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CITIZENS AND EXCEPTIONS: ILLEGAL IMMIGRATION, CITIZENSHIP AND THE STATE

Does the theory of the state of exception provide a useful framework for examining how citizenship is understood, constructed and regulated in contemporary South Africa?

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Abstract

Citizens and Exceptions is a theoretical examination of South Africa's current approach to immigration and citizenship. The work utilises Agamben's theory of the state of exception to analyse the laws and policies put in place to regulate immigration in South Africa and to examine the methods and practices used to enforce these laws. It also studies the xenophobic riots of May 2008 from this perspective. This is done in order to understand the discourses, practices, and modes of state power at work in the immigration sphere. The underlying theme in the work is based on Schmitt's assertion that the norm depends on the exception. Thus, a study of illegal immigration in South Africa – the exception – provides a lens through which the norm of citizenship can be understood. For Agamben, the state of exception is 'a legal no-man's land' in which law and illegality blur. The current South African state's approach to immigration constructs illegal immigrants as exceptions and places them within this no-man's land. This is done in several ways, which are explored in this work. At the same time, the establishment of a boundary, of an exceptional category, gives form to another category, that of citizenship and the nation. This is asserted in the thesis, and is done through the use of the state of exception, as well as Foucault's concepts 'governmentality' and 'biopolitics'. All of these are revealed as informative concepts through which contemporary citizenship, immigration regimes, and processes of population production can be understood. At the same time, flaws within these concepts are exposed and discussed.

Declaration

I declare that this dissertation/thesis is my own unaided work. It is submitted for the degree of Masters in the University of the Witwatersrand, Johannesburg. It has not been submitted before for any other degree or examination in any other university.

Aidan Mosselson

Third day of February, 2009.

Many questions were troubling the explorer, but at the sight of the prisoner he asked only: “Does he know his sentence?” “No,” said the officer, eager to go on with his exposition, but the explorer interrupted him: “He doesn’t know the sentence that has been passed on him?” “No,” said the officer again, pausing a moment as if to let the explorer elaborate his question, and then said: “There would be no point in telling him. He’ll learn it on his body.” – Frank Kafka, ‘In The Penal Colony’.

The longing for order is at the same time a longing for death, because life is an incessant disruption of order. Or to put it the other way round: the desire for order is a virtuous pretext, an excuse for virulent misanthropy – Milan Kundera, *The Farewell Party.*

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Preface

On the 25th of December, 2008 I was about to board a South African Airways flight to Heathrow Airport in London when I was stopped and interrogated by an immigration official. I had already passed through customs and passport control without a hitch, received an exit stamp in my passport and was inside the tunnel through which one passes to move from the airport into the aeroplane. At this point, I was asked by one official if this was the first time I was travelling to London. On answering that it was, I was told to move aside and wait to speak to his colleague, who was busy questioning a young lady, who seemed to be in some distress. Eventually the lady was allowed to pass and it was my turn.

The official began by asking to see proof of my hotel booking. As I was attending a conference for which I had been provided with accommodation and was staying with friends subsequent to that I had no hotel reservations to present him with. He then asked to see my letters of invitation from my friends as well as from the conference. In my naiveté I did not have either of those on me. This aroused the official's suspicions and after further questioning, including demands to see proof of the amount of money I was carrying with me as well as a key to my friend's house in which I was to be staying after the conference, he declared that he was "not satisfied" and marched me back down the tunnel. He put through a phone-call and using my allocated seat number, had my suitcase removed from the plane. Whilst this was happening the boarding gates had been shut and the plane began the final stages before take-off. I thus missed my flight without being given a chance to verify my arrangements and was left with a packed suitcase, a conference to attend, transportation arranged at Heathrow, and a plane ticket not worth the paper it was printed on.

In this instance, I had entered a space in which the whims and suspicions of an immigration official could decide my immediate circumstances and ability to travel and leave South Africa. I was in a space in which due process of law and

constitutionally guaranteed rights, such as the right of all South African citizens to exit the country, had been revoked in the name of immigration control. At the time, this seemed to me to be an extraordinary set of circumstances, and I was left cursing my fate at being in the wrong place, at the wrong time, and on the receiving end of the wrong official's quest to assert his power and ego. However, once I had gained enough distance and perspective on events, I was able to note that what happened was not extraordinary. It was, rather, symptomatic of the inner-workings of the law and measures put in place to deal with migration and the movements of people in contemporary times. In this period, migration is a phenomenon that allows for a variety of extra-legal practices and spaces to be created.

It is an element of contemporary society that allows states, their officials, and even citizens the power and ability to suspend the law and individual rights in cases in which they are 'not satisfied', suspicious, or convinced that individuals or groups of people do not belong in or deserve access to a nation-state. The desire to maintain regulation over people and populations in this period of mobility and globalisation has brought about a situation in which the rule of law has become a fluid, malleable element, and is open to manipulation and can even be overlooked or overridden in cases in which the conditions imposed by officials and states are not satisfied. Thus, I am able to conclude that far from being extraordinary, my experience of the excesses of migration control is common-place, and is, in fact, tame compared to the abuses and sufferings experienced by others in the state-led quest for regulation and control over populations.

Today, a situation has been created where the extraordinary or exceptional has, in fact, become common place. The erosion or suspension of the rule of law in the name of controlling migration and protecting the interests of nations and states has created a situation in which the law functions as an element of control, open to manipulation by those empowered by it. It thus functions in a double manner. On the one hand, the law, through its maintenance and the power it grants certain individuals and sectors of society, makes ongoing regulation and power relations

possible. At the same time, however, this ability to entrench and enforce power and societal control hinges on the ability to suspend or render the law non-applicable. The law, then, makes the exceptional normal, and can render the mundane exceptional.

The study that follows is an attempt to both document and make sense of this and is an effort to understand the implications this has for the way the law, the state, nationhood, belonging, and migration are understood in broader social contexts.

I would like to thank my supervisors, Jonathan Hyslop and Shireen Ally, for their guidance and advice throughout this process. I would also like to thank my family for the support and assistance they have given me, and Pfano, for helping me understand.

Introduction

Citizenship has emerged as one of the most important concepts and issues in contemporary times. It is an issue that holds a great deal of significance across the globe. A whole set of highly important sociological issues can be subsumed under citizenship. Within this term, issues around politics, nation-building, law and state power, social relationships, and contests over inclusion/exclusion play themselves out. It is thus a concept that encompasses several highly pertinent sociological, political and theoretical issues and therefore deserves a great deal of scrutiny.

This study makes use of the analytical framework provided by the theory of the state of exception in order to investigate how the treatment of illegal immigrants has shaped modern conceptions of citizenship and has, in turn, been shaped by these conceptions. Through examining the treatment of those who are excluded from citizenship and the criteria and methods upon which this exclusion is based, I feel I am able to gain insights and understandings into how citizenship has been conceived in contemporary South Africa and what practices and social issues this conception has given rise to. By looking at those who fall outside of the ambit of citizenship, I believe I am able to gain insights into what citizenship has come to mean and symbolise in contemporary times.

For the purposes of this study I will be using the theory of the state of exception, first developed by the German legal philosopher Carl Schmitt, and then expanded on by Giorgio Agamben. In Schmitt's work, the state of exception is a politico-legal concept used to deal with threats to society and elements of the social and political order that fall outside of the ambit of normal law and order. The state of exception is a concept invoked when the normal proceeding of the law is suspended or deemed redundant (Agamben: 2005). It is thus a concept that deals with social and political enemies and threats to order that fall outside of the law and that cannot be dealt with by the normative application of the law (ibid). For Schmitt, the norm depends on the exception (Hirst: 1999). Thus, rule of law and political order can only be understood and exist in the face of challenges, threats,

and social categories that fall outside of the politico-legal order. In this context, citizenship can only exist if there are exceptions to this concept. In the work that follows I conduct an investigation into the exceptions of citizenship, through the case study of illegal immigration into South Africa. By doing so I am able to interrogate the ideas and practices that shape and inform citizenship in the postcolony today.

In South African law, illegal immigrants are defined as persons who have contravened the country's immigration laws and are thus deemed to reside within South Africa illegally – i.e. without the requisite permission of the state[1]. In law, they are defined as "illegal foreigners"[2] and are distinguished from both South African citizens and foreigners who have legal permission to reside in the country. They are thus a category of illegal people and the state requires a set of specific laws with which to deal with them. These laws are separate to the laws and procedures through which legal persons – both citizens and foreigners – are dealt with. They thus fall into an exceptional category, reserved for foreign criminals, "prohibited person[s]" and "undesirable person[s]"[3], and those who are deemed to threaten law, order, and society. It is this classification and subsequent treatment that recalls and possibly situates illegal immigrants within a state of exception.

The state of exception is the product of modern discourses and assumptions about the nature of societies and people. An analysis of the construction, treatment, and constraint through which illegal immigrants are dealt with by state laws provides an insight into some of the issues, both theoretical and practical, that provide challenges and limitations to modern notions of citizenship. Through investigating and analysing the treatment and categorisation of and restrictions imposed on illegal immigrants by the state I hope to be able to critique modern notions of citizenship and the ways in which they are maintained and enforced. The work that follows is thus an analysis of the contemporary South African state's

[1] Republic of South Africa. (2002). Immigration Act 13 of 2002. Section 1. 'Definitions and Interpretations'. Government Gazette. no. 23478, 31 May.
[2] ibid.
[3] ibid.

treatment, categorisation, and restriction of illegal immigrants and is done so in order to ascertain what the links between this and citizenship and nationhood are.

As the state of exception revolves around an assumption about the nature of societies and what measures are needed to keep them intact, the possible influence this theory has on issues of nationality and immigration has a bearing on the manners in which citizenship is conceived and experienced. I consequently analyse the practices and notions of citizenship in South Africa today in order to understand which theories, concerns, and discourses they have been shaped by. In doing so, I hope to be able to generate a theory and interpretation of modern notions and practices of citizenship as they exist on both a practical South African and a broader, theoretical level.

The construction of terms and categories such as 'illegal immigrants' and 'citizens' necessitates the construction of boundaries and markers of difference. Schmitt was of the opinion that modern political practice and governance centred on the identification of the 'enemy' – the class or classes within the population that represented serious threats to the rule of law and the sovereignty of the state (Balakrishnan: 2000). During the inter-war years in which he was writing, the disaffected and increasingly hostile working classes represented the most substantial threat to European state power and the societies over which these states presided. For Schmitt, "after 1848 the proletariat was no longer an episodic threat to public order but its quasi-permanent enemy" (Balakrishnan: 2000: p.38). He thus argued that the modern European state needed to function in a semi-permanent state of exception or emergency to deal with this threat.

In contemporary, ever-globalising society, the threat of proletarian revolution seems distant. Through processes of out-sourcing, transfers of capital and information across national borders, the rise of multi-national corporations, and large-scale migration, the united, uniform working class placed at the centre of working-class political movements and struggles has, in many people's views, fragmented (Davidson: 2000; Castells: 1996; Laclau and Mouffe: 1985). This has

left a void in class-politics and has ensured that the threat of class revolution, so ominous in Schmitt's time, has fallen away. This has meant that the leading enemy of the modern capitalist state has been vanquished and does not occupy as prominent a presence in the social-political spectrum and friend-enemy binary. However, this has not led to the removal of this binary. Instead, the modern state's preoccupation with the enemy has shifted to new terrain. Today, the illegal immigrant has emerged as one of the central 'enemies' threatening modern states, their sovereignty, and abilities to exercise power and control over societies and populations.

There are several important reasons for the illegal immigrants' status as 'enemy'. My research is focused on uncovering and critiquing these reasons. The analytical framework provided by the theory of the state of exception will aid me in this as the state of exception is something that is invoked when a society and/or state is perceived to be under threat. Through the use of this theory, reasons as to why illegal immigrants have been constructed as threats to modern societies will be uncovered. I believe that these reasons are embedded in the nature of the modern state and the discourses in which it is framed and shaped. The theory of the state of exception will help me elucidate this, as this theory covers issues of social control and regulation, state sovereignty and power, and social, legal and political classification.

According to Schmitt, "the actions of the sovereign [– the state in contemporary times –] must be governed by what is prudent to restore order." (Hirst: 1999: p.12) An analysis of the public sentiment and discourse surrounding illegal immigrants in South Africa today reveals the extent to which they are considered threats to society. South Africa is increasingly seen as threatened, flooded, and swamped by illegal immigrants who are threatening and eroding the social fabric of post-Apartheid South Africa. The Comaroffs, for example, show how the furore over alien vegetation in the Cape is synonymous with xenophobia in South Africa and how the vegetation serves as a metaphor for invasion, threat, and takeover by illegal aliens of a human kind (Comaroff and Comaroff: 2001).

The common public association of illegal immigrants with crime and violence has seen them emerge as scapegoats and unwanted, destructive intruders into the otherwise cohesive, peaceful 'rainbow nation'. Like dangerous alien vegetation, illegal immigrants are seen as threats to the cohesive, uniform character of post-Apartheid South African society (ibid). The organic metaphor invoked by the Comaroffs is useful as it indicates how post-Apartheid South African society is increasingly romanticised as naturally diverse and harmonious, yet, at the same time, threatened by invasion. The primary threats to this natural harmony are crime and illegal immigration, which have emerged as synonymous terms.

At the same time, people's fears that illegal immigrants are crowding them out of labour markets and are draining already-limited economic resources and social benefits are put forward as partial explanations for the widespread and pervasive xenophobia in post-Apartheid South Africa (Nyamnjoh: 2006). In this case, illegal immigrants are portrayed and imagined as 'threats' to post-Apartheid South African society and the rights and entitlements newly inaugurated citizens deserve. They are thus envisaged as threats to the cohesion, promise, and structure of post-Apartheid society. This, then, necessitates the introduction of steps to restore social order. As the state of exception is invoked to deal with threats, this concept becomes increasingly relevant and applicable to the case of illegal immigrants in South Africa. The work that follows investigates the extent to which the state of exception can be used to describe the state's dealing with illegal immigrants, and what effects this may have on the conception, regulation, and practices of citizenship.

The denial of citizenship is made possible through different state mechanisms and practices. It is, primarily, an issue of policy, as state policies are used to determine who may and may not be regarded as a citizen and, consequently, who may or may not lay claim to rights within a country. As Staeheli points out, "procedural elements [of citizenship] are codified through the state and the citizen is granted recognition in relation to the nation-state" (Staeheli: 2007: p.6). In other words,

citizenship in contemporary times is not a natural right, it is a status that one can qualify for and that is awarded and mediated by the state. The procedures and criteria used to award immigrants citizen status are cased in the discourse and interests that govern modern societies and states. It is, primarily, in the area of policy formation and implementation that these interests and discourses are apparent. I thus start my analysis with a study of post-Apartheid immigration policies in order to analyse the discourses and interests that shape contemporary views of citizenship, and what this term and status entails.

Whilst policies form the basis of state approaches to citizenship, they are enforced through several physical mechanisms. It needs to be emphasised that whilst in the work of Schmitt the state of exception is a formal, legal mechanism, for Agamben the state of exception has progressed beyond this, and has become an everyday form of governance (Agamben: 2005). It thus remains a legal concept for Agamben, but one that is in force constantly and that makes itself felt in the day-to-day workings of the state and its interactions with the population.

The chief areas in which immigration policy and state attitudes to illegal immigrants are felt are policing methods and deportation/repatriation centres. These serve as the embodiment of the state's response to illegal immigrants and are the areas in which the state and immigrants come into contact most frequently and violently. The Lindela Repatriation Centre has emerged as a notorious institution in South Africa and reports of the harsh treatment of those interred in the centre are frequent. The well-documented human-rights abuses that have occurred at this centre pose a challenge to the post-Apartheid government as it attempts to forge a culture and community based on human rights and inclusion. The contentious practices used at Lindela and in the day-to-day policing of immigrants on South Africa's streets remain true tests of South Africa's approaches to and tolerance of illegal immigrants. I make use of research into the centre and police practices in order to illustrate and test the relevance of the state of exception in modern societies and how it has come to shape, and consequently hinder, approaches to citizenship and human rights.

At the same time, the events of May 2008, in which groups of South Africans went on violent rampages throughout the country, looting, destroying property, attacking, and even killing people suspected of being foreigners have shown in the most stark and troubling terms the fact that violence, xenophobia, and the politics of inclusion/exclusion are not confined to the state alone. At the same time, however, the attacks remained informed or framed by contests over the state – who has the right to lay claim to and benefit from the state – and who deserves to be granted recognition and the right to belong through the state – i.e. who is a citizen and who is not. Thus, an inquiry into the attacks needs to find ways to account for both the challenge to state power these represented, as well as the significance of the state within the attacks. In my analysis of the attacks, I attempt to test whether Agamben provides us with a framework for doing this.

Thus, I make use of the theoretical framework provided by the theory of the state of exception to analyse the ways in which citizenship is constructed, regulated, and practiced in post-Apartheid South Africa. The policy analysis, research into the Lindela Repatriation Centre and police practices, and examination of the May riots provide case-studies for this purpose.

This study is theoretical in nature and makes use of qualitative research. The primary research method used is expert choice interviews. In-depth interviews were conducted with several important figures, including lawyers active in the immigration field, local government councillors, academics, and activists. Whilst interviews were sought with government officials working in the Department of Home Affairs and immigration policy sector no cooperation was forthcoming. At the same time, this lack of cooperation from the Department of Home Affairs meant that access to facilities such as the Lindela Repatriation Centre was not possible. The research conducted in this thesis thus utilises work conducted by other research institutes and human rights monitoring bodies, in addition to the interviews conducted.

Chapter One:

Literature review and theoretical perspectives

The terms 'illegal immigrants' and 'aliens' are constructions of a particular discourse or set of discourses. The creation of these terms and their entrenchment in society, in the functioning of the state and its relations with people and populations, as well as people's own relationships with one another, is predicated on a set of assumptions, interests, agendas, and, in short, discourses. As such, there are several important sociological issues at work in the construction and enforcement of these terms and categories of people. These issues can be understood through different analytical lenses: theories of modernity and the state and the relationships and constructions this thrusts upon people; the character and construction of nations and the particular form of power and categories of people these constructions and nation-building projects create and disseminate; and South Africa today, as a case study of how the category of illegal immigrants is constructed and enforced.

"Down in the flood"? Illegal immigration in South Africa

Illegal immigrants are a category of people who occupy a primary position within public and political discourse and imagination in South Africa today. They have emerged as a new threat in the political and economic landscapes in democratic South Africa and it is a common perception amongst the media, the public, and some politicians that South Africa today is awash with these 'illegals'. For example, a recent newspaper headline screams, "Zim tsunami floods SA" and the ensuing article claims that "police have arrested more than 5 000 illegal border-crossers in [a single] fortnight" and that the number of illegal immigrants who make it into South Africa and do not get caught "could be between 2 000 and 3 000 a day"[4]. This article was written in the wake of the economic collapse in Zimbabwe and shows the high-profile position illegal immigrants occupy in

[4] Peta, B. Webb, B. de Lange, D. 'Zim tsunami floods SA'. article appearing in the *Saturday Star*. 14 July, 2007.

public imagination and discourse. The highly emotive language and extremely high numbers of people involved show that the issue of illegal immigrants is both a pertinent and emotive one in contemporary South Africa.

Whilst the figures quoted in the above article are speculative, there is no doubt that South Africa is experiencing high levels of illegal immigration and that this presents the fledgling democracy with several important challenges. In the first years of democracy, the South African state expelled large numbers of foreigners. According to the Department of Home Affairs' statistics, 90, 692 illegal immigrants were repatriated in 1994. In 1995 the figure rose to 157, 084, and then to 180, 713 in 1996 (Peberdy: 2001: p.19). Again, in both 1997 and 1998 the figures rose to 176, 351 and 181, 286 respectively (Klaaren and Ramji: 2001: p.40). In addition, in 2000, during Operation Crackdown – the South African Police Service's "crime blitz" begun in March of that year – 7, 068 illegal immigrants were arrested in a single month (Klaaren and Ramji: 2001: p.36).

This shows that there has been a steady increase in the numbers of illegal immigrants arrested in and deported from South Africa since the beginning of the democratic period. It also illustrates how illegal immigrants are included in categories of criminals as, during Operation Crackdown, illegal immigrants were targeted alongside other criminals and were arrested as "a prophylactic measure" designed to protect South African citizens from criminality (Klaaren and Ramji: 2001: p.37). It is thus apparent that immigration and the policing thereof is a contentious and increasingly prominent element of post-Apartheid South African society and attempts to regulate and exert control over it.

South Africa is increasingly seen as threatened, 'flooded', and swamped by illegal immigrants who are threatening and eroding the social fabric of post-Apartheid South Africa. In the riots of May 2008, illegal immigrants were singled out as threats to the post-Apartheid dispensation, as they were blamed by local communities and civil society organisations for usurping locals' positions of

privilege and stealing jobs, women, state housing, and social services from deserving South African citizens.

At the same time, xenophobic sentiments and "alarmist fantasies about unwanted foreigners" are rife within the media, public discourse, and even amongst the government (Murray: 2003: p.440). According to Oucho and Crush, the South African government has long opposed free movement or uncontrolled migration, and has done so through the backing of "government funded research", such as the 1995 report by the Human Sciences Research Council, entitled 'A Research Review of the Policies Surrounding the Issue of the Free Movement of People Across International Borders with Specific Reference to Southern Africa and the Particular Effect Thereof on South Africa', which was used by the South African government to resist and reject proposals for freer movement of peoples across the Southern African Development Community (SADC) region (Oucho and Crush: 2001: p.150). According to Oucho and Crush, the post-Apartheid South African government has adopted a "position that is based more on powerful anti-immigrationist [sic] discourse than on any systematic analysis" (Oucho and Crush: 2001: p.140).

Michael Neocosmos too has shown how the post-Apartheid government has adopted a hostile approach to immigration and has circulated a continuously xenophobic discourse throughout the country. In his study, Neocosmos focuses not only on documenting the proliferation of xenophobia and hostility towards foreigners in South Africa, but attempts to analyse this through the state and its dissemination of what he terms "state xenophobic discourse" (Neocosmos: 2006).

This has created a situation in which xenophobia, anti-immigration sentiments and discourses, and hostility towards foreigners are rife within South Africa. These sentiments have shaped many state responses and approaches and have come to work their way into the relationships between peoples within South African communities. A situation has been reached in which immigrants are portrayed and have come to exist as concrete 'outsiders' and threats in South Africa.

The ‘threatening’ nature of immigrants exists on many levels. On the one hand, they threaten the promise of the ‘new’ South Africa, as they are believed to compete with locals for economic resources, job opportunities and social services, as shown by Nyamnjoh (2006). At the same time, they are also seen to threaten the state’s ability to create the ‘new’ South Africa and deliver benefits and services to the deserving citizens. As the then Minister of Home Affairs, Mangosuthu Buthelezi, declared in 1997, steps must be taken to ensure that illegal foreigners and immigrants are prevented from accessing social services “in short supply to our own people” (Peberdy: 2001: p.22).

It thus becomes apparent that the alarmist, xenophobic discourse that has swept through South Africa characterises immigrants as threats to the citizenry and the state. The media, the government, and the general public have been swept up in this discourse, and have led South Africans to believe they are indeed in the midst of a flood of immigration. Crush (2000), Harris (2002), and Palmary (2002) have all documented the extent of violence against foreigners in local communities and have shown this to be a prevalent scourge in the post-Apartheid period.

This discourse and tide of fear and hostility towards foreigners reached its peak in May 2008, as rioters swept through regions of South Africa, leaving over 50 dead and thousands displaced as they hunted for foreigners and illegal immigrants in their communities. This violence took hostility towards foreigners to new levels in South Africa and exposed the alarming extent of these violent sentiments and resentments in this country. Through these riots, the extent of hatred, fear, and animosity towards immigrants in South Africa became clear, and the effects of the alleged ‘flood’ on local populations were brought into the spotlight.

This flood of immigration has thus come to play a central role in shaping existence and experiences in contemporary South Africa. It has been documented well through several sources, including Nyamnjoh, Neocosmos, the Comarroffs,

the South African Migration Project, the Forced Migration Studies Unit at the University of Witwatersrand, and the South African Human Rights Commission.

Whilst this body of work is extensive, it remains, on the whole, predominantly descriptive and has focused on documenting the plight of immigrants in South Africa, the predominance of xenophobic sentiments in the country, and making recommendations to the South African government. However, whilst these are all important areas, there are several other important issues at work that can be analysed through the study of immigration. Primary among these is the role and nature of the state in the construction of the population/nation in contemporary times. In addition, a study of immigration in South Africa reveals several important insights into the nature of state power, sovereignty, politics and the law; how nationhood has been conceived and practiced; and what citizenship itself, as a concept and mode of being, means.

The project of modernity

Foucault argues that, in modernity, enemies and threats are defined in new ways which are distinct to modern discourse (Foucault: 2007). These distinctly modern definitions produce similarly distinct methods of dealing with these threats. The singling out of enemies and attempts to regulate society and people in accordance with definitions of what constitutes a threat is a feature of the project of modernity and modern discourse. It is a feature related to the modern project of shaping the ideal society. According to Foucault, this tendency makes itself felt through the disciplinary mechanisms prevalent in all modern societies. Although pre-modern societies contained severe and well-enforced modes of discipline, Foucault argues that the objects and objectives of modern and pre-modern methods and mechanisms of discipline differ greatly. He argues that whilst pre-modern discipline centred on preserving social hierarchies and orders that were outside of humanity's ambit, discipline in modernity focuses on preserving the society created by humanity, in-line with people's desires, assumptions, and capabilities (Foucault: 1991).

This distinction is illustrated by the two methods of discipline Foucault describes at the very beginning of his book *Discipline and Punish*. The first method he describes is a public execution, aimed at torturing and obliterating an attempted regicide. The condemned Damiens is put to death under an accusation of attempting to murder a monarch, and is thus being punished and executed for daring to threaten the hierarchical order of society. In this instance, the objective of punishment is to protect monarchical power and to warn people against the folly of threatening the order of things. In this case, power and the object of discipline and punishment are personalised in both the victim and the order being protected and upheld (ibid).

In contrast, modern methods of discipline and punishment, Foucault argues, have moved away from the personalised and now exist in multiple, dispersed, and generalised forms. The prison, he argues, is designed to eliminate the undesirable members of society and is a mechanism used to reform people. It is thus part of a complex designed to create and protect society as a whole, rather than the personalised social order of the monarch (ibid). The shift from the personal to the general is greatly significant, and illustrates a distinct feature of modernity.

Modernity is a period in which people begin, arguably, forging their own paths and societies. It is thus a period in which everything, including the social order itself, is subjected to humanity's will and creative abilities. Rather than a fatalistic, monarchical society, modernity establishes a humanistic civilisation; the objective of discipline and punishment, then, is not the preservation of an other-worldly order, but society itself. The social order is regarded as something that, whilst still in need of protection and enforcement, is the product of human abilities and agency and that can be forged accordingly. Thus, the mechanisms of discipline and punishment are, in modernity, aimed at protecting and entrenching the man-made social order – the modern society.

Within the modern society there are manifold disciplinary mechanisms designed to protect society. These include the prison complex as well as the schools, places of work, and social clubs and settings in which socio-economic hierarchies, roles, and statuses are moulded and protected and people are taught to internalise the ideals of the societies in which they live and the roles accorded to them. Another integral part of modern disciplinary mechanisms is political and legal language, laws, and power. The state politico-legal complex exists in modernity as the sanctified ruler and is tasked with protecting society for the good of the populace. It thus forms part of the modern disciplinary mechanisms designed to protect society from the forces which threaten the order of things and the preservation of society. The terms 'illegal immigrants' and 'aliens' are products of this mode of discipline and are, thus, distinct products of modernity.

Illegal immigrants are produced (and reproduced) and disciplined by both social and state institutions, political and legal language, and state policies. With regard to the former, an entire complex of institutions of surveillance, internment and punishment has arisen in modernity. These institutions and mechanisms take the form of border controls and check-points and the repatriation centres in which illegal immigrants are interred before deportation. All of these serve as mechanisms used to discipline, unearth, and restrict the modern state's enemies. Their existence and functioning is predicated on the existence of an enemy, one that threatens public and social order and that needs to be dealt with as such. At the same time, numerous state laws and policies are devoted to illegal immigrants, and serve to describe who falls into this category (i.e. to create it) and to establish the treatment and modes of discipline to which they must be subjected. In this way, institutional mechanisms are built on the foundations of law, policies and language, and all serve to distinguish the category of enemies/illegal immigrants in contemporary society.

The state and the nation

The emergence and construction of the term 'illegal immigrant' is a product of modernity and the rise of the nation-state. The two – modernity and nation-states – are intimately linked. The rise of the nation state can be seen to coincide with the Enlightenment period. This was a period in which people began to assert their creative abilities and capacities to shape society in accordance with their own beliefs, aspirations, preferences, and interests. The Enlightenment is commonly viewed as the beginning of humanity's triumph over superstition and fatalism, and the rise of rationality (Seidman: 2004). This rationality allowed people to pursue their own interests and visions of what society should be. As Foucault asserts in *Discipline and Punish*, the shift in society's view that emerged in modernity manifests in people's – specifically authorities' – attempts to construct and maintain society in accordance with their views of what the ideal society should be (Foucault: 1991). Evidence of this project can be seen in the multiple mechanisms, objects, and elements that make up modern society.

The link between the rise of the nation-state and the Enlightenment and project of constructing the ideal society is apparent, on a theoretical level at least, in the manner in which nation-states have been constructed and delineated. In *Nations and Nationalism Since 1780: Programme, Myth, Reality,* Hobsbawm argues that, starting with the French Revolution in 1789 and the Age of Revolution in 1830, the nation began to be portrayed as a homogenous entity. Previously the nation was a political entity, made up of people who came together under the control of the state and political authorities. Nation, as a concept and social unit, was congruent with state (Hobsbawm: 1992).

With the rise of nationalist politics and aspirations, however, 'the nation' became synonymous with 'the people'. The nation/people were the heirs and foundations of the state. In the previous equation, the state was the basis for identification, political/administrative sovereignty, and national identity. In the nationalist equation, the order was reversed and the nation/people became the authors of the

state. In this way, it became possible for stateless peoples, such as the Basques and Jews, to lay claim to nationhood without a state to call their own (ibid). This, then, is symptomatic of the new-found ability to shape and determine nationality, identity, and society itself in accordance with people's aspirations and beliefs. With the rise of Enlightenment thought, people began to assert the ability to forge and shape their own identities, nations, and societies, rather than accept them passively.

The French Revolution introduced the ideal that the nation should be "one and indivisible."(ibid) In an era of growing nationalist sentiments and aspirations, this led to the inculcation of the aspiration to create homogenous nation-states, in accordance with people's assumptions about what the structures and ideals of society should be. For example, the French Revolution was, on a basic level, a revolt against unchecked authority and an attempt to create a society founded on the ideals of Liberty, Equality and Fraternity. The ability to determine and define membership within the state is a consequence of the modern project of constructing and shaping society. Thus, the categorisation of legal and illegal immigrants and citizens and non-citizens is symptomatic of the rise of modernity and the ideals and projects this has introduced into societies.

A consequence of the pursuit of the ideal society has been the rise of new, improved, and greatly advanced methods of social control. As Foucault points out, modern societies are home to multiple, diverse, and dispersed methods and mechanisms of social control and power (Foucault: 1980). For Foucault, modern methods of control extend from prison complexes, to schools and industries, and even to the manners in which both social and scientific knowledge is pursued and disseminated. All of these features of modern societies are, for Foucault, cased in and shaped by discourses and power that give rise to and cement social control.

This element of social control can be seen as prevalent within nation-states and their attempts to assert their sovereignty, power, and control over the societies which fall within their borders. If the rise of nation-states is to be seen in the

context of increased attempts – and abilities – to order and control societies, then features of nation-states too can to be seen in this context. For example, the ability to define and determine who does and who does not belong within a nation-state is an instrument of social control. Thus, categories such as 'legal' and 'illegal', 'prohibited', 'undesirable', and 'citizens' all belong to the mechanisms of control and power.

This is a power that is today held with the most authority by the state. As Foucault argues, in modernity, the state is confronted with the "problem of the population" and how best to manage, produce, and control this (Foucault: 2006: p.141). For, with the rise of techniques and modes of discipline, as well as the modern preoccupation with the production of the ideal society, "The population is pertinent as the objective, and individuals…are no longer pertinent as the objective, but simply as the instrument, relay, or condition pertinent for obtaining something at the level of the population" (Foucault: 2007: p.42). The nation/population, then is the object of power, and is subjected to all the diverse and dispersed techniques, mechanisms, and tactics of power possessed by the state.

In this way, sovereignty, which grants a nation-state the right to admit or refuse admittance to foreigners, and consequently to determine the nature and character of the social body, becomes a measure of social control and assertion of state power. As Castles points out, citizenship is an ambiguous concept as it contains possibilities for both inclusion and exclusion: "the citizenship of one type of person implies the non-citizenship of others" (Castles and Davidson: 2000: p.10). In this way, citizenship, as it relates to membership of a nation-state and political community and is a product of sovereignty, is symbolic of the modern attempt to regulate and control societies, and shape the character of the social body and the identities of those who comprise it.

Categorising people and inserting divisions into societies has been a feature of attempts to modernise and control societies in Africa since colonial times. This

tendency manifested itself most infamously in the system of divide and rule applied to settler colonies, especially those under British control. This policy of divide and rule is captured well by Mamdani through his conception of the "bifurcated state", the state in which different sets of rules apply to different members of the population (Mamdani: 1996).

In the colonial period, legal and social categorisations were based on citizen and subject distinctions. According to Mamdani, citizens were those who were governed and empowered by Western-style laws and systems of governance, whilst subjects were those who remained in a rightless state and could make no claims to law, rights, and systems and processes of governance. In this case, citizens were entitled to the benefits and norms of rights and privileges, whilst subjects provided the exception to this status, and were exempt from rights and subjected to harsh, arbitrary and coercive treatment by the colonial state (ibid). Subjects were thus placed in what can be deemed a state of exception.

Whilst progress has been made in eroding the citizen-subject distinction in post-colonial states, elements of this still persist. In South Africa, this bifurcation is no longer internal, however, but has taken on an external, international character. According to Nyamnjoh, the new subjects in post-Apartheid South Africa are illegal immigrants. They exist in a state of subjection or exception as they are exempt from many of the rights, privileges, and norms of governance that have come to characterise post-Apartheid society. They are denied many of the rights and privileges granted to legal citizens and are subject to a set of laws and practices that are at odds with the laws used to regulate and protect legal citizens (Nyamnjoh: 2006).

Here it becomes apparent that they exist under a set of laws that do not apply to the legal population – the citizenry. At the same time, state and police practices entrench illegal immigrants' status as subjects and outsiders. There are numerous reports of harassment by the police, and the government has even called on South African citizens to play leading roles in identifying and routing out illegal

immigrants in their communities (Klaaren and Ramji: 2001). Again, this serves to entrench illegal immigrants as outsiders and subjects within the post-Apartheid state. They are constructed in opposition to legal citizens and are placed at the mercy of the law and the empowered citizenry. It is thus clear that the case of illegal immigrants makes the citizen-subject division an on-going factor in post-Apartheid South Africa.

This is a division that is mediated and determined by the state. Today, then, the nation – and all the politics around inclusion, exclusion, conformity, and control that is contained within this – needs to be seen not only as Anderson's "imagined community" (Anderson: 1991), but as the product of state power.

Migration and state power

One of the central mechanisms through which state power and control over populations is carried out is migration. This is the process whereby people traverse borders and boundaries and settle, either permanently or temporarily, in new locations, regions, and countries. It is a process driven by people's searches for better living standards; political, ecological and demographic pressures may force people to seek refuge outside their own countries, or they may choose to migrate in the belief that better standards of living and lifestyles are available elsewhere (Castles: 1993). The one common theme in migration is that "settlement is closely linked to employment opportunities and is almost always concentrated in industrial and urban areas." (Castles: 1993: p.4) Since 1945 and most particularly since the mid-1980's, migration has been taking place at an increasing rate. It is a process that is linked to globalisation, as "large scale movements of people arise from the accelerating process of global integration" (Castles: 1993: p.3); a global society characterised by fluid communication channels and economic markets has also given rise to fluid and mobile populations.

And whilst this fluidity and mobility is often a threat to states and their ability to control territories and populations – in other words, their sovereignty – it is also a process that offers new opportunities for the exercise of this power. As migration entails the movements of people across boundaries, it is a process that allows the mechanisms of identification and surveillance to come into play most forcefully. Apart from borders, there are other mechanisms at the state's disposal in the struggle to keep unwanted immigrants out and ensure that control over the population is maintained. These include passports and identification documents.

As Torpey points out in *The Invention of the Passport: Surveillance, Citizenship and the State*, passports and identification documents have emerged in order to make state surveillance and control over people's movements possible (Torpey: 2000). These documents serve as a means of identification and to prescribe a particular identity for their bearers. The identities they prescribe are based on the state's relationship with and obligations to different people. They determine what obligations a state has towards people as well as what rights people enjoy within the confines of a particular nation-state. As such, passports and identification documents have emerged as markers of citizenship. One cannot vote, collect pensions or welfare payments, or engage with state administrative machinery without them. As such, they serve as documents designed to regulate people and populations – a central concern of modern states.

Torpey argues that passports and identification documents were designed to provide authorities in early modern Europe with the devices and abilities to exercise more thorough control over the populations over which they enjoyed jurisdiction and power. According to Torpey, European rulers needed to maximise this control in order to maximise the productive power and resources they could extract from the subjected populations. He argues that passports and identification documents were vital in the conscription process and the formation of large armies and in dictating who could work where and how (ibid).

They thus served as prime methods of population regulation and control. He also points out that one of the driving motivations behind modern European states establishing and enforcing the use of identification documents and passports was so that the numbers of poor and "public charges" could be regulated and kept to a manageable level (ibid). Here, they are used to determine who can and cannot make claims to and demands of the state; these documents serve as a means of establishing the limit of states' obligations and who can and cannot enjoy the rights and privileges of citizenship.

At the same time, Torpey shows that passports were used to enhance state's abilities to regulate populations so that they could extract maximum economic resources out of them. Identification documents were the mechanisms that made both mass conscription and taxation possible. They were also central in the transition from feudalism to capitalism, as they altered people's allegiances and identities; they served to transform people from serfs and peasants tied to the land and nobility into free labourers, defined by their membership in a particular nation-state (ibid). They were thus mechanisms central to the development and expansion of capitalism in modern Europe and throughout the world.

Thus, it emerges that passports and identification documents are mechanisms used to confer particular identities on people and to allow states to manage populations and movements of people. They not only define people as members of particular nationalities, they define and classify them as citizens and non-citizens and thus dictate their relationships to the state. The relationships that this form of regulation and classification gives rise to are enforced in different manners. It is initially imposed and framed in a policy framework and later implemented and made real through state practice.

Just as passports and identification documents allow states to exercise control over the movements of populations, so too does the legal framework of a state. Illegal immigrants are products of the process of migration. Although illegal immigrants can be seen to challenge and threaten state power as they move

against the state's wishes and without the state's permission, they are, in fact, products of state power too. This is because the term 'illegal immigrants' is constructed by the state, and is used to assign a particular status to this category of people. This is a status that holds much significance, as it designates particular roles, relationships and subjectivities to the people who fall into this category.

We see this in Peberdy's claim that current South African immigration policies and the practices used to enforce them "criminalize" immigrants in this country (Peberdy: 2001: p.25). This point is made clear in police operations, such as Operation Crackdown, in which illegal immigrants are arrested alongside criminals (Klaaren and Ramji: 2001). Here we see that being designated an 'illegal immigrant' by the state confers a particular identity onto people who fall into this category, and allows the state to exercise again control over them.

This state control and defining of people is carried out through policing practices 'on the ground', but is made possible first and foremost through the law. Klaaren and Ramji assert this when they assert that "The illegal immigrant is not merely *beyond* law but is instead *against* law" [emphasis added in original] (Klaaren and Ramji: 2001: p.40). Here we see that the law itself is a mechanism of state power and is used to ensure that states maintain control over people and populations. It is the law that makes categories such as citizens and illegal immigrants possible, and is thus a mechanism that allows for the constant exercise and enforcement of state power, even, or especially, in the face of threats.

The state of exception, citizenship and the 'rainbow nation'

Carl Schmitt has provided a valuable and insightful framework through which the issue of illegal immigrants and their treatment in modern times can be understood. For Schmitt, modern political practice and governance centres on the identification of the 'enemy' – the class or classes within the population that represents serious threats to the rule of law and the sovereignty of the state

(Balakrishnan: 2000). Today as discussed earlier, the illegal immigrant has emerged as one of the central 'enemies' threatening modern states

It is apparent that illegal immigrants are regarded as a new category of enemy in contemporary times as they fall into a political and legal category designed specifically to deal with threats to society and its order. As Castles points out, "Migrants and minorities are seen as a danger to living standards, lifestyles and social cohesion" (Castles: 1993). They are also threats to state power and ability to regulate populations and territories as their constant movement across boundaries places strain on state mechanisms of surveillance. They thus arguably fall into the category of laws designed to deal with threats to and enemies of society. This category can be classified and understood as the 'state of exception'. This is a legally-defined space in which the common rule of law and protection of human rights, allegedly characteristic of liberal democratic states, is removed or annulled.

The state of exception, according to Agamben, has its roots in early forms of public mourning to commemorate the deaths of Roman Emperors or similar states of crisis or emergency (Agamben: 2005). It is, then, a state in which the usual course of law has been suspended or is deemed to not apply. This suspension of common-place law and governance is invoked in order for the authorities to exercise total control over a population and is thus a period that coincides with rule by decree and suspension of the normal, liberal functioning of the democratic state; it is an "extraordinary political measure" used to protect society and cope with internal disorder (Agamben: 2005: p.5).

It thus has its origins in and bares similarities to pre-modern, monarchical times, as it is a period in which individual rights and protections are removed and the state has full coercive control over the population, as well as to a state of emergency. However, despite similarities, the state of exception remains a modern phenomenon and is an important indicator of modern discourse, distinct from a state of emergency in important ways.

For Agamben, what distinguishes a state of exception from a state of emergency is that, whilst the latter is an extreme emergency measure invoked by the state in times of crisis that entails the formal suspension of the normal course of law, the former, the state of exception, has become, as he terms it "a paradigm of government" – a means of governing and controlling societies that is not a formal suspension of the law, but rather something that is actually written into and a function of the law itself (Agamben: 2005). The state of exception is a state in which the law legally does not apply.

The state of exception remains fundamentally a construct and product of modernity as it exists in order to protect a pre-determined, enclosed society. It is a legal framework designed to "erase any legal status of the individual" in order to protect society as a whole from internal threat (Agamben: 2005: p.3); it is invoked 'for the good of all' and to protect the modern society constructed by people. Thus, whilst the state of exception appears 'anti-modern' in its erosion of rights and the elevation, even sanctification of individual, presidential power, it is firmly a product of modern discourse.

The state of exception is utilised to protect society as a whole. It is, then, a political-legal mechanism which has as its object the population. This is a modern feature, it needs to be remembered, as, in modernity the population is the focus of control. As Foucault argues, "the transition which takes place from the eighteenth century from an art of government to a political science, from a regime dominated by structures of society to one ruled by techniques of government turns on the theme of population". (Foucault: 2006: p.141). As Agamben sees the state of exception as an everyday technique of government, it becomes clear that it fits into Foucault's schema and is then, an entirely modern concept and strategy of governing and controlling populations.

A further significant reason for the state of exception existing as a product of modern discourse is that it entails the creation of binaries and categories of

people. According to Schmitt, the creation of binaries and categories of people is a necessity in modernity, as it allows societies to identify their friends and enemies. For Schmitt, the friend/enemy binary is a matter of interests: friends have similar or compatible interests, whilst an enemy's interests are always '"a negation" of one's own interests (Balakrishnan: 2000: p.106). Thus, it becomes impossible for modern states to tolerate and coexist with enemies. This has become apparent in contemporary times, as illustrated by ideological conflicts such as the Cold War and the current war on terror. Both conflicts have been characterised by the view 'you are either with us or against us', and this has shaped global politics, alliances, and practices.

These modern conflicts are clear examples of the friend/enemy binary that characterises modern political society. At the same time, this binary has extended into societies on micro-levels too. It is a binary that not only describes macro political relationships, but individuals as well. This is apparent in the rise of the term 'illegal immigrant' and its use in classifying and identifying individuals.

The term 'illegal immigrant' plays a vital role in the construction and maintenance of binaries within all modern states and for my concerns in South Africa in particular. On the surface, post-Apartheid South Africa appears to be a state and society at pains to remove social and political divisions and binaries. It has established itself as a state committed to principles of inclusion, recognition of and respect for difference, and characterised by a nation-building programme premised on that acceptance and celebration of national diversity. For example, the African National Congress (ANC) government has committed itself to a programme of national inclusion and transformation based on non-racialism. This is a programme that seeks to promote a shared national sentiment amongst all South Africans, regardless of their racial profile, religious beliefs, or ethnic affiliation (Sharp: 1988).

As the Comaroffs point out, citizens in modern nation-states such as South Africa "seem widely able to re-imagine nationhood in such a way as to embrace the

ineluctability of internal difference"; terms such as "multiculturalism" and "the rainbow nation" have become commonplace and have even emerged as defining labels for the post-Apartheid nation-state (Comaroff and Comaroff: 2001: p.635).

Through the South African Constitution and Bill of Rights, people's rights to and freedoms for group affiliation, cultural practice, and freedom of identification have been preserved (Simeon and Murray: 2004). However, despite the efforts to embrace and accommodate difference, binaries still exist and remain prominent in modern nation-states in general and contemporary South Africa in particular. These binaries are felt and constructed along lines of citizenship and nationality. Thus, immigrants residing in the South African 'rainbow nation' are not easily or readily accorded a place in the nation.

They continue to be regarded with hostility and contempt, and are hounded by both police and citizens. In addition, the rights and entitlements belonging to South African citizens are denied them and made inaccessible. This illustrates, on both a legal-technical level, as well as on a relational, social level, the binary between legal citizens and 'illegal enemies' in contemporary South Africa. This binary, it must be reiterated, is the product, first and foremost, of the law. Illegal immigrants are a category of people constructed by the law, illustrating the role this feature of modern states plays in the production, control and maintenance of the population.

Democracy, homogeneity, sovereignty and citizenship

Whilst inclusion, multiculturalism, and the rainbow nation may be defining principles and ideals, this inclusion has limits. The privileges of inclusion are only granted to those who comply with the dictates of the modern state. Schmitt argues that liberal democracy, as strived for by many nation-states today, can only function if the homogeneity of the population is preserved. For him, the successful functioning and preservation of democracy requires "first homogeneity and second…elimination or eradication of heterogeneity" (Mouffe: 1999: p.39). This

argument arises out of Schmitt's assertion that politics and political society are characterised by friend/enemy distinctions and struggles.

In most Western cases, the push for homogeneity has taken on a cultural and ethnic form. The nation is portrayed, through the processes of mythical creation and dissemination, as ethnically and culturally homogenous. In the era of mobility and globalisation, immigration and its regulation has become an area of central concern for states and governments as immigration and ethnic diversity threaten the idea of the nation as homogenous and unified. The process of settlement and immigration creates a population "without common ethnic origins" and thus threatens to erode the (putatively) homogenous nature of the nation-state (Castles: 1993: p.14). Thus, methods of regulating immigration and ensuring that only the 'right' kind of immigrants are accepted have come to prominence.

In the new, multicultural South African state and 'rainbow nation', efforts to preserve homogeneity appear to be at odds and incompatible with the principles and nation-building programme of the state, founded as it is on diversity and multiculturalism. However, the Schmittian binaries and quests for homogeneity do still apply; they make themselves felt in the citizen/illegal immigrant or citizen/subject distinctions that persist in post-Apartheid South Africa. Schmitt asserts his argument about the need for homogeneity in democracies when he argues that "Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally" (Mouffe: 1999: p.39). In this case, homogeneity is preserved through the creation of categories of equals and non-equals i.e. equal citizens and unequal subjects or illegal persons.

At stake in this modern political struggle between friends and enemies and the quest for homogeneity is the sovereignty of the state. States have emerged as the leading authorities in modernity and consequently have a firm grip on several techniques of control and power. As Foucault's analysis of discipline, punishment, and control in modernity shows, control and power have become

centred on forging and moulding societies in accordance with dominant discourses. The pursuit of homogeneity is a further example of this.

The ability to create a homogonous social body is an issue of state sovereignty, as it gives states the ability to pursue the Schmittian ideal of a society constructed according to social and political interest. Thus, in deciding who is and who is not an enemy, and in determining the necessary measures to cope with and eliminate enemies, states are engaged in struggles to assert their sovereignty and abilities to shape and influence the social bodies over which they have and continuously seek control.

Sovereignty can be understood as "the right of self-government within and over a given homeland" (Coleman and Higgins: 2000: p.53). It is thus a political and legal tool and right granted to states to enable them to control the territories and populations over which they have been given authority. Linked to this authority, then, is the pursuit of the homogeneity upon which all modern states, democratic or not, can be said to rely. This is pursued and exercised through mechanisms such as citizenship, which defines who is and who is not part of the citizenry/nation-state, and what expectations consequently fall upon them. In defining friends and enemies, legal members of the population and criminals or 'illegals', states are exercising their sovereignty and consequent ability to control populations.

Thus citizenship has come to serve the interests of democracy, sovereignty, and the preservation of the homogeneity upon which it is built. The Comoroffs echo Schmitt when they state that in modern nation-states, despite the possibilities of numerous, autonomous, and self-defining identities granted to individuals, people still remain divided by one simple distinction: one is either "an autochton or an alien" (Comaroff and Comaroff: 2001: p.635); one either belongs to the empowered citizenry or is an unwanted intruder, one is either a citizen or a subject. Through this statement, it becomes apparent that the principles and practices of inclusion, diversity, and acceptance that the new South African state

is founded on are limited, and only apply in the cases in which people meet the criteria for inclusion as citizens.

We can see the quest for homogeneity at work through the way in which the current government has proposed including a Bill of Responsibilities to be taught in the school curriculum[5]. This Bill stresses the responsibilities and obligations that fall upon the new generation of citizens in the new South Africa. The primary concern of this Bill is to create a citizenry that will uphold the Bill of Rights and honour the new South African nation through respecting the rights of others and committing themselves to the creation of a non-racial, inclusive, tolerant 'rainbow' nation. For example, the first responsibility listed by the new bill reads:

> "The right to equality places on me the responsibility to treat every person equally and fairly, and not discriminate unfairly against anyone on the basis of race, gender, religion, national, ethnic or social origin, disability, culture, language, status or appearance."[6]

In addition, the preamble to the Bill reads, in part:

> "I accept the call to responsibility that comes with the many rights and freedoms that I have been privileged to inherit from the sacrifice and suffering of those who came before me."[7]

From this it can be seen that the state is engaging in a very deliberate attempt to create a nation that fits in with very specific ideals and agendas. The new generation of citizens that the state is attempting to create are portrayed and constructed as the heirs of those who suffered and sacrificed for freedom and human rights. In this conception, to be a citizen of the new South Africa is to

[5] da Costa, W. 'Schools to teach Bill of Responsibilities'. article appearing in *The Star*. Tuesday, 19 February, 2008.
[6] Republic of South Africa. Department of Education. (2008). 'A Bill of Responsibilities for the Youth of South Africa'.
[7] ibid.

honour and defend rights and freedoms, to vote, to participate in and shape a free society, to help create the new South African nation. In this respect, to be a citizen is to continue the quest of the ANC for a national democratic revolution; it is to be what Chipkin has identified as the national democratic subject or the "national revolutionary citizen" (Chipkin: 2007).

The national democratic subject is the member of post-Apartheid South African society who has been tasked with and is engaged in continuing the legacy of those who fought for freedom and equality, and who is consciously engaged in the process of building the new nation on these pillars. As Chipkin points out, within the Reconstruction and Development Programme, the new South African citizen is understood and constructed not simply as a bearer of human rights, but as an individual in search of liberty, happiness and democracy (Chipkin: 2007: p.155). The Bill of Responsibilities is an extension of this vision of the nation and its citizens.

Chipkin points out that there are conflicting and contested understandings of what citizenship and national identity should comprise in the new South Africa. However, it is evident that in state language, the national democratic subject (as an ideal, at least) has taken centre stage. This has consequences for how citizenship is to be understood, and how non-citizens are to be treated and defined. Hansen and Stepputat write that:

> "Once in charge of the erstwhile colonial administrative apparatus, the new national elites devote enormous energy and pedagogical ingenuity to the task of converting colonial subjects into national citizens – capable of responsible public conduct, loyal to the state and prepared to accept their responsibility as the backbone of society in return for privileges and recognition from the state." (Hansen and Stepputat: 2005: p.26)

The Bill of Responsibilities shows this process in action and has helped in the creation of a nation and citizenship that is formulated in a particular way and is particularly homogenous. To reiterate, in the state's current conception of citizenship and national identity, a South African citizen is one who contributes to the struggle for freedom and shows respect and reverence for others; s/he is engaged in actively creating the new South African nation. Here we see that the homogeneity strived for is not based on ethnicity or racial markers, but is, instead delineated according to qualities, characteristics, or subjectivities. In South Africa today, the homogenous, active, respectful, democratic citizenry is constructed as the 'right' and desirable population. A consequence of this is the plight of those who do not belong to the nation, who are seen to threaten the stability, cohesion, and homogeneity of the nascent nation.

If national citizens are seen as the heirs and builders of the new nation, the protectors of freedom and democracy, then non-citizens are those who threaten this cohesion, democracy, and freedom. In popular discourse, criminals are seen as the embodiment of these threats. Illegal immigrants have emerged as scapegoats and are often blamed for violent criminality and property theft in South Africa (Klaaren and Ramji: 2001). The two terms – illegal immigrants and crime – have become synonymous, and thus illegal immigrants are constructed as the primary threats to the new South African nation, its peace and prosperity.

Nyamnjoh argues that xenophobia is, in many ways, explained by people's fears that illegal immigrants are crowding them out of labour and economic markets and are draining economic resources that should be theirs by right. Again, illegal immigrants are portrayed as 'threats' to post-Apartheid South African society and the rights and entitlements the newly inaugurated citizens deserve (Nymanjoh: 2006). In this context, it becomes apparent that illegal immigrants are seen as threats to the order of post-Apartheid society and this necessitates the introduction of steps to restore social order and remove/counter this threat. As Schmitt points out, the norm is dependant on the exception. In this way, the norm of the national democratic South African citizen depends on the destructive, harmful, nationally-

threatening exception. In many cases, this exception is embodied by the popularly-imagined parasitic, poor, criminal, illegal immigrant.

Thus, in dealing with concepts of citizenship and its exceptions, questions of national belonging and identity are at issue. At stake, then, is both the character of South African society and social order, and what steps are deemed necessary to maintain and protect this order. The ways in which this is done offer important insights into the nature of contemporary South African society and how citizenship is understood therein.

The process of qualifying for citizenship introduces important social and political questions. Through looking at the criteria used to award citizenship, to decide who qualifies for inclusion and who is to remain an outsider or subject, one is able to analyse and gain insights into the nature of the political state and society under construction. It emerges that citizenship and the processes of qualifying for this status are embedded in the quest to preserve the homogeneity that democracy and state sovereignty relies upon.

In South Africa, however, cultural diversity is not seen as a problem or threat, but is embraced, as discussed earlier. Thus, a different form of differentiation is required; this differentiation takes the form of the citizen/illegal immigrant binary. This is a position enforced through state law and governance; "the position of immigrants is sometimes marked by a specific legal status: that of the foreigner or non-citizen" (Castles: 1993: p.12). It thus becomes apparent that the creation of the category of illegal immigrants is used in South Africa to divide the population and ensure that the homogenous nature of the multicultural society is preserved. Only the 'right' kinds of immigrants are accepted; the rest are forced into the category reserved for the unwanted: the illegal immigrant.

Conclusion

Illegal immigrants and non-citizens are constructed and portrayed as everything citizens and members of the nation are not. This is in keeping with the modern practice of constructing nations as idealised, 'imagined communities'. This is done through mythical formulations of the intrinsically good and noble characteristics of nations (Hobsbawm: 1992). Enemies are those who do not posses these characteristics and who threaten the social fabric – such as the immigrants incapable of understanding the principles of American republicanism, or illegal immigrants in South Africa who are considered the root of all crime in this country. At the same time, it is reinforced through state practices and policies. In an era in which human rights are enshrined in national Constitutions which purport to protect and empower people, those who fall outside of the protection of Constitutions – the non-citizens – are left in a rightless, vague, and vulnerable position. This is in direct contrast to the privileges and protections granted to citizens.

It thus becomes apparent that issues of immigration and citizenship are driven by several concerns and interests. At issue, then, is the sovereignty and on-going protection of the state and its ability to regulate, control, and shape society. The rise of nations and boundaries between members of different nations is inextricably linked with the rise of capitalism and this system's particular concerns. These concerns translate themselves into issues of identity and assumptions about the nature of particular peoples. This is apparent in South Africa today, with the rise of xenophobia and the wide-spread association of illegal immigrants, particularly those from Zimbabwe, Mozambique, and Nigeria, with crime and drains on state resources (Williams: 2006). Through state practices which construct these people as criminals and illegal persons and modern, capitalist concerns with private property and protecting people's claims to limited resources, barriers have been erected and illegal immigrants have become entrenched in state law and public consciousness as enemies.

This process of identifying people as enemies thus hinges on self-interests and, to reiterate, the pursuit of the ideal society. Modernity has given rise to particular notions of self-interest and visions of the ideal society; these, in turn, have come to shape contemporary approaches to immigration and citizenship. In turn, these approaches shape people's identities and the manners in which they relate to each other. They also mediate the state's relationship with particular groups of people. Today, people are classified by the state as citizens or non-citizens, friends or enemies. Thus, the state is able, through a series of rewards and punishments associated with the granting of citizenship and basic rights, to dictate and determine people's identities and behaviour. This is always in accordance with self-interests and desired goals, determined by the friend/enemy binary and in pursuit of the problem of the population.

The study that follows is thus an examination of how the problem of the population is pursued in contemporary South Africa, and entails an investigation of the ways this population is constructed, delineated, policed, and enforced. Through examining those who are excluded from the population, who do not qualify for inclusion, it is hoped that an understanding of what it means to be included can be reached.

Chapter Two:

The policy framework, the law and illegal immigration

Much has been written about South Africa's immigration policies in the post-Apartheid period. These policies form the cornerstones of South Africa's approach to immigration and provide palpable insights into the manners in which immigration has been perceived and dealt with in the post-Apartheid period. As such, it is possible to read a series of discourses, interests, and objectives into the numerous Acts and government publications which have informed and shaped these policies and approaches. An examination of immigration policy in the post-Apartheid period thus yields considerable insights into the manners in which matters of inclusion, exclusion, identity formation, state power, and ultimately citizenship and nation-building are conceived and practiced on a legal and state-led level. The focus of this chapter will be a discourse-led analysis of South Africa's current immigration policies and laws. This will be done in order to examine precisely how issues of inclusion, exclusion, nation-building and citizenship have been constructed and pursued through immigration policies and control in the contemporary period.

Immigration is an issue that speaks to and deals with many central concerns of the modern nation-state. It is a concept and practice that is based primarily on the movement of people and populations across national or international boundaries, and subsequent to this movement, the incorporation (or exclusion) of these people into the population of the nation-state/the nation. It is thus an issue that challenges many of the key functions and characteristics of the modern nation-state and the powers that hold authority over these judicial areas and communities. Involved in issues of immigration are issues and concerns over sovereignty, rights and entitlements, security, population control and regulation, and inclusion/exclusion in the national community. In this way, immigration represents a heavily-loaded issue and is one that can be analysed from a variety of positions and that, in

addition, offers several valuable positions and insights into broader sociological and theoretical analysis.

Because immigration and the movements of people across international boundaries speak to so many of the concerns of the modern nation-state an analysis of immigration policies can aid greatly in an analysis and understanding of existence within a nation-state and a modern system comprised of nation-states. Thus, immigration policies, discussions around their creation and intent, and the implementation and consequences of these helps work towards an understanding of how existence has been effected and shaped in the era of modern nation-states, an existence and quality of existence that is today formulated and encapsulated for the most part in a single concept and mode of being – citizenship.

Thus, my analysis of and inquiry into South Africa's current immigration policies and the concerns that have shaped these is based on an inquiry into a far larger problem and issue – the content of citizenship in contemporary South Africa, and how this is understood and utilised as a mode of nation-building, governmentality and biopower. Thus, what we are dealing with when we deal with immigration and issues around how immigration is policed, formulated, and understood are issues around existence, state-power, and the creation and maintenance of a national community. All of these are issues which are encapsulated in Foucault's concepts of biopower and governmentality – concepts that deal with how populations are produced, disciplined, and maintained in the modern era. Linked very closely to issues of population discipline and maintenance is Giorgio Agamben's concept and paradigm of the state of exception.

This is a concept and mode of governance – governmentality – that encapsulates many of the issues involved in immigration. It encapsulates issues around national sovereignty and the powers accorded to the sovereign, national security and the steps deemed appropriate to safeguard this security and deal with threats, population control and inclusion, and the foundations of this inclusion and consequences of exclusion. Thus, the work of Agamben and Foucault provide

powerful paradigms which can be used to critique immigration issues and the subsequent problems of existence in the modern nation-state to which these give rise. Hence, the analysis of South Africa's immigration policies and approaches to immigration and national inclusion/exclusion that will be undertaken will be framed by Agamben's concept of the state of exception and the modes of governance this creates. A reading of contemporary immigration policies will be undertaken that will seek to establish whether the state of exception is relevant and provides a basis for analysing and understanding these policies, their concerns and effects.

Producing the population: immigration policy and governmentality

In the introduction to this chapter it was mentioned that immigration policies and practices play an important role in population control, regulation, and formation. As such, they are technologies of biopower and governmentality, two concepts that Foucault introduced to understand how populations are produced and maintained in modern nation-states. Biopower, he writes, refers to the "set of mechanisms through which the basic biological features of the human species became the objects of a political strategy, of a general strategy of power" (Foucault: 2007: p.1). In modernity, for Foucault, populations become subjects of authorities' power, they become bodies of people that are open to power, influence, control, manipulation, and discipline, and as such become inscribed, through multiple mechanisms and means, with the power and ideological interests – i.e. discourses – of sovereign powers.

In order to achieve this manipulation and control over the population states have resorted to what Foucault terms 'governmentality'. Governmentality, in his conception, refers to "the way in which the specific problem of life and population were raised within a technology of government" (Foucault: 2007: p.370). It is a technology of government that comprises institutions, procedures, tactics, and knowledge that all combine to disseminate discourses throughout society

(Foucault: 2007: p.108). This is achieved through focusing these technologies and mechanisms on the social body – i.e. the population – as a whole.

This gives rise to what Foucault describes as the disciplinary society – the society in which bodies of people and populations are produced and maintained through power and discipline, in the service of a particular discourse. (Foucault: 1991) For Foucault, these mechanisms include the penal and penitentiary system, as well as schools, workplaces and factories, all of which serve to inscribe within the body and reproduce within the population a system or discourse of power that is based on discipline and surveillance (through both the self and others) (Foucault: 1991). In this way, populations are produced by and used within modernity to reproduce particular discourses and modes of existence.

Immigration and specifically immigration policies can be added to the modes of governance and population production in modernity. These are policies that are concerned with creating and shaping populations, as well as controlling and regulating the movements of people across international boundaries. As such, they form part of biopower/biopolitics as immigration policies have been used in various eras and settings as methods of creating and shaping populations. The political aspects and techniques present in immigration control and policies are overtly clear in Apartheid-era policies. In these, immigration was utilised by the National Party government as a means of increasing the white population in South Africa.

As Aurelia Wa Kabwe-Segatti notes, the NP, once it had become politically strengthened and had secured a foothold for Afrikaner nationalism and identity, began to pursue a pro-active policy of white immigration. “Between 1961 and 1991 several programmes were implemented and subsidies and direct State aid allowed for the settlement of tens of thousands of European immigrants” (Wa Kabwe-Segatti: 2008: p.62). This was done to aid in both the economic development of South Africa and to prevent the white population from “sinking into an ocean of colour” (Wa Kabwe-Segatti: 2008: p.61). In this way,

immigration policies during Apartheid served a form of population engineering and helped the government to mould and shape the population in line with their racialised policies. Immigration in this context helped produce and reproduce a particular type of population, and thus can be seen in the light of and as an example of governmentality. A further extension of biopolitics and population control in the Apartheid context makes itself felt within the policies pursued regarding the non-white populations.

Wa Kabwe-Segatti makes reference to the "two-gate policy" favoured by the Apartheid regime. This was a policy that hinged on having

> "one front gate welcoming populations corresponding to the criteria of attractiveness defined by the minority in power, the other, the back gate, with a double function, on the one hand preventing unwanted migrants from entering and on the other letting in, but only on a temporary basis cheap and docile labour" (Wa Kabwe-Segatti: 2008: p.60).

In this way, immigration policies not only served to strengthen the white population and presence in South Africa, but were also used to control and instil discipline on the non-white, indigenous population, through ensuring that only those who fulfilled the economic needs of the state and industries would be given rights of temporary settlement and movement within South Africa. Examples of policies that served these intentions include the 1950 Population Registration Act, the 1962 Commonwealth Relations Act "that ended uncontrolled trans-border movements in Southern Africa" (ibid), and the various influx control measures, including the Native Consolidation Act that granted Africans who could produce proof of their employment residential rights within South Africa's urban areas under the notorious Section 10 ruling (Posel: 1991).

In these cases, it becomes apparent that immigration and movement controls were used not only to influence population numbers, but also to instil discipline within

the populations. The fact that Africans needed proof of employment to reside in urban areas is an obvious method of creating a pool of labour that is forced to abide by the state's rules in order to secure an existence. In this way, labour discipline becomes linked to patterns of residence and access to rights, however limited they may be. A further example lies in the insistence that racial groups carry passes as a means of identification. This served to instil discipline within the population and affirm within them the difference of racial categories and bring these to the forefront of both identity and policing. It was a concrete method of entrenching disciplinary racial and labour power and discourse as well as population control within South Africa. It was thus a very clear example of migration and movement control as a means of governmentality and biopolitics.

The biopolitical nature of these policies is clear from their racial nature and the manner in which they focused on the bodies of the population. In circumscribing people's ability to move, reside and work these policies were acting on and through the body. They thus established the body as a means of discipline, regulation and discourse circulation. At the same time, this method was used within a broader context of governmentality/population production as the Apartheid state was able to entrench racial categorisations within the population through focusing on the body. Through this practice, racial subjectivities and categories became entrenched and at the forefront of the population. In addition, this racial categorisation and differential treatment produced a disciplined population, as compliance with the state's biopolitical practices became the precondition for entry into the political community. Biopolitics is a technique or strategy of government that aims to control and manipulate "the processes that sustain or retard the optimization of the life of a population" Dean: 1999: p.99). This was a definite feature of the Apartheid government's approach to immigration, and remains one in the contemporary South Africa state's immigration regime.

In the post-Apartheid, democratic era, the proclivity for population control and the state's pursuit and practice of biopolitics has not diminished; it has simply found

different objects and subjects on which to exercise itself. One of the central targets of state power and control is the foreigner or migrant. A clear example of this is the demand made by the South African Immigration Act of 2002 that all immigrants in South Africa carry identification and be able to produce it at any given moment. Section 41 of the Immigration Act reads "When so requested by an immigration officer or a police officer any person shall identify himself or herself as a *citizen, resident or foreigner* [italics in the original]"[8].

As the South African Migration Project (SAMP) note in their paper 'The New South African Immigration Bill: A Legal Analysis', "the requirement that everyone identify themselves means, in practice, a requirement to carry identification". This order has, according to SAMP, "police state implications" and infringes the Constitutional rights of South Africans" (SAMP: 2001: p.11), as they too can be asked for and made to produce identification on demand. This law has some important parallels with the Pass Laws of Apartheid, and can be seen to serve a similar (although not identical) purpose of population production and regulation.

Just as the Apartheid Pass Laws regulated people's movements and introduced discipline and control into the social body, as well as an awareness of people's status, rights or the limitations thereof, and relationship with the state and its authority, the Immigration Act of 2002 too introduces measures of population control and regulation. This is evidenced and enhanced by the remainder of Section 41 of the Act which decrees that

> "if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such immigration officer or police officer may take such person into custody without a warrant and if necessary detain him or her"[9].

[8] RSA (2002). Immigration Act. Section 41. 'Identification'.
[9] ibid.

Here a further measure of population control and regulation is introduced. For not only are people now to be ever-aware of different statuses, such as resident, citizen or foreigner, they are to expect different treatment and rights.

As in Apartheid, the body is the medium through which these statuses and differences are circulated and is thus a central mechanism of control and regulation. In demanding that immigrants carry identification and produce this when requested, the body becomes a symbol and mechanism of identification and differentiation. At the same time, the detention of suspected immigration offenders places the body at the centre of punitive, disciplinary mechanisms, and ensures that it becomes a product of biopower. In this way, biopolitical measures have not been jettisoned in the post-Apartheid period. They remain at the forefront of state policies and actions, and serve as a central feature of population production, differentiation, and policing. At the same time, human rights and the discourses associated with this are utilised as mechanisms of population production.

Friends and enemies

Here it is apparent that in South Africa there is an historical precedent of using immigration policies and control as a measure of population production and governmentality. This serves to inscribe and normalise what Carl Schmitt refers to as the friend/enemy distinction in South Africa's immigration policies. A situation is created, normalised, and accepted in which the right type of migrants are accepted as friends and welcomed into South Africa, whilst at the same time illegal immigrants who do not fit the state's specifications are classified as enemies who are to be kept out. This has led to a preoccupation in South Africa's approach to immigration with security and control, as it becomes an accepted form of controlling and producing the population, and keeping enemies out.

According to the SAMP, the "objective that seems to override all [within South African immigration policies and approaches], is the need to deter and prevent

people from illegally migrating to South Africa" (SAMP: 2001: p.3). Similarly, Oucho and Crush state that "South Africa's primary post apartheid migration goal has been to stop not facilitate immigration" (Oucho and Crush: 2001: p.150). This has manifested itself in an aggressive approach to monitoring, deporting, and controlling illegal immigrants. As the Act states, one of its primary intentions is that "security considerations are fully satisfied and the State retains control on the immigration of foreigners to the *Republic* [italics in the original]"[10].

In this way, illegal immigrants are constructed and portrayed as threats and enemies to South Africa. This is done through emphasising the drain they place on South Africa's resources and social services and through linking them fervently with crime and criminality. This has served to establish them firmly as enemies of the South African state and 'people', and has added to the motivation for placing and constructing them within a state of exception, a state reserved for controlling and negating enemies and threats.

Carl Schmitt characterised politics as a contest between friends and enemies, and held that the object of this contest is the "negation" of one's enemies' interests (Balakrishnan: 2000: p.106). According to state discourse, then, illegal immigrants' interests are based on settling in South Africa illegally and draining the country and its legitimate population of resources. In opposition, the state's interests are protecting its sovereignty and borders and ability to deliver services, controlling immigration, and ensuring the economy is well-served and productive.

Thus, the state's objectives are, on the one hand, to increase security and surveillance so that illegal immigrants are prevented from entering or residing in the country and, on the other hand, to increase the punitive measures in place so that illegal immigrants who do enter are prevented from enjoying any sort of rights or existence in the country. This places them firmly as enemies, and ensures that a state of exception is present in order to deal with them. This is evident in the wide range of powers granted to police and immigration officers in order to police

[10] RSA. (2002). Immigration Act. 'Preamble'.

immigration as well as through the deprivation of rights to social security which characterise the state's interactions with this category of people.

In addition to these powers, the fact that immigration offenders are treated as criminals by the state indicates the seriousness with which the state takes immigration and the policing thereof. Kaajal Ramjathan-Keogh, the National Co-ordinator for the Refugee's and Migrants' Rights Programme at Lawyers for Human Rights, stated that "To be an illegal person is not a serious crime; it's an immigration offence, it's not a criminal offence. It's merely an immigration offence"[11]. However, the South African state's approach to dealing with this category of offenders allows them to be searched and arrested without warrants, detained for up to thirty days without sentence, and to be deprived of rights, such as rights to freedom of movement, security of the person, and the right to dignity[12]. Additionally, once an illegal immigrant has entered South Africa, "there's no mechanism for them to be able to legalise their stay"[13], ensuring that they remain illegal and enemies within the state's purview and systems. This, then, ensures an aggressive approach to immigration and preventing and policing illegal immigration. It is one based on security and the negation of the intentions and perceived interests of illegal immigrants.

In addition, it is an approach that is informed by and based on governmentality. The act of negating the interests and movements of those considered to be illegal is a method of ensuring that they have no presence in or claim to be part of the population. It is thus linked very closely to population control and production, and follows a similar pattern to that used to create the legal, desired population and citizenry. Just as the awarding of basic rights and social services to legitimate members of the population and the preference given to skilled and wealthy migrants serves to further the interests of the state and its mode of governmentality, practices based on excluding illegal immigrants also produce a type of population.

[11] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.
[12] ibid.
[13] ibid.

For instance, the emphasis put on skilled migrants and those who have a minimum net worth serves to exclude "Someone who is a domestic worker, or a gardener or a labourer" and ensures that these types of migrants are "unable to legalise themselves."[14] Similarly, David Cote – a legal councillor from Lawyers for Human Rights who works in the field of immigration law and assists "migrants, refugees, asylum seekers who have been arrested and detained" in South Africa – makes the example of "Somebody coming from Zimbabwe, who can't have anything to eat, whose grandmother works in the yard, and is coming here, and also maybe they're afraid of the political situation in general but they haven't actually met that criteria of a specific persecution," as a type of migrant who is criminalised and vilified by the Immigration Act and the South African state's immigration policies[15]. In this way, the South African state's approach to immigration serves to exclude the poor and unskilled, and ensures that this class of people cannot be included in the population.

On the other hand, the 1999 White Paper on International Migration – the White Paper that came to form the basis of South Africa's current Immigration Act – notes that immigration policy needs to be used "to let people who add value to our society in and to keep those that do not, out."[16] The authors of the White Paper "believe that this can and must be done,"[17] and describe people who are to be regarded as valuable and desirable as follows:

> "The people who can add value to our growth and development are those who invest, are entrepreneurs and promote trade, those who bring new knowledge and experience to our society, and those who have the skills and expertise required to do the things we cannot properly do at this stage."[18]

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[14] ibid.
[15] Interview with David Cote, conducted on 12 May, 2008.
[16] Republic of South Africa. Task Team on International Migration. (1999). White Paper on International Migration. Section 3. 'Preliminary considerations'.
[17] ibid.
[18] ibid.

There is thus a recommendation that immigration control be utilised as a means of population production and that differentiation between types of migrants needs to be pursued. This is done through categorisation and classification, which is, in turn, enforced through the law and differential treatment used to keep unwanted or undesirable migrants out. There is thus a clear intention of regulating the ways in which immigration both sustains and retards (as Dean put it) the life of the South African population.

This method is enforced and entrenched through the lack of mechanisms and spaces in the law that allow illegal immigrants, once in South Africa, to legalise their presences in the country. Here, immigration laws become a type of 'iron cage', and shows the state's power and bureaucracy to be inflexible and inescapable. This iron cage-approach is extended to children born of migrants in South Africa and the ruling within the Citizenship Act which ensures that if a " [foreign]child is born in this country they do not get citizenship, they take on the citizenship of their parents."[19] This means that a child born to a refugee or illegal immigrant in South Africa too will be classified as a refugee or illegal immigrant.

This was made clear by the experience of one particular refugee interviewed, who related how, when his child was born in South Africa, the word "alien" was immediately inscribed on his birth certificate[20], immediately placing the child outside of the population and in a state of exception. In this case, the biopolitical nature of immigration control and policing is clearly evident, and is shown to be a method of producing and identifying members of the population practiced from birth**.** This cage-like inflexibility in dealing with illegal immigrants and refugees is in contrast to the White Paper's recommendation that, in the case of 'valuable' immigrants, "openness to the world should be welcomed."[21] Thus there is an

[19] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.
[20] Interview with Pastor [real name withheld], conducted on 15 July, 2008.
[21] RSA. Task Team on International Migration. (1999). White Paper. Section 3. 'Preliminary considerations'.

overwhelming use of differentiation and categorisation within current immigration policies, which are based on security, self-interest, and population production.

The preoccupation in immigration policies with security and controlling the population in order to further the national interest and protect national sovereignty opens up a very particular and significant form of political and social space and practice. It is one that can be described and understood through the state of exception. For Agamben, the state of exception is a mode of governmentality and paradigm of government that is bound up inextricably with issues of national security and sovereignty. Citing Carl Schmitt, Agamben formulates and theorises sovereign power as resting on the state of exception and the ability to enforce it. For Schmitt the sovereign is "he who decides on the state of exception" (cited in Agamben: 2005: p.1), meaning that the definition and extent of sovereign power is measured by and contained in the ability to decide on the social and political limit and to create the norm.

In this conception, sovereign power is grounded in the ability to decide on what constitutes normal society and social-political circumstances and to decide what represents an exception to this. As noted previously, the state of exception bears striking similarities and has its origins in the state of emergency as a mode of governance. The state of emergency is a temporary form of political and social rule that is invoked in order to deal with exceptional social-political circumstances, and is viewed as a measure needed to restore order in these periods. The declaration of a state of emergency thus rests on a presumption and conception of what represents normal and desirable circumstances and a view of when these are exceeded or disrupted. Thus, in deciding on what represents an "exception", the sovereign power is given the ability and authority to not only decide on what represents an exceptional case, but also to decide on what represents the norm. It is thus a mode of governance and understanding of power that rests on the production and protection of a particular form and functioning of society, and is thus a very powerful and extensive form of governmentality.

Agamben grounds his theory of the state of exception in this Schmittian understanding of sovereign power, and sees the state of exception as a paradigm of governance that gives maximum expression to sovereign authority and entrenches the ability of the sovereign to decide on the normal and desirable social and political situation. It is thus a form of governmentality that is heavily invested in issues of security and producing and protecting a form of society. It has its roots in the state of emergency and earlier forms of this, such as the *iustitium*, or period of public mourning, in which the normal functioning of the law and society was suspended in order to allow for the passing and commemoration of the sovereign after his death (Agamben: 2005). It is thus a form of governance and controlling society and applying the law that rests on the suspension or non-application of the law.

What distinguishes the state of exception from a state of emergency, however, is that whilst a state of emergency is formally declared, a state of exception is not; rather, it is a suspension of the law that ensures the continual application and functioning of the law through creating instances in which the law does not apply or can be overlooked. It is thus a legal outside or exception, rather than formal suspension, and is seen not as a temporary, extreme form of governance but rather as what Agamben describes as a "paradigm of government" – a particular view, practice, and mode of governance or governmentality (Agamben: 2005).

As a practice of governance that depends on and entrenches situations in which an outside is created and circumstances are decided on in which the law does not apply or can be overlooked, the state of exception is, like a state of emergency, dependant on a decision on what constitutes an exception, and resting on this, what constitutes the norm. It is thus a practice of governance the focuses on preserving and entrenching a norm and normal state of society, and is thus bound up in issues and practices of security. This is clear in the case of illegal immigrants in South Africa. They fall into a category and case in which the normal course of law does not apply:

> "The type of rights foreigners can aspire to in South Africa is…restricted by Section 36 of the Constitution which is the limitation clause. It enables the State to distinguish between different categories of rights and only grant some to different categories of people without breaching the Constitution," (Wa Kabwe-Segatti: 2008: p.85)

thus creating a situation in which foreigners and illegal immigrants especially can be seen to be outside the law and treated differently, or exceptionally.

The exceptionality of migrants in South Africa and the non-applicability of the law in their case is evidenced in the 1999 White Paper where it is stated that

> "In South Africa we will need to determine the extent to which the circumstances of being an alien, either a legal or illegal one, may authorise government to provide them with a lesser degree of constitutional protection. However, even if there is uncertainty on the extent, there is agreement that alienage is one of the circumstances which triggers the application of the limitation clause as a matter of fact which enables government to legitimately deal with aliens on a different footing than it would with its own citizens."[22]

Here we have a concrete assertion that 'aliens' or immigrants are of a different order to citizens, and thus need to be dealt with in different ways. There is clear acknowledgement that, in the case of illegal immigrants, the normal course of law and constitutional order do not apply. This has paved the way for their exclusion from 'normal', legal society and has entrenched them as vulnerable, excluded enemies or aliens in South Africa.

[22] RSA. Task Team on International Migration. (1999). White Paper. Section 6. 'The need and parameters for a new policy'.

The preoccupation with security in South Africa's immigration laws and approaches thus gives rise to a series of abuses and practices that can be seen to be outside and in contradiction of the law: The declaration that, in the case of foreigners in South Africa, particularly, illegal immigrants, the law can be legally suspended has given rise to a series of practices and abuses that entrench immigrants within a state of exception and place them outside of the normal acceptable community. This indeed points to a state of exception as it provides an instance in which a category of people are created that serve as a limit point for the law and its applicability and provide an outside in terms of which the norm can be understood. This is evident in the categorisation of foreigners and the different treatments meted out to different types of migrants.

The prioritising and inclusion of particular types of migrants and the exclusion of undocumented 'aliens' serves to create a boundary between what can be seen as acceptable and normative, on the one hand, and threatening, dangerous, and exceptional, on the other. In this way, a norm or standard is created – the law-abiding, productive migrant and member of South African society – and is preserved through the exclusion of the exceptions to this – the illegal, undocumented, parasitic migrant. South African immigration policies and approaches, then, can be seen to be framed and influenced by a state of exception that is utilised to create a population and norm.

Human rights and population production

One of the fundamental human rights is the right of *habeas corpus*, the right to be present at one's trial and to be given a fair trial. In his classical and highly influential writings on citizenship, T.H. Marshall stresses that the notion of citizenship begins with "civil rights, for example, rights to property and to a fair trial in which proper individual citizens could claim *habeas corpus*…which curtailed the arbitrary exercise of state violence" (Hansen and Stepputat: 2005: p.10). In the modern period, then, rights and citizenship are secured by protecting the individual and his/her property from the arbitrary exercise and excesses of state power. The ruling within the Immigration Act that suspected undocumented

immigrants and foreigners who are in South Africa without the correct identification documentation can be arrested without a warrant and can be deprived of their property can be seen as a method of denying suspected foreigners and immigration law offenders the rights to a fair trail and due process before the law.

For example, Joyce Tlou of the South African Human Rights Commission (SAHRC) recounts that the SAHRC has encountered and received complaints from "specific individuals who complain that they are detained in Lindela but they are legally entitled to be in the country" and have not been given the opportunity to prove that they are legally allowed to reside in South Africa[23]. Here we have a very real denial of the right to *habeas corpus*, fair trials, and basic human rights in cases in which people are suspected of being illegal immigrants. In some cases this denial of rights is even extended to South African citizens, such as the young man who was arrested for being 'too dark' and subsequently deported to Mozambique, despite being a fully legal South African citizen[24].

In cases such as these, the exceptional status of immigration offenders and the state's denial of their rights, even the most basic of these, are evident. This denial of rights and access to fair trials is made even more concrete through David Cote's assertion that "rights are accessible if you have access to legal representation. If you're in Lindela, for example, and unless you get to speak to a lawyer, you are unable to access those [rights]"[25]. This adds further vulnerability to the position of immigration law offenders, who are placed in a situation in which their ability to access rights and fair treatment on behalf of the state rests on their ability to attain legal representation.

In this case, the most basic of human rights is only accessible through expert mediation, creating a situation in which rights are not always applied or

[23] Interview with Joyce Tlou, conducted on 11 July, 2008.
[24] Venter, Z. 'Damages for boy considered to be 'too dark''. article appearing in *The Star,* Tuesday 11 March, 2008.
[25] Interview with David Cote, conducted on 12 May, 2008.

recognised. The Immigration Act also insists that "no person shall aid, abet, assist, enable or in any manner help… an illegal foreigner"[26]. This serves to "turn every illegal resident into a legal leper" as this section of the Act isolates people who are in South Africa illegally and is designed to "ensure that no person or body corporate in the Republic will lend any assistance to an illegal resident whatever their reason for being in the country" (SAMP: 2001: p.11). In this way the Immigration Act pushes people into a space in which rights are minimal and their (ideal) isolation from the rest of the population is clear. Through denying them rights to legal representation, access to legal processes, and seeking to ensure that they are isolated from the 'legal' population, the state is producing illegal immigrants as an excluded, exceptional category of people.

They are marked out as different from the rest of the population as they are isolated and the legal population is encouraged to enforce this isolation. At the same time, they are denied basic human rights, rights which have been constructed as part of the foundation of citizenship. Thus, the immigration policy pursued by the South African government can be seen to push illegal immigrants into an exceptional space – a state of exception – and ensure their separation from the population and their clear designation as a category of people who are outside of the law.

For Agamben, the state of exception is a legal space in which the law is deemed to legally not apply. In the case of the Immigration Act making it legal for suspected illegal immigrants to be forced to carry identification documents, stopped, searched, and even harassed without warrants, and be deprived of legal counsel and access to the law, we see a clear example of a state of exception being in force. This is the case as there is no legal requirement for people to carry identification documents in South Africa, and measures such as the ones contained in the Immigration Act have denied people suspected of being illegal immigrants the rights to presumption of innocence, free movement, and security of the person (SAMP: 2001). This has created illegal immigrants as a vulnerable,

[26] RSA. (2002). Immigration Act. Section 41. 'Identification'.

excluded category of people as in their case the law can be said to legally not apply.

This vulnerability and tenuous link between immigration law offenders and human rights is a telling example of the state of exception in service of biopower/biopolitics, and serves as a very real method of introducing control, regulation, and bases for inclusion and exclusion within the social body. As Agamben points out, one of the foundational laws and rights that proceeded habeas *corpus* was Article 129 of the Magna Carta, which declared that

> "No free man…may be arrested, imprisoned, dispossessed of his goods, or placed outside the law…or molested in any way; we will not place our hands on him nor will have others place their hands on him…except after a legal judgement by his peers according to the law of the realm" (cited in Agamben: 1998: p.123).

According to Agamben, this was an early and preceding form of the law of *habeas corpus*, and laid the ground for the command "you will have a body to show" and will "account for the cause of the arrest and detention" (ibid).

For Agamben, it is the introduction of the term and insistence on the presence of the body that is significant in an analysis of the modern formulation and preoccupation with biopolitics. It is the presence of the body within the formulation of the law that, according to Agamben, allows one to perceive the activity of biopolitics as being at the heart of modern democracy and law. For him, it is laws and formulations such as this that serve to imbue the body or bare life with political significance, and thus make it the site and subject of biopolitics and governmentality.

At the same time, however, the former article Agamben points to – Article 129 – also contains a significant foundation for modern governmentality. What is of

significance in the formulation of Article 129 is the distinction "free man". It is in this simple category that a fundamentally modern mode of politics – the politics of inclusion and exclusion, differentiation and categorisation – raises its head and makes its presence felt. In singling out "free men" as the subjects to whom Article 129 applies an immediate exception is introduced between the rights and treatments the free and the non-free can expect. In this case, one can find a definite basis for inclusion and exclusion and an immediate insertion of division between free and non-free, between members of the realm or community and outsiders.

It is the distinction between free and non-free that also points to and paves the way for modern practices of biopolitics and governmentality, as it, in this case and numerous subsequent cases, introduces a distinction between people in the eyes and practices of the law on the basis of people's statuses. In modernity, the awarding of status in relation to the nation-state paves the way for peoples' opportunities to be judged as included or excluded, as free or not free. A clear example of this is present in Mamdani's citizen/subject distinction, in which different laws apply to different sectors of the population (Mamdani: 1996).

In a similar case, the rights to settlement afforded to employed Africans in Apartheid urban areas were distinct from the rights afforded, or more accurately denied, other Africans who could not meet the Apartheid state's conditions or requirements. In all of these cases, in the free man versus the non-free, in the citizen/subject divide, and in the employed African with Section 10 rights versus the unemployed African whose presence in the urban areas was prohibited, we see that rights and inclusion are tied inseparably to characteristics or qualities, be it employment status, race, or wealth.

What emerges, then, is that one's claim to rights and inclusion is based on certain characteristics or features. Or, put conversely, certain qualities or characteristics of population make one qualified for inclusion and the treatment granted and protected by rights. Those who cannot meet these conditions are forced into an

exceptional space, a place in which the rights afforded to others are absent and do not apply. In this sense, then, rights and treatment by the law is a method of producing people and populations, as societies learn that their abilities to meet the requisite criteria for inclusion determine their rights and the treatment they can expect. Thus, rights and the regulation and enforcement of these are key tools of biopolitics and the creation and discipline of the population; they are methods used to ensure that the 'right kind' of population is produced.

Social services, citizenship and exclusion

Immigration laws and policies are another clear form of biopolitics and the creation of populations. It becomes apparent that within South African immigration law there is a desire or overriding preoccupation with using immigration, as was the case in Apartheid, as a means of producing the population and ensuring that only the right kind of people are admitted and given rights in South Africa. The fact that illegal immigrants and others who are suspected of violating the conditions of their stay in the country can be arrested and detained without warrants is just one indication that immigration laws are attempting to discipline and produce populations within South Africa.

In addition to making it the responsibility of police and immigration officers to ascertain the identities and statuses of people present in South Africa, the Immigration Act also makes it the responsibility of employers, learning institutions, and businesses providing accommodation to identify and verify the statuses of customers, employees, or clients in order to ensure that "a foreigner whose status does not authorise him or her to receive…training…or instruction"[27] or services does not do so, and thus does not cross the division between an included member of the population and one on the outside.

What this section of the Act serves to do is to not only affirm the isolation and exclusion of illegal immigrants or foreigners in South Africa, and confer onto

[27] RSA. (2002). Immigration Act. Section 39. 'Learning Institutions'.

them exceptional status, it also serves to place issues of identification, and thus difference and inclusion/exclusion, at the forefront of public consciousness. This is a form of discipline that is thus instilled not only on the illegal population, but on the legal population too, as it ensures that the differences between legal and illegal are always clear and at the forefront of transactions and interactions. In this way, both a legal and illegal population is produced and maintained, and the state of exception and differential treatment is placed at the centre of this biopolitical strategy.

This strategy of introducing differential treatment and rights to different categories of peoples and placing identification and the need to verify status at the forefront of interactions is made abundantly clear in Section 44 of the Act – which deals with "organs of the state" and their interactions with immigrants and foreigners – which declares that "*any organ of State* shall endeavour to ascertain the *status* or *citizenship* of the persons receiving its services and shall report to the *Department* any *illegal foreigner*, or any person whose *status* or *citizenship* could not be ascertained [italics in the original]"[28].

The effect of this section of the Act is to again enhance the panoptic and surveillance powers of the state and society, and make the detection of illegal immigrants a primary concern, even in issues of social services. Here disciplinary and exclusive practices of identification are placed firmly within the state's focus and its dealing with the population. Once again this ensures that issues of inclusion and exclusion are brought to the fore and are inscribed within state policies and practices, and the ways in which these are translated into actions and interactions in the public sphere. The insider/outsider or citizen/illegal distinction is placed in a position of prominence.

A further effect and intention of this section of the Act is to ensure that social services remain the preserve of the legal population i.e. the citizenry. In 1997, the then Minister of Home Affairs, Mangosuthu Buthelezi, in a precursor to Section

[28] RSA. (2002). Immigration Act. Section 44. 'Organs of State'.

44 of the Act, "called on all government departments to 'request identity documents or passports of all foreigners requesting services subsidized by the government' to 'ensure that they do not gain access to services in short supply to our own people' " (Peberdy: 2001: p.19). Here, the distinction between citizens and illegal outsiders or foreigners is made abundantly clear in both state language and practice.

This serves a dual purpose of entrenching divisions and categories within the population, and also serves to strengthen state power. According to Sharma and Gupta, state power is circulated and reproduced through "the repetitive re-enactment of everyday practices", particularly at a bureaucratic level (Sharma and Gupta: 2006: p.13). Through these practices and re-enactments, state insistences and edicts become common-place and entrenched within populations, as people learn that in order to access and interact with the state, they need to abide by these rules and processes. This is the case in the demand that all those who receive social services produce the correct identity documents.

At the same time, state bureaucratic power and processes are used, as Sharma and Gupta point out, to entrench class, gender, caste, and other categories of difference within the population (ibid). They use the example of the Indian bureaucracy's insistence that all interactions with the state be conducted through writing and filling out forms as a way in which differences in education, caste, class and gender are reproduced by the state. As they note, "Upper-class and higher-caste men are often better situated to take advantage of state programs than poorer and lower-caste women." (ibid).

One can note a similar trend at work in South Africa today. Those with the correct status and identification documents to prove this are able to take advantage of social services in ways that those without these cannot. This reproduces divisions between obedient, classified citizens and illegal outsiders on a day to day basis, and thus reproduces state power and barriers between inclusion and exclusion.

This approach of cementing lines between citizens and outsiders through differential treatment and the denial of social services was criticised by Kaajal Ramjathan-Keogh who, when asked whether the state wants to encourage people to apply for citizenship responded by saying that

> "[The government] doesn't want everybody to be able to get citizenship or permanent residence [and] will try to keep a very close hold on who is permitted to do so and who is not, primarily for the reasoning that they would then be able to access state resources: pensions, grants, all of the above."[29]

Similarly, David Cote points out that within the government "there's the idea that you must exclude foreigners, and it must be citizens first," in order for the social grant and public health system to be maintained[30].

So, it is apparent, then, that keeping people outside of the law and legal populace and within a status declared by the state to be illegal is a measure of ensuring that people are not able to lay claims to the services provided by the state. Illegal foreigners are thus kept in a status that prevents them enjoying the social benefits provided by the state, and deprives them of important human rights, such as economic security, schooling, and even medical care. As Joyce Tlou stated, "if it's not life threatening, if it's not an emergency, [illegal immigrants] are not going to get medical assistance." This places them in a situation in which "the right to life", as she put it, is the only right that illegal immigrants in South Africa can lay claim to[31].

Thus, a very clear and stark picture emerges, one in which statuses such as 'citizen' and 'illegal immigrant' convey and translate into very real and different experiences of existence within South Africa. What we see is a situation in which citizenship is produced and reproduced as the gateway to entitlement and

[29] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.
[30] Interview with David Cote, conducted on 12 May, 2008.
[31] Interview with Joyce Tlou, conducted on 11 July, 2008.

enjoyment of rights. It is the foundation on which human rights and the politics of inclusion in society are built, and it relies on an outside, on an excluded section of the population for its substance or significance. As is seen in the quote from Buthelezi cited by Peberdy, citizenship and social services are a means of placing "our own people" on a plane above others. In order to do this, an excluded 'other', a referent against which 'our own people' or citizenship can be measured, is required. In many ways, illegal immigrants and the policies used to exclude them from access to social services provide this.

Thus, citizenship and the classification of people as 'illegal immigrants' are both established as mechanisms of biopolitics. Biopolitics is concerned with "matters of life and death, with birth and propagation, with health and illness", and, ultimately, the conditions under which populations live and die (Dean: 1999: p.99). All of these spheres are regulated by the classification of people into 'citizens' or 'immigrants', and these categories are thus central mechanisms of biopolitics in South Africa today.

The norm depends on the exception

For Carl Schmitt, the norm depends on the exception. This means that in order for a norm to be understood and have meaning, an exception to this norm needs to be present so that the norm can have substance and significance behind it. As he saw it "all laws have an outside" and it is only through viewing this outside that the 'inside' of the law can make sense (Hirst: 1999: p.12). In Schmitt's view, this translates into a practice of politics that is based on producing an inside and an outside, both a political community and a community that exists as outsiders or in opposition to the community. This line of thinking allowed Schmitt to pursue the argument that democracy is a political process and practice that relies on "first homogeneity and second…elimination or eradication of heterogeneity" (Mouffe: 1999: p.39).

Schmitt asserts his argument about the need for homogeneity in democracies when he argues that "[e]very actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally" (ibid). In this way, within democracies, and in order to preserve democratic societies and ensure their functioning, a community has to be created and then delimited. Thus, even though democracies putatively strive for inclusive social and political conditions, a limit to the inclusion and formulation of the political and national community has to be reached. In this way, the norm of inclusion and membership of the community – which today takes the form of citizenship – has to have an exceptional outside in order to have meaning and be maintained. This practice is evident in the manner in which social services are allocated and awarded in contemporary South Africa.

As the examples used above show, one of the central meanings of citizenship in South Africa today is access to social services. As Buthelezi points out, efforts must be made to ensure that services are reserved for 'our own people'. In this statement it becomes apparent that not all who are in South Africa are part of 'the people' or community, and need to be treated as such. This approach is made concrete in the 1999 White Paper on International Migration, where it is stated that

> "The objectives of GEAR [Growth, Employment and Redistribution] could be best achieved by the maximum possible limitation on the entry of any migrant other than tourists and business persons, so as to reduce the number of people to whom government needs to supply services and for whom the economy needs to provide."[32]

In addition, the Paper notes that "illegal aliens have…negative impact[s] on the provision of services and on our society" as they "compete for scarce resources with millions of South Africans" and "compete for scarce public services, such as schools and medical care, infrastructures and land, housing and informal trading

[32] RSA. Task Team on International Migration. (1999). White Paper. Section 5. 'The existing policy framework'.

opportunities"[33]. The Paper goes on to suggest that methods need to be found to ensure that 'illegal aliens' are made unwelcome in South Africa, so that they are discouraged from remaining in the country and placing a drain on services they have no claim to. The Paper states that "the best way to prevent further illegal immigration is to create in South Africa an environment which does not offer them the opportunities of employment and free available public services which they cannot find in their countries of origin"[34], thus showing an unambiguous intention of making it clear that illegal immigrants are not welcome in South African and need to be excluded from the public sphere.

Here, then, it becomes clear that illegal aliens are not to be permitted or tolerated in South Africa as they compete with and deprive deserving citizens and residents of services to which they are entitled. In this way, it becomes apparent that social services and rights such as medical care, public infrastructures, land, housing, and schooling have been constructed and are maintained as the preserve of South African citizens and those who have been granted the right to permanent residence. In this way, the South African democracy and political community is constructed and given meaning through producing categories of people who belong and are entitled; simultaneously, these categories are enforced through the production of categories of people who are outside of the community, who form the exception.

Setting limits on the population

This method of giving form and substance to the South African population through establishing illegal immigrants as an exceptional category is made evident and abundantly clear by a 2004 Constitutional Court ruling which declared that it was unconstitutional to reserve access to social grants such as child-support grants, care-dependency grants and old-age pensions for South African citizens only. The Court ruled that permanent residents should also be entitled to these

[33] RSA. Task Team on International Migration. (1999). White Paper. Section 6. 'The needs and parameters for a new policy'.
[34] RSA. Task Team on International Migration. (1999). White Paper . Section 11. 'Enforcement'.

grants as "the Constitution vests the right to social security in 'everyone' and…permanent residents are bearers of this right"[35].

However, whilst this ruling can be seen as progressive and a means of furthering inclusion and social security in South Africa, there are two important elements and exceptions made within it. The first is the judgement that declares that the South Africa state is "entitled to prioritise its citizens" when awarding and distributing social grants. Here, it is clear that citizenship remains a privileged status and places one who bears this status above other categories of population. Here, again, citizenship is given substance through the construction of a boundary and limit.

The second aspect of the ruling that enforces an exceptional status and legitimises a mode of biopolitics and governmentality is the ruling that singles out permanent residents as the category of foreigners who are entitled to social grants. The Immigration Act declares that permanent residence status will be granted to foreigners who have been employed in South Africa with valid work permits for five years and who have received permanent offers of employment, as well as to foreigners of "good and sound character" who have permanent employment in South Africa, who intend to establish viable and profitable businesses in South Africa, and who have a "minimum *prescribed* net worth [italics in the original]"[36]. Here it becomes clear that permanent residents are those members of the South African community who meet specific criteria specified by the state. They are foreigners who are well-disciplined and who comply with the legal obligations set upon them by the state, such as having legal work-permits and being present in the country for five years continuously, and who meet specified economic criteria.

This is a direct form of governmentality and population production as it serves the purpose of only admitting a certain type of person into the population. It thus forms part of a strategy of creating a community or population. The focus of the

[35] Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development (CCT 13/03; CCT 12/03) Decided on 4 March 2004.
[36] RSA. (2002). Immigration Act. Sections 25, 26 27. 'Permanent Residence'.

granting of permanent residence rights is to create an economically viable and productive community and to ensure that foreigners admitted into the South African community are disciplined and obedient to the state. Hence this status is open only to those who comply with the state's demands of identification and who submit to the surveillance of the state bureaucracy, and who are considered economically beneficial and productive. Thus, inclusion in the South African political and social community, and the awarding of rights that goes with this, is the preserve of only a select type of person.

Foucault declares that, in modernity, when population production, management, and control become the object of sovereign power and discipline, a situation is created and becomes prevalent in which "[t]he population is pertinent as the objective, and individuals…are no longer pertinent as the objective, but simply as the instrument, relay, or condition pertinent for obtaining something at the level of the population" (Foucault: 2007: p.42). Thus, Foucault describes a situation in which individuals are the objects of state control and discipline not as individuals, but as members and conduits of the population. Thus, in seeking to instil discipline on an individual, the sovereign is, in fact, seeking to instil discipline within the population as a whole. In this way, methods of biopolitics and governmentality aimed at individuals have a bigger objective in mind: the population. This is apparent in the South African state's treatment and delineation of permanent residents. In awarding this status and rights only to individuals who meet specific criteria, the state is aiming to produce and reproduce not just a type of individual, but a type of population.

This objective becomes clearly evident when one examines the case and treatment of a different category of foreigners, illegal immigrants. In the Constitutional Court case cited above, in addition to declaring that permanent residents are imbued with the right to social security and are part of the 'everyone' to whom rights in South Africa apply, the Court ruled that "it may be reasonable to exclude from the legislative scheme [and the definition of to whom social security rights

apply]…illegal residents, who have only a tenuous link to this country"[37]. This ruling thus makes it constitutionally permissible to exclude illegal residents from social security rights, and declares that their presence and existence in South Africa should be regarded as tenuous, temporary, and precarious. This is an open contradiction of the opening line of the South African Constitution, which declares that "South Africa belongs to all who live in it"[38], for in this ruling, it is declared that even though illegal immigrants live/reside in South Africa, they are not to be considered part of the community or population, and are not entitled to the benefits, services, and rights that membership of the community confers. They are thus posited as on the outside of the community, and are thus to be treated differently.

The result of this differential and exclusionary treatment of illegal residents/immigrants in South Africa is two-fold. On the one hand, it places this category of people in a concrete state of exclusion and exception. The denial of basic rights and services to illegal foreigners, such as housing and medical care ensures that their existence is, tenuous and precarious, and their only right, as Tlou put it, is "the right to life". This ensures that illegal immigrants' existence is one of bare life – a state that Agumben characterises as marginal and exceptional. Bare life is existence that is removed of comfort and protection and has little more than life itself at its heart. It is life that is "exposed to death" and is characterised by this vulnerability (Agamben: 1998: p.88). This is a contrast with life for full members of the population, who enjoy rights such as rights of *habeas corpus*, social security, freedom and security of the person, and political rights. As Agamben puts it, "*Not simple natural life, but life exposed to death (bare life or sacred life) is the originary* [sic] *political element* [italics in the original]" (Agamben: 1998: p.88). From this, the second effect of the exemption and exclusion of illegal immigrants is introduced.

[37] Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development (CCT 13/03; CCT 12/03) Decided on 4 March 2004.
[38] Republic of South Africa. (1996). Constitution of the Republic of South Africa Act 108 of 1996. 'Preamble'.

Not only are illegal immigrants excluded from the population and removed of all but the most basic of rights, they are used as a foundation on which political inclusion – citizenship – can be built. As Agamben points, out, the production of bare life – marginal and precarious life – is the foundation of politics and political life. Citizenship is an inherently political concept, and thus can be seen to have its foundation in bare life. However, it is a foundation that serves not to expose citizens to bare life, but to protect them from it. Thus, the South African Constitution grants citizens rights to far more than simple life; they are imbued with rights to social security, which ensure a basic quality of life and they are granted political rights, allowing them to play an active role in the political functioning and life of the nation-state. This is a stark contrast to the illegal immigrant, who has only bare life, the right to life, as the distinguishing feature of his/her existence.

The Immigration Act does commit itself to controlling immigration "within the highest applicable standards of human rights protection"[39]. However, this is a disingenuous claim, as the Act later goes on to advocate that illegal immigrants be treated in manners that are "in compliance with minimum *prescribed* standards protecting his or her dignity and relevant human rights [italics in the original]"[40]. There is thus a qualification within the Act that makes it clear that the extent to which illegal foreigners can enjoy protection and human rights rests with the state and its prescriptions. We have already seen that the White Paper advocated the limiting of basic rights to this category of people and a truly 'bare' or minimal standard is in place. Going back to Joyce Tlou's statement, the only human right that is relevant in the case of illegal foreigners is "the right to life".

Here we see an entrenchment of state power and governmentality. As Schmitt wrote, "Sovereign is he who decides on the exception" (cited in Norris, p. 5: 2005). Through establishing minimum prescribed standards of human rights and entrenching illegal immigrants as outside of the population and normal course of law, the state is wielding its power to decide on the exception and enforce it. This

[39] RSA. (2002). Immigration Act. 'Preamble'.
[40] RSA (2002). Immigration Act. Section 34. 'Deportation and Detention of *illegal foreigners*'.

is a clear method of enforcing sovereignty and state power through the state of exception. In prescribing minimum standards of human rights and consequently existence, the state is establishing its power as an arbiter of existence and a producer of populations.

For, at the same time, it is out of this exception and in light of this contrast that citizenship is given its form. Going back to Schmitt's formulation, the norm depends on the exception for its character and content. Thus, the prescription of the extent to which immigrants can enjoy human rights and the constant exposure of illegal immigrants to bare life is a manner in which citizenship in South Africa is given form; in the case of social security rights and protection from bare life, illegal immigrants provide the exception that the norm of citizenship depends upon. As De Genova writes, "Illegality'…is a social relation that is fundamentally inseparable from citizenship" (De Genova: 2002: p.422). This is so because without the concept and category of 'illegal' or 'illegality', citizenship would have little meaning or substance. The two concepts are mutually dependant.

It is thus apparent that the creation of a population deemed to be illegal and their exceptional treatment by the state and the law serves as a means of governmentality. By constructing illegal immigrants as separate, vulnerable, and excluded from the legal population, the South African state is able to create a foundation for belonging within the nation-state, and is able to give substance to this belonging. In the case of illegal immigrants, their exclusion and the treatment and denial of rights that characterises their existence in South Africa helps create the norm of citizenship. It is thus a form of population production and control that rests with the state. This is apparent in the conditions set out that form the bases of people's exclusion and prohibition from becoming legal members of the South African population.

Producing the 'right' population

In addition to declaring that foreigners wishing to become permanent residents and thus legal members of the South Africa population have to be of 'good and sound character' (as obscure and problematic a definition as this is) and must be economically productive, self-sufficient, and obedient to the state, the Immigration Act sets out the following criteria as bases for excluding people and preventing them from entering the country and residing here: foreigners who "are infected with infectious diseases", have outstanding warrants of arrest or records of conviction against them, "anyone previously deported and not rehabilitated", and people who are acknowledged members of groups advocating terrorism or racial hatred are all classified, according to the Act, as "prohibited persons" and are thus denied entry and residence in South Africa[41]. In addition, the following types of people are declared "undesirable" by the Act and are also excluded from entering into South Africa and residing in the country: "anyone who is or is likely to become a public charge", "anyone who has been judicially declared incompetent", and any person who is "an unrehabilitated insolvent"[42].

Thus, it can be seen that entry into South Africa, inclusion in the community and the granting of rights, and thus protection from bare life is reserved even further for people who meet specific criteria. In addition to not being criminals or advocates of hatred, people wishing to enter into South Africa legally, and thus not be exposed to bare life and ill-treatment by the state need to be, again, obedient and have no record of violating laws, including immigration laws, and cannot be economically vulnerable or unable to support themselves. Thus, South African immigration policy serves to exclude not only people who are criminals and may threaten public safety and security, it reserves rights and access to South Africa for those who will bring economic benefit, rather than those who will "become public charges" and place strain on the economy.

[41] RSA. (2002). Immigration Act. Section 29. 'Prohibited Persons'.
[42] RSA. (2002). Immigration Act. Section 30. 'Undesirable Persons'.

Here again, very specific qualities and characteristics are deemed requisite for inclusion in South Africa, and all those who do not meet these are deemed undesirable, prohibited, or, if they have entered into South Africa's territory, illegal. Again, a mode of population production is present here, one that is used to ensure the population present in South Africa is law-abiding, economically productive, disciplined, and in compliance with the political practices of the South African state; all those who are not will be kept out. Thus, the function of immigration policies as a means of governmentality is brought to the fore and made clear.

This is further emphasised by the declaration in the White Paper that skilled migrants must be attracted and play important roles in building the South African economy. It is also the stated intention of the Immigration Act to utilise immigration control as a means of, in addition to excluding unwanted and prohibited categories of people, ensuring that "the South African economy may have access at all times to the full measure of needed contributions by foreigners"[43]. Thus we see that, in addition to placing restrictions on unwanted and unwelcome foreigners, immigration policies are aimed at attracting foreigners who will bring benefit to the country's economy.

It is common practice that "immigration selection may be tied overtly to criteria of productivity, class, wealth, and skills." (Peberdy: 2001: p.16) For example, in July 2005 the 'Draft Protocol on the Facilitation of Movement of Persons' was adopted by the Southern African Development Community (SADC) Ministerial Committee (Williams: 2006). One of the primary goals of this protocol is the granting of freedom of movement to migrants who are seeking employment in SADC states. It seeks to ease the process for migrants seeking to establish businesses and find work (ibid). In this way, it fits into line with the SADC Treaty which

[43] RSA. Immigration Act. (2002). 'Preamble'.

> "requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally, among member states." (cited in Williams: 2006: p.9).

Here it emerges that efforts to establish the free movement of people in the SADC region are not driven by humanitarian concerns and ambitions of promoting and extending rights and liberties, but by issues of economics.

This is an additional form of governmentality and population production, as it has at its heart an attempt to build a particular type of society and population; one that is productive and economically sustainable. Here it is apparent that skilled migrants and foreigners are placed at a much higher premium than unskilled foreigners, and thus have far higher status in the state's eyes.

This is made apparent emphatically in the White Paper, in which it is declared that

> "[South Africa's] migration policy could choose to shape the future composition of the South African population by giving preference to certain types of individuals who are deemed to be more desirable as members of our national community than others. In this respect, for instance, the migration policy could choose to give preference to professionals or people with skills or higher education."[44]

Here we have an abundantly clear acknowledgement of the use of immigration policies as a form of population production. In this case, we see a clear intention on the part of the state to utilise immigration control as a means of creating the 'right', desirable population. In privileging one type of immigrant over others, the

[44] RSA. Task Team on international Migration. (1999). White Paper. Section 7. 'Criteria for admission'

state is exercising its ability to determine the bases for inclusion in the political community and shape this community in line with its discourse and interests.

This practice is entrenched further through the fact that, whilst the Immigration Act emphasises the need to grant foreigners business permits so that they can bring capital and skills into South Africa, current immigration policies "reject the idea of trader's permits" and thus do not recognise this important aspect of cross-border movements and exchange. In fact, within the Immigration Act "there is no specific mention of traders at all" (SAMP: 2001: p.5). This is despite the fact that

> "since 1994 informal sector cross border trade (or SME trade) between South Africa and neighbouring countries has increased significantly. Many of these traders hold visitor's permits to enter South Africa to enable them to shop for their businesses in their home countries, and/or to sell goods brought from their home countries. While these traders may not strictly count as migrants or immigrants, they constitute a significant component of traffic through South Africa's borders." (Crush and Williams: 2005: p.9. see also Peberdy: 1997)

In this case it is apparent that South Africa's immigration policies do not account for this aspect of migration and do not make any efforts to recognise or formalise it. This has the effect of marginalising this type of activity, despites its prevalence, and ensures that only skilled, professional business people are entitled to economic activity in South Africa. Again, immigration policy is playing a key role in shaping and giving form to the population deemed desirable in South Africa. It is apparent that this is one that is professional, highly-skilled, and educated, as opposed, to unskilled, uneducated, and engaged in in-formal trading. Again, a clear intention of population production is at work.

This mode of governmentality and population production is inscribed in immigration policies, as the Apartheid immigration policy of attracting white

immigrants shows. This approach has also been adopted around the world. For example, when the United States was seeking to establish itself as an industrial power, it welcomed the vast numbers of Chinese and other immigrant labourers that were arriving on its shores as they provided an extensive pool of cheap labour. However, once American industrial power was developed, "the ranks of those held to be unworthy of admission into or citizenship in the United States expanded beyond the Chinese to include a variety of groups regarded as impure, unclean, idiotic, non-white or incapable of understanding the principles of republicanism" (Torpey: 2000: p.102). In this case, immigration was first used as a means of building the nation through permitting desirable immigrants, and, once the nation was constructed sufficiently, used as a means of maintaining and entrenching the nation, this time through the exclusion of immigrants.

It is thus a recognised function of immigration policies. The acceptance of this function is not confined to states only. In South Africa, there has been growing praise of current immigration policies amongst members of civil society for their focus on skilled migration and efforts to attract economically beneficial foreigners. For example, the Immigration Bill was lauded by SAMP as being "extremely business friendly" (SAMP: 2001: p.4) and the Centre for Development and Enterprise comment that

> "The provision [in the Immigration Act] allowing for business permits is potentially of very great value to the country in attracting foreign direct investment and the importation of skills and capacities of direct benefit to growth." (Centre for Development and Enterprise: 2005: p.2)

In addition, Joyce Tlou, from the SAHRC, commented that the Immigration Act "is well-meaning in that it is focusing on skilled migration,"[45] again giving credence and support to the position that immigration policy and economic interests and priorities are intertwined. There is thus recognition and support

[45] Interview with Joyce Tlou, conducted on 11 July, 2008.

amongst civil society for the use of immigration as a form of population production, showing that the discourse of economic self-interest has been well and truly entrenched in South Africa.

The myth of control: restructuring reality

We thus see that immigration control is a method of creating a population and inscribing them within a particular reality, one based on identification, control, and regulation of the population in line with state interests and discourse. It is important to note, however, that the method adopted in South Africa, based on security, policing, and preventing immigration is criticised as being unsuitable to the South African context. As Loren Landau – the director for the University of Witwatersrand's Forced Migration Studies Programme – points out, "South Africa has an immigration policy that is uniquely ill-suited to its context. It is based on this myth of control, that you can and should control the borders." However, "South Africa actually depends on migrant labour" and has this system built into its economic history and life[46].

Compounding this is the fact that South Africa shares a seven-thousand kilometre "largely unguarded", porous border with six other countries, the majority of which are 'sending' countries, which makes controlling the movement of people in the region difficult (Peberdy: 2001: p.20). Thus, efforts to control and prevent immigration into South Africa are ill-suited to the reality in which the state finds itself and have come to focus on a punitive approach in order to discourage migration, rather than a 'pragmatic' approach that recognises migration as a fact.

The White Paper agrees with this position when it states that "given…the difficulty of securing the borders policy emphasis on deportation will not significantly improve the situation."[47] However, rather than seeking to address the system as a whole, the White Paper instead argues that the best way to prevent

[46] Interview with Loren Landau, conducted on 19 May, 2008.
[47] RSA. Task Team on international Migration. (1999). White Paper. Section 6. 'The need and parameters for a new policy'.

illegal immigration into South Africa is to make South Africa an inhospitable place for immigrants to live in.

In this way, immigration laws and policies are attempting to enforce a particular reality on migrants. As SAMP point out,

> "the stated goal is that the legislation will deter people from coming or staying in South Africa illegally and 'encourage' them to voluntarily repatriate by creating conditions that make South Africa an unattractive place to live" (SAMP: 2001: p.3).

Within the White Paper it is noted that

> "Under the present circumstances people will continue to take enormous risks and endure personal anguish to enter South Africa illegally because of the attraction of the 'pull' factors. Therefore, policy emphasis should be given to reducing the 'pull' factors which make South Africa attractive to them."[48]

In this way, the South African method of dealing with the fact of migration relies upon an attempt to entrench a reality that discourages this fact and makes it difficult to migrate.

This has given rise to a situation in which immigration laws are in force without significance, as they try to guard against and prevent a reality that is already entrenched. This has given rise to extraordinary legal practices such as the empowering of the police and denial of rights already discussed, as well as a call on local populations to be actively involved in the identification and policing of illegal immigrants. This has created conditions in which the law is attempting to impose itself on a reality and has created opportunities for abuse and violation.

[48] ibid.

As Agamben points out: "Law is made of nothing but what it manages to capture inside itself through the inclusive exclusion of the [exception]: it nourishes itself on this exception and is a dead letter without it." (Agamben: 1998: p.27) In this way, the law depends on an exceptional reality or limit in order to sustain itself and have form, and it is the attempt to encapsulate and regulate the exclusion within the ambit of the law that gives the law its force. Thus, in seeking to control the movements of people and impose a reality upon the region of Southern Africa that is at odds with current and historical movements and practices, the South African state is nurturing its own power and authority and expanding its conception of the law throughout society. This is done through the state of exception and creating a space within the law, and simultaneously in contradiction or violation of the law, and immigration policies through which exceptions – migrants who make it across the border and who violate the state's regulations – can be dealt with.

Klaaren and Ramji also assert that "The illegal immigrant is not merely *beyond* law but is instead *against* law [emphasis added in original]" (Klaaren and Ramji: 2001: p.40). Thus, illegal immigrants are exceptions, but they remain included within the ambit of the law as exceptions. This serves the purpose of putting force behind the law. At the same time, however, the significance of the law can be questioned. As Landau points out, "Deportations and harassment doesn't control immigration."[49] Additionally, David Cote points out that "In Jo'burg you have a lot of police operations where hundreds of people will be rounded up and they'll be deported, only to come back in a week or so".[50] This has even been acknowledged within the White Paper, as shown above.

This creates a situation in which the law has tremendous force behind it, but little significance, as the law's attempt to prevent a particular reality and create a different one are falling short. This gives rise to a situation again in which the law, lacking significance, has to include the exclusion in order to sustain itself and have substance. But as the exclusion in this case is *against* the law, the law itself

[49] Interview with Loren Landau, conducted on 19 May, 2008.
[50] Interview with David Cote, conducted on 12 May, 2008.

comes to have little but force behind it. Agamben characterises conditions in which a state of exception predominates as being governed by a "separation of 'force of law' from the law" (Agamben: 2005: p.38); it is an "anomic space in which what is at stake is a force of law without law" in which force predominates under the illusion of law, but is in fact without real legal substance or significance (ibid). The suspension and removal of rights in the cases of illegal immigrants and the application of force that lacks significance is thus very much a product of the state of exception, and an entrenchment of this paradigm in South Africa.

It is a paradigm that is used in the production and protection of the population and that validates itself in the name of security. What is at stake, then, is the nature of the population that is to be protected and the characterisation of what is to be considered a threat. Through the use of an inclusive exclusion or exception, the South African state is firmly constructing illegal immigrants as 'threats' and enemies. At the same time, the exception or threat, through its inclusion as exceptional, gives character and form to the inclusion and provides a foundation and template for what can be considered the norm and desirable. The creation of an exceptional space and treatment within the law into which illegal foreigners fall provides the exception against which the norm can be measured and understood. In this way, the state of exception and its applicability in the case of illegal immigrants in South Africa provides a lens through which citizenship – the norm and standard of inclusion – can be understood.

Conclusion

It is apparent that within South Africa's laws and policies, the exclusion of illegal foreigners lays the foundation for the standards of inclusion and citizenship. Just as illegal immigrants are regarded as parasitic, economically unskilled and unproductive, criminal and threatening to the South African state and population, citizens, though the presence and creation of the exception, are constructed as law-abiding, disciplined, skilled and economically productive, and deserving of state assistance and services. In the present South African context, the exception is

created and used to give form to the norm. It is present within the laws and policies, as discussed in this chapter, but also within the implementation and enforcement of these laws. This will be the subject of the following chapter, which will examine what the effects of creating an exceptional status for illegal foreigners in South African law are. This will be done through documenting and analysing the ways in which immigrants are treated by police officers and within state institutions.

Chapter Three:

Policing immigration: police practices, the Lindela Repatriation Centre and the state of exception

The previous chapter discussed and illustrated the ways in which illegal immigrants have been placed in a state of exception by South Africa's current immigration laws and policies. These policies have served to construct illegal immigrants as enemies and threats to the nation-state and political community and have served to entrench this category of people as a group that is considered to be outside of the normal functioning of the law. They are, consequently, placed in an extra-legal or extraordinary space; in short, a state of exception. Having illustrated how this has been prescribed by the laws and policies in place, the proceeding chapter will detail and discuss the effect of current immigration policies and the placement of illegal immigrants in a state of exception. It will thus examine the methods of policing and controlling immigration that current laws and policies have given rise to.

It has been argued that immigration policies and laws have been utilised by the state as a means of governmentality. They are methods used to produce both people and populations in line with the state's discourse and assumptions about what sort of society is deemed desirable. What is at stake, then, is the nature, character, and identity of the population and the people that it comprises. However, this mode of governmentality cannot be simply viewed from the purview of the state's laws and policies. These provide only the framework for actions within the nation-state and its territory. What is of more significance is the manner in which these policies, laws, and discourses are implemented and the practices they give rise to. In 'States and Illegal Practice: an overview', Heyman and Smart argue that in order for the nature of state power and discourse to be understood fully, states need to be viewed and analysed "from below' and 'from within' as much as 'from above" (Heyman and Smart: 1999: p.15).

This approach entails examining not only the laws and policies in place but also the everyday practices and activities utilised by states in their quests to regulate, police, and control societies. It is thus an approach that requires moving the focus and analysis of state power away from the 'top-down' approach and grounding it within a more circulatory, "capillary" understanding of power and discourse (De Genova: 2002: p.428). The focus then of this approach to understanding state power is not the top-level laws and policies in place, but rather the ways in which these policies are enforced.

In the case of the state of exception, this approach is both valid and necessary. For, as Agamben contends, the state of exception has moved away from being a provisional measure used in times of threat or crisis to restore order to a working "paradigm of government" (Agamben: 2005). It is thus a measure that is not confined to particular cases of threat or disorder but has become a mode of operation for contemporary states. This means that the state of exception, whilst present and prescribed by law, is found in some of the everyday practices and mechanisms of the state. Thus, whilst it is important to analyse laws and policies as providing the framework for the state of exception, one needs to analyse the practices and responses this framework gives rise to in order to understand the implications and significance of the state of exception.

In the South African case, the state of exception that is implicit within immigration laws and policies makes itself felt in important manners. The two most significant and telling instances are the ways in which immigration is policed and the practices utilised during the detention and deportation phase. In both of these instances important issues with regards to state power and discourse, institutional practices and mechanisms, and population production and governmentality make themselves felt. Thus, the focus of analysis in this chapter will be on the policing of immigration and implementation of immigration laws 'on the ground' and the practices utilised during the detention and deportation phase. Again, the purpose of this analysis will be to examine the presence and

effect of the state of exception in South African approaches to immigration, and to establish what significance this holds for how citizenship, belonging, and state power can be understood.

An anthropology of the 'law'

Previously, attention was paid to Section 41 of the Immigration Act, which holds that when requested to do so by a police or immigration official, "any person shall identify himself or herself as a *citizen, resident, or foreigner* [italics in the original]"[51]. As mentioned by the SAMP report 'The South African Immigration Bill: A Legal Analysis', this section of the Act has "police state implications" (SAMP: 2001: p.11). SAMP is right to point to the important implications of this section of the Act as its implementation has had severe and disturbing consequences in South Africa.

The South African Human Rights Commission (SAHRC) has pointed out that the section of the old Aliens Control Act (the Apartheid-era immigration legalisation that was maintained in the democratic period until being replaced by the Immigration Act in 2002) which ensured that all suspected illegal foreigners could be made to produce identification on demand amounted to an "effective pass law requirement" (SAHRC: 1999: p.30). This requirement and disturbing reminder of the past has been maintained in the current immigration policy and when requested to, suspected foreigners are still forced to produce identification on demand or face the prospect of being detained and held as illegal immigrants.

This has created a situation that the Human Rights Commission deems to be unconstitutional and in violation of human rights in South Africa as "there is no legal requirement to carry identification documents on your person in South Africa" (SAHRC: 1999: p.20). In addition, Jonathan Klaaren of the University of the Witwatersrand's Centre for Applied Legal Studies has argued that this section of the Act and the powers it grants police is in violation of the individuals' right to

[51] RSA.(2002). Immigration Act. Section 41. 'Identification'.

security of the person, as it means that all are at the mercy of police or immigration officials and can be arrested without a warrant at any time with "a view towards deportation" (SAHRC: 2000: p.11).

Again, this has very disturbing and worrying implications and reminders of South Africa's Apartheid past as it is a method of policing that focuses on controlling the movements of people and detecting offenders. As Bishop Paul Verryn of the Central Methodist Church declares, "Police pursue immigrants as in the old 60's and 70's pass-law attacks on the Black community."[52] It is a clear sign of a state of exception or extra-legal practice being introduced and implemented in South Africa in order to deal with and police illegal immigration, as human rights, which are said to form the foundation of the post-Apartheid dispensation, have been superseded in the name of policing and controlling immigration.

This is strikingly apparent in the practices adopted by police officers in South Africa, as not only are foreigners made to produce identification on demand and arrested if they fail to do so, South African citizens too are subjected to police requests for identification and have even been arrested for failure to produce adequate identification. This has created a situation in which common rule-of-law and constitutionality is suspended or superseded in the search for illegal immigrants and efforts to control the movements of people.

This is a situation that can be seen to resemble either a state of emergency, in which the rule of law is suspended and replaced by rule by decree in order to protect society, or even a totalitarian form of rule, as individual rights are suspended or removed. As Agamben states, "the state of exception appears as a threshold of indeterminacy between democracy and absolutism." (Agamben: 2005: p.3) It is apparent, then, that the threat of illegal immigration and the uncontrolled movement of foreigners in South Africa is regarded by the state as sufficient a threat to warrant the removal of people's rights. This serves to

[52] Interview with Bishop Paul Verryn, conducted on 1 December, 2008.

enhance and entrench illegal immigrants' or foreigners' statuses as enemies or threats in South Africa, and places them within a state of exception.

This has created a situation in which illegal immigrants and suspected illegal immigrants – whether they are or are not – are extremely vulnerable to police powers and has led to abuse becoming rampant in the name of immigration control and policing. For example, the Human Rights Commission "found that assaults were commonly used during the apprehension procedure" (SAHRC: 1999: p.33). In addition, Kaajal Ramjathan-Keogh states that

> "Police harassment is a very big issue. Especially if you look different, if you speak with a different accent or dress differently you're more likely to be approached on the street and asked for your documentation; you're more likely to be harassed and asked for a bribe if you cannot produce documentation; you're more likely to be arrested and taken to a police station. And in addition to all this you're more likely to be at the risk of being at the end of police abuse. We see that's quite a significant problem.[53]"

Thus, those who are suspected of being foreign and in the country illegally are vulnerable and open to abuse in the name of immigration control. This creates a situation in which suspected illegal immigrants live very precarious and vulnerable lives in South Africa. Again, Ramjathan-Keogh speaks of "intimidation, harassment, and xenophobia" as being the police force's main mode of operation in dealing with immigrants – illegal or not[54].

This has important implications for how state power and policing can be understood. Police violations and abuses of power fit into a cycle of corruption in which those with power – which emanates and is derived from the state – exercise this power over those without, especially the most vulnerable. This serves to

[53] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.
[54] ibid.

entrench power relations and dominance within a society and extends the state's power into everyday relationships and interactions. Because illegal immigrants are, as mentioned in the previous chapter, "against the law" and regarded as enemies by the state, this places them firmly within a rightless, marginal space in which they are vulnerable to state security measures.

This marginality and rightlessness is made concrete through interactions with state officials and police. The fact that they are vulnerable and such ready victims of police abuse inscribes power relationships and distinctions between those who are for and those who are against the state within people. In this way, the abuses and violations which are the common lot of immigrants and those suspected of being illegally in South Africa serve as a means of entrenching state power within people.

This is made concrete not only in occurrences of abuse, but also in the difficulties faced by people wishing to take legal recourse against their abusers. As Ramjathan-Keogh illustrates,

> "If you have a right violated it's very difficult for you to lay a charge, to lay a complaint, and even if you do so you might not be able to see it through because you might get deported in between."[55]

In addition, she claims that

> "Police operate with relative impunity because there's not much sanction against police officers who do operate in this manner. The Independent Complaints Department [ICD] which is meant to be a police watchdog is relatively ineffective. We've [Lawyers for Human Rights] submitted many complaints from this office and after that we get an acknowledgement that the

[55] ibid.

> complaint is received but after that, nothing. There's very poor investigation and usually no real sanction on the police officer. There have been cases where we've sent a complaint to the ICD and then we copied it to the police station commissioner and we subsequently found the person who we lodged the complaint on behalf of was receiving phone calls from police officers harassing them and asking them to drop the case. They even received a phone call from the police station commissioner asking them to come into the station and have a chat with them, which is highly irregular when there is an investigation pending. So a lot of police officers, even those at high levels, are operating on their own mission, without really operating under procedures and guidelines. And there's not much check on it, so it's a very serious problem."[56]

This creates a situation in which those who act on behalf of the state and are imbued with powers of control by the state act with impunity against those without power and who are seen as enemies by the state. The result of this is twofold: firstly, it means that immigrants' human rights are often superseded by their statuses or perceived statuses as 'illegal'. This means that to be an illegal immigrant is to exist in a *de facto* rightless space – a state of exception, which ensures that state power is unchecked and circulated and entrenched in day to day activities and interactions. This state of exception, and this is the second consequence, thus comes to form the basis of one's identity and relationship with the state.

In his paper, 'Immigration and the State of Exception: Security and Sovereignty in East and Southern Africa', Loren Landau points to instances of police corruption and abuse and the lack of action or rebuke these activities receive as creating a situation in which "government officials…legitimise or help create parallel-extra-legal-systems for policing foreigners" (Landau: 2005: p.338). Similarly,

[56] ibid.

Ramjathan-Keogh states that xenophobia and police harassment of foreigners is "clearly illegal" but reiterates that police are allowed to "act with impunity". This again enforces a state of exception or exceptional status on immigrants and ensures that they are the subjects of state power and are, in many cases, powerless against this.

The fact that xenophobia and abuse of immigrants is "clearly illegal" yet still takes place frequently and is not acted upon by the government shows that illegal immigrants clearly are in an extra-legal space in which legal violations are not followed up on and the law is not upheld. In addition, violent actions carried out by state officials which violate the rights of foreigners and illegal immigrants (however limited or minimal these may be) and elicit no formal response or rebuke have been described by SAMP as akin to "state supported violence" (SAMP: n.d.: p.2). This is, then, as Agamben describes, a space in which law is absent or minimal and force predominates. Clearly, then, a state of exception applies.

It is possible to assert that the state of exception applies in this case as it is not a simple case of people acting in corrupt, illegal manners. Whilst police corruption and violence can be explained as illegal actions perpetrated by individuals the fact that this type of illegality is so rampant and continues unabated points to a bigger problem. It is the very status and position in society of immigrants that is at the heart of the cycle of abuse and their vulnerability at the hands of the police. Because they have been placed in a state of exception through the law itself they are constructed as outside of the normal course of law and thus in a space in which illegality can be considered acceptable. The state of exception can be understood as a "no-man's land between public law and political fact, and between the juridical order and life" (Agamben: 2005: p.1).

Thus, illegality and vulnerability are products of the law itself, and of its subsequent suspension. In a state of exception law recedes and force predominates. Thus, illegal immigrants in South Africa are vulnerable to the law

and to the force that has replaced it in this exceptional space. This makes police violence and corruption possible, and establishes these actions as more than individual criminality. They are, rather, evidence of the state of exception as an everyday function of the state and law.

Understanding state power

The presence of this rightless state of exception ensures the state and its officials are imbued with the ability to define people and populations. This is done through the law, as already detailed, but is made explicit through actual actions. The denial of rights and the frequent occurrences of abuse which come to characterise immigrants' experiences in South Africa serve to inscribe them with an identity. This is the identity of enemy and outsider and is made concrete through state abuses, harassment and intimidation. Extending this cycle of abuse to citizens who are only perceived to be illegal foreigners further entrenches this identity as it shows that state protection and inclusion is extremely vulnerable and dependant on tolerance and consent by the state.

This is made apparent in cases of police abuse, in which one's status as 'illegal' supersedes one's human rights. It is further entrenched in instances in which the citizenry itself is at the forefront of policing and control. Within the White Paper on Immigration, the South African government calls on communities to engage actively in policing immigration and seeks to make the "[South African] community responsible for cooperating with internal policing actions to ensure that illegal immigrants are not attracted to South Africa" and to "ensure that illegal aliens are not harboured within the community."[57] Thus, it is a community's and citizenry's responsibility to police immigration.

This has been taken to an extreme in cases of vigilantes on the South African borders and within communities who have taken it upon themselves to seek out

[57] RSA. Task Team on International Migration. (1999). White Paper. Section 6. 'The need and parameters for a new policy'.

and 'repatriate' illegal immigrants[58]. In addition, Landau points to 'Operation Buyulekhaya' (Operation 'Go Back Home) – in which "armed gangs of South African citizens claiming to be members of the ANC, the South African Communist Party, and South African National Civic Organisation embarked on a campaign to rid Alexandra Township of all foreigners" (Landau: 2005: p.342) – as a further instance in which state power and immigration policing has been usurped and exercised by the citizenry, rather than state officials.

For Landau, instances of police corruption and citizen policing represent "a privatised realm of law enforcement [which exists] largely outside government regulation and public security" (ibid). For him, these activities "threaten to undermine the form of sovereignty South Africa is actively working to effect" (Landau: 2005: p.347). He thus sees the state of exception as a threat to South Africa's sovereignty and security, as sovereign powers are now being usurped from the state by ordinary citizens and corrupt police officials.

This is, however, a misunderstanding of both the nature of state power and the state of exception on Landau's part. For whilst sovereign powers are being taken on by the citizenry in cases of vigilantism and police are being afforded opportunities to act as laws unto themselves, it is incorrect to view this as reducing state power and control. For it is important to note who, or what types of people, are the objects of this extra-legal practice. It is the category of people declared or suspected of being 'illegal' by the state. It is thus a people's relationship with the state that defines their status within law and within society. Groups of people who are imbued with power by the state – both police offers and citizens – are able to exert extraordinary power and control over another category of people who have been declared 'illegal', unwanted and in effect, rightless by the state.

It is thus the relationship between groups of people and the state which comes to mediate relationships between groups of people themselves. Rather than being

[58] Koch, E. and Chiledi, A. 'An evil story of fascism in our backyards'. article appearing in the *Weekly Mail and Guardian,*. 3 to 9 February, 1995.

seen as a threat to state power, this should be seen as an extension of power, as people have now taken on and acted according to the statuses and subjectivities conferred upon them by the state. Citizens who have been granted human rights, power, and the right to belong in South Africa by the state are exercising these rights through expelling and hounding out non-citizens. In these cases, people's relationships and statuses are being determined by the state, and are being reproduced in their own interactions. What we see, then, is that state power is indeed circulatory and diffuse throughout society, as it sets down parameters for people to act and instils in them identities or subject positions on which action can be based. In this case, it is the difference between citizens, state employees, and the category of people declared 'illegal' or foreigners that determines their relationships.

In this way, state power to define and categorise – in effect to create subjects – is affirmed and entrenched. This shows that the state of exception and the marginal status it confers on people, rather than undermining state power and sovereignty, actually entrenches and enforces it. It thus fits in clearly with a mode of governmentality that is premised on population production. Taking on state-conferred subjectivities and acting accordingly only serves to entrench and make this form of population control real.

Producing the population – part two

The significance of this entrenchment of state power lies in the fact that two types of population are produced: in the first instance, an illegal, excluded population or category of people is created, which is highly significant in itself. But more importantly, the exclusion of people and creation of an illegal population serves to create, secondly but simultaneously, a legal population too. Through accepting and actively creating a rightless space for illegal immigrants the state and its employees are entrenching differences within the population and ensuring that this category of people remains outside of the population and vulnerable to exceptional treatment.

When this exceptional treatment and removal of rights is extended and taken up by the legal population, a true distinction and power relationship is established. For not only are excluded, illegal peoples made powerless before the state, they are made powerless before the rest of the population too, as legal citizens are called on by the state to police communities and have taken it on themselves, in some instances, to purge foreigners from communities.

They thus become vehicles for the exercise of power and serve to make distinctions between those who are included and those who are excluded, between citizens and outsiders, real. Actions premised on removing foreigners from the territory or community send very real and significant messages about who is to be included and who is excluded, and also establish the power relationship between the two sets of people.

These power relationships stem from the state, as it is the state that mediates people's access to rights, statuses within the nation-state, and claims to belong. Thus, even in interactions between individuals and communities, state power and subjectivities are present, as it is this power to produce populations and subjectivities that can be seen to inform actions. In this way, the citizen/outsider divide is created by the state, but is enforced through the population. This, in turn, not only enforces the division, but state power too.

We thus see that state power is circulated throughout the community through populations. These populations are themselves products of this state power. State power, then, needs to be understood as encompassing the ability to produce populations and categories and have these entrenched throughout society. Thus, the production of one type of population is not only made possible through the production of another, but in fact relies on this.

Escaping state power?

It is important to note, however, that this form of power and population production is not entirely successful and binding. There are instances of people resisting state-mediated identities and distinctions and offering assistance to vulnerable, marginal, illegal people. For example, the Johannesburg Central Methodist Church and its Bishop, Paul Verryn, has developed a reputation for protecting and sheltering illegal immigrants and refugees. The church's community has "vowed to fight tooth and nail against police who violate the rights of refugees staying at the cathedral's premises"[59] and has emerged as an important challenger to state power and provider of a place of safety to many who are vulnerable.

The church had an "open-door policy for more than twenty years", and was initially a place of refuge for homeless and impoverished people[60]. Then, "about four or five years ago", Bishop Verryn "became aware of the fact that people coming through the borders were very vulnerable on our streets; they were being dispossessed of everything they had, obviously often violently assaulted, and were particularly vulnerable [and so] decided then to open the doors" of the church to immigrants.

"Since then the numbers have grown and grown and grown" and the church provides shelter for up to 1, 600 people at a time[61]. The church is an interesting case of an alternative space and challenge to state power, for not only does it provide shelter to people, regardless of their legal status, it is also attempting to create an new community within Johannesburg. At the church, "[They have] opened up a school which is run by a Zimbabwean teacher and street kids are now coming to the school voluntarily." The church also has

[59] Seale, L. 'Church to tackle cops over abuse of refugees'. article appearing in *The Star*. Thursday, 31 January, 2008.
[60] Interview with Bishop Paul Verryn, conducted on 1 December, 2008.
[61] ibid.

> "a full school, a small crèche which caters for new-born babies, and a completely fitted out pre-school in the basement of the building which takes over seventy kids. [They] have as many educational processes as possible."[62]

In a climate of hostility, suspicion, and exclusion, Bishop Verryn

> "want[s] to create the kind of atmosphere where people can learn, where they can get skills, where they can be empowered so they can enter South African society and participate in the areas in which we are vulnerable."[63]

The church is thus attempting to create a new community and provide an alternative regime of immigration and way of interacting and dealing with immigrants in South Africa. Whilst the state is attempting to create the community through exclusion, the church is attempting to create a community through inclusion and embracing immigrants. It thus provides an alternative and challenge to state power and discourse.

Other organisations such as Lawyers for Human Rights, Médecins Sans Frontières, the Legal Resources Centre, and the University of the Witwatersrand's Law Clinic are also active in attempts to assist and protect refugees, asylum seekers and immigrants who are vulnerable to abuses in South Africa. This is a clear sign that the totalising approach to and view of state power, prevalent in the work of both Foucault and Agamben, needs to be avoided, or at least tempered. This caveat should not, however, diminish the importance and validity of their work and approaches to issues of state power and control.

Even in the face of civilian resistance and rejection of state-imposed identities and vulnerability, the South African state has remained belligerent and focused on population and identity production. Bishop Verryn, for example, has come under

[62] ibid.
[63] ibid.

fire from Members of Parliament who have accused him of "breaking the law by harbouring illegal immigrants and criminals" at his church and have even warned him that he, in the words of the National Assembly's committee on Home Affairs' chairperson, Patrick Chauke, "can be charged" with breaking the law and contravening the Immigration Act[64].

This was an instance of the law being invoked to defend state power in the face of a challenge. At the same time, on the 30th of January, 2008, police raided the church and "basically arrested the whole building".[65] According to Bishop Verryn, "It was an illegal raid and did not have legal authority on five counts."

As he recounts,

> "Ostensibly [the police] came looking for drugs, ammunition and weapons – they found none. And then they turned it into a searching for asylum papers thing. They basically arrested the whole building. They held them in custody and then they released about 800 and took 500 away. Ultimately none of the charges stuck and ultimately the thing was dropped."[66]

Here we have a case of the state resorting to extra-legal measures to deal with a threat or alternative to its power and system of relations. Here we see the state of exception in action, as it entails a suspension of the law in the name of security, protection and reinforcing state power.

In addition, Ramjathan-Keogh states that Lawyers for Human Rights and the government, despite having a "cordial, amicable relationship" often become "opponents in the system"[67]. In this way, it is apparent that whilst the state's grip on power and the population is not complete, efforts are made continuously to

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[64] Mkhwanazi, S. 'Illegal aliens living in your church, MPs tell cleric'. article appearing in *The Star,* Thursday, 27 March, 2008.
[65] Interview with Bishop Paul Verryn, conducted on 1 December, 2008.
[66] ibid.
[67] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.

enforce this power and challenge those who do not subscribe to and embrace state relationships and categorisations.

This is because, in many ways, state power rests on the ability to mould and shape populations and enforce categories. If these categories are binding and spread throughout relationships and interactions at all levels of society, state power can be comprehensive and entrenched. It thus relies on circulation and diffusion. Efforts such as those of Lawyers for Human Rights and the Johannesburg Central Methodist Church threaten this circulation and entrenchment and thus oppose or threaten state power. This is why the law – the state's recourse and foundation of power – is often invoked by the state, such as in the case of Bishop Verryn, in instances when power is challenged. Here we see that the law is central to state power and is invoked in service of this. At the same time, the law is also revoked in some instances to protect state power. It is for this reason and because of this state practice that the state of exception presents a valuable contribution and mode of inquiry into state power.

The significance of the state of exception as a means of enforcing state power is apparent in the manners in which the state, when threatened or challenged, resorts to the law as a means of reinstating control over society and wayward elements within it. As Foucault points out, the objective of power and authority is the creation of docile bodies. This refers to both individual bodies, who become disciplined and attuned to the rhythms and dictates of production, reproduction, and consumption, as well as to social bodies – i.e. populations – that are instilled with knowledge of and respect for authority and the state (Foucault: 1991). Those who challenge this authority, such as migrants who do not follow correct legal procedures or members of the population who seek to protect categories of people designated 'illegal' thus often become opponents or threats to the state. It is in these cases that the realm of the state of exception is entered.

Policing the population

This realm and its significance as a mode of governmentality and population production is felt in the methods of policing utilised in South Africa. As mentioned, these methods have manifested themselves in extra-legal practices being adopted by the police as well as in community vigilantism which is legitimised and even encouraged by the state. This serves to create firm barriers, identities, and relationships between citizens and excluded people, thus giving form and content to these different identities. Further examples of police practices serving to entrench these distinctions and the state of exception within society are apparent in the manners in which investigations and searches for illegal immigrants are carried out.

According to the Immigration Act, a police officer may question and detain a person for being in the country illegally if the "officer has reasonable suspicion that you are unlawfully in the country."[68] In these cases,

> "They can come up and ask you to identify yourself. You have to identify yourself either as a citizen, as a permanent resident or as a temporary foreigner. If you're unable to do one of those three then you are considered an illegal foreigner and you can be arrested at that point."[69]

It has been pointed out and argued by commentators and legal experts that the emphasis in the Act on 'reasonable grounds' has been interpreted by police as granting them a right to "arrest or detain people who look or behave foreign, not illegal" (SAMP: n.d.: p.3). As David Cote points out, because the qualification 'on reasonable grounds' is so broad and undefined, it has created a situation in which "you'll look a little too Muslim, or… too dark to be a South African," or

[68] Interview with David Cote, conducted on 12 May 2008.
[69] ibid.

> "You may be walking around Hillbrow and they'll say you look too dark or you speak a funny language and someone will come up and say 'Where's your ID, where's your ID?' If you can't produce anything then you'll be arrested at that point as an illegal foreigner."[70]

Here it can be seen that the wide powers granted to police in the name of immigration control have created exceptional circumstances in which state officials and employees are given the power to determine who belongs and who does not, and in so doing, determine who can be regarded as a member of the population and who should be excluded. Here we see that the power contained by and transmitted by the state entails the ability to determine what makes a person suitable for inclusion in the social body; it is the power to define national and communal qualities and characteristics and ensure that these are protected and circulated throughout society.

At issue again, then, is population production and the creation and maintenance of the 'right kind' of society. This society may be defined according to economic criteria – migrants who come 'to steal jobs' and social services are not to be tolerated and must be deported – , in terms of people's obedience to the law – foreigners who are routinely blamed for crime in South Africa too are a social threat and scourge that must be eliminated and removed from society – or even according to ethnic, linguistic, or racial criteria – people who are seen as too dark, who dress differently, and who cannot speak local languages are regarded as illegal foreigners and have been arrested and deported; in one reported instance, a South African woman was even denied an Identification Document by Home Affairs officials because she was deemed "too ugly to be a South African"[71]. What is important here is to acknowledge how these criteria frequently originate from the state and are enforced with the backing or in the name of state power.

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[70] ibid.
[71] Anon. 'Woman told: you're too ugly for an ID'. article appearing in *The Witness,* 25 April, 2008.

Population production is a key feature of state power and it can be seen to be at work in all the instances mentioned above.

This is because state power encompasses the ability to determine belonging and to enforce the barriers erected in order to police and control this. Hence, police have launched operations such as Operation Crackdown, launched in 2000, which have functioned as "crime blitz[s]" and have entailed sweeping the streets and "areas predominantly populated by black immigrants" in order to detect and arrest illegal foreigners (Klaaren and Ramji: 2001: p.36). In addition, the South African National Defence Force (SANDF)

> "uses roadblocks both within short distances of the border and within the central economic region of Gauteng to detect and arrest suspected undocumented migrants. Additionally, the SANDF operates and patrols the electrified fence that is set up along part of the border between South Africa and Mozambique." (Klaaren and Ramji: 2001: p.41)

State power and force is thus at work in efforts to define and maintain definitions and barriers between populations, between those who belong and those who do not. Police operations and 'crackdowns' on illegal migration have been criticised for "criminalising" migrants and foreigners (Peberdy: 2001). This is exacerbated by the fact that migration offenders are frequently detained in police cells alongside criminals, rather than in separate facilities (SAHRC: 1999). The deployment of the SANDF and its use of force in policing immigration clearly indicate that undocumented/illegal migrants are considered enemies and threats to South Africa, and must be deterred and removed at all costs. This indicates clearly how state power is in operation and is exercised in the creation of categories of people; the illegal, criminal, threatening migrant is created and maintained through state power, just as the legal, included, citizen too is produced through this antithesis and practice of state power.

It is also apparent that this aspect of state power infuses and disperses throughout society. The fact that 'reasonable grounds' is a fallible, ill-defined concept has resulted in a situation in which anyone could be an illegal immigrant and South African citizens have been arrested for failing to produce identification documentation on request (SAHRC: 1999). This fallible section of the Act and the vast powers given to police have thus created a situation in which the right to freedom from arbitrary arrest, the right to security of the person, and the right to be presumed innocent until proven guilty have all been eroded (SAMP: n.d.: p.3). Here again we see that the legal order can be suspended and ignored in the name of population production and the protection of society. A state of exception, then, is very much present and at work in the production of the population and different categories of people within this.

We have examined the practices used by police in arresting and detecting illegal immigrants as a key method in which the state of exception is utilised and entrenched as a method of control and the construction of subjects. Widespread instances of abuse, corruption, harassment and infringement of human rights clearly construct illegal immigrants as vulnerable, marginal, excluded people.

In so doing, this mode of policing sets out a clear demarcation between the legal, acceptable population and the enemies of this population and the state – illegal immigrants. It thus serves to produce and enforce identities which stem from the state. A clear indication of the centrality of the state and its powers to confer statuses and identities on people is contained in the common police practice of destroying identification documents held by refugees or asylum seekers.

As David Cote illustrates, it is common for police officers to "look at [one's] asylum seeker permit and say 'This isn't a real permit, this is nothing,' and then they may rip it up"[72], thus ensuring that the victim is reduced to a marginal, bare status in South Africa. This practice and the importance that identification documents take on entrench identities that are mediated by the state. In cases such

[72] Interview with David Cote, conducted on 12 May, 2008.

as this, the identification document becomes the central object and signifier of one's status and right to reside in South Africa.

The removal or absence of this document leads to the removal or absence of legality and a legitimate presence in the country, thus paving the way for vulnerability and exclusion. As SAMP point out, this practice and the common practice of arresting people merely on the suspicion that they are 'illegal' gives police the power to "actively [make] people illegal" (SAMP: n.d.: p.3). Here, the state and its employees' ability to define and produce people and categories is made concrete and state power is entrenched firmly as the arbiter of identity.

The destruction of identification documents by police officers in South Africa, and the accompanying vulnerability, marginality, and exposure to violence shows that people's statuses and rights to reside in South Africa are dependant on the documentation they posses and the whims of state employees. Again, the state and its representatives are imbued with the power to define who belongs and who does not, who is to be deemed fit for inclusion, and who should be forced out.

Here again a clear demarcation is made between a legal population and an illegal one, and this is proven to be an issue stemming from the state. The extra-legal practice of destroying identification documents and thus rendering people 'illegal' can be viewed as a means of circulating state power as it entrenches the state's ability to define and declare people legal or illegal. Whilst corrupt practices by police officers may be seen as undermining the state and creating extra-legal spaces that threaten or marginalise state power, it can also be argued that this practice, to reiterate, re-enforces state power as it entrenches various identities and power relationships, which are derived from the state and its mode of biopolitics.

It is precisely people's relationship with the state that constructs them as powerful or vulnerable, and citizen vigilante groups and abusive police officers alike are acting on and in accordance with this when they attack and abuse migrants. As David Cote points out, police and immigration officials are the "gatekeepers" of

society for immigrants and foreigners and thus access to social structures and inclusion in society depends on and is mediated through them[73]. In destroying identification documents, neglecting or eroding basic rights, and acting in abusive and corrupt manners, state officials are clearly shutting the gate on outsiders and ensuring that entry into the legal, acceptable community is barred.

The fact that the destruction of an identification document paves the way for abuse indicates how fragile and vulnerable migrants are in South Africa. It also indicates that the separation between protected and unprotected life, between human rights and vulnerability, lies in the identification or distinction made by the state. The granting of refugee or asylum seeker status represents a veil of protection and a veneer of entitlement to rights; on stripping away this veil state officials are able to remove protection and place migrants in an exceptional, vulnerable state, thus showing that human rights and inclusion in the social and political community are dependant on state-conferred identities and the protection of state officials. Without these, life is precarious indeed.

In this way, state power and ability to define people and populations and to set the grounds for inclusion and exclusion is entrenched and given real substance. This serves to further population control, regulation and production and inserts a clear demarcation between a legal and illegal population, between the population that 'belongs' and the one that is considered 'illegal' and unwanted. Here it is apparent that citizenship and the power of belonging encompasses the ability to enforce divisions between the included and excluded population, and places the excluded at the mercy of the legal citizenry. This is apparent in the White Paper on International Migration's calls for a community-based approach to immigration policing and the identification of illegal immigrants, as well as in the power relations between employers and employees that are made possible through categories such as legal and illegal.

[73] Interview with David Cote, conducted on 12 May, 2008.

Invisible immigrants versus active citizens

Illegal immigrants are, in Ramjathan-Keogh's words, "people who are highly vulnerable, highly exploitable"[74]. Because they are in the country illegally and South Africa's immigration policy aims to ensure that when immigrants or foreigners are employed they do not fill positions of employment that may be filled by "suitably qualified *citizen[s]*or *resident[s]* [italics in the original]"[75] their employment is often gained against state wishes and laws. This ensures that illegal immigrants are employed covertly and are thus in positions in which they are unable to enforce or lay claim to standards of employment and labour rights.

Added to this is the fact that, because, illegal immigrants cannot open bank accounts, employers often "refuse to pay…or give some difficulty in paying" them, again ensuring that illegal immigrants' "economic rights…are very, very difficult to enforce"[76]. Here again, a means has been created of enforcing a divide between the legal population and the category deemed illegal. Due to the marginal status of illegal immigrants, they are, in fact, placed in positions of powerlessness and are made highly exploitable.

This assertion is affirmed by Machava and Polzer, who, in their case study of Mozambican immigrants employed in the Bushbuckridge district in South Africa, argue that

> "Mozambicans who remain undocumented are the most vulnerable to labour exploitation in industries such as agriculture or domestic work. They are not excluded from working in these industries, but are employed in the most insecure, temporary and physically demanding jobs." (Machava and Polzer: 2006: p.171)

[74] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.
[75]RSA. (2002). Immigration Act . Section 27. 'Permanent Residence'.
[76] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008

Machava and Polzer affirm this through documenting how these migrant labourers are at the mercy of their employers who frequently deny them the time off required to apply for identity documents or simply hold these documents on behalf of the workers, thus denying them access to these and, consequently, the ability "to move freely to seek alternative employment" (ibid). At the same time, "they cannot apply for government social welfare payments as a safety net", and are thus kept "quiet and captive" (Machava and Polzer: 2006: p.172). This gives the legal population great power over them and serves to entrench different identities and relationships between peoples based on their relationships with and statuses conferred by the state. The citizenry, who are legal and empowered by the state, have the ability to exploit, hold captive, and exercise great power over those whose status, or lack of legal status, leaves them defenceless and vulnerable. As Human Rights Watch note in their report into xenophobia and violence against foreigners in South Africa,

> "The almost complete lack of accountability for abuses committed against undocumented farm workers has led to some horrific instances of violence against undocumented migrants." (Human Rights Watch: 1998)

Coutin argues that illegal immigrants are forced into "spaces of non-existence" and their existence is characterised "by forced invisibility, exclusion, subjugation, and repression" that serves to erase their "legal personhood" (Coutin: 2000: p.30). This creates conditions and forms of existence in which police harassment and abuse, civilian vigilantism, and exploitation by employers are common-place and characteristic of 'illegal' existence. This thus places illegal immigrants in marginal, exceptional, extra-legal spaces in which human rights and basic standards do not apply. This is in contrast to the treatment meted out to South African citizens.

The formal intentions of the South African government are to create a vibrant, active political community of citizens in which every person is free to participate

in public and political life and is imbued with rights and entitlements that allow them to do so. For example, the South African Constitution grants all citizens the right to make political choices, and the right to vote, campaign for and participate in political parties and causes, and form political parties[77]. In this way, citizens are given clear rights to active participation in political and community life. Citizens are also granted rights to freedom of speech and freedom of assembly[78]. They are thus, on a formal level at least, given the rights to have presence and power in political and social life. At the same time, "Everyone has the right to fair labour practices"[79] and "No one may be subjected to…forced labour"[80]. Here, again, citizens are protected and empowered by the Constitution and Bill of Rights. This is a stark contrast to the invisibility and vulnerability of illegal immigrants.

This invisibility thus provides the contrast or exception to citizenship and ensures that divisions between the included and excluded are substantive and clear. This division is further entrenched by the ability of citizens, once their rights have been violated, to take recourse and action against the state. For example, the South African child who was arrested for being "too dark to be a South African" and "almost deported to Mozambique" was awarded R90 000 in damages after instituting a successful case against the Minister of Safety and Security[81]. In this case, a South African citizen was able to exercise rights and be compensated for the violation of his rights as a citizen. In contrast, foreigners and illegal immigrants are, as mentioned previously, often subjected to abuse at the hands of police and are powerless to do anything about it.

As mentioned earlier, the police's Independent Complaints Department is ineffective and the state is loathe to take action against officers and officials who violate the rights of migrants. Migrants have, in many cases, been prevented from

[77] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 19. 'Political Rights'
[78] ibid.
[79] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 23. 'Labour Relations'.
[80] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 13. 'Slavery, Servitude and Forced Labour'.
[81] Venter, Z, 'Damages for boy considered to be 'too dark''. article appearing in *The Star,* Tuesday 11 March, 2008.

following up on complaints against arresting police officers because they have been deported before their complaints can be heard in full[82]. In addition, the SAHRC notes that it is common for detainees in the Lindela Repatriation Centre to be deprived of the free phone calls and opportunities to contact friends or family due to them by law (SAHRC: 2000), effectively shutting them off from the outside world or legal population and ensuring their invisibility. In this way, there is a firm barrier erected between the invisible illegal immigrant and the politically active, empowered South African citizen. The creation and enforcement of migrant invisibility is done through legal and extra-legal avenues, ensuring that the state of exception is prevalent in the creation of barriers and affirmation of the divide between the legal and illegal population.

The essence of political power, according to Thomas Carl Wall is "the power to suspend (not apply) law and thus to create a sphere of beings without qualities…whom every being, insofar as he or she is alive, may be" (Wall: 2005: p.40). Through citizens' violence against and exploitation of illegal immigrants and police arrests, abuses, and harassments a pattern is enforced in which those with political power – the power derived from the political status of citizenship – exercise power over the non-legal excluded population. Here we see that political power and the ability to enforce extra-legal spaces is granted to the legal population, thus establishing them as bearers of political power. In this way, clear distinctions are made and enforced between the legal and illegal population, as defined by the state. Here we see that the exceptional, marginal status of one type of population is vital to giving form and power to the status of another type; the norm that is citizenship depends on the exception that is the illegal immigrant.

Institutions, power and the production of subjects

This divide between the legal and illegal population is, then, the product of state power and identities; the utilisation of the state of exception is central to this and the circulation of state power. So far, this has been examined in the context of

[82] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.

relationships, interactions, and practices on a micro-level. An additional level at which state power operates is within institutions. These are exceptionally powerful mechanisms of discourse dissemination and population and identity production.

In his book *Asylums: essays on the social situation of mental patients and other inmates* Erving Goffman illustrates how an array of practices, mechanisms, and techniques are utilised within institutions such as asylums to ensure that inmates are given subjectivities and come to assume and accept these for themselves. Within institutions there are myriad practices designed to produce people and categories of people and to ensure that these identities are accepted and internalised by the subjects they are aimed at (Goffman: 1961).

In *Asylums*, Goffman argues that people's identities are products of both social structures and individual agency and creativity. He argues that people are able to adapt and shape their identities/selves through their own agency and creative abilities. However, the frames of reference and basis for people's identities remain socially structured and determined. Thus, agency and creativity only exist under the structural, defining influence of society, according to Goffman. For him, this structural influence on individuals is felt and exercised most palpably in institutions. Modern society is made up of institutions, and it is these institutions that teach, influence, and mould people and their identities. It is through people's interactions with and experiences in institutions that their frameworks for constructing their identities and those of their fellows are established (Goffman: 1961). For Goffman, then, institutions play hugely significant roles in the production of individuals, identities, and populations.

A theory of governmentality and population production should thus take into account the central role that institutions play in the production of both individuals and social categories. In South Africa, the Lindela Repatriation Centre has emerged as a state institution that has received a fair amount of attention from both the media and civil society organisations, and has gained an infamous

reputation as a centre in which xenophobia and abuses of power occur frequently. An examination of the state's treatment of illegal immigrants should thus take this centre into account. The practices and methods used at this centre offer valuable and significant insights into the exercise of state power and what this entails and makes possible.

The Lindela Repatriation Centre is located in Krugersdorp, south of Johannesburg. It is situated in "an old mining compound" (SAHRC: 1999: p.64) and is used to hold illegal immigrants and process them so that they can be repatriated/deported back to their countries of origin. It has become infamous for the hostile, degrading, and poor conditions that detainees are kept in. Despite this, the centre has operated unabated since 1996. Since then, thousands of people have passed through the centre on a monthly basis. For example, in the first "five-and-a-half-months" of the centre's inception, "15 000 people…passed through" it on their way to deportation[83]. According to Human Rights Watch, since Lindela's inception in August 1996 until the end of October 1997, 79,378 persons were detained there. "Of these, 67,186 were repatriated, while another 11,037 were released." (Human Rights Watch: 1998). It thus holds a place of prominence in the state's strategy of policing and controlling immigration. Due to this, it is a central mechanism of governmentality and biopolitics.

In *Chibaro*, van Onselen's classic history of the mine compounds in then-Rhodesia, the author paints an elaborate picture and details how brutal, violent treatment and conditions were used to create docile, disciplined, obedient, and subservient labourers ready to obey mine-bosses and work in dangerous, degrading conditions to satisfy the mines' unceasing needs for production and extraction (of both mineral resources and labour). He describes how, during that period, extra-legal treatments, including beatings and killings, were used by authorities on the mines to legitimate domination and entrench power relationships between the mine authorities and the labour force. Beatings, excessive punishments, and the deprivation of food, free movements, and access

[83] Marais, H. 'Twilight zone where deportees wait'. article appearing in the *Mail and Guardian,* 1 to 14 February, 2007.

to women and families were all used as institutionalised means of creating a disciplined, obedient work force and conferring identities of subjugation and forced labourers upon mine workers.

For example, van Onselen writes that

> "At the Gaika mine in 1930, workers who missed the first call in the compound at the start of the morning shift, those who fell asleep on the job or left work early, were all given six lashes with the *sjambok*. In 1916 at the King's Asbestos mine, failure to meet the piece-work target on any three days in a month earned 25 lashes" (van Onselen: 1976: p.145).

It is thus clear that force and violence played prominent roles in the creation and disciplining of the work force. This mode of discipline and population creation, although declared illegal when it led to deaths and was deemed excessive, still received acceptance and legal backing: an editorial in the Rhodesian Herald noted that "To inflict reasonable corporal punishment is acceptable in fact if not in law" (van Onselen: 1976: p.148). Similarly, "violence against black workers within the compound was legitimised by the state" and legal action was seldom if ever taken against compound authorities who used excessive, even fatal force; "The state lent its implicit support to the mining companies by indemnifying their agents against the consequences of any violence used" (van Onselen: 1976: p.149). Thus, workers in the compounds were exposed to extra-legal treatments and acted under conditions not dissimilar to those described by Agamben as a state of exception. Again, circumstances prevailed in which the law was overlooked or ignored and a simple system of force was put in place. This served to create order, control, and a hierarchy of subjects in the compounds.

In addition, the racial hierarchy and relationship of domination was maintained through means as surreptitious as entertainment and film screenings:

> "[White] male settlers…were reluctant to allow Africans to see films which showed white women as having normal sexual desires and needs. There was equal reluctance to allow blacks to see scenes of conflict between whites." (van Onselen: 1976: p.193).

This was done to ensure that the African workers, in accordance with the settlers' views of them, "were treated as impressionable children and were 'protected' from 'undesirable' and 'dangerous' images" (ibid). In this way, settler myths, of both themselves and the population they sought to subdue, were circulated, affirmed and reproduced. In light of all this, van Onselen concludes that "The setting of the compound, the presence of the armed uniformed assistants and the power of the white settlers all combined to produce a generally unquestioning acceptance among black workers of assaults" (van Onselen: 1976: p.145) and served to instil and maintain subjectivities and discipline within the workers. In this way, institutional practices served, as Goffman contends, to produce a population and enforce identities and different roles within a society.

Lindela: a space of exception

In very similar and significant ways, extra-legal practices and abuses are exercised at Lindela – itself a former mining compound which is currently run by BOSASA Security, a company that was started "20 years ago" and began "guarding mines and hostels", according to the company's website, www.bosasa.com. These practices serve a similar purpose: the production and circulation of identities and the entrenchment of power relations and regimes.

In *Asylums*, Goffman describes how in-patients in mental institutions undergo a series of "abasements, degradations, humiliations, and profanations of the self" upon being admitted into these institutions (Goffman: 1961: p.24). These abasements and removals of dignity and human rights are used by the institutions to reconstruct the patients' identities and to establish them as subjects of the

institutions and people who are un-well and thus non-members of the 'well', privileged society from which they came. The treatment and degradation of mental patients is thus part of the process of constructing and redefining their identities, in personal as well as structural terms.

Similar processes are utilised in Lindela. For example, the journalist Abbey Mokoe, who entered Lindela posing as an illegal immigrant, describes how, on arriving in Lindela, he and other detainees were told by the Chief of Security that he was the detainees' "father, or brother or friend."[84] This immediately shows inmates that their connections with the outside world are severed and their identities and relations are being reconstituted and reformed. In addition, as mentioned earlier, whilst it is law that all inmates be allowed to make a free phone call, "most detainees stated [to the SAHRC researchers] that they had no knowledge of the right to make one free phone call." (SAHRC: 1999: p.42)

Here again, detainees at Lindela are cut-off from the outside world and are pushed into a space in which the institutions' ability to define and create relationships is made concrete. Lindela thus fits into Goffman's schema of "total institutions", institutions which encompass and dominate all aspects of life for those contained in them and that serve as "worlds" for their inmates (Goffman: 1961: p.17). In addition, the denial of the right to a free phone call is the first instance of rights being overlooked and an exceptional, extra-legal space being created.

The creation of an extra-legal space at Lindela is carried out through the common practice of extortion and corruption. As the SAHRC found, detainees at the centre frequently paid guards and Home Affairs officials sums of money to secure their release and that these authority figures "extort money from detainees under a wide variety of circumstances. These circumstances include requiring money for fingerprinting, for the use of public phones, and in order to allow access of family and friends to the Facility." (SAHRC: 1999: p.41) As the SAHRC points out, "corruption at Lindela contributed to incidents of unlawful detention" (SAHRC:

[84] Makoe, A, 'Special Report: Inside Lindela', *The Star*, 19 July, 2002.

2000: p.71) and serves to establish it as an institution in which the normal course of law does not apply and can be suspended or revoked.

In addition to being informed that the security guards at Lindela constitute inmates' new families, detainees are body-searched and dispossessed of basic items such as nail clippers, pens, "sharp instruments" and even packs of cards[85]. Here again, a process is carried out designed to strip inmates of their connections to the outside and ensure that they are created and reconstituted as subjects of the institution. The stripping away of personal possessions, reading out of rules, and declaration by the Chief of Security that

> "No one should try to escape because it is too dangerous. Our fences are high. We have one with barbed wire and the other is electric. Besides, there are patrol dogs running between the fences. If the dogs should find you stuck there you can't say 'I'm sorry.' So don't try to escape. You'll only hurt yourself,"[86]

ensure that it is made clear to inmates that they are subjects of the institution and will have to abide by its rules. It also serves to teach inmates, as is done with inmates in mental hospitals, that detention in and subjection to the institution is in the inmates' interests and for their 'own good'. Here, the virtues and importance of obedience, discipline and internalisation of the rules are inculcated and affirmed for the inmates.

This is the first, and most innocuous, step in the remoulding of subjects in Lindela. Having possessions removed is part of the process of reducing inmates to bare life. This process is carried through and enforced through several other means. Inmates in Lindela are deprived of adequate food – according to the SAHRC report of 2000, "Food at Lindela is served twice a day" and the facilities' "medical doctor has agreed, that 'it might not be enough to serve food only twice a day" (SAHRC: 2000: p.63) – and, in the words of David Cote, "There is no

[85] Makoe. (2002).
[86] ibid.

leisure. There's television in each of the rooms…but there's no books, newspapers, games to play, anything to keep you occupied during the entire day."[87] Thus, inmates at Lindela lead very bare, meagre lives.

The centre consists of an administrative block and two housing units, one for adult males and a second for women and children under the age of sixteen (Human Rights Watch: 1998). It is built to accommodate "2,500 persons" but is frequently overcrowded (ibid). According to the SAHRC, "Sometimes up to 85 persons sleep in the same room," and whilst an inventory list found by SAHRC personnel stated that there are 657 mattresses and 1,114 blankets at Lindela, sometimes up to 1,500 persons are detained at the facility (SAHRC: 2000: p.60).

Thus inmates are kept in degrading conditions and are exposed to abasements and erosions of their basic rights. This degradation is carried out even further through verbal abuse by the centre's staffs. As Human Rights Watch found, "Detainees often complained about the rude behaviour of the security guards working at the facility." (Human Rights Watch: 1998) One detainee at the centre is recorded as stating

> "The guards are very rude. When I ask them something, they just walk away. And they yell at us and we are supposed to run to obey their orders. You know, I am not a criminal and should not be treated as one. I am an honest businessman." (ibid)

However, this sort of abuse is not confined to the guards only. According to a detainee interviewed by the SAHRC, "The ladies that serve the food in [the] kitchen insult us using Zulu insults." (SAHRC: 1998: p.46) Thus, the abasement of inmates is made complete, as not only are they insulted, abused, and belittled by security personnel, they are abused by staff with little to no authority too. This serves to complete their humiliation and entrench their powerlessness within the centre. They are firmly established as sub-human, degraded subjects within the institution.

[87] Interview with David Cote, conducted on 12 May, 2008.

In addition to being insulted, humiliated, and deprived of basic material requirements such as adequate food and leisure activities, inmates are deprived of adequate health care. This report, accessed from the SAMP website gives a very clear description of the conditions and vulnerability at Lindela:

> "Nine illegal immigrants have died from curable diseases at Lindela in the past year - evidence, a human rights organisation says, of unhygienic conditions at the repatriation centre. Yesterday the Co-ordination Body of Refugee Communities (CBRC), slammed conditions at the centre, where, over the past three years 116 people have died of illnesses which human rights bodies and the Department of Home Affairs, which runs the facility, say are curable. In the past year, people have died from normally treatable diseases such as meningitis, pneumonia and diarrhoea. Ndessomin Ndosso, spokesperson for the CBRC, said this was unacceptable. 'The structure of the building is good and it looks nice, but once you go inside, the conditions change dramatically, especially at the sanitation area. The toilet facilities are not up to standard and this is why people get diarrhoea and pass it on to others. The conditions are bad,' he said. In 2004, 54 people died of natural causes at the centre. The following year, a further 53 died…Following the high number of deaths at the centre, the Minister of Home Affairs, Nosiviwe Mapisa-Nqakula, set up a committee in 2005 to investigate the problem. According to the findings of the inquiry released in October 2005, many of those who died could have survived if proper medical care had been provided to the inmates."[88]

[88] Anon. 'Foreigners in Lindela die of curable disease', *The Star*, 1 September, 2007.

In addition, another report notes that in 2005 "At least seven people…died at Lindela…while a further 21 detainees died at the neighbouring Leratong Hospital, where they were taken for treatment"[89].

Whilst reports of this nature have elicited 'outrage' and 'fury' from the Minister of Home Affairs[90] and "staff members…have been arrested in connection with the beating to death of an illegal Nigerian immigrant"[91], Joyce Tlou from the SAHRC points out that, although conditions have improved in Lindela in recent times, "It doesn't mean that people are no longer dying [there]"[92]. Thus, it seems that the best that can be hoped for is a reduction, rather than eradication, of death at Lindela. In this way it becomes apparent that death is a common feature and is central to the functioning of the centre.

This means that inmates held in Lindela are placed in a state in which bare life – life exposed to and built on the foundations of death – is ever-present and characteristic of their time there. At this point it needs to be reiterated that, according to Agamben, "*life exposed to death…is the originary political element* [italics in the original]" (Agamben: 1998: p.88). Thus, the foundation of political life is life that has been exposed to death and that can be killed. In light of this, one can argue that the deadly conditions at Lindela are, in fact part of a political process and the creation and maintenance of bare life. The vulnerability and bareness of life in Lindela helps provide one of the foundations for political life in South Africa.

Lindela, bare life and the political community

The political life that death in Lindela serves to create and sustain is citizenship. It needs to be recalled that "Procedural elements [of citizenship] are codified

[89] Sapa. 'Home affairs minister outraged by deaths at Lindela'. *Mail and Guardian Online*, 24 August, 2005.
[90] ibid.
[91] Anon. 'Five staff members jailed for bloody murder at Lindela'. *Mail and Guardian Online,* Sunday, 11 May 2002.
[92] Interview with Joyce Tlou, conducted on 11 July, 2008.

through the state and the citizen is granted recognition in relation to the nation-state." (Staeheli: 2007: p.6) It is thus a relational and political status, as citizenship relies on inclusion in, approval from, and is mediated through the nation-state, an inherently political body. It is thus a status and state of being that is embedded in political relationships. These are consequently entrenched and made real through the maintenance of an exception – the exception depends on the norm.

For Agamben, this exception is bare life, life that can be killed. In Lindela, where inmates are exposed regularly to death, an exception is created and maintained. This exception makes the rights of citizenship concrete as those held in Lindela are excluded, illegal persons who are not part of the political community of citizens. Thus, death in Lindela shows that inclusion in the community means protection from death, and exclusion means continual exposure to death. Here, the Schmittian concept of the norm depending on the exception is given clear and chilling significance. The prevalence of bare life in Lindela, then, confers identities and relationships on people: those who are outside Lindela are members of the free community – the citizenry – whilst those inside are the excluded, killable outsiders. These identities are essential to the construction and maintenance of the political community itself.

The fact that Lindela is a privatised centre – operation and control over the centre was outsourced to Dyambu Operations in 1999, who were subsequently replaced by BOSASA Security – and is operated by civilians empowered by the state entrenches this division between the political community of citizens and the excluded community of exceptions, outsiders, or 'illegals'. Landau argues that staff at Lindela is creating a "semi-privatised" criminal justice system and is taking policing and legality out of the state's control, thus diminishing sovereignty and state power (Landau: 2005: p.345). However, it should be reiterated that allowing civilians to exercise excessive, extra-legal power over others, with the state's blessing and acceptance it must be added, ensures that categories are made distinct and are maintained. Again, the division between the empowered political

community of citizens and the powerless, excluded non-citizens or outsiders is enforced.

Those with power at Lindela are given this by the state and are able to exercise it over those whom the state has designated unwanted, enemies, and 'illegals'. Here again, relationships between people and the state define relationships between people themselves. This serves to define and delimit the categories of the legal and illegal population, of citizens and exceptions. Empowering the legal population through the privatisation of Lindela is another mechanism of governmentality that enforces the production of both the legal and extra-legal population.

Sharma and Gupta point out that the outsourcing of state jobs in the United States of America proved to be a very contentious and controversial issue, and emerged as a "key issue in the 2004 presidential election", as "a strong backlash against the contracting of work by government departments to firms that lie outside of the territorial boundaries of the US nation-state" arose (Sarma and Gupta: 2006: p.4). In this case, white-collar workers in 'the North' have become threatened by outsourcing and have resorted to a type of economic nationalism in a bid to counteract outsourcing and liberalisation.

This initiated a process in which state jobs became "deserved by, and reserved for, 'real' citizens" only (Sharma and Gupta: 2006: p.5). Here we see how state employment is used as a marker of identity and serves in the creation of the population/nation. In this case, being hired by the state is a sign of one's inclusion in the national community. A similar process is at work in the privatising of Lindela. In contracting the running of the centre to civilians and the private sector, the state is establishing civilians as legitimate holders or conduits of state power. They are granted this power through the state and are able to use it over others. In this case, the legitimate, 'real' population of citizens is reinforced through outsourcing by the state, as is the illegitimate, excluded population. We see here

how state power, rather than being threatened by outsourcing and privatisation, is actually circulated and entrenched through this process.

There are further measures in place at Lindela that serve to create and maintain the political community. Inmates at the centre are subjected to degrading, humiliating treatments, which include being "abused verbally and laughed at by the staff at Lindela" (SAHRC: 2000: p.65). They are also confined in unsanitary conditions and are only permitted to use the bathrooms at specific times, with permission from security guards. As inmates testified to the SAHRC,

> "We are not allowed to go to the loo unless given permission. But since they do not enquire as regularly as they should, people often go to the loo without asking. If such a person is caught he is usually assaulted by the security officials." (SAHRC: 1999.43)

Similarly,

> "The security hit me in the mouth...He hit me with his knob Kerrie [sic], The reason seems to be that he found me in the toilet and asked why am I in the toilet at that time." (ibid)

Thus, a pattern of systematic humiliations, insults, violence, and abasements is carried out at Lindela. These abasements, as Goffman points out, are used to reconstruct inmates' identities. At Lindela, humiliating inmates through verbal abuse and regulating their use of bathroom facilities ensures that they learn to surrender their rights and individual subjectivities and come to accept the identities conferred on them by the centre and its staff. Submitting to regulation and harassment ensures that inmates learn that they are powerless within the institution and are subject to the rules as enforced by the staff. At Lindela, this serves to ensure that inmates are taught that they are excluded outsiders and exceptions to the legal society from which they have been removed and that they

are now members of a rightless, excluded community. This circulates subject positions and entrenches exceptional status amongst the institutions' population.

One of the most fundamental human rights is the right to dignity. According to the South African Constitution, "Everyone has inherent dignity and the right to have their dignity respected and protected"[93]. In light of this, Ramjathan-Keogh states that everybody in South Africa has "the right to life, the right to dignity, the right to equal treatment[94]" and the Constitution declares that even in a state of emergency, all of these rights – the right to dignity, life, and equal treatment before the law – must be protected and be regarded as non-derogable[95]; it also holds that all people who are arrested and detained must be held "in conditions of detention that are consistent with human dignity"[96].

However, it is clear from our discussion that the practices adopted in Lindela and by the police and state officials in their attempts to regulate and police immigration clearly leave little room for dignity and equality before the law. It is thus clear that illegal immigrants – suspected and real – are well outside of the law and are thus clearly removed from the legal population in very real and powerful ways. This serves to entrench them as outside of the population and the normal course of law, and places them in an exceptional space. This entrenches their categorisation as outsiders and exceptions and serves as a mode of governmentality as categories and populations are created, enforced, and circulated throughout society.

This rightless, excluded community is further created and entrenched through the use of violence. Reports of violence and intimidation of inmates at the centre are widespread. The SAHRC reports that guards in Lindela are quick to resort to

[93] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 10, 'States Human dignity'.
[93] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 35, 'Arrested, detained and accused persons'.
[94] Interview with Kaajal Ramjathan-Keogh, conducted on 31 May, 2008.
[95] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 37, 'States of Emergency'.
[96] RSA. (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 35. 'Arrested, detained and accused persons '.

violence and frequently abuse detainees, both physically and verbally. According to the SAHRC's 2000 investigation into Lindela

> "Most violence at Lindela occurs, according to the detainees, at night when no one is there to observe the situation. Every night the detainees are woken up between 2-5 times for security reasons. The security guards wake everyone up by shouting and banging on the doors. They also walk into the room and hit those who do not wake up fast enough. The detainees are told to stand in two rows with their heads between their legs. If someone looks up to see what is going on, the guards will, according to information received by interviewed detainees, use their belts and batons to beat that person up. It has further been argued that detainees may have to stand in the same position for half an hour while they are counted. Others explain that they risk being beaten up by the guards if they ask to use the bathroom at night." (SAHRC: 2000: p.65)

David Cote also points out that "there's a large amount of violence being used by security guards against detainees."[97] Guards use "sjamboks and pipes" to beat and discipline detainees "for relatively minor offences".[98] He also notes that there is a common practice in which "People will be shoved into a room, teargas will be shot into it and the door will be closed. And it's meant to subdue people if there's a perception that they may start getting out of control."[99]

Human Rights Watch, too have documented abuse at the centre. As one inmate explained:

> "The security officer at Lindela called us and started assaulting us with baton sticks all over the body. They then took us to the

[97] Interview with David Cote, conducted on 12 May, 2008.
[98] ibid.
[99] ibid.

> office and let the dogs free to bite us. They continued to hit us and kicked us with boots. They then thereafter took us to room eight where they hit other inmates who were there. They again took us to room one where they let the inmates hit us. One of the security officers demanded that I give him my car keys as I had told him the place where I parked it. I did not give him the car keys." (Human Rights Watch: 1998)

Another inmate interviewed by Human Rights Watch claimed that

> "I was locked into a room by myself, room twenty-three. Yesterday, three men entered the room. I was handcuffed and my leg was tied to a bed. One man started beating me. He punched me in the face and kicked me to the bladder. Later, I was urinating blood. My jaw is very swollen. After beating me up, they left me handcuffed. I was released by a night shift worker. They beat me from 10 a.m. and they beat me until 5 p.m., changing the people who beat me. That is when they left me. The next shift released me at 8 or 9 p.m." (ibid)

Yet another reported that

> "Yesterday, guys were beaten severely. One guy was thirteen years old. He was beaten severely with a baton stick. And kickings. Very bad. These guys from Maputo were complaining that they wanted to go home. So for this, they were beaten severely" (ibid)

Foucault has argued that "the basic biological features of the human species [have become] the object of a political strategy, of a general strategy of power." (Foucault: 2007: p.1). The violence perpetrated against inmates at Lindela as well as the general neglect at the centre can be seen to confirm this, as, in these cases,

the body and human biology have been used as primary means through which power is circulated and subjectivities and categories of people are produced. In Lindela, the body is the central focus and medium of power.

Thus, Lindela is an institution in which violence predominates and serves as the normal mode of operation. This shows clearly that detainees in the institution are kept in an exceptional space in which force predominates and law is absent. There are few mechanisms for oversight at the centre and inmates are unable, for the most part, to lay complaints against staff in cases of abuse and violations of their rights. It is thus a centre that exists and functions outside and in the absence of law.

This serves as a very clear and real method of governmentality. Keeping with Goffman's theory of institutions and the practices therein serving to impart subjectivities on people, it becomes apparent that keeping detainees at Lindela in this exceptional, lawless state serves to construct them as outside of normal society and as unwanted outsiders. The fact that deprivation, violence, and death form the basis of inmates' experiences of the centre demonstrates that these inmates are helpless, vulnerable, and excluded from society and the protections this inclusion is meant to provide. For instance, the South African constitution declares that "Everyone is equal before the law and has the right to equal protection and benefit of the law."[100] It also proclaims that everyone in South Africa has the right "to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way"[101].

The treatment of inmates at Lindela is clearly in violation of these Constitutional rights and thus establishes Lindela as a space in which the Constitution and country's laws do not apply. In addition, this serves to establish inmates held in Lindela as persons to whom the law and Constitution do not apply. They are

[100] RSA (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 9. 'Equality'.
[101] RSA (1996). Constitution of the Republic of South Africa Act. Chapter 2. Section 12, 'Freedom and Security of the Person'.

consequently excluded from South African society and are conferred very clearly and firmly with the status of outsiders and exceptions. In this way, the practices used at the centre serve very clearly to produce subjectivities and populations, and thus serve as a mode of governmentality and circulation of state power.

Thus, Lindela serves as a clear example of institutional power and practices being used to create subjects and populations. The maintenance of Lindela as an exceptional space in which rights do not apply or have any significance ensures that illegal migrants caught in South Africa and detained there are taught that they are excluded and not members of the legal population. This serves to entrench and circulate categories of subjects and the state's power to confer these. Just as police and official harassment on the streets serves to create an illegal, excluded population distinct from the legal community of citizens, practices at Lindela give substance and significance to the status of 'illegal', and construct it as one that excludes people from the community and human rights.

Delimiting the community

According to Ivor Chipkin, the post-Apartheid nation-building project has been founded partly on human rights and has based efforts to create an inclusive national discourse and community on human rights and the extensions of these to all. A consequence of this, according to Chipkin, has been to create South Africans not as a distinct people but rather as a "world people" (Chipkin: 2007: p.185). This is because, for Chipkin, human rights do not serve as a clear limit point or demarcation of belonging: "Invoked to define a specifity of a people, they [human rights] must necessarily appeal to all people" (Chipkin: 2007: p.186). This is problematic for Chipkin, as it makes a distinct South African identity elusive: "South Africans are merely instances of humanity, indistinguishable from anyone else" (Chipkin: 2007: p.185). However, despite a rhetoric and nation-building process based on human rights, South African identity is not as elusive as Chipkin believes.

This is because just as human rights and humanity form the basis of inclusion in South Africa, they also form the basis of exclusion and delimitations. We see that in the case of illegal immigrants, a category of people, despite being present and residing in South Africa – the qualities the Freedom Charter and the Constitution deem sufficient for inclusion in the citizenry –, are excluded from the community and are not granted the human rights that form the basis of national inclusion. This serves a two-fold purpose of both providing a limit point for the national character and population and also giving substance to this inclusion.

If to be a South African is to be imbued with human rights and, by virtue of this, be human, then illegal immigrants form the excluded exception to this, as they are denied human rights and are, subsequently, reduced to something less than human, having only bare or killable life as their foundations for existence. As Landau points out, non-nationals in South Africa are denied legal identities, "making them non-peoples in the state's eyes" (Landau: 2005: p.341). Similarly, but more damningly, an inmate held in Lindela complained to Human Rights Watch: "The problem is that we are not treated like human beings." (Human Rights Watch: 1998) It is in this way that an elusive national identity that subscribes to and invokes human rights is given a limit. It is a limit that is based firmly in and on the state of exception and on the production of excluded as well as included categories of people.

This aspect of power and the malleability of the law and human rights is lacking in Chipkin's search for the South African national character. His account fails to examine the ways in which this national character or community is formed through an exception or exclusion of other categories of people. At the same time, he does not account for state power and ability to mould or shape populations.

According to Chipkin, the national community of citizens is formed through a "series of processes (rituals, ceremonies) through which the individual comes to see that he or she really is like those around him or her" and that all are of equal worth and status within the community (Chipkin: 2007: p.213). He cites queuing

to vote in an election as an example of one of these rituals, as, in the election queue, “whites, blacks, coloureds and Indians became South Africans.” (ibid) And whilst this account is heart-warming and hopefully does hold some truth, an important aspect is missing from it.

What is of significance in the example used by Chipkin, aside from the warm feelings it invokes, is the manner in which the body is utilised in the process. In the account of police violence against immigrants and abuses carried out at the Lindela centre, we have seen how the body is placed at the forefront of political and security measures and is used as a medium through which subjects and communities are produced. This analysis can be extended to the example of standing in queues to vote.

In the voting queue it is true that people are able to exercise their citizenship rights and are consequently able to affirm their belonging in the political community. At the same time, however, obedience, patience, and docility are at the heart of the process, as people gather in queues and exercise their citizenship through being obedient and orderly. This is an obedience that functional elections depend upon, and that can only be attained through cooperative bodies. In this way, a biopolitical function can be seen to be at the heart of the election, as the political community of citizens is moulded and entrenched through people’s physical bodies and cooperation with the process.

Foucault has argued that the production of docile bodies is at the centre of state power and governmentality and that basic biological features are the objects of a political strategy of power (Foucault: 2007: p.1). The voting queue, and consequently the affirmation of the national community, depends on this docility and political strategy which is exercised through people’s bodies, and can thus be seen to fall within the state’s mechanisms of biopolitics and power. Chipkin does not account for this, and thus fails to account for the role state power plays within this process of nation formation.

Alternative subjectivities: a challenge to state power

Thus it can be seen that the state of exception and creation of extra-legal spaces and methods used to deal with and police illegal immigration serves state governmentality and methods of population production and regulation in South Africa. This helps ensure that state power to define, categorise, regulate, and produce populations and subjects is entrenched and circulated in society; the state of exception is a powerful mechanism in this process. However, it needs to be remembered that state power is never complete nor total in any society. Even within an enclosed institution such as Lindela, people have the capacity to defy or evade power. For example, Makoe points out that as soon as detainees settled in at Lindela, "house rules were broken one after the other"[102]. This indicates that power and the circulation and enforcement of subjects is never complete or absolute.

Another example of people's ability to challenge or circumvent state power is the fact that, as Dr. Zonke Majodina, the Deputy Chairperson of the SAHRC pointed out, (in a presentation made at an HSRC seminar held on 23 Spetember, 2008) "people cross the border with impunity". This shows that borders and immigration controls are never complete nor successful in regulating people's movements. Similarly, Kaajal Ramjathan-Keogh points out that South Africa's approach to dealing with and policing immigration, whilst extremely aggressive "Doesn't take into account the fact that people will continue to arrive in the country and go back and forth between the borders, irrespective of whether you permit them to do so or if you don't," and consequently "does not actually work in deterring people" or preventing illegal immigration[103].

Here again we see that state power to control borders and the movements of people, and consequently to entrench power and produce populations obedient to and in line with state interests and ideals, is not absolute. Spaces always remain in which resistance and rejection of power and alternative subjectivities and forms of

[102] Makoe. (2002).
[103] Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.

power exist. This is an issue that is often lost in the work of Agamben, and consequently mitigates against an uncritical or complete acceptance of his work and its use as a means of understanding state power and processes of nation-building, including the creation of citizenship.

The very fact that illegal immigration exists illustrates that state power cannot be complete and exert total control over populations and people. Because it is illegal it is against and in violation of the state and its laws. This does weaken the power and control of the state. At the same time, however, the very fact that people can be defined as illegal and treated in manners that exclude them from the legal population also entrenches and strengthens state power, as it illustrates the ability of states to produce populations and categories of people. We see, then, that state power operates in a manner in which it is constantly challenged and constantly seeks to reinforce itself. This drive to reinforce itself opens up spaces for extra-legal practices as, as Agamben notes, the state of exception was traditionally invoked and utilised in times of threat and social disturbance.

Conclusion

As illegal immigration and movements of people threaten state power and serve to reduce it, it follows that extra-legal attempts will be made to reassert and regain control. Again, a situation in which force exists with very little law or relevance behind it is introduced and maintained. This serves to impose realities on populations in the face of alternative, challenging ones and attempts to maintain state control in times of threat. Here we see that the state of exception is a valuable and edifying contribution to understanding the significance and drive behind immigration control and the different types of populations this gives rise to. The state of exception is a means of controlling populations and resisting or counter-acting threats to state power and is thus highly relevant in an understanding of immigration control and the population production this serves. This is clearly apparent in the ways in which immigration is policed on South Africa's streets and within its institutions.

Chapter Four:

Understanding the xenophobic attacks: citizenship, the politics of belonging and the state of exception

The previous two chapters have examined how the South African state has placed immigrants, particularly those classified as 'illegal', within a state of exception. This has been done through the legal framework and laws governing immigration as well as through on-the-ground policing and practices within institutions. The result of this has been to construct immigrants firmly as outsiders or exceptions to those who are included in the South African community; in this way, the exclusion of one category of people has served to lay the foundation and provide substance for an alternative category – that of citizens. This bifurcation has thus played an essential role in the governing and controlling of the South African political community. Whilst this mode of governmentality has sprung from the state, it must be emphasised that it is not the sole preserve of the state.

Previously it has been argued that state power is circulatory and encompasses the ability to produce subjectivities that are lived and acted out by the general population, not just state actors and representatives, as in the cases of citizen vigilantes and private security companies running repatriation centres. State power – the ability to define, categorise, and produce people and populations and to order realities – is thus not only effective within a top-down, legalistic framework, but finds its most powerful expression in the interactions between subjects, be they individuals or whole communities. It must be remembered that governmentality is a process or practice of governance that includes institutions, procedures, tactics, and knowledge (Foucault: 2007: p.108). It is thus more than a way of governing and ruling; it is a mode of discourse production and dissemination that focuses on and makes possible population control and creation. As such, governmentality and the forms of population this gives rise to cannot be studied through the actions of the state alone; it also finds targets and subjects

within the general population. This is made evident and disturbingly clear through the violent attacks on foreigners that swept through South Africa in May 2008. These attacks provide clear insights into the effects of governmentality, population production, and the state of exception at work in South Africa today, and illustrate the disturbing reality of the politics of belonging this has given rise to.

On 11 May, 2008, after a series of community meetings in Alexandra Township, a group of local residents gathered together and embarked on a rampage through the township, discovering and then violently, and in some cases fatally, assaulting foreigners and South Africans accused of being foreigners residing in Alexandra. This violence lasted for four days before police were able to gain control and prevent further attacks. However, whilst the violence in Alexandra subsided, attacks of a similar nature soon erupted in other areas of Gauteng, and eventually spread to other provinces, including the Northern and Western Cape and KwaZulu Natal. The violent attacks lasted the whole of May, and led to the deaths of over fifty people and the displacement of thousands, as people fled their attackers and sought refuge, first in police stations and later in displaced persons camps set up by the government.

Deadly precedents

The May attacks sparked widespread condemnation and inquiries from South African society, its non-governmental and civil society organisations, the political and academic community, as well as the general public. For most, the attacks were unexpected acts of violence and riots. However, it is clear that these attacks were not isolated incidents nor were they without precedent. For example, "violence perpetrated against foreign migrants, and particularly Africans, was documented as early as 1994" (HSRC: 2008: p.19). An article appearing in the *Mail and Guardian* from February 1995 notes that the ANC called a meeting in Alexandra "between residents and the *amamakwerekwere*…to discuss a recent

wave of violent attacks on foreigners who have flocked to the township"[104]. The article also describes how

> "villages in the Eastern Transvaal districts that straddle the Mozambican border…have joined the local commando, once the preserve of conservative white farmers so that they can receive military training and weapons [in order to] hunt down and repatriate illegal immigrants."[105]

In addition, attacks against foreigners have occurred "in Cape Town informal settlements in Du Noon and Doornbach (2001), and Joe Slovo Park (2002)" (HSRC: 2008: p.19), and even in February 2008, just three months before the wave of riots and attacks, "about 300 foreigners were forced to move out from their respective homes after residents of the Itireleng informal settlement next to Laudium turned against them"[106].

Thus, attacks against foreigners in South Africa are not a new phenomenon, and has been occurring for many years and with increased frequency and intensity in the post-Apartheid period. The previous chapters have shown that the South African state and its representatives have entrenched immigrants in South Africa in a vulnerable, exclusive, exceptional space; Due to this, they exist in an extremely vulnerable condition in South Africa, and it should come as little surprise that they have been the focus of so many sustained and recurring acts of violence. However, it is not enough to understand the violence perpetrated against foreigners simply as violence for violence's sake. In the wake of the May 2008 attacks, explanations of the attacks abounded.

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[104] Koch, E. and Chiledi, A. 'An evil story of fascism in our backyards'. article appearing in the *Weekly Mail and Guardian,* 3 to 9 February, 1995.
[105] ibid.
[106] Anon. 'Home affairs to deal with attacks on foreigners'. article appearing in *BuaNews.* 20 March, 2008.

Common explanations

The majority of the explanations put forward have focused on the socio-economic conditions that prevail in South Africa, and have consequently come to understand the attacks as manifestations of people's growing frustration and disappointment with on-going poverty, deprivation, and poor service delivery. As Loren Landau states, the reason for the attacks "clearly is about how services are delivered.[107]" In addition Adam Habib, the current Deputy Vice-Chancellor (Research) of the University of Johannesburg, blames the attacks on "relative deprivation, the social foundation on which revolts are constructed", and argues that inequality and frustration with continuing poverty has made people in squatter camps and informal settlements angry, leading them to seek out scapegoats and targets for their anger[108].

The Human Sciences Research Council's report into the underlying causes of the violence also underlines how people's deprivations, frustrations, and sense of siege or being under threat prompted the violence:

> "Impoverished people feel literally 'besieged' by a range of pressing socio-economic challenges. Rising food and fuel prices, the onset of winter, endemic unemployment and the lack of formal housing have all contributed to the increasing 'othering' of large numbers of working men and women coming from other parts of the continent. In some instances this has included internal migrants from other parts of South Africa." (HSRC: 2008: p.45)

Thus, the explanations for the attacks that focus on the socio-economic environment and base themselves on theories of frustration and aggression have taken hold and have been promulgated by several prominent scholars and opinion-makers. Focus on socio-economic conditions and deprivation have led Ebrahim

[107] Interview with Loren Landau, conducted on 19 May, 2008.
[108] Habib, A, 'Why? Why? Why?'. article appearing in *The Star,* Tuesday, 17 June, 2008.

Khalil Hassen (a political analyst) and Stephen Gelb (the director of the EDGE Institute) to conclude that "Yesterday's service delivery protests are today's xenophobic attacks"[109]. This is obviously a popular explanation and one that has received much currency. And whilst there is an underlying relationship between the violence and people's on-going deprivation and frustration with the state and poverty, this explanation fails to account for much, and sheds little light on the subjects of the attacks and the specific form they took.

An alternative view: the politics of belonging and the state of exception

The photojournalist, James Oatway, speaking at a symposium held by the HSRC on 23 September, 2008, remarked that the attacks/riots differed from service delivery protests because, during the riots, "Everyone was armed to the teeth; once they've got the scent of blood, nothing will stop them until their blood-lust is satisfied." Thus, we can see that the focus of the attacks was very different from that of service delivery protests. The latter are about people expressing their anger and frustration with the state, its economic policies, performance, and failures to improve their socio-economic conditions. They are thus protests designed to express anger and disappointment and their focus is the state. In the riots, however, the focus was much more simple and sinister, as people gathered not to protest or make political statements, but simply to kill, to satisfy a 'blood-lust'.

There is thus a very important difference between the purpose of the attacks and the average service delivery protest, as well as between the focus of the two actions. Service delivery protests focus on the state; violent attacks against foreigners focus on identities and subjects which in fact are mediated by the state. The one is thus an attack or protest against the state, the other can be seen as an affirmation of the state and its role in mediating the politics of belonging.

Attacks that base themselves on nationality and countries of origin are products of state-centred discourse and governmentality. Rather than subsuming the attacks of

[109] Hassen, E.K. and Gelb, S. 'Today's protests are tomorrow's attacks'. article appearing in *The Star*. Tuesday, 17 June, 2008.

May 2008 under the blanket of service delivery protests, they need to be explored within the context in which they occurred: the politics of belonging and existence in the nation-state. As the pervious two chapters have shown, this is a politics that bases itself, in many ways, on the production of categories of population, of insiders who belong within a society and outsiders who, whilst remaining crucial to a population as they give form and substance to inclusion, remain firmly outside of it. Through the government's immigration policies, policing methods, and institutional practices, illegal immigrants have been constructed as these outsiders. It is possible, and perhaps necessary, then, to view the May 2008 attacks as extensions and products of this mode of politics and belonging.

We have seen in the previous chapters that the state of exception plays a prominent role in this politics and mode of governmentality, as it is this state of exception which allows the community of insiders and outsiders to take shape. It is a feature of contemporary South African law and society which ensures the vulnerability and exclusion of one type of population in order to give shape to and empower another. Thus, in interactions and clashes between communities of insiders and outsiders the state of exception is at work and comes to shape the relationships and positions of different communities. These stem from the state and its utilisation of the state of exception. Thus, the state of exception and the state need to be given a place in our understandings of the politics of belonging.

In addition to being framed by governmentality, the politics of belonging within the nation-state rests on biopolitics – a form of governmentality, discipline, and regulation that focuses specifically on the body and human biology. According to Foucault, biopolitics and biopower refers to "the way in which the specific problem of life and population were raised within a technology of government" (Foucault: 2007: p.370). It is thus a feature of governmentality, of the mechanisms, techniques, tactics, and institutions which modern governments and societies use to produce populations and regulate lives within the nation-state, and is a feature of governmentality that is focused specifically on the body.

In *Homo Sacer*, Agamben illustrates how the Nazis came closest to mastering modern biopolitics in its most monstrous and powerful form. This ability to utilise the modern state's control over the mechanisms of biopolitics allowed the Nazi regime to decide on what was disturbingly described as 'life that does not deserve to live'. (Agamben: 1998) This understanding of what constitutes life that deserves to live was used to eliminate Jews and Gypsies, the populations that had no place or value in the Nazi schema or worldview, as well as the mentally and physically handicapped, who threatened the purity of the German race. This mass-elimination was accomplished through the Nazi's mastery of the mechanisms of biopolitics, which extended from the railway systems used to transport victims, to the camps used to house and process those consigned to either productive slavery or extermination, all the way down to the legal mechanisms and definitions used to separate citizens of the Reich from those undeserving of life. Whilst the Nazi example represents the most horrifying and disturbing example of the power and application of biopolitics, it also represents this modern phenomenon's most clear application and its features, features which remain present to this very day and which once again reared their ugly heads in the May xenophobic violence.

It is incorrect to compare the recent violence with the Nazi's state-led attempts at genocide. However, telling similarities, especially in the objects of both the Nazi's and current violence and the mechanisms through which these objects are uncovered and defined, can be exposed. What was at issue with the Nazis and what remains at issue in contemporary times is the control over biopolitics – and by extension existence – exerted by sovereign powers over populations. One of the key methods in which this control over populations is exerted, and thus of modern biopolitics, is through the bureaucratic processes and workings of the nation-state.

The Nazis mastered this process as the means to make people and populations 'killable' or undeserving of life. As Agamben points out, German Jews could only be killed by the Nazi's once each one had formerly had his or her citizenship fully removed (Agamben: 2005). In these cases, the Nazis could only kill people and

populations who were legally not German. Thus, the distinction between life and death became determined on a formal legal basis. And although this makes itself felt in less extreme ways, citizenship today continues to provide a formal and legal distinction between people.

In his comment piece entitled 'Nothing justifies this savagery', which appeared in *The Star* newspaper accompanied by a photograph of a Mozambican man who had been set alight by rampaging South Africans, Sonwabile Mancotywa (the Chief Executive Officer of the South African National Heritage Council) writes that citizenship in modern nation-states is the determinant of one's humanity, of one's ability to claim rights and opportunities within nation-states. He writes that "the location of birth trumps one's humanity. The very fact you are a human being in need is less important [than the fact that one is a foreign national]"[110]. In other words, a situation has been created in which questions of origin and status (as determined by the sovereign nation-state) supersede and ultimately determine a person's existence in the contemporary world. Thus, it can be seen that the nation-state, with all its various mechanisms, institutions, and powers, has emerged as the determinant of existence and humanity in contemporary times. Consequently, existence today is framed in the particular type of sovereignty and power contained within nation-states.

This is a power that, in addition to containing the ability to define and create populations and subjects, rests on the ability to draw distinctions between life and death, between life that 'deserves to live' and life that can be killed. The nature of the May 2008 riots, the manners in which they were carried out and the objects of the violence all fit into this scheme and can consequently be seen as manifestations of governmentality and the form of biopolitics – a contestation over life and death – that this gives rise to in contemporary times.

This contest over life and death, over the politics of belonging, has become framed by the state of exception. This is used, as argued previously, to demarcate

[110] Mancotwya, S. 'Nothing justifies this savagery'. article appearing in *The Star*. Monday, 2 June, 2008.

communities, and has come to ensure and enforce the vulnerability of one type of community at the hands of another. In creating a community of insiders/citizens who are empowered and protected by the law as well as a community of outsiders/foreigners who are vulnerable before the law and are exempt from its protections, the state of exception is used as a basis for demarcation between citizens and non-citizens, and ultimately between those who deserve to belong and those who do not. The May riots can be seen as a way of enforcing this distinction, as well as a product of this state of exception and state-produced vulnerability.

Re-enforcing barriers

During the May riots, crowd violence and anger was directed at foreigners, who were said to be responsible for crime, on-going unemployment, and other social problems in South Africa, including a reduction in South African males' masculinity and power over South African women. Accusations that foreigners were stealing jobs and social services from locals and were even stealing their women and exposing South African men as lazy, un-industrious, and unable to provide for their families sparked the fire of citizens' rage. What this rage showed was that citizens/insiders resent the competition, encroachment and even presence of foreigners within their communities. Foreigners represent unwelcome outsiders, and crossing the barriers of exclusion/inclusion represents an unforgivable crime, one that is deserving of death, the removal of one's right to life.

What is at issue then, and what the violence needs to be understood as symptomatic and representative of, is the contest and politics of inclusion/exclusion. This is a politics that bases itself on and enforces distinctions between who is permitted to participate in and be a member of a community and who is not. As the piece by Mancontwya points out, this is a contest that has been framed by the nation-state, and that plays itself out in a contest between citizens and non-citizens, members and non-members.

All of the 'crimes' and offences committed by foreigners can be traced back to them overstepping or infringing the citizen/outsider divide, and the consequent attacks can be seen as an attempt to reaffirm this divide. As Councillor Sizukela Nkosi (a senior local ANC Councillor in Alexandra) pointed out, due to the perceptions (which are facts for some) that foreigners can "come into communities and do as they wish", and can move about freely in South Africa and even work and usurp locals' privileges, "There is no difference between citizens and non-citizens, and that is why people are frustrated."[111]

So, it is apparent that levels of frustration are high in South African communities, especially those that are yet to see marked improvements and benefits in the post-Apartheid period. However, this frustration is not merely a manifestation of frustration with socio-economic conditions; it has emerged as a frustration with people's positions and statuses in South Africa, and the blurring of lines of distinction. It can thus be argued that the May attacks represent attempts to re-draw or re-enforce the lines of demarcation in South Africa. This is apparent in the ways in which the attacks, in some instances, came to take on ethnic tones too.

During the attacks ethnicity became a symbol of belonging. Anecdotally, it emerged that groups of people harassed others and asked them to provide Zulu translations for certain words or body parts; failure to do so signified one's otherness or foreignness, and consequently one's lack of a right to belong in South Africa – i.e. one's unsuitability for life. In mobilising ethnicity in this way, rioters were again re-enforcing the barriers of belonging. Those who are like 'us', who have the 'right' citizenship and ethnic markings are fit for and deserving of inclusion; those who lack this are not and consequently do not deserve a presence or existence in South Africa. Here we see again how violence was mobilised in the name of community-building and demarcation.

[111] Interview with Councillor Sizukela Nkosi, conducted on 6 August 2008.

The explanation that the attacks were provoked by people's on-going socio-economic suffering and the lack of improvements in poor communities appears to be supported by one of the issues that sparked the violence in Alexandra, the fact that foreigners were occupying houses built as part of the government's Reconstruction and Development Programme (RDP). This is perceived to be a great offence or crime by foreigners as the RDP houses were one of the few visible and concrete attempts made by the post-Apartheid government to improve the living conditions of South Africa's urban poor.

The houses are, consequently, symbols of the new democratic dispensation and the socio-economic improvement citizens, especially Black, formerly oppressed citizens, can expect. However, the Institute for Democracy in South Africa (Idasa) point out in their report on the riots, "it is hard to conclude that a relatively small number of foreigners receiving RDP houses…has a significant effect on the number of South Africans denied benefits." (Idasa: 2008: p.8) In addition, the HSRC report notes that foreigners who were occupying RDP houses had done so through either renting or purchasing them from South Africans. As an informant pointed out, people in Alexandra have been selling RDP houses in order to gain money to use as down-payments on "a house in the suburbs" (HSRC: 2008: p.38). At the same time, *The Star* newspaper reports that "South Africans allocated RDP houses in Alexandra…are illegally renting them out to foreigners or other South Africans."[112]

So, it is apparent that South Africans were, in fact, benefiting from foreigners' occupation of these houses. However, this was still a source of anger for locals, who went door to door demanding to see people's identification books[113]. As James Oatway recounts, people were "attacked just for stopping the mob coming into their houses". The violence, then, cannot be seen as a consequence of foreigners depriving locals of houses, but as a revolt against their mere presence

[112] Radler, M. 'RDP houses at core of the recent attacks'. article appearing in *The Star,* Monday, 9 June, 2008.
[113] Khupiso, V. and Rank, F. 'Terror on the home front'. article appearing in *The Sunday Times,* 18 May, 2008.

in local communities. The assumption that access to RDP houses was at the forefront of locals' anger is also dispelled by the fact that, according to Constable Neria Malefetse, the current Alexandra Police Station Communication Officer, "Locals burnt down shacks in which foreigners were living and built their own shacks" on those sites[114]. Again, we see that violence was not overtly linked to socio-economic conditions, but was directed at and fuelled by foreigners' presence in communities. Since the attacks, whilst socio-economic conditions in Alexandra remain unchanged, "It is peaceful since the foreigners are gone."[115]

It can thus be deduced that socio-economic, materialist explanations of the riots are overly simplistic and reductionist and do not get to the heart of the issues involved. What needs to be added to our understanding of these attacks is the issue of the politics of belonging and contest over existence in the contemporary nation-state. This is a contest that is, in many ways, framed by governmentality, biopolitics, and the state of exception. Returning to Mancotywa's assertion that in modernity one's location of birth and legal status trumps one's humanity, it becomes apparent that the nation-state and modes of governmentality at work within it contain the ability to classify, define, and ultimately determine people's existence and claims to life.

This is because governmentality, biopolitics, and the state of exception allow the state to order reality and produce subjects who live out this reality. It needs to be reiterated that governmentality does not refer to the state's ability to order society and control it from the top down. Governmentality refers to the way in which state power is infused and circulated throughout society, through the very populations and people it has as its objects and subjects. Thus, the categorisation and contest over belonging within the nation-state is not relevant in terms of a state-centred process, but rather makes itself felt within the relationships and subjectivities of the population. During the May riots, populations and communities were acting in terms of the subject positions produced through the state of exception and state power.

[114] Interview with Constable Neria Malefetse, on 13 August, 2008.
[115] ibid.

The law, citizenship and bare life

The law is one of the central features of these mechanisms of governmentality. According to Agamben, "Law that becomes indistinguishable from life in a real state of exception is confronted by life that, in a symmetrical but inverse gesture, is entirely transformed into law." (Agamben: 1998: p.55) We have already examined the ways in which illegal immigrants have been constructed and placed within a state of exception; in the wake of the May riots, it now becomes clear what the effects of this have been.

In a society in which a state of exception serves as one of the fundamental modes or paradigms of governance, citizenship – which connotes the difference between those within the community and those within the state of exception – becomes the arbiter of one's "humanity" and thus determines the quality of rights and existence one can expect and, ultimately, when taken to its most extreme end, life and death. Attacks by locals on foreigners who transgress the citizen/outsider line, and whose biggest crime is to have the wrong documentation, status, and country of birth clearly represent law as indistinguishable from life, and represent the danger when "the location of birth trumps one's humanity."

The killabilty of immigrants stems directly from the state and law. It is a product of their being placed within a state of exception, and consequently outside of the realms of the community. In resorting to illegal measures to deal with foreigners, local communities have reproduced this state of exception and acted according to the politics and form of governmentality it has been part of. The fact that locals feel that it is within their rights to resort to the most extreme illegal measures in order to deal with the 'threats' posed by foreigners is indicative of the state of exception foreigners find themselves in. Their status as 'foreigners', 'illegal', or 'non-citizens' stems from the state and its laws. They are thus products of the law itself. At the same time, their vulnerability, marginality, and killabilty places them outside of the law and creates the impression that extra-legal or illegal measures

are justified or acceptable. They are thus simultaneously created by and placed outside of the law.

However, citizenship is not merely a distinction stemming from and at work within law; it has emerged as a fundamental mechanism of contemporary biopolitics – the contest over the body and life and death in modern times and the production and reproduction of the population. This contest played itself out during the May riots, and it is no accident that issues of belonging, inclusion, and rights were so central in these attacks. With the establishment of the state of exception, immigrants or foreigners have become targets and represent life that is killable or that does not deserve to live; this is what Agamben classifies as "bare life".

For Agamben, bare life is life that can be killed without being sacrificed; it is, then, life that has no meaning outside of the fact that it can be killed. This 'killabilty' or life that has meaning only in the fact that it can be killed is, however, highly significant in a broader social context. For Agamben, bare life serves as the distinguishing feature between life that can be included in the community and that which is outside it – the exception.

As he points out, the German nation was constructed through the production of bare life and its eradication. In seeking to wipe out peoples who did not deserve to live, the Nazi regime was clearly establishing what it meant to be included in the German nation – it meant being allowed to live or being worthy of life. It is possible to see a similar, but far from equivalent, mode of biopolitics at play in the May 2008 riots.

As Donald Horowitz points out, in a riot, "the aggressor is curiously dependant on the victim. The source of the target choice is located in their relationship and in the characteristics believed to be displayed by the aggressors." (Horowitz: 2001: p.128). In the May riots, it became apparent that the aggressors based their attacks on a relationship or characteristic of belonging. The targets of the attacks were

those who did not posses the characteristics of locals – they spoke with foreign accents, were dark in skin colour and were (supposedly) responsible for a range of social ills, such as unemployment and crime, and were not perceived to belong in South Africa.

Thus, the aggressors were seen to be all that the victims were not; they were those who deserved to be in South Africa, to benefit from the post-Apartheid dispensation and its symbols (such as RDP houses), and to enjoy the right to life/citizenship. These characteristics are only made possible in the light of or in the presence of a comparison, of a group that lacks these characteristics. In this way, a relationship of dependency is indeed established: those who belong, who are to be considered South African citizens deserving of life, are dependant on a group who do not belong and who have no rights in South Africa, including the right to life. In this way, it can be seen that there was a strongly biopolitical character behind the riots. The attacking, beating, and killing of foreigners served to reinforce and reproduce the lines of demarcation between those who belong and those who do not. It thus served to reinforce the demarcation between citizens and those placed within a state of exception. Central to this demarcation of belonging is bare life.

Agamben argues that, "the first foundation of political life is a life that may be killed, which is politicised through its capacity to be killed" (Agamben: 1998: p.89). In this way, the production of life without significance, of life that does not deserve to live, of life that can be killed, is an integral part of politics and governmentality in contemporary times. The construction of the political community rests on the construction of a barrier, which contains within it a barrier between life and death. Inclusion in the community brings with it the right to life and invests life with meaning.

Exclusion, by the same token, removes one's right to life, and establishes one firmly as life that can be killed, as bare life. This mode of politics and policing the lines of belonging reached its apogee in regimes which wielded immense

bureaucratic, military, and panoptic powers, such as the Nazi regime or the Soviet Union. However, it is apparent that this mode of politics has worked its way into the general, more dispersed forms of politics and is at work in most societies today. The May riots bare testament to this.

Within the attacks, as has been noted, attackers went door to door seeking out foreigners, demanding identification and murdering those who resisted or were found to not 'belong'. Before the attacks took place, as Councillor Sinah Gwebu, an ANC councillor for Alexandra Township described, "People armed to the teeth with pangas" congregated and demanded that "They [foreigners] must go!"[116] Here it is obvious that the attackers' demands for the removal of foreigners from their communities were based on and could only be satisfied through violence. The attempts by locals to reinforce and assert barriers of belonging depended on violence and murder. This is not dissimilar from the manners in which the Nazi regime disposed of all of those who did not deserve to 'belong' and live through murder on an immense scale. Although the methodology and scale may vary greatly, the objective remained the same: the demarcation of the community through violence.

The comparison with the Nazi case may seem extreme, yet it points to very significant features of politics in contemporary times. This feature of contemporary politics has made itself felt in many cases around the world, including the infamous 'communal' riots in India. Once again in these riots, the politics of belonging and of biopolitics was at work, as Hindus massacred Muslims in attempts to assert their nationhood and right to belong. In these attacks, the power and unity if Hindutva was evoked and mobilised, and required a demarcation based on life and death in order to have substance (Engineer: 2004. see also Bhatt: 2001. and Shah: 2002). During the riots of May 2008 and other attacks on foreigners in South Africa, a similar current is at play. In these attacks, the notion and status of South African citizenship was prominent, and has been mobilised as a framework and justification for violence and murder.

[116] Interview with Councillor Sinah Gwebu, conducted on 6 August, 2008.

The fact that citizenship is at the heart of the attacks points to a highly significant feature of power, politics, and existence in societies today. In the Nazi case, the state was the arbiter of life and death, and encapsulated this power within its machinery, bureaucracy, science, and laws. In South Africa today, this power over life and death has been appropriated by the citizenry. However, it still bases itself on the state and peoples' relationships with it. The attacks were made possible and were in fact mediated by people's relationships with the law and the state; people's 'statuses' were at the forefront of the violence and they distinguished the attackers from their victims, thus providing focus for aggression and blood-lust. These statuses stem from and are regulated by the state. Consequently, the attacks need to be examined in light of state power and its relationship with and influence over individuals. In this way, the attacks can be understood in further complexity, as can the nature of the state, state power, and existence today.

However, whilst status and rights to belong stem from the state, this does not mean that people are the simple conduits or puppets of the state. They illustrate that the state provides a field for action that can be utilised by people for their own ends and desires. During the May attacks, people were acting through the citizen/outsider distinction, and came to capitalise on the vulnerability enforced on foreigners by the state through the state of exception. At the same time, however, they were challenging the state itself and its hold over violence, life, death, and social control.

In Agamben's formulation, the state takes on a monolithic, all-encompassing power. Through the use of the Nazi example, Agamben argues that the state holds power over life and death and over populations in their entirety. It thus appears that the state is an inescapable arbiter of existence and violence. Whilst this point of view is instructive, it does, however, attribute a power and status to the state that is not reflected in most societies. As the May riots show, this power over life and death does not only rest with the state. It is in the hands of members of the population too.

In the attacks on foreigners, people were appropriating the state and its power over life and death for their own means and to satisfy their own needs. We see this in accusations that "criminal elements" were active in the attacks and took advantage of them as opportunities for looting and robbery[117]. David B. Coplan, for example, argues that

> "young men attacked their foreign and in some cases even South African neighbours from more northerly ethnic groups because the impetus was looting and they were the most convenient target" (Coplan: 2008: p.11).

Here we see that the state is not only the arbiter of existence in society; it is also malleable and open to manipulations by the population itself. As Rose points out, "The technologies and devices that are assembled into the apparatuses of the state have neither the unity nor the functionality ascribed to them." (Rose: 2006: p.148) This is apparent in the ways in which the May riots provided a challenge to state's position as the holder of power over life, death, and violence and, consequently, to Agamben's theory of the state.

At the same time, however, the attacks were made possible by the vulnerability of foreigners in South Africa today. This is a vulnerability that stems directly from the state. The previous two chapters have documented how, through a range of laws and practices, immigrants in South Africa have been placed in a state of exception. Through laws which deprive them of all but the most basic of rights, which illegalise and ban their presence in this country and which reserve social services and freedoms for citizens and approved populations, illegal immigrants have been excluded and placed in vulnerable, bare positions in South African society. This bare position has been enforced through police practices which harass and abuse migrants, and institutional practices which ensure their exceptional status is enforced through violence, deprivation, denial of rights to

[117] Interview with Councillor Sizukela Nkosi, conducted on 6 August, 2008.

dignity and exposure to death. This has served to construct a real state of exception for illegal immigrants, suspected and 'real' in South Africa, and needs to be seen as the foundation for their vulnerability and status as legitimate or 'convenient' targets for locals seeking to vent frustrations, make political statements, and enforce their own identities and rights to belong.

In a real state of exception, as quoted earlier, law becomes "indistinguishable from life", and life thus comes to exist and be regulated by this state of exception. This is the case with foreigners in South Africa and needs to be regarded as a direct cause of the attacks and their extremely violent nature. Through state actions which remove illegal migrants' rights to dignity, to services, to be present in South Africa, and ultimately, to life, this category of people becomes established within a state of exception, and come to represent bare, marginal life through which inclusion and the privileges this grants can be given significance and form. Law as life and life as law have blurred and the legal categories of 'citizen' and 'exception' have come to mediate the very boundaries between life and death. Due to this, immigrants who have been marginalised, criminalised and established as outsides to the law and society are made out to be legitimate targets for violence.

So, it can be argued that attackers during the May riots were in fact acting on and through the framework of the state, but challenging it at the same time. This is apparent in the cries utilised by the rioters: cries of "They must go'"[118], "This country is ours, they should leave" and "The foreigners must leave or die'"[119], all illustrate how state-conferred subjectivities and status were at the centre of the violence. The violence was a contest over the right to belong within the nation-state and was consequently framed in its terms. This is indicative and a disturbing confirmation of the argument made previously that state power contains within it the ability to produce subjectivities and to frame actions for people. This is a powerful example of state power and a disturbing consequence of

[118] Interview with Councillor Sinah Gwebu, conducted on 6 August, 2008.
[119] Ndlovu, N. 'They must leave or die…'. article appearing in the *Mail and Guardian,* 16 to 22 May, 2008.

governmentality that bases itself on biopolitics – the problem of populations and contest over life and death.

In the case of the riots, the subjectivities produced by governmentality and the state of exception have reached their ultimate conclusion as a contest over life and death. In this case, we see that state power is not at operation only within the mechanisms of the state – its bureaucracy, military and police forces, and laws – but is at work in the very identities, subject positions, and interactions of populations. This is confirmation of state power to produce populations and to provide barriers between inclusion and exclusion, life and death.

Politics and bare life

In Councillor Nkosi's statement "There are no differences between citizens and non-citizens", a very significant factor in the violence emerges. The violence was an attempt to reinforce the barriers of citizenship and inclusion and it came to do so in the most bare, violent terms. It was, in fact a political action, one based on and produced by the state, governmentality, and biopolitics. We have seen how state laws and policies have established citizenship as the arbiter of one's right to claim privileges and protections from the state, as well as a place within the community. In areas in which people lack these privileges and protections and are yet to realise the fruits of citizenship, despite enjoying this status, methods are required to reassert this and provide substance to it. These methods were found in the attacks, as citizenship was reasserted as the barrier between bare life – life that can be killed – and existence in the community. At his presentation at the Human Sciences Research Council's symposium, James Oatway described how in the aftermath of the attacks there were "dead bodies lying in the street whilst people went about their daily business". This is a clear indication that the attacks were a method of producing bare life.

This is life that is not reprehensible or hidden, but that provides the very foundation of political life. It is life (or death) that needs to be present in order for

political life and inclusion in the community to have significance. As Agamben points out, life exposed to death is the 'originary' or foundational political element. The attacks most certainly did expose ordinary citizens and communities to death – as is evidenced by Oatway's descriptions and by the photograph printed on the front page of *The Star* newspaper of a group of schoolchildren pointing and laughing at a refugee from the violence sheltered at the Alexandra Police Station[120] – and thus served to provide the foundation or element for political life in South Africa. They took place predominantly in impoverished areas in which people are yet to enjoy the fruits of their citizenship. Thus, alternative methods were needed to draw the demarcation between citizens and non-citizens. This line came to be drawn through death and violence: citizens were established as those protected from violence and entitled to belong, non-citizens were established as bare life. In this way, the attacks served not only as means of producing bare life, but as means of establishing political life too, and what it means to be included in the political community.

This gives credence to Andrew Norris's claim that "politics must again and again enact its internal distinction from bare life. It must repeatedly define itself through the negation of bare life – a negation that can always take the form of death." (Norris: 2005: p.5) We thus need to understand the May riots as political acts, acts that served to redefine political life in South Africa and base it in terms of the struggle and distinction between life that deserves to live and life that deserves death. Politics and the politics of belonging have thus come to be defined in terms of life and death, inclusion and exclusion.

The political element of the attacks was clear from their outset. According to an ANC report on the violence, the momentum for the attacks was generated at an Inkatha Freedom Party (IFP) Annual General Meeting held in Alexandra over the weekend of the 10th and 11th of May. At the meeting, "a resolution was taken to drive foreign nationals out of Alexandra", and the attacks began "immediately

[120] *The Star*, Thursday, 15 May, 2008.

after the AGM"[121]. Prior to this meeting, a South African National Civics Organisation (SANCO) Summit held on 29 March also "resolved to drive out the foreign nationals from Alexandra" and an Alexandra Community Policing Forum (CPF) meeting held on the 6th of May "blamed rising crime, murder and rape on migrants"[122]. There was thus a strong element of community political organisation and mobilisation at work prior to the attacks. The Idasa report into the riots also notes that the attacks were made possible through "spontaneous, albeit troublingly effective, local organising," learnt in South African communities' "deep experience, from the struggle era, with this type of collective violence and protest." (Idasa: 2008: p.9)

Thus, it emerges that the attacks were political actions, originating within local communities themselves. They need to be regarded as forms of local political action and mobilisation. However, to lump them in the same category as other forms of local organisation, such as service delivery protests, is incorrect. Rather, they need to be understood as actions of biopolitics, motivated and framed by the state of exception and politics of belonging. The biopolitical nature of the attacks is obvious, as their focus was on bodies, lives, and the reproduction of the community, rather than structures or material conditions. Foucault uses the term 'biopolitics' to "designate forms of power exercised over persons specifically in so far as they are thought of as living beings." (Gordon: 1991: p.5) It is a form of politics that is "concerned with subjects as members of a *population* [italics in the original]." (ibid)

However, in the HSRC's report into the violence, the authors write:

> "Some of the locales in which these [attacks] occurred have also been the site of violent and other forms of visibly bold protest around other issues, most notably service delivery. For example,

[121] African National Congress. (n.d.). Greater Johannesburg and Zone 13 Briefing to ANC Provincial Executive and National Executive Committees. 'Status Report on the Alexandra Community Conflict (Xenophobic Attacks)'. p. 1.
[122] ibid.

> Mamelodi, the site of xenophobic violence in March 2008 which saw the burning and looting of shacks also experienced violent forms of protest (attempted vandalisation [sic] of businesses) against service delivery and the delivery of houses in particular in 2007. In September 2007 residents of Alexandra, which was the focal point of recent anti-migrant violence were protesting against a lack of service delivery and housing provision by occupying a construction site in the township." (HSRC: 2008: p.24)

It is thus possible to conclude that some of the issues motivating the attacks against foreigners were residual and had motivated prior protests. However, to regard the two forms of violence as part of the same trend is incorrect. The motivation, targets, and sheer scale of violence in the May riots points to them being of a different nature. Through actions focused on the very bodies and lives of their victims, attackers were redrawing the lines of political inclusion, rather than protesting against the government's poor service delivery or their on-going frustrations. They were seeking to re-make the political community and once again bring substance to their citizenship. This is illustrated by the fact that some victims of the attacks were subjected to the most extreme form of violence used during the political conflicts of the late Apartheid period. .

The photographs of Ernesto Alfabeto Nhamuave, better known as 'the flaming man', emerged as the iconic pictures of the May riots. In the photographs which were displayed prominently and reproduced again and again in newspapers, Ernesto is shown on all fours as flames engulf his body after he was set alight by rampaging locals. For Christine Qunta, a lawyer, author, and contributor to *The Star*, the burning of Ernesto "revived memories of the horror of the 1980s when people settled political differences by resorting to burning people"[123]. Similarly, Sonwabile Mancotywa draws parallels between the burning of foreigners in 2008 and the 'necklacing' of Black people suspected of collaborating with the

[123] Qunta, C. 'Consider a third-force option'. article appearing in *The Star,* Thursday, 5 June, 2008.

Apartheid state[124]. In both cases burning is used to bring about "the most excruciating death imaginable" and to serve as a symbol of ultimate contempt and destruction[125]. Donald Horowitz, in *The Deadly Ethnic Riot*, notes that "In an ethnic riot, fire is an emblem of complete hostility" (Horowitz: 2001: p.113). Thus, burning and the use of fire is a common and extremely symbolic mode of violence in riots.

The fact that this was used against 'traitors' during Apartheid and again against foreigners in 2008 serves as a highly illustrative point. In both cases, attackers wished to make clear their 'complete hostility' and utter contempt for the victims. This can be put down to the fact that in both cases the victims were perceived to be threats to broader political societies. In the case of collaborators or traitors, these people were suspected of setting back the struggle against Apartheid and the aspirations of the oppressed. In the second case, foreigners have been targeted for their perceived crimes against South Africans, such as stealing jobs and women, taking services away from deserving locals, and infringing the country's regulations and laws. The fact that the two crimes, incomparable at face-value, receive equal punishment tells us something highly significant: today, citizenship is the mark of belonging within the community. Those without this are to be regarded as enemies who threaten and have no place within the community and whose lives have significance only in the fact that they can be killed. In both cases, inclusion in the political community is measured through exposure to life and death.

Because foreigners have been constructed within a state of exception, they, like traitors and collaborators, should not and cannot be included in broader society as they are committing crimes against those who belong, who are part of the entitled and legitimate community. Burning is consequently used as a visible means of making this point and ensuring their exclusion. In both cases, burning was used as an inherently political and symbolic act, and served as a means of demarcation

[124] Mancotwya, S. 'Nothing justifies this savagery'. article appearing in *The Star,* Monday, 2 June, 2008.
[125] ibid.

between those who deserve life and inclusion in the community and those whose only significance is the fact that they can be killed. In this way, their deaths serve as foundations and symbols for belonging. The deaths of foreigners, like the equally violent deaths of collaborators, are thus highly (bio)political.

We can thus conclude that the May riots were indeed political actions, actions that centred on the politics of belonging and that have been framed in the state of exception and the production of bare life. They are representations of the modes of biopolitics and governmentality produced in contemporary societies and which are circulated and produced by state power. In framing attacks in terms which derive from the state – terms like 'immigrants', 'citizens', 'foreigners', and 'locals' – people are creating political communities and acting in terms of classifications that stem from the state. The state has used violence against and hostility towards foreigners as a means of demarcation and creating the political community. This violence, as has been argued, has given form to the excluded community, but has simultaneously provided a basis for inclusion. In this way, the state's approaches to and use of violence have created insiders and outsiders, citizens and exceptions. What is of vital significance now is that people have accepted and assimilated these state-produced statuses and relationships for themselves.

The riots represent, as has been illustrated, a form of popular politics that, whilst being framed in terms that are essentially 'top-down' (in that they are derived from the state), have sprung up and been mobilised at community, grass-roots level. This is a clear indication that state governmentality – the art of producing populations and dealing with the 'problem of population' – and biopolitics has become ingrained within societies and is now at the forefront of interactions and relationships between communities. The May riots illustrate this, and show how citizenship – the right to belong – has become a fundamental instrument of governmentality and biopolitics.

Locating discourse in the state and the state in discourse

The extent to which the form of governmentality and biopolitics represented by citizenship has pervaded societies is made clear from the nature of the riots and their origins in community politics and mobilisation. This is of great importance for how state power is to be understood today. In *From Foreign Natives to Native Foreigners*, Michael Neocosmos argues that the rise and spread of xenophobia in post-Apartheid South Africa is a result of 'state xenophobic discourse' (Neocosmos: 2006). He attributes the prevalence of xenophobia to hostile, xenophobic attitudes within the government and lays the blame on politicians such as Mangosuthu Buthelezi for fomenting these dangerous sentiments in South African society. For Neocosmos, xenophobia is entirely a 'top-down' construction, and can be attributed to individuals within the state and state practices which have been reproduced and entrenched within broader society. He thus contends that a form of "popular-emancipatory politics" is required to counter-act this and stamp out xenophobia in South Africa (Neocosmos: 2006: p.123).

This argument is extremely narrow in focus, however, basing itself entirely on the state and its 'top-down' relationship with society. In the light of the May riots and other attacks by locals against foreigners, it is clear that xenophobia and violence against foreigners is rife within local communities as well as within the higher echelons of the state. The May riots were themselves a form of popular politics, and thus should dispel Neocosmos' blithe claim that politics from below will eradicate xenophobia. What the riots indicate is that state subjectivities and practices of population production have entrenched themselves firmly within society, and have come to mould people's conceptions of themselves, their communities, and the rights of people to exist therein. The very notion of the community, of the South African nation and citizenship has become dependant on this form of exclusion and politics, and thus thrives within local communities, as well as within the state. Neocosmos does not deal sufficiently with the power of the state and its ability to define and create populations and subjectivities, and

thus he fails to account for the type of popular politics at work in attacks such as those witnessed in May.

This is primarily because his focus is fixed too firmly on the top, on the state and the discourse it disseminates. This is an important area, but it is only a part of the broader phenomenon. The state needs to be situated within the nexus of power in which it is located and most potent. The state has multiple mechanisms and techniques used to disseminate discourses in society and mould populations. It does not operate in a top-down way, but in a range of diffuse and subtle methods. As Sharma and Gupta argue,

> "Instead of assuming that states are the supreme 'holders' of power and deploy that power exclusively to dominate and rule, governmentality offers a lens to understand how power is exercised in society through varied social relations, institutions and 'bodies' that do not automatically fit under the rubric of 'the state'." (Sharma and Gupta: 2006: p.25)

Neocosmos does not do this, and thus is unable to account for the popular content of xenophobia and violence against foreigners. This violence and hostility, whilst stemming from the state, needs to be framed in this conception of governmentality, and regarded not as something that is produced through the state, but as something that is produced through the population and mechanisms of social control instead.

At the same time, what needs to be examined, in addition to the state's power to disseminate and circulate discourse, is the very discourse within which the state itself is located. For it needs to be remembered that not only is the state a producer of discourse, it is itself the product of discourse.

This discourse is one of control and regulation, one that finds its pinnacle in the state and its ability to marshal bureaucratic, military and police force, the law, and

panoptic mechanisms in service of this. It is, however, one that is not confined to the state, and is at work in much broader segments of society. We see this in the aftermath of the riots, in which various commentators and individuals spoke out about the need for the state to do more, to exercise greater control over the lines of demarcation and inclusion in South Africa in order to prevent further outbreaks of violence against foreigners. For example in their key recommendations to respond to the violence, the HSRC "call on government to conduct a national audit on the occupation of RDP housing and to take steps to ensure that only South Africans occupy this form of public shelter." (HSRC: 2008: p.10)

In addition, the HSRC authors contend that

> "It is essential that government move urgently and effectively to protect South Africa's borders and points-of-entry [as] no migration policy or strategy aimed at alleviating xenophobic tensions can be contemplated if the national borders are porous and people can come and go as they please." (ibid)

They consequently blame the violence partly on the state's "lack of control" (ibid) over borders and the movements of people and argue that this form of violence can only be remedied through increased state control and regulation.

This view was also supported by Councillor Nkosi, who stated that the best way to prevent further attacks is to

> "Give people assurance that we [the government] are in control. At the moment that assurance is not there. People don't believe that we are in control. People come into our country and live where they like. They also commit criminal activities like our own [people], but sometimes even worse. So if our people can be given that assurity [sic] that something is being done to make

> sure that there is control [then further attacks will be prevented]."[126]

Here again we see that the ideal and necessity of control is not only preserved and upheld by the state, but is idealised by members of society too. Thus, it is apparent that the discourse that is embodied by the state is not only produced by it; the state is itself situated and produced by this discourse. In calls for the state to "close the borders" (HSRC: 2008: p.38), to ensure that only citizens benefit from state projects, and for greater control over people's movements to be exerted, we see how the power of regulation, control, and policing has diffused throughout and become idealised within society. Thus, whilst the violence was in many ways the product of state-imposed relationships and subjectivities, people have retreated to the shelter of state power and control in order to prevent it occurring again.

Thus it needs to be recognised that the state is as much a product of the desire for control and regulation as it is the source of this. This is because, as has been stated previously, the formation of the community, the demarcation of those who belong – which is a central feature of contemporary societies – relies on this control, regulation, and policing. The problem of population is one faced by all societies wishing to construct barriers on inclusion/exclusion, and is one that is seemingly best answered through tighter control and regulation. The state thus owes its position of dominance in society to this conception of politics and belonging and relies on this to maintain its position. The May riots have shown this, and thus have shown how the politics of belonging have today been framed in the discourse of control and policing. If we are to understand the violence, we need to understand this pervasive discourse within society, and find measures that extend further than 'popular politics' to combat it.

During the May attacks, people were expressing their displeasure with state failures to police lines of inclusion/exclusion – "There are no differences between citizens and non-citizens anymore" – and consequently took this responsibility on

[126] Interview with Councillor Sizukela Nkosi, conducted on 6 August, 2008.

themselves. During the riots, 50 people were arrested "for public violence and robbery" in Alexandra alone and police "had to use rubber bullets to disperse violent crowds"[127]. In total, "more than 1 400 people [were] arrested in connection with the xenophobic violence"[128]. Rioters battled against the police as they constructed road blocks, threw objects at police officers, and even shot at them in some instances[129]. According to reports, "Area[s] resemble[d] war zone[s] as police battle[d] to contain attacks on foreigners."[130] Eventually the army had to be called in to quell the situation and prevent further violence[131]. Thus, locals actually found themselves acting as combatants against the state.

At the same time, however, they were acting in the name of the state and in defence of their abilities to lay claim to and be recognised as members within it. This contradictory position shows how powerful and pervasive the ideal of control and policing the lines of belonging has become. It also shows how governmentality and the production of populations stems from the state and its discourses, but is also situated within a broader discourse that encapsulates the state itself. The riots were themselves a form of population production and regulation, and illustrate how this feature of modern biopolitics and governmentality is present within popular politics and people's subjectivities, as well as within the state.

It is also indicative of another omission in Agamben's theory and understanding of the state. As pointed out previously, in Agamben's theory the state takes on immense power and proportions, and is seen as the ultimate decision-maker and potentate in society. It appears, in Agamben's work, to operate with efficiency and internal cohesion and always with a unity of purpose and results. However,

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[127] Alexandra South African Police Service. Communication Office. (2008). Report on violence in Alexandra. 13 May. See also Eliseev, A. Seale, L. Maphumulo, S. and Smillie, S. 'On the edge of a bloodbath'. article appearing in *The Star,* Tuesday, 13 May, 2008 and Idasa. (2008).
[128] Hawkey, K. 'Special courts to try xenophobia accused'. article appearing in the *Sunday Times,* 1 June, 2008.
[129] Interview conducted with Constable Neria Malefetse, on 13 August, 2008.
[130] Seale, L. Smillie, S. Ngqiyaza, B. and Eliseev, A. 'Mob violence spreads to Diepsloot'. article appearing in *The Star,* Friday, 16 May, 2008.
[131] Flanagan, L. and Ngqiyaza, B. 'Now army rolls into townships'. article appearing in *The Star,* Thursday, 22 May, 2008.

whilst possibly evident in the Nazi regime, this type of cohesion and purpose is not a feature of other societies and effects of state power. The fact that May saw communities battling the police and state, whilst simultaneously invoking it and their rights to it, illustrates a particular irony. In this case, the empowered citizens that have been the focus of state nation-building projects came to oppose and threaten, rather than support and respect the state.

Their abilities to oppose it and the belief that they had a right to invoke violence against others were based on the fact that they are subjects of the state and deserve to be rewarded accordingly. It needs to be remembered that their positions in society and privileges have been made possible through the negation and vulnerability of others. This is a project that has been led by the state but, as the violence of May has shown, has harmed it too.

Here we see that the subjects produced by the state are not passive nor are they simple products of the state who act accordingly. The incidents of May show this, and show the agency and ability to appropriate the state and its discourse possessed by people. This is absent in Agamben's theory and understanding of the state, and is a crucial addition if we are to understand the state and its relationship with people and society in all the requisite complexity. As Abrams notes, "The state is a unified symbol of an actual disunity." (Abrams: 2006: p.124) This disunity was apparent in the actions of citizens in May, and is absent in Agamben's account.

Producing the population – part three

Another way in which the state's power was challenged and appropriated by communities during the May attacks is evident in the ways in which the attacks served as a means of demarcation and population production. It has been argued previously that the powers of demarcation and population production rest powerfully within the state. At the same time, however, the events of May have

shown that this power, whilst still located in and stemming from the state, also vests itself within the communities created and empowered by the state.

One of the key indications that a form of population production was at work during the attacks and in their aftermath is illustrated clearly in the already-mentioned photograph printed in *The Star* under the headline 'Kids learn lessons of hate'[132]. Here it is clear that children have learnt that foreigners are outside of the community and consequently outside of the realm of life that deserves to live. They deserve to be scorned, ridiculed, harassed and even killed simply because they are not part of the community. This is made shockingly clear in an incident recounted by James Oatway.

During his presentation at the HSRC seminar he recalled how a seven year old boy came up to him and told him that he wants "to kill a Shangaan 'because they steal from us' ". Here it is clear that lines of demarcation have been drawn and have been reinforced through violence and the biopolitical production of bare life. The production of bare life has served to produce populations and reproduce them within people's subjectivities, relationships, and experiences.

Within the incidents recounted here, we see that a means of population production has been circulated within communities and has come to draw the distinction between bare life and life that deserves to live. This has been framed by the state and people's relationships with the state. Hostility towards immigrant communities has been fuelled through the supposed threats they pose to the community – "they steal from us" and take away women and jobs – as well as threats they pose to the state and its ability to regulate and control populations. This is shown by Councillor Sinah Gwebu's compliant that "People in the community do not respect the by-laws; they just put their shacks wherever they want"[133] as well as Councillor Nkosi's claim that people need to be reassured that the state has control. Here again, we see that the attacks were prompted by

[132] *The Star*. Thursday, 15 May, 2008.
[133] Interview with Councillor Sinah Gwebu, conducted on 6 August, 2008.

people's perceptions that societal control, and hence their positions of privilege within the community of insiders or citizens, was under threat and needed to be reinforced.

Again, it is of vital significance that rioters, although involved in illegal activities which were condemned and opposed by the state, were seeking to reinforce the state and were acting out state-produced subjectivities and distinctions. Here we see clear evidence that the state can produce populations, but is simultaneously produced by these subjectivities too. According to Althusser, the school is the dominant "State Ideological Apparatus" and is the most powerful and prominent instrument in the circulation of state ideology and production of subjects (Althusser: 2006).

Whilst it is true that the school is a dominant feature of state apparatuses, the events recounted above have shown that ideology and discourse circulation are not only located within the state. During the May riots, discourse circulation and subject production took place outside of the state and school, and children's subject positions were learnt through violence and riots. At the same time, however, these subject positions reinforce the state, as they are based on distinctions between citizens and exceptions which stem from the state directly. Here again we see that whilst the state is a prominent force in society and the production of subjects, this power does not only lie within the state and can be located in various other aspects of the population.

Exploring the disunity of the state

At the same time as they served to reinforce state power, the riots proved in many ways that alternative subjectivities and relationships are possible. During the riots, people fleeing the attackers found refuge in police stations, where emergency shelters were set up. This was an inversion of the prior relationship between immigrants and the police, as those who had previously acted as their persecutors (as detailed in the previous chapter) now came to serve as their protectors. For

example, when the violence broke out, "People started flocking in at the [Alexandra police] station for safety [sic]."[134] This pattern was repeated throughout the country and police stations moved from being places of hostility to places of refuge for the victims of the attacks.

Bishop Paul Verryn recounts that once the attacks broke out and people started flocking to the Central Methodist Church to find refuge, "The police were incredibly vigilant [in protecting his church]" and even came to prevent three separate attempts to attack the church[135]. Joyce Tlou too points out that the police

> "reacted better than we expected. Previous police responses were actually a dereliction of duties – facilitated harassment and looting. But this time they went out of their way, beyond their call of duty [in their efforts to protect people]."[136]

This indicates that relationships established by state-produced subjectivities are not set in stone and are changeable. The emergence of new subjectivities is possible and the state, it needs to be reiterated, does not act with a constant unity of purpose. Abrams argues that

> "Political institutions…conspicuously fail to display a unity of practice – just as they constantly discover their inability to function as a more general factor of cohesion." (Abrams: 2006: p.124)

This is apparent in the change in attitudes and approaches towards immigrant communities displayed by the police during the attacks, and the ways they came to serve as protectors of those they had been allowed and actively sought to persecute previously.

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[134] Alexandra South African Police Service. Communication Office. (2008). Report on violence in Alexandra. 13 May.
[135] Interview with Bishop Paul Verryn, conducted on 1 December, 2008.
[136] Interview with Joyce Tlou, conducted on 11 July, 2008.

However, the presence of bare life and a state of exception does make this shift difficult. For example, whilst police and the South African army did attempt to protect the victims of the riots, the protection they offered based itself, more often than not, on the use of force. This is evident in the picture printed in the *Sunday Times* newspaper on the 25th of May depicting the last moments of Ernesto Alfabeto Nhamuave, 'the flaming man'. In this photograph, whilst Ernesto lies prostrate and burnt but still alive, a police officer stands over him, ostensibly in order to protect him. However, this officer has no medical equipment or ability to offer Ernesto any care or comfort; all he has is his gun, which he holds above him, poised to shoot. Here we see that, confronted with bare life, the state has little to offer other than force.

This is reiterated by comments made by an official at an External Stakeholders' Meeting for the Crown Mines Refugee Reception Centre, held on the 9th of July, 2008. At this meeting, it was noted that the huge influx of people seeking refugee status and the renewal of their permits in the wake of the riots had placed the centre under extreme strain. The centre found itself in a situation in which crowds were unmanageable and at one stage police officers had actually charged the crowds with horses and used force in order to disperse the crowds[137].

Responding to this, one of the officials from the centre stated that "[They] had to use batons to save lives." Here again we see that, confronted with disorder and bare life, the state has little recourse other than force and violence. The fact that this use of force is alleged to be for the protection of the victims on the receiving end shows clearly that force is all those in a state of exception can expect from the state. Within a state of exception, law loses significance and is replaced by force. This is made clear in the two examples cited here.

The difficulty in shifting paradigms and approaches to dealing with entrenched subjects is further illustrated by an example of violence in the displaced persons

[137] Interview with Pastor, [real name withheld], conducted on 15 July, 2008.

camps given by a Councillor from Benoni who attended a Gender Links Summit held to explore the attacks and their ramifications. In this case, the Councillor explained that staff at the camp had encountered more problems from the security personnel at the camps than with those sheltered there. She pointed out that one of the guards brought in exclaimed that he was "going to 'f…' [sic] all the women" in the camp."

This illustrates that in some cases those who are entitled and remain powerful still regarded the victims of the attacks as nothing more than passive, bare life on which they could act and exercise their will. Here we see that the subject positions established through the politics of belonging and state of exception are very much entrenched within people and are altered with difficulty or very little success.

Thus, whilst the riots have shown that alternative subjectivities and relationships are possible, something Agamben's work does not address or provide enough space for, it is apparent that the reality of a state of exception does make this difficult. In instances in which the state of exception becomes the normal mode of operation, force, rather than law, predominates, making the emergence of new relationships and subject positions difficult indeed.. The production of bare life, biopolitics, and the state of exception have become central mechanisms of governmentality and population production today and are thus often the predominant forces at work in society. This establishes the field for action and relationships in very specific ways, which often prove inescapable.

Active citizens and bare life

The fact that death or exposure to death and bare life served to provide the foundation for the political community is borne out further in the public's responses to the attacks. It is notable that the majority of the media and general public were extremely quick to come out in condemnation of the attacks. The outpouring of donations, charity, and sympathy for the victims was noted and lauded as South Africans 'opened their hearts to the refugees' and victims of the

violence. Whilst commendable, these actions of giving and asserting the generosity and goodness of the majority of South Africans too can be framed in and understood as part of the practice of biopolitics and of the politics of belonging.

At the seminar hosted by Gender Links, William Bird, from the Media Monitoring Project, criticised some elements of the media for the way in which they portrayed the victims of the violence. As the photograph of the refugee sheltered at the Alexandra police station described earlier, as well as the example provided by Bird, of another photograph on the front page of *The Star*, this time of a young girl, accompanied by the headline "Please help this girl"[138] shows, those who experienced the attacks were predominantly portrayed in the media as helpless victims, at the mercy of the rouge or violent elements of the South African community, and in need of sympathy and assistance from the kind-hearted members of society. Descriptions of the victims of the violence made use of words such as "pitiful"[139], "shattered"[140], and "sorry"[141] and the helpless state of the victims was conveyed and entrenched through the common use of photographs of women and especially children. This is another manifestation of biopolitics and governmentality used in the production of populations.

The most contemporary type of citizenship and the type endorsed and embraced by the South African Constitution envisages citizens as active, as contributing to the construction and formation of the nation-state/political community and as having rights as well as obligations. In this way, citizens and members of the nation have active rights whilst others who are present in a country, but do not belong, have simple passive rights. This formulation was introduced as early as the French Revolution where, in the *Preliminairess de la constitution* it was stated

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[138] Flanagan, L. Skade, T. and Rondganger, L. 'Please help this girl'. article appearing in *The Star,* Tuesday, 27 May, 2008.
[139] Serrao, A. 'Blind victims tell of pitiful plight'. article appearing in *The Star,* Wednesday, 21 May, 2008.
[140] van Rooyen, K. and Chauke, A. 'Samaritans lend a helping hand to shattered victims'. article appearing in the *Sunday Times,* 25 May, 2008.
[141] Thakali, T. 'Sorry plight of the refugee children'. article appearing in the *Saturday Star,* 30 August, 2008.

that "All inhabitants of a country must enjoy rights of passive citizens…all are not active citizens" (Sieyes, cited in Agamben: 1998: p.130). In that case, "women…, children, foreigners, and all those who would not at all contribute to the public establishment" were denied active rights, and were thus secondary in the grading of citizens and members of society (ibid).

Today, on a formal level at least, women have all the rights afforded to men, and even children are imbued with rights as well as the responsibilities incumbent upon active citizens. The Bill of Responsibilities, which has been proposed for inclusion in school curricula, calls on children to accept the responsibility of protecting and furthering "the rights enshrined in the Constitution of the Republic of South Africa"[142]. The conclusion of the Bill states

> "I accept the call of this Bill of Responsibilities, and commit to taking my rightful place as an active, responsible citizen of South Africa. By assuming these responsibilities I will contribute to building the kind of society which will make me proud to be a South African."[143]

Here, then, we see that a notion of citizenship that rests on participation, engagement, duties and responsibilities is being advocated and entrenched in South Africa. This notion and construction of citizenship can be traced back to the immediate post-Apartheid period and the Truth and Reconciliation Commission (TRC) which was intended to serve as a means of healing the divided nation and exposing the violence of the past. During the TRC hearings, according to Ivor Chipkin, the people of South Africa, "were made whole, not by seeking to punish the perpetrators of human-rights violations, but by making them speak the truth about their criminal actions" (Chipkin: 2007: p.179).

[142] Republic of South Africa. Department of Education. (2008). 'A Bill of Responsibilities for the Youth of South Africa',
[143] ibid,

Thus, in order for the South African nation to be re-formed and for people to be included in it they had to do two things: those who had committed crimes in the past had to admit to these and ask forgiveness and those who were victims had to forgive. In this way, the reconstruction of the nation and the granting of places within it depended on an active process, one of admittance, repentance, and forgiveness. Through the TRC, like the Bill of Responsibilities, South African citizenship and belonging has been framed in active, participatory terms.

This does not mean, however, that the division between passive members of the population and active citizens has been consigned to history. The fact that today South African citizenship relies on activities and participation to give it substance means that it needs a passive referent against which it can be measured. The May riots and the responses to them confirm that today immigrants and foreigners fulfil this role. The depictions and descriptions of those who experienced the attacks as helpless, pitiful, sorry victims who can survive only through the actions of the kind, concerned, generous, 'responsible' citizenry enforces this. Just as the killers during the riots asserted their right to belong and citizenship by actively producing bare, killable life, kind-hearted citizens affirmed their status as active citizens by caring for these victims.

This is evident in the manner in which communities and individuals sought and found validation for their inclusion in the South African community through their acts of charity and concern during the riots and subsequent crisis. In an article in *Jewish Affairs*, Wendy Kahn writes that, through their relief efforts after the attacks (which included delivering basic aid packages including food, clothing and blankets, and collecting and distributing toys and educational materials) "the Jewish community became recognised as a responsible and reliable NGO/body that could be called on when need arose [and] [i]t became known that the community would deliver and deliver fast." (Khan: 2008: p.13) Here we see that the 'community's' response to the crisis affirmed them as active, responsible, and deserving members of the South African nation. Kahn writes further that

> "In recognition of the contribution made by the Jewish community to the relief effort…we [the South African Board of Jewish Deputies (SAJBD)] were approached to participate in numerous forums addressing the short, medium and long term challenges it posed…The SAJBD has served on numerous task-teams and think tanks, including those organised by the HSRC, the Centre for Study of Violence and Reconciliation, the Disaster Management Forum, a parliamentary group hosted by Speaker Baleka Mbete and numerous interfaith working bodies." (ibid)

Here we see that not only has the Jewish community been affirmed as good and responsible, they have also been assured of their place in South African society and its numerous structures and institutions. This has been possible through their response to bare life, to a passive subject upon which they can act in order to affirm themselves and their belonging. It was an approach that was echoed by other sections of the South African community, including corporations and businesses, as the Old Mutual Foundation, Independent News and Media group, and the Oppenheimer family all donated large sums of money to funds set up to support the victims of the riots[144]. In these cases, the wealthy sections of society were seeking to affirm themselves as good "corporate citizens"[145] who are integral members of the 'good' South African nation. Again, validation and nation-hood are made possible through the presence of bare life and the actions of active citizens in its presence.

This has been a powerful and widespread consequence of the riots, and once again illustrates the biopolitical character of the events. Through them, bare life has been constructed and established firmly as a foundation that makes inclusion in

[144] Cox, A. 'Old Mutual offers support to refugees'. article appearing in *The Star*. Tuesday, 17 June, 2008; Yoro Badat, N-J. 'R1,5m for xenophobia victims'. article appearing in *The Star*, Monday, 9 June, 2008; Serrao, A. 'Oppenheimers donate R1m to xenophobia victims' fund'. article appearing in *The Star*. Monday, 2 June, 2008.
[145] Cox, A. 'Old Mutual offers support to refugees'. article appearing in *The Star*. Tuesday, 17 June, 2008.

the political community possible. Again we see that bare life is indeed part of the original foundation of political life. As Norris puts it, "Bare life is a necessary part of the good life, in that the good life is both what bare life is not and is what bare life becomes." (Norris: 2005: p.4) This was definitely borne out by the May riots and the responses of the 'responsible' citizenry.

This distinction between the responsible, deserving citizenry and the excluded, bare community was further illustrated by the furore and upsurge of complaints from residents when displaced persons camps were set up in Johannesburg's northern suburbs. Newspaper reports illustrate how residents in these areas were quick to respond and give charitably when the attacks broke out, but reacted with hostility and repulsion when camps were erected in their areas. As one report notes, residents in Corlett Gardens, where a camp was established, "were so angry that there was talk of burning down the tents."[146] In another incident, one resident stated, "I feel sorry for them but we don't want them here. They must just go put [the camp] somewhere else,'"[147] whilst other residents "complained they were not consulted and their property values would drop."[148]

Here again we see a stark divide between citizens and outsiders, as citizens are able to dictate the terms on which they interact with outsiders and the conditions under which outsiders exist. In this case, we see how one group's sense of empowerment and dominance over another is played out, and made possible through distinctions between active, empowered citizens and passive, bare exceptions. Again, the on-going tolerance, safety, and existence of foreign exceptions was dependant on the cooperation and tolerance of citizens.

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[146] Staff Reporters. 'Residents fume over tent towns in suburb'. article appearing in *The Star,* Monday, 2 June, 2008.
[147] Gerardy, J. 'Shame about the refugees, but not in my backyard'. article appearing in the *Saturday Star,* 7 June, 2008.
[148] Govender, P. 'Refugees decamp to posh suburbs'. article appearing in the *Sunday Times,* 1 June, 2008.

In the camps

The passivity and bare nature of the non-citizens' lives was made most stark by the establishment of refugee or 'displaced persons' camps. These camps were erected to house those who fled or had their homes destroyed in the riots. In these camps, existence is fragile, and the passivity of those in them is extreme. As one report recounts, conditions in the camps are "brutal, with inadequate nutrition, sanitation, shelter, and minimal access to heath care"[149].

Residents in the camps are reduced to waiting for charitable handouts in order to eat, clothe themselves and their children, and have shelter. As one refugee stated, "Most of the time we are just sitting here, hoping that time will pass.'"[150] The sight of people queuing, pushing and shoving and extending their hands through a steel gate just to receive an item of clothing to keep them warm through the night (as I witnessed at Cleveland Police Station) emphasises just how passive, hopeless, and vulnerable foreigners have become in South Africa at present.

This passivity is extended to their very existence, as they now rely on the provision of camps and food by the state and charitable organisations for their immediate protection. The continued operation of the camps is dependant on the state. The camps were established as a temporary measure to deal with the crisis and were meant to be in place for two months, after which reintegration was meant to take place[151]. "When the deadline comes on August 15 the government plans to dismantle the tents, shut off the water and cut off electricity."[152]

Thus, those sheltered in the camps are reliant upon the state and its impression of when conditions are right for reintegration for their protection and housing. It is

[149] Joubert, P. 'No place called home'. article appearing in the *Mail and Guardian,* 11 to 27 July, 2008.
[150] van Hoorn, I. and Mhlana, Z. 'In the camps'. article appearing in the *Mail and Guardian,* 6 to 12 June, 2008.
[151] Gerardy, J. 'Refugees find themselves living against a deadline'. article appearing in the *Saturday Star,* 5 July, 2008.
[152] Rondganger, L. 'Time running out for shelter refugees'. article appearing in *The Star,* Friday, 1 August, 2008.

an issue that has been taken out of their hands and rests solely with the state. As one refugee declared, "We didn't come here on our own, the government sent us here and they must tell us what the next step is."[153] At the same time, refugees in the camps are "terrified of being forced to reintegrate" and fear for their lives when that time comes[154].

In this case, the state has been restored to a significant presence and controlling force in society. The illegal actions of the rioters, actions which saw them confront and challenge the state, ultimately resulted in the state's re-emergence as a powerful force and institution. It is, however, an institution with power over the exceptions, rather than the citizenry. In this way, the state and societal regulation is restored whilst active citizenry is maintained.

As one refugee housed in a camp stated,

> "I'm tired of life. I just wait for God to say what I will do…I don't know what's coming for us. We don't like staying here, but what's the alternative?"[155]

They are thus in a position of complete passivity and abjectness, which is the complete antithesis of the empowered, active citizens inaugurated by the Constitution, the TRC process, the Bill of Responsibilities, and similar mechanisms. According to Castles and Davidson, citizenship is constructed as an empowering mechanism: to be a citizen is "to act to empower oneself" (Castles and Davidson: 2000: p.26).

In contrast, the refugees' continued presence in the country and 'enjoyment' of state protection was dependant on their being obedient and passive. This was made clear in a statement made by the Minister of Home Affairs, Nosiviwe

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[153] Tolsi, N. 'There is still a crisis'. article appearing in the *Mail and Guardian,* 11 to 27 July, 2008.
[154] Joubert, P. 'No place called home'. article appearing in the *Mail and Guardian,* 11 to 27 July, 2008.
[155] ibid.

Mapisa-Nqakula, who stated that the government would "deport foreign migrants who were victims of xenophobic violence but had refused to register [for identification], as requested by her department"[156]. Here we see that the refugees' on-going protection and presence in the country depended on them obeying the state and complying with its demands and attempts at control. Any form of action or non-compliance would result in deportation.

In one case, a coordinator of one of the camps described the Blue Waters camp in the Western Cape as being "like a concentration camp", and, in addition to exposing the terrible conditions within the camp, declared that "The government is planning to deport most of the refugees still in the camps" and wanted her to "make things as unpleasant as possible – if not impossible – for the refugees to stay [t]here"[157]. Here again we have an illustration of how the camps restored the government to a position of supremacy in some sections of society. In this case, the state is again inaugurated as the determinant of the refugees' existence and presence in the country and comes to once again exercise the powers of the sovereign. This position of power and preeminence, it needs to be remembered, depends on the passivity of the refugees and their maintenance as bare life. This further emphasizes the necessity of bare life to the state and political community, as it is this passive community of exceptions, rather than the community of citizens which has been sustained and comes, in turn, to sustain the state.

It is also interesting to note that when they were perceived as passive victims, people were described as 'refugees', survivors, and 'victims' in the media. Once they began to act and show signs of agency and defiance of the state they were once again labelled "aliens", as is shown by the headline 'Trouble making aliens will be deported'[158]. Again we see that foreigners' presence in South Africa is only tolerated when they are passive subjects to be acted on by the state and citizenry. When this passive/active binary relationship is broken they are again

[156] Quintal, A. 'Trouble making aliens will be deported'. article appearing in *The Star,* Monday, 21 July, 2008.
[157] Joubert, P. ''Like a concentration camp''. article appearing in the *Mail and Guardian*, 26 September to 2 October, 2008.
[158] *The Star,* Monday, 21 July, 2008.

unwanted, unwelcome non-humans in the eyes of the state as well as in the eyes of the media and public. This illustrates again that the political community depends on a powerless, bare exception in order to have substance.

The weakness of foreigners in the camps was borne out by the story that emerged on the 9th of June 2008 . According to reports, a group of Somalis housed at the Soetwater camp near Cape Town, "allegedly attempted a mass suicide" in an attempt to "draw the world's attention to their plight".[159] Here we see the bareness of life in the camps. The only leverage or substance those sheltered there had was their lives. They are thus in a position in which the line between life and death is all that distinguishes their existence and is all they have to assert themselves with. They have been removed from all active participation in political and social processes, and have only life or death to act with. They are consequently living-bare-life – life that can be reduced to death at any time. This is a truly bare state, and represents their complete removal from the political community and presence within a state of exception.

In this way, foreigners in the camps came to provide the referent or exception upon which citizenship requires in order to have any substance or significance. Returning to Schmitt, the norm depends on the exception. In this case, the norm of the empowered, active citizen was reinforced and made possible through the relegation of foreigners to bare life in the camps. For Agamben, concentration camps serve as the paradigm of modernity (Agamben: 1998). In the case of the displaced persons' camps this is confirmed, as these camps provide powerful paradigms for the politics of belonging and existence in South Africa at present. These camps reveal the stark realities of the contest over inclusion/exclusion that is played out and framed by citizenship and the state of exception today.

[159] Staff Reporters. 'Hoax claim in Somalis' suicide scare'. article appearing in *The Star,* Monday, 9 June, 2008.

Conclusion

If the formation of active, empowered members of the political community is the pinnacle of citizenship, then the relegation of foreigners to passive victims or living-bare-life is a concrete means of exposing and re-enforcing the division between citizens and exceptions. This was a process that started with the state and has been carried to a startling conclusion by members of the public. It is important to situate the attacks in this framework and to regard them as part of a larger discourse and process of population production.

Thus, one can argue that over-and-above material conditions and relative deprivation, the current wave of violence has a far more political and sinister objective. It is, in fact, a product and exercise in biopolitics, and as such is part of the production of a population and the establishment and re-enforcement of the boundaries between citizens and exceptions. What is at issue in the attacks is a question of existence and belonging, a question that is mediated through the state of exception, with disturbing consequences indeed.

This conception of the state of exception and its role in producing populations offers important insights into our understanding of the attacks, as well as into the discourses and relations of power that made them possible. In situating the attacks within the politics of belonging framed and exercised by the state, the state of exception, biopolitics and governmentality it is possible to add complexity to the ways in which we understand them and the broader issues at work. In this case, Agamben provides a valuable, although still problematic and incomplete, framework for understanding the attacks and contests over citizenship that they were influenced by.

Conclusion

Through examination it has become apparent that a state of exception has come to frame and define immigration in South Africa today. This state of exception runs through immigration laws and policies themselves, is present in day-to-day police practices, within institutions designed to detain illegal immigrants, and has even worked its way into interactions and relationships between foreigners and local communities. From policies which ensure that the usual course of law and human rights do not apply to illegal immigrants, to un-checked police abuse, to death and violence in Lindela, through to mob violence that allows the distinction between citizens and outsiders to be enforced, we see that the state of exception in many ways defines the existence of immigrants in South Africa and their relationships with the state and local communities. It is thus an apt and powerful framework for understanding this most pressing and topical issue.

At the same time, understanding immigration through the framework of the state of exception allows us to analyse another pressing, defining element of existence in South Africa. The theme that has run through this inquiry is Carl Schmitt's notion of the norm depending on the exception. Thus, focus has been on the exception, but always with an eye on the norm that it is helping to give form to. Through examining the exception – illegal immigrants – and the manners in which they are produced and treated by the state, it has become possible to arrive and some understandings of the norm – i.e. citizenship.

It is possible to conclude, in a manner that Schmitt would approve of, that the norm that is citizenship depends on the exception of excluded, illegal, unprotected categories of people. Illegal immigrants provide this, and thus provide an exception or referent against which citizenship can be measured. The significance of this conclusion is that the ways in which we understand citizenship need to be re-examined. Far from being a universal good or an end in itself, citizenship needs to be understood too as an exclusionary concept, one that can only thrive on the production of an exclusion. As Councillor Nkosi reminded us, people in

Alexandra were angry because "There is no difference between citizens and non-citizens," and were thus driven to kill so that this difference could be re-enforced. Here, citizenship became the distinction between life and death, and was reproduced and enforced through making death the consequence of exclusion. In this way, citizenship was given form through exclusion.

This process of violent exclusion, however, is not something that belongs only to local communities. It starts from the state and its laws, and works its way down into the population. This is evident in the fact that illegal immigrants cannot receive health care, cannot receive social grants, and do not enjoy any degree of personal security or dignity. As Mangosuthu Buthelezi emphasised, social services – the benefits of citizenship in post-Apartheid South Africa – must be reserved for "our people". In so doing, 'our people' comes to have substance. The notion of 'our people', of the deserving South African community, is made possible and shaped through the production or delineation of a community that cannot be 'our people' and that cannot receive the same treatment, be it from the state, its employees, or local communities themselves.

Thus, the state too needs to be placed at the forefront of our understanding of citizenship, exclusion, and existence today. For, as has been shown, all of these features of life stem from and are shaped, to some degree, by the state. Citizenship is a fundamentally political relationship between individuals and the state, as well between broader communities and the state. Thus, the state, as it is able to determine the qualifications it deems requisite for inclusion as a citizen, determines the character of citizens themselves. These qualifications and distinctions are made through the state, and are made clear through its production of categories unfit for inclusion. We thus see that the state does not only determine what is to be the basis for exclusion, because, through doing so, the state determines the basis for inclusion too.

State power encompasses, as has been argued, the ability to define and categorise people and communities and to create or mould subjects. One of the primary ways

through which this is done is through producing excluded, exceptional categories of people, people who do not qualify for or are undeserving of inclusion in 'our people', the community of citizens. At the same time, as the norm depends on the exception, the included, deserving category of people is also produced. This is done through the state and the privileging of certain qualities or characteristics that this entails. As has been shown, the norm of the South African citizen is dependant on the exception that is the illegal immigrant. Through excluding illegal immigrants, who are predominantly black, poor, and unskilled, the state is proving a template for the measure of the right population – those who are disciplined, skilled or educated, 'legal', and have complied with the state's mechanisms of bureaucracy and control.

In this way, the state is able to use citizenship not only as a boundary for exclusion, but as a means of producing what is to be included. Citizenship, then, needs to be understood as a mechanism of governmentality – a mechanism through which populations are produced. At the same time, it has been shown that the state of exception too is a mechanism or technique of governmentality. It is an everyday form of rule and discipline, one that is written into law, is present on the streets and in institutions, and that shapes people's subjectivities and is circulated on a day to day basis.

Thus, the state of exception, in conjunction with citizenship and the law, serves to produce populations and subjects, not only through the exclusion it is used to entrench, but also through the inclusion that it defines and protects. The theoretical framework that is provided by the state of exception then, provides many useful and powerful ways through which citizenship, and by virtue of this existence itself, can be understood today.

Agamben's theory is, however, not without fault. The state is not the uniform, all-encompassing entity it appears as in his, and in Foucault's, work. There are, as has been shown, instances in which people challenge or try and escape the definitions, categories, and subjectivities that the state produces for them. For, whilst the state

is a dominant force in people's lives today, it does not exist without challenges or hindrances. It is, rather, locked into a cycle in which it is challenged and then seeks to re-establish itself. The state of exception aids the state in this, and thus is vital in an understanding of the state's response to illegal immigration, an act which, by its very nature, challenges and threatens the state. One thus requires a means of understanding this constant, everyday contest; the state of exception helps provide a framework for this.

It is thus through the use of the theoretical perspectives that inform Agamben's theory of the state of exception, that one is able to understand many of the issues that surround citizenship, immigration, and the state today. Thus, Agamben's theory should be regarded as a useful contribution – not an end point, it must be stated, but a useful contribution nonetheless – to our understanding of all of these issues.

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Appendix: Interview schedule

Interview with Bishop Paul Verryn, conducted on 1 December, 2008.

Interview with Constable Neria Malefetse, on 13 August, 2008.

Interview with Councillor Sinah Gwebu, conducted on 6 August, 2008.

Interview with Councillor Sizukela Nkosi, conducted on 6 August 2008.

Interview with David Cote, conducted on 12 May 2008.

Interview with Joyce Tlou, conducted on 11 July, 2008.

Interview with Kaajal Ramjathan-Keogh, conducted on 31 March, 2008.

Interview with Loren Landau, conducted on 19 May, 2008.

Interview with Pastor, [real name withheld], conducted on 15 July, 2008.