Restriction (b)orders as humanitarian (b)ordering:

An analysis of a recent federal court sentence concerning foreign nationals in Switzerland

Séminaire interdisciplinaire CDM : « Migration irrégulière »

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1. Introduction

> Da der Aufenthalt des Beschwerdegegners seit Ablauf der Ausreisefrist ohnehin in der ganzen Schweiz rechtswidrig ist, verbietet ihm die Eingrenzung auf den Bezirk V. nichts was ihm nicht ohnehin schon verboten ist. […] Der Beschwerdegegner hat es in der Hand, durch rechtmässiges Verhalten die Massnahme hinfällig werden zu lassen. (BGE 2C_287/2017 E. 5.3.)

This excerpt is part of a recent sentence of the federal court of Switzerland, legitimising the application of restriction orders for rejected asylum seekers who cannot be 'forcibly' deported. In Switzerland, academics have increasingly scrutinized such practices in terms of a continuum between inclusion and exclusion in order to shed light on processes of bordering. In this context, it is important to acknowledge that, over recent years, migration control and policies have considerably changed throughout the world with important repercussions on people crossing territorial borders as well as on nationals and foreign-nationals living on these territories (Walters 2011). Walters (2004) calls this phenomenon a process of deterritorialisation of migration controls, towards the inside and the outside. In this context, Wilson and Donnan (2012: 19) state that: "Immigration control […] has come increasingly to be understood as a feature of governance in general, potentially enforceable everywhere and not just at the border itself […]". State borders should, in this context, be understood as a continuous social construction with important material consequences, recently described as processes of bordering (Van Houtum 2012: 406). Academically, this implies that borders should be understood "[…]as spaces of struggle between inclusion and exclusion wherever such struggles are found" (Wilson and Donnan 2012: 17). The "exclusion of the unwanted" (Achermann 2013: 17) occupies a central theme within these theoretical straits, since it is the "deportability"[1] of foreign nationals (De Genova 2002), which allows to uphold a certain imagery of the nation and citizenry, reinforcing the 'cohesion' and 'identity' of the excluding actors (Rajaram and Grundy-Warr 2007).

Investigating restriction orders raises questions about the constantly shifting character of migration control as an integral part of bordering.[2] Restriction orders are by definition spatial, allocating specific individuals which represent a threat to public order or security or which received a binding expulsion or removal order to a predefined territorial entity (cf. art. 74 para. 1 AuG). Hence, it firstly represents an internalisation of border control. Furthermore, restriction orders represent a practice of cantonal migration offices, a practice which has gained momentum in recent years,

[1] De Genova (2002: 423) perceives deportability as a main characteristic in the process of illegalisation of foreign nationals: the consequences is living in a state where deportation is an ever-present possibility (ibid: 238). Although in his Marxist analysis the aspect of disciplining deportable foreign nationals in order to gain a cheap labour force is central, I focus in this paper on processes of 'othering' (Khosravi 2009, 2010; Andersson et al. 2011), as shown in more detail in my theoretical part.

[2] In German, the legal term is *Eingrenzung*. Even though restriction order does not confer the same meaning as *Eingrenzung*, I will, for the sake of simplicity, throughout this paper use the term applied in the English version of the AuG. Interesting to note, however, is the clear relation of *Eingrenzung* to the word border, boundary, or frontier, expressed in the central part '*grenz*'. The suffix *'–ung'* implies an act or a practice, meaning that somebody is being restricted by somebody. And the prefix *'Ein-'* refers to a spatial dimension. The original language of the citations and laws used in this paper is German. I will also use the German abbreviations of laws (cf. AuG) and court rulings (cf. BGE). Where English translation are available and do not alter the meaning, I will apply the translation. But the English versions of legal text do not have legal force.

especially in the canton of Zürich (Häberli 2016). This practice was heavily contested by different groups: lawyers, human rights groups, groups of sans-papiers, scholars, and solidarity movements among others. The last reason why restriction orders are particularly fruitful for investigating the shifting nature of bordering practices is the recent federal court sentence (BGE 2C_287/2017). This sentence ruled, in short, that restriction orders can be enacted despite the lacking possibility of Swiss authorities to forcefully expel the concerned person. Serving as a future reference sentence, it backs the practice of cantonal migration offices to enact restriction orders so as to 'incentivise' people to leave Switzerland 'voluntarily'. The verdict stems from a complaint by the Swiss Secretary for Migration (SEM) which contested a cantonal court who has defined the restriction order as disproportionate in the present case.

This paper aims at shedding light on restriction orders in Switzerland as bordering practices by contextualising them in the specific case and historical developments in this area. Closely analysing the recent federal court sentence, allows to illuminate current developments of bordering in Switzerland and to point to possible future trends in dealing with the 'undeserving' (Fassin 2011) or 'unwanted' (Achermann 2013). I will analyse restriction orders as a practice and as a further 'escalation' of incentivising illegalised migrants to leave the territory of Switzerland voluntarily (cf. Johansen 2013). I claim that the present court sentence concerning the practice of restriction orders exemplifies a momentum where it is especially clear that such governmental practices do not originate from a given centre of official authority but in contexts of contestation and politicization (cf. Walters 2011: 153-154). In claiming this, I "do not try to solve the problem proposed by the system under study but rather question its premises, practices, and repercussions" (Samimian-Darash and Stalcup 2017: 79).

My theoretical framework builds on Johansen's (2013) concept of the 'funnel of expulsion'. This analytical concept implies that "the overall objective [of restriction orders] is to force the unenforceable, locking these people in a situation that is so unbearable that they 'choose' to leave" (Johansen 2013: 258). The concept of the funnel of expulsion builds its main argument on Khosravi's (2009; 2010) analytics of 'hostile hospitality' in order to prevent an analysis that perceives immigration control as a coherent assemblage of security interests (Johansen 2013: 257f.). Complementing this theoretical framework more closely with Walters' (2011) concept of the humanitarian border allows to shed light on this specific form of bordering.

In order to support my claim, I will first present the most important points for analysing bordering practices before elaborating on my theoretical framework. Secondly, I will outline the historical development of restriction orders and contextualise them in current and past efforts in 'dealing with the unwanted'. Finally, by applying the theoretical frame, I will analyse the recent federal court sentence (BGE 2C_287/2017) and point to the implications it has for understanding the current diagramming of migration politics and its bordering practices.

2. Theoretical Frame: (b)ordering the unwanted

As restriction orders only concern illegalised persons who stay in Switzerland without a legal stay permit, I will concentrate my theoretical frame and the following analysis on this categorised group of people. I use the term 'illegalised migrants' because "they are produced and patterned" (De Genova 2002: 424), meaning that the existence of this categorised group is constructed and based on unequal power relations, whose result should be questioned and not taken for granted. De Genova (2012: 494) connects this illegalisation of migration as an integral part of bordering, with a dialectical relationship between the scene of inclusion and the scene of exclusion, whereby 'illegality' is naturalised. In this context, Bigo (2002) uses the expression of the "migration-security nexus" by which migration is increasingly perceived as a security issue, leading to what Stumpf (2011) called 'crimmigration', the merging of criminal law with immigration law. It is the general mobility of "illegal" migrants that is viewed as problematic, not only by transgressing borders but especially by their presence in the interior, within the "sanctity of home" (Walters 2004: 242). This production of "illegality" is necessarily concerned with the mobility of the migrant body (De Genova 2012: 495). Analysing practices, such as restriction orders, thus implies analysing how such bordering practices naturalise 'migrant illegality' at the same time as they build upon them. Since restriction orders should be implemented in order to 'incentivise' or guarantee illegalised migrants' expulsion of the state territory, it is a practice principally concerned with 'deportable aliens'. Walters describes deportation as the "[…] removal of aliens by state power from the territory of the state, either 'voluntarily', under threat, or forcibly" (2010: 72). Hence, deportation is a specific form of expulsion through state power, which stems from a particular diagramming of migration policies (Walters 2004).

In such an analysis, the produced knowledge about people is important. While borders are constructed by humans, they also shape the knowledge of people and have important material implications. Green suggests in this context that "borders are both generated by, and/or help to generate, the classification system that distinguishes (or fails to distinguish) people, places and things in one way rather than another" (2012: 580). It is in this context that the notion of biopolitics becomes important. In this sense, Dillon observes a "shift in the referent object of security from sovereign territoriality to life" (2007:11). It is a 'move' to control the circulation of bodies, defined as 'dangerous'. But in order to have critical purchase, "we should also note all those instances where [biopolitics] combine with other forms of power and other specifications of the subject" (Walters 2011: 152).

Johansen (2013) takes a similar theoretical stance by pointing to a new rationality in governing undesirable bodies and their social exclusion. By analysing the deprivation of welfare and medi-

cal aid, he illustrates how rejected asylum seekers in Norway are 'encouraged' to leave the territory 'voluntarily'. He states that the "handling of refused asylum seekers reveals broader and complex sets of strategies of social exclusion and expulsion directed at the 'unruly' inhabitants of the globalized world, forming a distinct field of politics, which I call 'the funnel of expulsion'" (ibid: 258). The funnel of expulsion is thereby defined as the denial of access to the most basic societal institutions (ibid: 261) which should incentivise the 'undeserving' to leave. It becomes visible that the choice of leaving the territory is still left to the individual, since a "forcible" (Walters 2010:72) deportation is not possible. Instead, the undesirable, not 'forcibly' deportable, are governed through obstacles "designed to shape their choices" (Johansen 2013: 263), until "a life situation [is established] where the only rational choice seems to be to leave" (ibid: 266). This is achieved by eliminating the 'loopholes' in the funnel of expulsion – be it through deprivation of welfare and medical aid, as in the case of Norway (Johansen 2013) or Sweden (Khosravi 2009) or, additionally, through the restriction or deprivation of the freedom of mobility, as in our case.

Importantly, this analytical thinking is in line with a scholarly attention that rejects border control as a coherent assemblage of security interests (Samimian-Darash and Stalcup 2017). Instead, border control and bordering practices should be understood as a complex outcome of a diversity of interests and actors, although with unequal power relations (Coleman 2012: 432). Acknowledging this is insightful to further elaborate on the 'minimalist biopolitics' applied by Johansen (2013). He states, that a 'minimalist biopolitics' "is not developed in the spirit of producing a healthy population but has the goal of reducing poor health" at the same time as it "refers to the activities devoted to monitoring and assisting populations in maintaining their physical existence" (ibid: 267). This thought is taken from Walters' (2011) exploration of the humanitarian border where he observes a new development within the history of bordering which is by itself becoming a zone of humanitarian government (ibid: 139).

The humanitarian border does not determine the form of bordering or all forms of bordering. But it means that it is a selective process materialising with important consequences in certain circumstances (ibid: 146-148). Therefore, it intersects with and alongside other strategies of bordering and is constantly shifting. Humanitarianism is thus a field "which exists in a permanent state of co-option, infiltration but also provocation with the state (but also with other supranational and international entities as well)" (ibid: 149). It is this intersection of different rationalities and interests which is illuminating for dealing with practices of bordering, such as restriction orders. If the humanitarian border is analysed as an assemblage, it has to be contextualised: "logics of security, policing and law seek to eclipse and neutralize its presence. They seek to deactivate its elements, and contest their field of operation" (Walters 2011: 156). It is this politicisation of migration as well as of the humanitarian which I will use in the present analysis to illuminate the recent court judgement and to elaborate on its broader repercussions.

3. Restriction orders: Past developments and current trends

In the Federal Act on Foreign Nationals (art. 74. para. 1 AuG), restriction orders are currently defined as follows:

> The competent cantonal authority may require a person not to leave the area they were allocated to or not to enter a specific area if: a) they do not hold a short stay, residence or permanent residence permit and they disrupt or represent a threat to public security and order; this measure serves in particular to combat illegal drug trafficking; or b) they are subject to a legally binding expulsion or removal order and specific indications lead to the belief that the person concerned will not leave before the departure deadline or has failed to observe the departure deadline. c) deportation has been postponed (art. 69 para. 3). (art. 74. para. 1 AuG)

The recent history of restriction orders has started with its implementation in the AuG in 1994. The law was implemented due to the public depiction of foreigners and mainly asylum seekers as drug dealers in the open drugs scene in Zürich, the biggest in Europe at the time (Binswanger 2015). Due to this public perception, the federal council drafted a law with coercive measures (in German: *Zwangsmassnahmen*) which should allow to tackle this new threat and to give an instrument to cantonal authorities in dealing with it. After parliamentary sessions, this law was slightly modified and implemented in 1994.[3] The aim of these coercive measures was to restrict foreign nationals from drug dealing. It is for this reason that the exclusion orders of art. 74 para. 1 AuG were more commonly used in order to prevent suspected individuals from entering the 'area of drug dealing'. It is the notion of 'suspect' which merits closer investigation, since a forcible confinement would not hold in the rule of law, particularly the art. 5 EMRK envisioning a lawful arrest or detention (in German: *rechtmässiger Freiheitsentzug*). It is in this context that the coercive measures under art. 74 para. 1 are seen as an additional, less severe mode of legal instruments for 'fighting foreign criminality' and protect the rule of law itself. What is important is the observation of the security-migration nexus by perceiving foreigners as the drug dealers. This enables the implementation of coercive measures that aim at punishing these 'unwanted' individuals, while acting within the limits of human rights. Disregarding these orders leads to prison sentences for the concerned individual, clearly blurring the area of criminal and of migration law.

But even more illuminating is the fact that the original purpose of the law, disabling foreigners from selling drugs, has shifted considerably over recent years. In 2010 after parliamentary sessions, lit. b and lit. c were added under art. 74 para. 1 AuG. In this sense, the article became more aligned to its use as an instrument to ensure a expulsion of 'deportable aliens'. During the parliamentary sessions, a majority (in the context of adopting the European 'Directive on the

[3] Due to the lack of space, this implementation and public as well as political attention on this question cannot be analysed in detail here. But see Bossard (2017) for a detailed account.

Return of Illegal Immigrants') was in favour of implementing these additional possibilities for restriction and exclusion orders in the case of deportation, with the main argument delivered by Fluri (AB 2005 N 1202):

> Die Mehrheit […] ist der Auffassung, dieser Antrag bringe eine Verbesserung im Hinblick auf die Durchsetzung der Wegweisungsverfügung in den Fällen, in denen keine Ausschaffungshaft angeordnet werden kann oder in denen man keine solche anordnen will. Die Bewegungsfreiheit der entsprechenden Personen soll tatsächlich eingeschränkt werden. Das ist der Zweck der ganzen Übung.

In this context, restriction orders became a more prominent instrument, by perceiving it as enabling an effective deportation while simultaneously representing a more 'decent' form of coercive measures through gentler restriction of the freedom of movement. In short, restriction orders are a "prison without fences and walls" (WOZ 2016), to which the body of a person defined as deportable and awaiting its deportation is confined. It is the rejected asylum seeker, the person whose stay permit has been withdrawn or the sans-papier who is subjected to such measures if an enforceable restriction order has been enacted.

Around the same time, the subject of emergency aid gained attention. From 2008 on, a person who was rejected in her asylum claim was excluded from social welfare and thereafter only granted emergency aid. This is in accord with art. 12 of the Swiss Constitution and envisions only the basic needs of a person (specified in art. 82 para. 1 AsylG). Apart from (contestable) economic 'rationalities', the main argument was to incentivise rejected asylum seekers to leave the territory and to make a journey to Switzerland less attractive for denominated 'bogus asylum seekers', arguing in the paradigm of 'push and pull factors' (Sanchez-Mazas et al. 2011; Frei et al. 2014).

Over recent years, the continuum of the 'funnel of expulsion' expanded as many cantonal migration offices, mainly the one in the canton Zürich, increased their use of pronouncing restriction orders away from only 'forcible deportable aliens' (Häberli 2016).[4] It was in this context that the practice was increasingly denounced and contested by different kinds of groups. Thus, the question was raised if it was proportionate to enact a restriction order on a person who was not forcibly deportable. The legal question arising is if the measure is appropriate and if it actually constitutes a deprivation of freedom or only a restriction of mobility. Despite this unclear legal question, the canton of Zürich continued to make increased use of it (Häberli 2016). This summary of the historical evolution of restriction orders sheds light on the dynamic character of its use. Originally being primarily in the realm of drug related offences, in itself already a clear sign of the "migration-

[4] Although, already with the 'emergency aid regime', there is a spatial restriction visible due to the different practices applied by the cantonal authorities. For example, in different cantons the individuals receiving emergency aid have to register daily in the centre of accommodation in order to receive the aid (even though emergency aid should not be bounded to any requirements (art. 12 BV)). This is already a spatial restriction, even though less 'sophisticated' than the one applied by restriction orders.

security nexus" (Bigo 2002) and crimmigration (Stumpf 2011), restriction orders became continually seen as a measure to ensure effective deportations from the territory of Switzerland.

4. Restriction (b)orders and humanitarian (b)ordering

4.1. Tapping the loopholes, bordering the unwanted

The case under analysis concerns an Ethiopian man whose asylum demand was rejected and a removal order established in June 2015. After a complaint by him at the Federal Administrative Court was rejected, a definitive departure deadline was established for January 2016. He refused to leave 'voluntarily' and stayed in Switzerland. A forcible 'removal' was not feasible due to a lack of 'cooperation' by the Ethiopian government.[5] As the 'voluntary' return remained the only option for leaving the country, the Cantonal Migration Office of Zürich half a year later enacted a restriction order for two years. This means that the concerned person was not allowed to leave the territory of the community or region s/he is assigned to. If s/he trespasses this decree, other mechanisms can be enacted, for example a coercive detention according to art. 78 AuG.

The current case is an instantiation of the wider practice of cantonal migration offices in recent years. No landmark ruling took place so far and uncertainty exists in the conformity of such a practice with the rule of law, namely with human rights. In the context of this uncertainty, cases of restriction orders were taken to the cantonal administrative courts where they filed complaints with the support of advocates and legal aid offices. These complaints were often rejected and, in few cases, the time horizon was shortened or the area of restriction reduced by the court (Häberli 2016). The present case is peculiar because the Cantonal Administrative Court of Zürich approved the complaint and enacted that the restriction order was not in accordance with the principle of proportionality, since the individual could not be deported forcible. The Swiss Secretary for Migration (SEM) subsequently filed a complaint at the Federal Court in order to nullify this decision. In this context, the judgement resulting from this complaint will have a decisive impact on the legal grounds of future cases of restriction orders. Hence, the content and applicability of restriction orders will be jurisdictionally refined. It is in this context that the dynamic character of law and its enactment become visible and give important insights into its workings and rationales (Chappe et al. 2016). In the sentence, the federal court weighs the different arguments against each other in order to clarify the aim of the implementation of restriction orders (in a teleological legal analysis). It is done so by basing the verdict on the historicity, and on the political context

[5] This is due to the lack of readmission agreements. Ethiopia is one country with which Switzerland has no such agreement. This leads to the paradoxical situation that Switzerland enacts expulsion orders for persons who cannot be deported (Tagesanzeiger 2016).

and debates surrounding the subject. As already mentioned, the complaint by the SEM was approved by the Federal Court, having important repercussions for the future use of restriction orders.

In the sentence, restriction orders are defined as a "Massnahme [, die] erlaubt, die weitere Anwesenheit des Ausländers im Land zu kontrollieren und ihm gleichzeitig bewusst zu machen, dass er sich hier illegal aufhält und nicht vorbehaltslos von den mit einem Anwesenheitsrecht verbundenen Freiheiten profitieren kann" (BGE 2C_287/2017 E. 2.1). Already with this premise it becomes clear that the court views restriction orders as an essential instrument to incentivise illegalised persons to leave the country and to demonstrate their 'non-belonging'. This is clearly a refinement of the original purpose of the law, since it was used to prevent illicit drug dealing and later to ensure the enactment of a 'forcible' deportation. This means, that in the view of the court, the aim of restriction orders legitimises that its enactment is not restricted to cases where a feasible deportation order has been authorized. In other words, illegalised people are more and more perceived as a "threat to public security and order" (art. 74 para. 1 lit. a AuG) which has to be efficiently dealt with.

The court continues by stating that it is indisputable that the concerned person is a foreign national, that he has obtained a legally binding removal order, and that he did not conform with his deadline (BGE 2C_287/2017 E. 3.1). Hence, as declared by the court, the main task is to clarify "[ob] die Eingrenzung im Sinne von art. 74 para. 1 lit. b AuG einzig auf die Vorbereitung und Durchführung der (zwangsweisen) Ausschaffung gerichtet und deshalb unzulässig ist, wenn eine solche unmöglich erscheint" (BGE 2C_287/2017 E. 4). They conclude, that according to recent jurisdiction, coercive detentions are not only appropriate when the deportation of the person is not possible (even by following the concerned person's obligation to cooperate). Since restriction orders are less severe means than coercive detentions, this is also applicable to them. Hence, the application of restriction orders is in accordance with the systematics of the law and cannot be viewed as disproportionate (ibid. E. 4.3).

This lays the ground for defining restriction orders as a middle way between a "totally voluntary departure" and a "forcible deportation", that should ensure the "return decision" of the person (ibid. E. 4.5, own translations). Through the lens of the 'funnel of expulsion', it constitutes a measure to fill a leak in the execution of the current return directive and to incentivise the 'voluntary return' of the person. This is done through the restriction of freedom of movement and the consequent demonstration to the person that s/he is illegalised and hence not entitled to all the freedoms connected to a regularised residence in Switzerland. The rationale behind the emergency aid discussed above continues, in this sense, by further depriving the "poor health" (Jacobsen 2013: 139). It is, in the view of the Federal Court, an efficient means to foster the 'voluntary' deportation of the person, because the other, harsher instruments are not expedient in the

present case. It is this measure that, according to the court's verdict, allows to restore the lawful state, which was threatened by the "illegal stay" of the person (BGE 2C_287/2017 E. 4.6), and that safeguards the essential interest of the rule of the law, and hence of human rights (ibid. E. 4.7.2). These arguments condense in the conclusion of the court regarding the proportionality of the measure:

> Das Gesetz will zu diesem Zweck den Behörden alternative Mittel zur Rechtsdurchsetzung in die Hand geben. Die Eingrenzung ist eine Massnahme, die indirekt darauf abzielt, den Betroffenen zur Einhaltung seiner Rechtspflicht zu bewegen. So wenig wie bei anderen indirekt wirkenden Massnahmen (vorne E. 4.7.1) kann bei der Eingrenzung die Zwecktauglichkeit verneint werden mit dem Argument, die Realexekution sei nicht möglich. Im Gegenteil ist die Eingrenzung auch und gerade dann ein legitimes Mittel zur Durchsetzung der rechtskräftigen Ausreiseverpflichtung, wenn eine zwangsweise Ausschaffung nicht möglich ist. (BGE 2C_287/2017 E. 4.7.2)

4.2. Restriction (b)orders as humanitarian borders

In the court ruling, it becomes evident that the restriction order is perceived as a decent mode of incentivising 'illegal aliens' to leave the territory. The court argues that this is true since a coercive measure would also be applicable (BGE 2C_287/2017 E. 5.2). It is this framing of the ultimate goal, which is the execution of the deportation that legitimises the means of restriction orders. What makes this uneasy is the framing of the inevitability that the person leaves and that her stay in Switzerland is pernicious to the rule of law *per se* (ibid. E. 4.7.2). It is his illegalised presence in Switzerland which endangers the liability of the asylum system and by which the restriction order is a humane mechanism in order to protect fundamental rights.

The concerned persons are not "reduced to bare life" and thereby 'stripped of all their rights' (Agamben 1998:171). But their rights are reduced to a minimum. It is here that we observe a minimalist biopolitics which strips the concerned person of her social welfare by isolating her in a specific area. This internal border is presented as a humane way of dealing with the anomaly of his presence. Because the necessity of this measure is only his fault: "Der Beschwerdegegner hat es in der Hand, durch rechtmässiges Verhalten die Massnahme hinfällig werden zu lassen" (BGE 2C_287/2017 E. 5.3). In short, he did not deserve any rights but, still, he is granted some. The responsibility is located at the individual, while the authorities are presented as 'humanitarian actors' (or at least acting within the limits of human rights). The concerned person contested in his statement to the Federal Court (similar to the broader contestation of restriction orders) that, due to the restriction order, he cannot attend German lessons in Zürich as he did before, nor can he practice his religion due to the lack of a mosque in the area he is restricted to. He loses an important part of his social life by not being able to leave the allocated territory. The court neglects this by stating that he still can interact with other humans and that the restriction order represents the least severe coercive measure at disposal. Since other, more severe measures are basically

possible, there is already a proportionality present (ibid. E. 5.2) and thus a humane consequence for his actions is established (ibid. E. 5.3).

Applying the concept of the humanitarian borders to these arguments is especially insightful if we take into account that the court verdict is a result from contestations surrounding the practice of restriction orders. It is this contestation which mainly builds on the fact that restriction orders strip the concerned persons from their human rights. The court sentence, thus, has to be seen in the context of the production of knowledge surrounding human rights and the 'harsh' destiny of individual migrants. As Walters (2011: 152) writes, "there certainly is a concern with the migrant as a living subject/population". This knowledge and logic intersects with other more 'neo-liberal' arguments of deservingness, intrinsically aligned with the nation-state and a restrictive conception of citizenship (ibid.).

Conceptualising restriction orders as bordering, as the establishment of borders and boundaries (Fassin 2011), allows to shed light on the contradictions of communities, nations and 'cultures'. It is in this context that restriction orders are diagrammed as a bordering which, on the one side, incentivises the illegalised person to leave the territory and, on the other side, keeps up with a humanitarian discourse which grants rights, although minimal ones, to all persons living in the territory of Switzerland. In this sense, it is an ongoing struggle over defining the space and content of human rights. It is not a "politics of destitution" (Johansen 2013: 257) but represents the subtle ways in which the 'unwanted' are managed through the intersection of different rationalities, thereby exposing the "complex and often contradictory interplay of exclusions and rights which define the funnel" (ibid: 258). The rhetoric of humanism is increasingly inscribed in bordering practices, transforming and hybridising 'governmental borders of deprivation' into and with humanitarian borders. It is this uneasy alliance that expresses a hostile hospitality:

> The ambivalence of hospitality lies in the initial 'acceptance' of individuals through hospitality, but then keeping them strangers for generations, rejecting them because they are not like us and placing them in refugee camps, detention centres, or ghettos. What stateless, asylum seekers, undocumented migrants face today is a hostile hospitality. (Khosravi 2010: 127)

It is in this sense that immigrants embody the often contradictory "articulation of borders and boundaries" (Fassin 2011: 215). These borders are situational and depend on the context of their enactment. Restriction orders are embodied, in our case, by the contradictory conjuncture of the illegalised persons who cannot be deported nor want to leave the territory and their illegalisation. It is a humanitarian border at the same time as it is a governmental border that envisions a certain conception of citizenship, state and "sanctity of home" (Walters 2004). As in the case of emergency aid, the concerned persons are stripped of a part of their rights, while they maintain others, minimal ones. It is this observation that is expressed by Johansen (2013: 268): "Aid is accepted as long as it does not obstruct policing".

Migrants' bodies become in some sense the 'battleground' of restrictive immigrant policies and human rights conventions and movements. What is worrisome is that these 'battles' are increasingly 'fought' on the backs of individual persons. This is an observation Fassin describes quite well in the context of the possibility of applying for asylum: "[…] the efforts of European governments to reduce as much as possible the numbers of individuals entitled to claim these rights by keeping the borders closed. In order that the ideal of a land of human rights can be maintained, those applying to benefit from it must be as few as possible" (2012: 156). But this does not mean that the humanitarian just serves to naturalise inequalities and political conflicts and that it is just instrumentalised by governments and other actors (even though this is also the case). Instead, "it should be seen as an emergent zone of politics in its own right" (Walters 2011: 157). For our case, this means that the analysed federal court sentence is an instantiation of the ongoing struggle which is by no means terminated but ongoing and dynamic.

With this point, I want to come to a conclusion by focusing my attention to the "autonomy of migration" (De Genova 2017), which is particularly suitable for understanding these processes. It helps to give weight to human action and perceiving the funnel of expulsion as a "tactic of bordering" (ibid.). It is with this view that the body has not only become "the site of inscription for the politics of immigration […]" (Fassin 2001: 4) but itself a place of contestation, not least by rejecting a voluntary exit of the territory and thereby keeping, at least a part of, autonomy.

5. Conclusion: autonomy of migration and tactics of bordering

The present paper has elaborated restriction orders as bordering practices by analysing the recent federal court sentence (BGE 2C_287/2017). Through the analytics of the funnel of expulsion (Johansen 2013) and the humanitarian border (Walters 2011), I tried to provide insights into the current diagramming of migration policies in Switzerland. These are influenced by international factors, be it European Directives, Schengen or human rights. In this sense, I have contextualised the recent sentence into the broader history of restriction orders and other instantiations in the funnel of expulsion, such as emergency aid. This contextualisation has helped to understand the current application and legitimisation of restriction orders as a further escalation in the funnel of expulsion, by trying to expel the 'unwanted' by "locking these people in a situation that is so unbearable that they 'choose' to leave" (Johansen 2013: 258). It is this observation that allows to draw on the recent terms coined by De Genova (2017): Autonomy of migration and tactics of bordering.

In this conclusion, I want to point to the contribution of these terms for understanding current bordering practices such as restriction orders. De Genova (2017: 5) writes that "it is the sheer incorrigibility of migrant and refugee subjectivities and their mobility projects – the autonomy of migration – that has instigated a crisis on the scale of Europe as such". The reaction of European governments, thus, has to be put into the context of this crisis of the conception of citizenship, state and nation which is questioned by this mobility (Walters 2004: 256). The reaction to this 'threat' is illustrated by De Genova (2017: 6) as the "heterogeneous tactics of bordering respond[ing] to all the unpredictable and intractable dimensions of the elementary subjectivity and autonomy of migration". These insights are particularly fruitful for the 'funnel of expulsion', since tapping the loopholes in the funnel is a way of trying to keep up with the subjectivity of migrants who try to circumvent the boxes established by migration policies. But importantly, this is not to say that this autonomy is a totality, free of any context, force or pressure. In my view, the opposite is the case. It is despite these power inequalities that humans are able to use the restricted possibilities of movement and mobility which necessarily exist since borders cannot be hermeneutically closed (Andersson 2016). It is in this way that the tactics of bordering "mobilizes images of home, a natural order of states and people, of us and them, in such a way as to suppress and deny these subjectivities" (Walters 2004: 256). The additional fact that the tactics of bordering have to be increasingly defined by the contested realm of humanitarianism might be a further sign of the weakness of the present restrictive conception of citizenship. It is in this sense that, on "the border, the contradictions between the rhetoric of human rights and the practices of exception and the polarization of the world between the North to be protected and the South viewed as a threat become extreme" (Fassin 2012: 16).

With these points in mind, restriction orders might be better conceptualised as a tactic of bordering which tries to get hold of the "political struggles which delimit the scope and the limits of the humanitarian" (Walters 2011: 155). It is in this sense a reduction of reality which neglects "a larger, messier reality […] that does not conform to what lawmakers and the judicial review of immigration cases say." (Valdez et al 2017: 553). It is also the fact that, as in the case of emergency aid, the boundary between a 'voluntary' deportation and an undocumented stay in Switzerland are difficult, if not impossible, to establish and to verify. This again, can be seen as a tactic in order to uphold a certain image of citizenship that builds on the effective working of the asylum system which, after all, must not be the case.

This paper was concerned with the theoretical contributions for understanding current processes of bordering in Switzerland. Due to this focus, a lot of other, insightful aspects of bordering were necessarily missed. It has to be reminded that restriction orders are just one form of bordering in dealing with the 'unwanted'. Numerous other legal and practical instruments exist in excluding, as well as including, rejected asylum seekers. Moreover, it has to be said, that the practical repercussion for the concerned persons are far beyond what has been explored in this paper. I did not elaborate on the implications for the social life of migrants or on their possibility of applying for a 'hardship case', nor that the reachability of legal aid offices is immensely hampered. Another aspect missing due to the focus of this paper is the important contribution of different organisations and rejected asylum seekers themselves in contesting the current restrictive diagramming of migration policies. In order to better grasp the whole complexity, a closer investigation would be necessary that allows to draw on specific repercussions from the bordering practices and laws and that also mobilise an interactionist perspective on the negotiation surrounding their implementation.

What would further nuance the picture of restriction orders as bordering practices is a careful anthropologically situated enquiry which allows "to reconstruct more precisely described scenes and more broadly situated contexts, thus avoiding simplification, locating narratives and arguments within their frame of utterance, and eventually grasping the issues within which they are contained and which they contribute to constituting" (Fassin 2012: 10). In this sense "anthropological conversations that include perspectives drawn from situated knowledge together with perspectives drawn from direct attention to apparatuses are of immense value in illuminating particular dimensions of border control today" (Murphy and Maguire 2015: 171).

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