Legitimizing Evictions in Contemporary Europe and Apartheid South Africa

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At the basis of this article is a purely visual association. Media pictures of the eviction of informal migrant settlements in Calais, Idomeni, Amsterdam and other places in Europe are reminiscent of pictures of informal settlements in South Africa under Apartheid being dismantled. In both cases, the people who are being targeted by state violence are "non-white"; law and order is maintained by "whites"; the places people are being evicted from are informal dwellings; and this is happening for years and years on a regular basis.

But is the association more than visual? Does the visual give us access to a similarity that deserves to be fleshed out in verbal concepts; or is it an association that, upon closer inspection, is better discarded? This paper undertakes to investigate these questions. In both cases, people were denied the right to a home (or at least: to the home they were occupying at that moment) because they were considered to be illegal aliens. But how did this situation come about? How did these people become illegal aliens? And while it seems obvious that illegal aliens can be deported from the territory, how did their alien status come to justify the destruction of their homes?[2] Pursuing the association means we will not only identify similarities, but also try to establish where the association meets it limits. It seems likely that there are real differences between the situation in Apartheid South Africa and contemporary Europe with regard to the underlying normative frameworks that informed these policies.

The aim of pursuing a visual association across time and space is not primarily to draw exact parallels. In contemporary Europe, the use of violence of a "white" state in order to destroy the housing of "non-whites" is accepted as a normal element in the regulation of "non-white" populations. The association with Apartheid seeks to problematize this normality by pointing to the uneasy pedigree of such practices.

Under the South-African Apartheid regime as well as in contemporary Europe, a situation came into existence where considerable numbers of people were categorized as illegal aliens. This paper will map how, on the basis of their illegal alien status, their houses could then be destroyed because they were not supposed to be living where they lived. The legitimation for this will be clustered in two groups, being internal spatial policies (public planning in the case of South Africa, public order in contemporary Europe), and external spatial policies, i.e. migration law. A final section discusses where the association between South Africa under Apartheid and contemporary Europe makes sense in a legal context, and where the parallel reaches its limits.

1. Illegalization in Apartheid South-Africa

The apartheid policy that South African Government adopted up until to the 1990s was founded on four legal pillars, two of which are relevant for our context: the Population Registration Act and the Group Areas Act (the other two were the Prohibition of Mixed Marriages Act and the

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[2] Comp. on the plasticity of the relation between alienage and rights Linda Bosniak: *The Citizen and the Alien. Dilemmas of Contemporary Citizenship*, Princeton University Press, 2008.

Immorality Amendment Act). The legal foundations of apartheid policy were laid with the 1950 Population Registration Act,[3] which divided the South African population into three main "racial groups", namely "whites", "natives (blacks)" and "coloreds".[4] The concept of race was considered a mixture of physical and social characteristics, such as language.

1.1 Legitimation through spatial planning law

The 1950 Group Areas Act[5] and 1966 Group Areas Act[6] played an important role in racial segregation. The former divided urban areas into racially segregated zones based on the 1950 Population Registration Act[7] and criminalized the residence and the ownership of land in a territory that was not assigned to the appropriate "racial group". Its aim was to exclude "natives" from more developed urban areas and the best suburbs, applying the theory that "natives" could only live there temporarily. "From the Government's point of view, the most useful" effect of group areas has been the creation or expansion of labour pools of non-white workers in conveniently controllable areas linked by railroads to the industrial cities."[8] In case of conviction, not only would "natives" face a penalty (a fine or up to two years imprisonment); they could also be ordered to vacate the urban area where they were living.[9]

This law, combined with 1954 Native Resettlement Act,[10] endowed the South-African authorities with the power to forcibly remove "natives" from any area within and next to the magisterial district of Johannesburg. An example of the application of these laws is the destruction of Sophiatown, a multi-racial suburb of Johannesburg. The area became overpopulated when "non-whites" were removed from the inner city of Johannesburg. Because "natives" were not allowed by the government to acquire permits for land ownership, they built houses out of metal sheets and excess materials. On 9 February 1955, the South-African authorities sent 2.000 policemen armed with sten guns and rifles. They destroyed Sophiatown and ultimately removed 60.000 inhabitants. People who had settled in there were moved to Meadowlands, which formed a part of Soweto. However, some people refused to leave Sophiatown. Residents of Sophiatown protested and used explosives and guns to fight government officials. In 1960 the destruction of Sophiatown was finalized, and a new "white"-only neighborhood was erected with the name of Triomf (Triumph).[11]

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[3] Act No. 30 of 1950.

[4] Section 5 (1), 1950 Population Registration Act.

[5] Act No. 41 of 1950.

[6] Act No. 36 of 1966.

[7] Section 3 (1), 1950 Group Areas Act.

[8] Barry Higgs: The Group Areas Acts and Its Effects, United Nations Centre against Apartheid, Department of Political and Security Council Affair, 1971, p. 20; comp. Henry J. Richardson: Self-Determination, International Law and the South African Bantustan Policy, *Columbia Journal of Transnational Law* 17 (1978), p. 185-219 at 186-190.

[9] Section 34, 1950 Group Areas Act.

[10] Act No. 19 of 1954.

[11] South Africa History Online (SAHO), "Sophiatown", http://www.sahistory.org.za/place/sophiatown. More generally, see the special issue of *African Studies* Vol 74 (2015), No. 1, p. 1-145.

Figure 1 Sophiatown, Photo Jürgen Schadenberg

The effect of moving "non-whites" to areas devoid of facilities was "to undermine their standing and leave them at the mercy of powers designed to manipulate them as movable units of labour. In many cases, after group areas removals had been effected, communities were transplanted to other areas which, due to their total lack of development or facilities, have rapidly assumed the slum characteristics of their forerunners. A prime example is Lenasia, the township for people of Indian descent in Johannesburg created towards the end of the 1950's. It was reported in 1963 that there were still no street lights, only two tarred roads, no waterborne sewage, no hospitals or clinics, no mail delivery, and inadequate police protection."[12] Lenasia was one of the townships to which the former inhabitants of Sophiatown had been forced to move.

In 1966 the Group Areas Act was amended to introduce stricter criteria for "non-whites" (for instance, District Six of Cape Town was declared as a new "whites"-only place and

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[12] Barry Higgs, The Group Areas Act and Its Effects, p. 15.

destroyed after 1968 by government bulldozers). Significantly, "blacks" were not called "natives" anymore in public acts, but "Bantu" instead, indicating what the next step of the apartheid policy would be in the years to follow. A study of Eric Winchester (a United Party Member of Parliament) shows that solely in 1969 more than a million South Africans had been ordered to move away according to this Act[13], while the Surplus People Project estimates that 80% of the 3.5 million people forcibly removed from 1960 to 1983 were "blacks".[14] Similarly, informal settlements in urban areas were destroyed and the 1951 Prevention of Illegal Squatting Act[15] punished squatting severely. Denial of "black" property ownership led to a situation where "blacks" were accommodated in hostels, compounds and shanty towns, and formed the majority of squatters. The shortage of "black" housing is illustrated by the fact that there were 1,3 million squatters in South Africa at that time.[16] The grounds of forcible removals were multiple:

- Farm removals, including removals due to the abolition of labour tenancy on "white" owned farms in the 1960s and 1970s. This was abolished in 1979;
- Clearance of so-called 'black spots'. These are properties outside areas designated for occupation in terms of the 1913 and 1936 Natives Land Act;[17]
- Removals that have been necessary to consolidate the various tribal areas into blocks for homelands;
- Urban relocation, including the removal of African townships from prescribed areas to the national states;
- Removals of informal settlements in urban and peri-urban areas. Section 38 of the Black Communities Development Act[18] provided, before its repeal, that where a town or hostel was altered or disestablished, any person could be removed from such town or hostel to another place;
- Removals due to the operation of influx control legislation;
- Group Areas Act removals. People were often 'disqualified' in terms of the Act from occupying the land in question.[19]

The 1952 Natives Law Amendment Act[20] amended the Natives (Urban Areas) Consolidation Act[21] and regulated the conditions under which "natives" could stay in the urban areas. It allowed "natives" to live in urban areas only if they permanently resided there since birth or had continuously lived in the same urban area for 15 years or had worked for the same employer for ten years or had a permit. In order to have a permit, it was necessary either to be registered as a local worker or to be a job-seeker (in the latter case, the residence could last between 7 and 14 days). Wives and children of people so qualified could live in urban areas as well. As concerns

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[13] Quoted in Barry Higgs, The Group Areas Act and Its Effects, p. 6.
[14] Surplus People Project: *Forced Removals in South Africa*, Cape Town 1983, Vol. 5, p. 95.
[15] Act No. 52 of 1951.
[16] Quoted in J. Burdzik and D. Van Wyk: Apartheid legislation 1976-1986, *Acta Juridica* 1987, p.119-164, at p. 155.
[17] Act No. 27 of 1913; Act No. 18 of 1936.
[18] Act 4 of 1984.
[19] Burdzin and Van Wyk., supra note ***, p. 158.
[20] Act No. 54 of 1952.
[21] Act No. 25 of 1945.

children, they could live in urban areas as long as they were dependent on their parents. All those who did not have these qualifications could stay in urban areas no longer than 72 hours without permission. Those who stayed unlawfully in urban areas were considered criminal offenders and they were eligible under section 36 to forcible removal. They were detained in custody pending removal and then they were sent home or to a place indicated by a commissioner or a magistrate.

1.2 Legitimation through migration law
The Group Areas system assigned geographical areas to particular racialized categories. This facilitated the step to a situation where some areas were declared "independent" , with the consequence that migration law became applicable to the new "aliens". When the Bantustan policies culminated in formal independence of a number of Bantustans, migration law became an additional legitimation of policies which resulted in eviction and destruction of informal settlements of people who had now become "aliens" and, if they resided in South-Africa, were "migrants".

The 1959 Promotion of Bantu Self-Government Act[22] set up eight (later extended to ten) "Bantustan" (Homelands) out of the existing reserves, each one with a degree of self-government. It is remarkable that most of these Bantu Homelands were not geographically unified: instead, their territories were scattered (Figure 2).
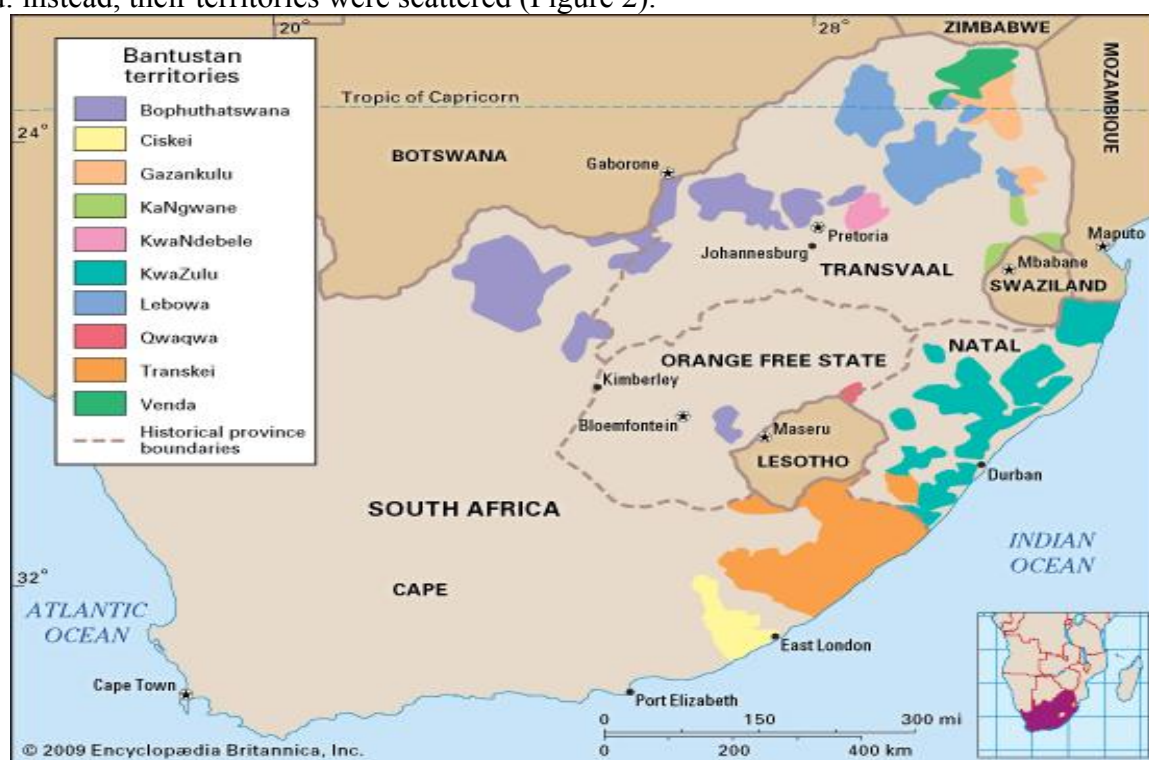

Figure 2 Bantustan territories, source Encyclopedia Britannica

This Act became one of the keystones of the South-African policy. These Homelands were to be given independence and "natives" were forced to move there and exercise their civil and political rights only in these Bantustans. Indeed, "blacks" were given a whole new citizenship through the

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[22] Act No. 46 of 1959.

1970 Bantu Homeland Citizenship Act.[23]   The newly assigned Bantustan citizenship was connected to their racial, cultural and linguistic backgrounds. It affected all "blacks", whether they had ever lived in the areas to which they were assigned or not. Section 3 of the 1970 Bantu Homeland Citizenship Act grants citizenship of the respective Bantu territories to every Bantu person born or domiciled in that territory; every Bantu person speaking the Bantu language of that territory; or Bantu persons related to or identified with the Bantu population or associated with it by virtue of cultural or racial background. Independence was to be gradually granted to all Homelands. Between 1976 and 1981, Transkei, Bophuthatswana, Ciskei and Venda actually became independent. As a consequence, the respective "black" South Africans lost their South-African nationality. It is estimated that approximately ten million "blacks" were dispossessed of their South-African nationality,[24] but approximately 2-3 million "blacks" received it back with Restoration of South African Citizenship Act 73 of 1986.[25] The other 7-8 million continued to be regarded as aliens in South Africa in terms of the Aliens Act of 1937.[26] A 1986 study shows that in South Africa, excluding Bantustans, "whites" represented the 19.5% of the population, while the 65% of population were "blacks", even if the official figures probably undercounted the "black" population because of widespread reluctance among "blacks" to provide census data.[27] The Aliens Act of 1937 provided that no alien could enter Republic of South Africa for the purpose of permanent residence or temporary sojourn without a permit, and without having a valid passport or other valid travel document issued by his own state.

In effect, the South-African government deprived a substantial group of its citizens of their South-African nationality by assigning them to Bantustans, which were then declared to be independent states. And subsequently, they applied immigration law to the people who, after losing South-African nationality and acquiring a Bantustan nationality, had become "migrants". This did not per se mean that they became illegal immigrants. When the Government was interested to keeping "blacks" in South-African territory, it did. This is what happened with men: young, adult and able-bodied males were actually allowed to stay close to "white"-reserved urban areas, while children, women, elderly and infirmed men were removed. But Bantustans ended up being overcrowded, with a high rate of unemployment, because the richest part of the country remained in the territory of the Republic of South Africa. Generally, the Bantustans were the poorest parts of South Africa, with only about 3 percent of South Africa's Gross Domestic Product produced in all the Bantustans combined. It is remarkable that Bantustans represented the 13% of the South Africa's territory while 75% of its population resided there. Those who had the opportunity worked in South Africa. The "migrant" workers from Bantustans were usually hired on one year contracts, and could not take their families with them. They used to live in squalid, single-sex, barracks-style hostels. "Migrant" workers were not allowed to go out and seek work directly with an employer: employers submitted their labor requests to a central labor bureau, which then recruited in the Bantustans. Bophuthatswana provided some 236,000 migrant workers and 163,000 commuter workers; both groups worked in "white" areas. Commuter workers actually lived in Bophuthatswana but commuted by bus or train on a daily basis to jobs

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[23] Act No. 26, 1970, Government Gazette , 9th March 1970.

[24] Joe W. Pitts: The concept of citizenship: challenging South Africa's policy, *Vanderbilt Journal of Transnational Law* 19(1986), p. 533-584, at 552.

[25] Burdzik & Van Wyk, *supra* note ***.

[26] Act No. 1 o 1937.

[27] Thomas S. Szayna: *Identifying Potential Ethnic Conflict: Application of a Process Model*, Rand Corporation, Santa Monica 2000, p. 190.

in the "white" areas. Since they were not able to live near the workplace, they were forced to travel several hours every day. To be as near as possible to their place of employment, people built squatter settlements in Bophuthatswana, especially near the Pretoria-Witwatersrand industrial areas. Over 40 percent of the Bophuthatswana population lived in these squatter camps in 1984.[28]

The South-African government stated officially that the aim of Bantustan policy was not racial discrimination.[29] Three main arguments were used for its rationalization. First, there was a *cultural* argument. According to this argument, the Bantustan policy was used to prepare "blacks" to cope with a "higher" grade of civilization, where they were allegedly not able to function yet.[30] A South-African government report on "reserves" for the "black" population asserted that "a continuation of the policy of integration would intensify racial friction and animosity", and that "the only alternative is to promote the establishment of separate communities in their own separate territories where each will have the fullest opportunity for self-expression and development".[31] The purported impossibility of integration was underlined by the fact that Afrikaans-speaking "whites" and English-speaking "whites" struggled over 50 years to merge, after South Africa was established as a single country in 1910. Therefore, according to the South-African government, whereas the international community (especially, UN) criticized South Africa in moralistic language, by contrast what was needed according to its architects was a sociological appraisal. Moreover, the two cultures (that of "whites" and that of "blacks") were not to be seen as hierarchically superior or inferior, but as two different cultures, whose integrity had to be preserved. Indeed, the scholar Charles Manning who defended Apartheid suggests a comparison between the Bantustan policy and that that involving Ireland and UK. According to manning, in both cases, the portion of the country that historically belonged to an ethnic group was assigned to it.[32]

Second, the then Prime Minister Verwoerd explained that the Bantustan policy was a result of international pressure to recognize the *right to self-determination* of "black" Africans. In a 1961 speech, he affirmed that due to the pressure caused by UN and proceedings before the International Court of Justice, South Africa had to choose between giving up Apartheid completely and making concessions in the framework of separate development.[33] In 1963, the South-African Government "granted" a limited form of self-government to Transkei[34] in order to prove to ICJ the sincerity of its program. In the proceeding before ICJ over South West Africa,

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[28] *Development Studies Southern Africa*, Bureau for Economic Research, Co-Operation and Development, Pretoria, Vol 5, No. 1, October 1982, pp. 106-109; *Development Studies Southern Africa*, Bureau for Economic Research, Co-Operation and Development, Pretoria, Vol. 6, No. 1, October 1983, p. 98; and Quarterly Bulletin, South African Reserve Bank, June 1982. p. 83. These sources are referenced from Richard Knight: Black Dispossession in South Africa: The Myth of Bantustan Independence, *Southern Africa Perspectives* 2/84, accessible on http://richardknight.homestead.com/bophuthatswana.html, last accessed 9 October 2017

[29] 11 U.N. Monthly Chronicle, no. 10, at 21 (1974).

[30] Henry J. Richardson: Self-Determination, International Law and the South African Bantustan Policy, *Columbia Journal of Transnational Law* 17 (1978), p. 185-219, at 191.

[31] Quoted in Charles A.W. Manning: In Defense of Apartheid", *Foreign Affairs* 43 (1964), p. 135-149, at p. 136.

[32] Manning, supra note *** at 142.

[33] House of Assembly Debates, cols. 4191-93, Apr. 10, 1961.

[34] Transkei Constitution Act, Act 48 of 1963.

Dr. W. M. Eiselen, one of the main architects of the separate development doctrine, affirmed that the aim was to grant independence to different ethnic groups in South Africa, in respect of the principle of self-determination.[35] It is noteworthy that South Africa was not the only country rejecting international claims accusing the South-African Government of perpetuating colonial domination and violating international law. Representatives of Benelux countries, indeed, when justifying their abstention for the adoption of a General Assembly's resolution condemning the Bantustan policy, affirmed that "white" populations cannot be equated to "white" overlords, because this would be a reverse-discrimination towards "whites".[36]

Thirdly, there was a *democratic* concern. Manning thought that the critics of Apartheid were guided by a Communist ideology that managed to affect Western countries, while South Africa honestly realized a capitalistic model of economy and society. Furthermore, he argued that in the elections only 70.000 citizens circa voted for the Progressive Party (which opposed Apartheid), while the majority voted for the National Party, which advocated apartheid. Obviously, manning referred to elections in which non-whites were not allowed to participate.

1.3 Racialization – eviction – alienation

In sum, in the South-African context the authorities first distinguished different racialized groups by means of the Population Registration Act. It then gradually "cleansed" particular geographical areas of the racialized categories of "natives/Bantus" and "coloreds" through, sometimes massive, evictions. By subsequently declaring some of the "Bantu" areas to be "independent" in some respects, the subjects of these newly "independent" states became "aliens" and could be subjected to migration law. Declaring the Bantustans to be "independent" was explicitly meant as a strategy to legitimize the racialized stratification that was a cornerstone of South-African Apartheid. Adding migration law allowed the South-African state to rely on the widely acknowledged rule of international law holding that states have the right to control the entry and residence of aliens.[37] People who used to be South-African nationals were thus "alienated". The separation of different racialized groups, and referring particular racialized groups to destitute areas and situations, was eventually legitimized through migration law. One of the forms this referral took was the forced eviction of people from their informal homes – the visual aspect mentioned at the beginning of this article.

1. Illegalization in contemporary Europe

Having analyzed the legitimation of evictions under Apartheid South-Africa, we will now turn to contemporary Europe. Episodes of dismantlement of informal settlements and the destruction of places occupied by migrants occur on a regular basis in various European places such as Calais, Amsterdam and Idomeni. [38]

2.1 Legitimation through public order law

In Calais, Amsterdam and Idomeni, migrant settlements have been evicted by local or national authorities relying on their competences to maintain public order. In some instances, these broad

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[35] 10 South West Africa Cases, [1966] I.C.J. Pleadings 103.

[36] 12 U.N. Monthly Chronicle, no. 11, at 25 (1974).

[37] I.a. United States Supreme Court in *Chae Chan Ping v US* (The Chinese Exclusion Case), 130 U.S. 581 (1889); International Court of Justice in the *Nottebohm* Case, 1955 ICJ 4; European Court of Human Rights 28 May 1985, *Abdulaziz, Cabales and Balkandali v United Kingdom*, 9214/80; 9473/81; 9474/81.

[38] Comp. Matthew Willner-Reid: Emergence and Decline of a Protest Movement: The Anti-Deportation Campaign for Afghan Asylum Seekers in Belgium, *Journal of Refugee Studies* 28 (2015), 505-522.

prerogatives were supplemented by more specific public powers based on anti-squatting laws (criminalizing squatting) and private property law (where the owner of a building or of land requires occupants to vacate the place).

Figure 3 Idomeni, Photo Petros Giannakouris/AP

In Calais, French authorities adopted a 'policy of invisibilisation', that consisted of removing migrants from the public eye in order to pretend that the migrants' emergency has been solved.[39] The migrants "problem" in Calais started in the 1990s, when non-EU migrants began to stop there before going to UK. The more the entry into the UK became difficult, the longer migrants used to spend in Calais after the opening of the Channel tunnel in 1994. From this period on, migrants and French authorities clashed on a regular basis. The situation was characterized by multiple protests, destruction and subsequent reconstruction of migrants' informal settlements, which involved NGOs, media and human rights lawyers. Migrants and their legal representatives filed different lawsuits against French authorities but they have never been successful, mainly because the court has always recognized that French authorities perpetuated this policy in order to protect public safety. However, they have prepared alternative shelters to migrants in different cities.

Figure 4 Calais, Photo Getty

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[39] Lieneke Slingenberg and Louise Bonneau, "(In)formal Migrant Settlements and Right to Respect for a Home". Paper presented at DAMR Conference Urban refugees and migrant integration in the city.

In 2014, the Administrative Tribunal in Lille allowed the Calais local authorities the forcible eviction of migrants on the grounds that the municipality has as its task to ensure the proper use ("bon usage") of land, and gave this permission in an accelerated procedure on account of the insufficient sanitary infrastructure and an accumulation of excrements and waste ("l'insuffisance d'infrastructures sanitaires et l'entassement d'ordures et de déchets") resulting in a danger to public health. The argument raised on behalf of the migrants that evacuating this particular location would do nothing to relieve these problems was rejected using the argument that this does not affect the grave danger to public health which can presently be observed in this location. [40] In a subsequent case a group of migrants and humanitarian organizations sought an injunction suspending the decision to evict another location. It concerned a place that had initially been set up as a shelter following the 2014 eviction of another location. However, the new location became overcrowded on account of new arrivals and what the court calls sedentarization (the court later refers to migrants living in this location for months or years). The local authorities want to evict the migrants for reasons of public order and safety, including the safety of the migrants themselves. The court considers that the situation in this location is untenable and says there is another location where the migrants (in particular single women and unaccompanied children) can get shelter.[41]

The issue of informal migrants' settlement of Calais may be assimilated to that of Amsterdam, even though the latter started more recently. In Amsterdam, the "We are here" protest started in 2012. It has been organized by a group that began by occupying the square of a former school with tents, and since then is squatting empty buildings.[42] They do so not only to have a place to stay, but also to host political, cultural and social events.[43] Despite the fact that this was initially tolerated, also in Amsterdam there were frictions and conflicts between the migrants and the local authorities. The protest group occupied different places (an old church, empty office spaces, empty garage, etc.), always ending up being evicted or leaving the location 'voluntarily' in order to prevent forcible eviction. In 2013 and 2014, the Amsterdam municipality offered two different possibilities of temporary accommodation: the first one was a former prison which the migrants could use for six months, but after six months only the most vulnerable migrants were offered new accommodation, while the others were forced to leave; the second one was represented by the granting of basic shelter, food and sanitary facilities only from 4 pm to 9 am. Even though it was deemed sufficient by the Court of Appeal of Amsterdam, some migrants did not accept this and kept on squatting. Some who would accept the available night shelter have no other option than squatting because the night shelter often is full.

The District Court Amsterdam in 2012 refused to give an injunction prohibiting the mayor of Amsterdam to evict a tent camp, agreeing with the local authorities that eviction was necessary for the prevention of disorder (there had been incidents between the migrant groups varying from hard core nationalists and "a group of scooter boys") and public health.[44] In another

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[40] Tribunal Administratif de Lille, 27 June 2014, *Commune de Calais,* req. n° 1403975.

[41] Tribunal Administratif de Lille, 25 février 2016, *Sharifi & autres*, req. n° 1601386. Comp. Tribunal Administratif de Lille, 18 October 2016, *M. Loay M. et autres,* req. n° 1607719.

[42] See http://wijzijnhier.org/who-we-are/, last accessed 13 November 2017.

[43] D. Dadusc, 'Squatting and the undocumented migrants' struggle in the Netherlands', in: P. Mudu and S. Chattopadhyay (eds), *Migration, Squatting and Radical Autonomy : Resistance and Destabilization of Racist Regulatory Policies and B/Ordering Mechanisms*, Routledge 2016.

[44] Voorzieningenrechter Rb Amsterdam 28 November 2012, ECLI:NL:RBAMS:2012:BY4471.

case, the District Court gave an injunction ordering migrants to vacate a building they had squatted at the request of the owner, with the owner's property rights as legal basis.[45] A more complicated picture arises from litigation about another squat, the Vluchtgarage. The city of Amsterdam was the owner of this building, and had filed a criminal complaint for trespassing. The migrants sought an injunction to prevent eviction based on criminal law. The District Court issued an injunction for 2½ months, holding that the migrants were in a desperate situation which they were unable to influence, and held that during winter their interest in having shelter prevailed over the municipality's interest in immediate eviction.[46] The Amsterdam Appeals Court however overturned, ruling that because of the night shelter offered by the municipality the interests of the municipality outweighed those of the migrants.[47]

Anti-squatting policy and dismantlement of migrants' camps also took place in Greek cities, such as Thessaloniki and Idomeni. In particular, after the evacuation of Idomeni's camp in May 2016, the Greek government started to transfer migrants to smaller camps around the country, in collaboration with the EU, UNHCR and NGOs. But the conditions of these military and police-run camps[48] put into being more problems: indeed, migrants protested not only because of the lack of electricity, quantity and quality of food and water in the camp, but also for its distance from other facilities.[49] Thus, Greek authorities applied the policy of migrants isolation as well as the French ones. In the meantime, in September 2015 a group of migrants occupied abandoned buildings in Athens, thus starting to take part of social and political life of the city. However, in Thessaloniki police evicted three self-organised squats in a mass operation.

1.2 Legitimation through immigration law

In the previous paragraph, internal spatial policies that are used to legitimize evictions were addressed. Another source for a more general legitimation by governments for their exclusion of undocumented migrants from socio-economic rights, including the right to shelter, is external spatial policy, in the form of migration law. Illustrative for this is the position the Dutch government took in a case before the European Committee of Social Rights concerning the situation of the *We Are Here* group in the Netherlands.[50] The Dutch government maintained that the European Social Charter does not apply to migrants in an irregular situation, because the Charter explicitly provides that foreigners are only covered by the Charter if they are nationals of other states that are party to the European Social Charter and if they are lawfully resident or

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[45] Voorzieningenrechter Rb Amsterdam 1 August 2013, ECLI:NL:RBAMS:2013:4804.

[46] Voorzieningenrechter Rb Amsterdam 20, February 2015, ECLI:NL:RBAMS:2015:847. See for a similar intermediate position, in a case where the municipality wanted permission to evict from a building it had rented for six months as shelter Voorzieningenrechter Rb Amsterdam 20 June 2014 ECLI:NL:RBAMS:2014:3532; in the final decision, the court did order the migrants to leave the building, Voorzieningenrechter Rb Amsterdam 4 July 2014, ECLI:NL:RBAMS:2014:3952.

[47] Gerechtshof Amsterdam 31 March 2015, ECLI:NL:GHAMS:2015:1121; cassation appeal rejected without substantive grounds, Hoge Raad 7 October 2016, ECLI:NL:HR:2016:2281.

[48] The Guardian (2016, May 28). Protests grow as Greece moves refugees to warehouses 'not fit for animals'. Retrieved from: https://www.theguardian.com/world/2016/may/28/greece-refugee-warehouses-not-fit-for-animals

[49] Middle East Eye (2016, May 26). Greece, where refugees prefer petrol station forecourts to military-run camps. Retrieved from: http://www.middleeasteye.net/news/idomeni-camp-evacuation-1175931541 .

[50] European Committee of Social Rights 1 July 2014, Conference of European Churches (CEC) v the Netherlands, 90/2013.

working regularly within the territory of another state party. Secondly, the government argues that migrants who cannot return for fear of persecution are granted asylum, and migrants who cannot return through no fault of their own receive a humanitarian residence permit. So migrants whose applications have been rejected can return safely (there is no risk of inhuman treatment) and they can actually return, provided that they cooperate (for example by giving their correct identity). The government argues that the irregular status of adult migrants is often the result of a conscious choice. They can end their irregular stay by agreeing to return, which according to the government actually is their legal obligation.

This means that the Dutch government denies having any obligations in the field of socio-economic rights vis-à-vis irregular migrants except emergency provision of health care, education for minors, and legal aid. This is based on the notion "that, as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory."[51] The Dutch government argues that this right of states implies the right to deny socio-economic rights, because otherwise the state right to control migration would become meaningless (because socio-economic rights would have to be granted regardless of the legal status of aliens). In terms of Bosniak, the issue is what the irregular status of aliens can lead to: is it merely grounds for the alien to be deported, or can states also deny rights to aliens on their territory without deporting them? Does the status of illegal alien only influence the migrant's position in immigration law (s/he may be deported), or does it also influence other rights (can illegal aliens be tortured, do they have the right to fair trial, do they have the right to work, rent a house?)

In Calais, Idomeni, Amsterdam and other European places, the people who are being evicted from their homes are overwhelmingly African or Asian. They originate from countries such as Somalia, Ethiopia, Eritrea, Sudan; and from Syria, Iraq, Afghanistan. They originate from the countries that are black in the map below.

Figure 5 Global passport index (visuals Yussef Al Tamimi)
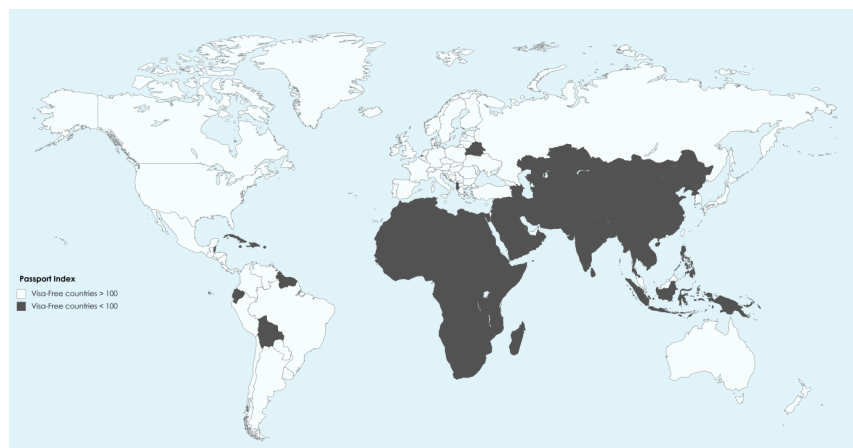
The map divides countries in those of which the nationals can access more than 100 other countries without needing an entry visa (white), and those of which the nationals can access less than 100 other countries without an entry visa.[52] The fact that the evicted people do not have a right to reside in France, Greece, the Netherlands etcetera is crucial in legitimizing their eviction. As we have seen, the public order and public health grounds for the evictions functions in a context where their right to socio-economic entitlements as such is disputed by the authorities on the ground that they claim these entitlements in the wrong country, being a country where they have no right of residence.

1.2 Racialization/alienation – eviction

In the contemporary European context, the authorities found a ready-made situation in which the people who are subjected to evictions were already aliens. They did not first have to create independent states in order to have a right under international law to entirely exclude the populations they want to exclude. However, they did have to decide to what extent the status of alien would matter. For citizens of the United States, Japan or Australia, their status of aliens in Europe has a totally different meaning than for citizens of Somalia, the Democratic Republic of Congo. First and foremost, the former can enter Europe without needing a visa, while the latter need one[53] and are likely to be denied one if they were to apply for it. The racialized nature of the visa obligations is less blatant than under Apartheid, because "white" South-Africans need visa just like "black" ones, while "black" Americans benefit from visa-freedom just like their "white" fellow-citizens. Notwithstanding this, the degree to which the status of alien matters is racialized, as illustrated by the passport index map (Figure 5).

Within the racialized group of nationalities subjected to a visa requirement, differences are made as well. Some people may be granted visa, but this is related primarily to having sufficient means (Article 21(1) Regulation 810/2009 in conjunction with Article 6(1)(*c*) Regulation 2016/399; Article 21(3)(b) Regulation 810/2009). In this manner, denial of visa is based on class and indirectly to race and gender (think of the relative socio-economic position of women globally[54] and of Blacks in countries such as South-Africa, Mauritania and Tunisia[55]).

Thus, in the European context the racialization of the status of aliens is indirect. People are not subjected to visa obligations, and are not refused visa, on the basis of their race. Nonetheless, visa obligations apply to all of Africa, all Middle Eastern nationalities except Israel and the United Arab Emirates, and to all of Asia except the most affluent countries (being Japan, South Korea, Taiwan and Malaysia). The racialized nature of the resulting map (which is almost equal to Figure 5) is hard to deny.

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[52] Based on *Passport Index*, https://www.passportindex.org/, last accessed 13 November 2017.

[53] Regulation 539/2001, last amended by Regulation 2017/850. Compare the visualization of visa requirements for the European Union on the website of the European Commission, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/visa-policy_en, accessed 25 November 2017.

[54] *The Little Data Book on Gender* 2016, World Bank, Washington DC 2016.

[55] Comp. Achille Mbembe and Felwine Sarr: Face à l`esclavage, luttons pour notre dignité, *Le Monde* 26-27 November 2017, p. 25.

Forced removal from informal dwellings exclusively affects racialized groups, as the inhabitants of these informal dwellings are exclusively "non-white".[56] The evictions are legitimized via public order law and immigration law. The use of the concept of public order is part of the more general development in which authorities conceptualize irregularized migration not merely as an administrative issue, but as a threat to public order. The legitimation through immigration law relies on a racialized legal system, as I outlined above, hence is racialized by ricochet.

In conclusion: the racialization in contemporary Europe is subtle when the Apartheid system is taken as the norm. But it is undeniable both in legal terms (see Figure 5), and because it is exclusively "non-whites" who are evicted. The use of violence, which includes violence against persons and the destruction of their homes, could only become routine and normalized because its victims were racialized.

1. Parallels and differences

So far, the position of two groups has been sketched: that of people in South Africa who were deprived of their South-African nationality, and people in Europe who have been denied asylum or other forms of legal residence. This final section addresses the question what the parallels between these groups are, and what the distinctions are.

There are two major parallels. First: in both cases, the vocabulary is contested. In the South-African context, obviously the racialized terminology ("natives", "Bantus", "coloreds", etcetera) used in apartheid legislation and policy is contested. But in the present context, it is relevant to note that it was also contested whether or not people were referred to as citizens of one of the Bantustans (and consequently as migrants when in South Africa), or on the contrary as South-African citizens. The use of these terms was at the core of the conflict about apartheid. There were no neutral terms to refer to the people involved. The use of terms itself signaled a particular politicized position. The same is true in the contemporary European context. The *We Are Here* group, for example, refers to itself as refugees. On the other side of the political spectrum the same people are referred to as illegal aliens. In between are terms such as rejected asylum applicants, and non-removable irregular migrants. Efforts are made to use neutral terminology – for example the European Committee for Social Rights refers to irregular migrants. But this may be, and is, contested by people who emphasize that these people are in fact refugees and that they have been illegalized.[57] So in both cases the terminology used to describe is simultaneously political, moral, and indicates the investment of the person using the terms.

Second: in both cases, the nationalities assigned to the people concerned have only little meaning for their citizens. People are referred to "their" states for the realization of basic human rights, while it is evident that "their" states are unable to deliver. Of course, the Bantustans were specifically created for that purpose, while the states of origin in the contemporary European

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[56] Comp. the eviction of the informal dwellings of Roma people in France, Maryline Baumard: Le dernier camp rom de Bobigny en sursis, *Le Monde* 2 June 2017, http://abonnes.lemonde.fr/societe/article/2017/06/02/le-dernier-camp-rom-de-bobigny-en-sursis_5137480_3224.html?xtmc=rom_france&xtcr=7, accessed 25 November 2017. Because of their different legal status (the Roma concerned have the nationality of European Union member states), the legitimization of the evictions is different.

[57] See on this for example Harald Bauder: 'Why We Should Use the Term 'Illegalized' Refugee or Immigrant: A Commentary', *International Journal of Refugee Law* 2014, p. 327-332.

situations are *objets trouvés*. The Bantustans were not recognized as independent states by the international community, and did not have governments capable of fulfilling normal state functions. In contrast, the countries of origin of contemporary migrants in Europe are recognized as states. But in some cases, this recognition is in fact the only thing there is. The internationally recognized governments of Somalia and Libya have no factual authority outside limited areas which they control. Europe tries to set up internationally recognized governments there, with which they can enter into binding agreements. Governments of states like Iraq and Afghanistan are unable to guarantee even a minimal form of law and order in substantial parts of their territory. States like the Democratic Republic of Congo and Burundi are so entangled with business interests that there is something artificial to treating them like any other subject of international law.[58] On the other hand, some countries of origin which are more "real" than some internationally recognized regimes are not recognized by the international community (concretely the de facto authorities in Somaliland and Puntland in Somalia, and Kurdish North Iraq). Both under Apartheid and in contemporary Europe, for the realization of their socio-economic rights "migrants" are referred to states which are not recognized internationally, or which effectively exist only in some ways and not in others. The limited actual meaning of the existence of some these states is not created on purpose (as that of the Bantustans was). The decomposition of Afghanistan, Iraq and Libya was the consequence of military actions of Western countries, but was not the aim of these actions. So although the limited reality of countries of origin was not purposefully constructed, it is an actual fact of which European countries can hardly be unaware. Also, European countries can hardly claim that they have no involvement in that situation. Notwithstanding this, the formal existence of these states eagerly seized to claim that their citizens have a place where they can realize their socio-economic rights. This process might be labeled as a reverse form of institutional isomorphism. Institutional isomorphism is defined as a process in which organizations are forced to resemble each other as they face the same set of environmental conditions. A coercive form of this occurs when the environmental conditions consist of formal and informal pressures exerted on organizations by other organizations upon which they are dependent.[59] In the contemporary European context, states of origin such as Libya do not actually resemble states like Japan, but are ascribed such resemblance by European state authorities. It suits the interests of European states to emphasize the resemblance, whereas "migrants" emphasize the fundamental difference. The "migrants" concerned consider it as unrealistic to expect the states of which they have the formal nationality to deliver. Some of them have no territorial control; some are heavily dependent on private actors; some are unable to deliver on basic points such as safety and the bare minimum for survival. In that sense, like the citizens of the Bantustans "migrants" concerned are referred to "their" states of nationality while they experience these as being unreal and unable to provide even the most basic forms of human needs.

There are two differences as well. First: the Bantustans were not recognized internationally. The idea of referring people to the strawman-states which South-Africa set up to legitimize apartheid was unacceptable at every level. In contrast, the countries of origin of

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[58] Approximately half of the tax income of Burundi comes from one firm, beer brewery Brarudi, which is controlled by Heineken, https://www.nrc.nl/nieuws/2016/11/18/zo-werkt-dat-in-burundi-5337152-a1532331.

[59] Paul J. DiMaggio and Walter W. Powell: The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields, *American Sociological Review* 48 (1983), p. 147-160.

contemporary migrants are formally recognized states, and as such are recognized as having obligations under international law towards their nationals. There are a few exceptions, which are relevant for irregular migrants in Europe (Northern Iraq, Somaliland and Puntland, see above). However, this difference relies on the formal recognition of states under international law, and passes over the actual differences between contemporary states. For example, for Japanese nationals in an irregular situation, the legitimation of their exclusion from socio-economic rights seems quite convincing. It is not incongruous to argue that, if they want to effectuate their socio-economic rights, they can turn to the appropriate authorities in Japan and should not expect this from the authorities in European states where they find themselves. To suggest that a Somalian national can turn to the appropriate authorities in Somalia is utterly unconvincing: these authorities have very limited territorial control, and even within the territory they control they are unable to deliver safety and basic mans of survival. Nevertheless, there is a real difference between apartheid South Africa and contemporary Europe on this point. The problematic nature of referring Somalians to the Somali authorities is of a different order than in the apartheid context. Under apartheid, the argument was unacceptable as a matter of principle. In contemporary Europe, the argument is arguably not acceptable because the Somalian authorities have proven unable to provide for basic human needs for over 25 years. If this factual situations changes, as a matter of principle there are no objections against referring Somalians to the Somalian authorities for the realization of their socio-economic rights.

Second, and related to this: the alien status of people who under apartheid were assigned Bantustan nationality was not recognized in international law. The application of migration law to them was therefore as such unacceptable. They were South-African citizens on South-African territory, and under international human rights law had the right to be on that territory. This is different for contemporary Europe. These people are aliens, they are subjects of internationally recognized states, and therefore under current international law as a rule they need consent of the state where they find themselves for their presence, because it is not the state of their nationality.

As a final remark, it has to be noted that in the above it has been questioned whether states like the Democratic Republic of Congo or Somalia can be treated as actual independent states. From the perspective of their citizens residing in Europe, it is artificial in treating them as if they were states like Australia or Japan. While this is something that needs to be underlined, it should also be pointed out that there is something deeply uneasy about an academic from the global North relativizing the status under international law of decolonized states. Decolonization has been one of the central political and moral aspirations of the 20th century, and is not to be dismissed lightly. What this analysis shows is how former colonial states use the fact that their former colonies are now independent in order to justify how they treat people who, under colonialism, would have been their subjects. The former colonial powers thus ignore the incomplete character of decolonization, which is evident from the disruption resulting from previous and current waves of globalization.