalistic schemes, and the construction of human rights as a persuasive alternative to them." [21]

IY displays the difference between two forms of organization. On the one hand, the local organizations of the community, as present in the IY development forum, made up most mostly of organizations from the community, and accountable to the community, with elected officials who will have to explain their actions to that constituency. In the case of the political parties, like the ANC and organizations like the SACP, accountable to the party as well. On the other hand, many of the human rights advocacy groups campaigning against xenophobia are NGO's, not social movements. Or social movements external to the communities where the violence has taken place.

NGO's, by and large, bring with them a particular kind of political practice since they are often driven not from the bottom up, by the mandate of 'the grassroots', as democratically representative and accountable, but are professional groupings with particular interests, with paid officials, and often times accountable to the concerns of donor funding upon whom they are dependent, most of which originates in the metropoles of Europe and North America. This is not say that there is not considerable variation, or that many NGO's take as their interest advocacy work related to the needs of marginalized, disadvantaged or vulnerable categories in a society. NGO's are thus accountable, but not necessarily to the constituency they claim or seek to represent.

In the case of IY, the lesson is that the external organizations, from the Houtbay residents in the middle and upper class houses, to those driving through with their placards saying "No to Xenophobia", are doing little to work with and through the local organizations, and to support the slow, less visible day to day work that those who live there are doing. The kind of organizing that recognizes that neighbour will have to live with neighbour. That recognizes that the message of love and tolerance struggles to find traction if not accompanied by a political struggle against the structural violence that places vulnerable people in vulnerable situations, an leads them to do awful things to each other sometimes, locked together as they are in this cheek by jowl poverty. And alongside the inequality, now the highest in

[2121] Samuel Moyn (2010) *The Last Utopia*, New York: Columbia University Press, p7

the world[22]. The actual violence is also symbolic and a manifestation of a kind of politics, a kind that cares less about the formal institutions of parliamentary constitutional democracy, less about the uproar and outrage of the very small but dominant bourgeois civil society.

When the residents of informal settlements expelled foreign nationals from these areas, attacked them and looted stores, a new urban refugee was produced. Betwixt and between, the UN intervened, along with the South African government, to set up refugee camps. The government adopted a policy designed to prevent the existence of any enduring formally constituted refugee camp. It decreed that those in the temporary refugee camps be 'reintegrated' to the informal settlements they had fled from. Those who resisted reintegration would face deportation. Reintegration was not thought of as an organized or institutionalized process, but simply as the injunction to return. Mindful of the status of the camp as a site of care, and possible quandary of the consequences of creating permanent temporary camps, the South African government was quick to seek to dismantle these camps before its occupants might make claims to be citizens who seek both representation and care. After some protest by NGO's, the camps were allowed to endure slightly longer than the two month period decreed, and a year later in May 2009 the provincial government of the Western Cape applied for the eviction of 461 refugees in two camps in the province[23].

Forced removals, and the creation of homelands which are the spaces for the existence of apartheid subjects, rather than its citizens, share with the refugee camp its key feature: The camp, like the homeland Bantustan, and the township where

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[22] Haroon Bhorat & Carlene van der Westhuizen & Toughedah Jacobs, 2009. "Income and Non-Income Inequality in Post-Apartheid South Africa: What are the Drivers and Possible Policy Interventions?," **Working Papers** 96114, University of Cape Town, Development Policy Research Unit

[23] "Foreigners displaced by violence in South Africa move into temporary camps". The Canadian Press. http://canadianpress.google.com/article/ALeqM5ibeZeGJbRIF2sQiMsqquz3WRICMw. Retrieved 30 June 2008.; "Camp conditions alarm SACC". News24. http://www.news24.com/News24/South_Africa/Xenophobia/0,,2-7-2382_2346122,00.html. Retrieved 30 June 2008.;"Reintegration the priority – government". Independent Online. http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=nw20080604125107561C769068. Retrieved 30 June 2008.; "Go home or go back: Home Affairs". The Times (SA). http://www.thetimes.co.za/SpecialReports/Xenophobia/Article.aspx?id=780888. Retrieved 30 June 2008.; "No 'forced reintegration' for immigrants". The Times (SA). http://www.thetimes.co.za/SpecialReports/Xenophobia/Article.aspx?id=781999. Retrieved 30 June 2008.; "Govt: Victims of xenophobia won't be deported". Mail & Guardian. http://www.mg.co.za/article/2008-06-20-govt-victims-of-xenophobia-wont-be-deported. Retrieved 30 June 2008. "Cape Town wants to evict refugees". The Times. http://www.thetimes.co.za/News/Article.aspx?id=996699. Retrieved 11 May 2009.

those who are forcibly evicted are relocated to, is in this instantiation a site of displacement, and the location of pain and suffering. It is worth noting that the memorialization of migrant labour exists in postapartheid South Africa through 'community' initiatives, like the Lwandle migrant labour museum on the outskirts of Cape Town, that seeks to mark this displacement and narrate the pain and suffering that arises from the desire to have the native be a subject that migrates into the urban area, but does not belong there. I would say that condition of the black subject under apartheid might be described as the condition of the refugee. And like the refugee in the camp, the urban native South African increasingly comes to be constituted within a certain mode of critique that arises against this condition, as a victim, and a target that is the object of care. Like the refugee in the camp around which an entire discourse of pain and suffering emerges, and around which humanitarian technologies and humanitarian beings act, the refugee requires its advocates, often in the form of the international NGO movement who mediate the pain and suffering of the refugee through a discourse of care which universalizes the condition of the victim as a human rights violation. So too did apartheid's ethnic subjects come to find themselves increasingly being mediated victims of pain and suffering by their own advocates—quite literally advocates of law. The lawyers and paralegal community that came into being to draw attention to, and fight the case of the victims of apartheid's most brutal aspects- its will to denationalize the majority and reorder belonging and territory. Those are who were racially classified had access to civil law, and could make a case on behalf of those who were ethnically subjected to the violence and insecurity of an precarious urban existence. Both the discourse of care that emerges around the refugee in the camp, and the discourse of law that emerges around the black subject proclaim themselves anti-political or non-political. Humanitarianism asserts care in ethical and bio-medical terms. It constitutes the victim in universal terms abstracted from history, identity, and politics. Law narrates its autobiography in a similar fashion: the law, claims apartheid's legal critics, is not political, even if apartheid itself was legal. Like care, law is something to be administered.

Another way of looking at the violence that characterized South Africa's townships under late apartheid would see it as the claiming of a collective right, the right to belong as a citizen, based on residency. These were the political claims made by formations within townships, who demanded self-determination and self-

representation. From this vantage point apartheid was its will denationalize rather than its exceptional violence. In other words, the question of who could be a citizen. The category of native and refugee w speaks then centrally to a postcolonial African dilemma. The solution to the desire to denationalize the indigenous in many African countries was to see justice as the privileging of those considered indigenous as the rights-bearing postcolonial political citizen. The legacy of colonial rule was to politicize indigeniety[24]. Making it the grounds for citizenship or for being considered a foreigner, often a refugee. Even if one has lived in the same place for more than a generation, often having fled a political conflict or civil war. Rather than a temporary exception the refugee camp then becomes normalized. The refugee camp might then be the paradigmatic metaphor for one of our postcolonial dilemmas: the care of those who come from else where, but who never can belong as long as descent rather than locality is the yardstick for rights and citizenship. A question, and it is above all, a political question [where 'citizen' is to name a litigious condition, following Ranciere] then remains: when, and under what conditions, might the refugee be freed from the camp and transformed from the victim, the person who comes from elsewhere, into a citizen? It is a political question in as far as it prescribes the answer to the question: who can be the political subject?

[24] Mamdani (1996) *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* New Jersey: Princeton University Press