

*The Use of Military Forces in the Protection of the Borders and Prevention of Irregular Migrations in Selected South East European Countries**

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The 2015 refugee crisis in Europe was a humanitarian, legal, and logistical crisis that resulted in military presence at borders. In this paper, all the elements of the refugee crisis that could legitimise or denounce the use of military forces to protect state borders will be analysed. Governments have international obligations to protect refugees as well as to provide security for their citizens, and these obliga-

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tions came into conflict during the crisis. The refugee crisis challenged not only international law, but also EU policies. Possible solutions included accepting all refugees and closing the borders, and somewhere in between those the army was considered as a tool. A comprehensive answer to the legitimacy of army forces at borders will be offered. To conclude, Hungarian, Slovenian, and Croatian legislation will be discussed, with an emphasis on problems that could arise from the differences in these legislations.

Keywords: refugee crisis, military, army, borders, Schengen, EU, migrations

1. Introduction

In the midst of the refugee crisis of 2015–2016 some European countries decided to call upon their armies to serve and protect their borders. At the time nobody was sure what exactly the armies were doing or what their responsibilities were meant to be at state borders. The following questions arose: (1) was Europe closing its gates to refugees and was the purpose of military presence to strengthen this position and deny the refugees passage, or (2) was its role supposed to be merely supportive and subsidiary? The situation was highly troubled because there were several elements that caused confusion and even panic amongst European citizens. There were no clear signs of any distinct political plan or agenda regarding the refugee crisis, no one offered answers as to the extent to which the refugees would be welcomed, which countries they would eventually be situated in, and how the whole situation would evolve. Soon it was realised that among the refugees there were many economic migrants. What was even more troublesome, there were also ISIL terrorists hidden in the crowds, who were exploiting the situation and represented a great security threat (Smale, 2016). Because of this, international and domestic public opinion included problematic comments. Tensions ran high and the public was divided between acceptance of refugees and migrants and closing the borders to them entirely. In such circumstances the governments of Austria and Hungary decided to send military forces to the borders. It was then that the public started to ask if that was a sign of a militarisation of borders and if force would be used on people. Suddenly, an increasing number of comments suggested that military forces should not be sent to the

borders. Some of these opinions were based on the view that all refugees were welcome, but there were more voices that were directed only against the military and the legitimacy of their role in this crisis. That is why this paper aims to analyse all the elements of the refugee crisis that could impact the circumstances in which the role of military could be legitimised and how this could be done.

First, some statistical information will show the actual extent of the logistical and humanitarian aspects of the refugee crisis. With that in mind, an analysis of international legal instruments and state obligations regarding their borders will be correlated to the numbers of legal and unlawful entries and the manpower necessary allow the state to execute its obligations, particularly considering how hard it was to differentiate between genuine refugees and economic migrants. It will be explored if this particular situation and process fall within the scope of the extraordinary. If that is the case, in extraordinary times special tools and regimes could be recognised as legal and legitimate answers.

To explain another problematic aspect of military presence at borders, cooperation between the army and the police will be analysed to identify some issues that may occur – in particular, to analyse the possibility and the need for the military to exercise police powers at the border. In addition, real and hypothetical examples will be used to show a different approach to this specific situation and to explain that sometimes idealist views cannot solve the problem. That will also help explain the role of governments in a refugee crisis. Governments have serious concerns regarding refugees and they also need to determine how military forces will be used to respond to all issues.

Furthermore, an analysis will show how different European countries responded to the refugee crisis, in particular Slovenia, Hungary, and Croatia. These countries were selected because they are all EU member states and they also share borders with Schengen zone countries and all these countries are along the “Balkan Route”. The focus will be on the military aspect of their response and how they differed from each other in this aspect. This will introduce an EU perspective to the problem but also bring up the following question: how is it possible that EU members have such different approaches to the Common European Asylum System, which is a vital part of the European Agenda on Migration formulated by the European Commission (EC) in 2015? The main purpose of the agenda is to manage all aspects of immigration more effectively. In other words, the EC has medium- and long-term objectives and proposes guidelines in four

policy areas: a) reducing incentives for irregular immigration, b) border management – saving lives and securing external borders, c) developing a stronger common asylum policy, and d) establishing a new policy on regular immigration (Schmid-Drüner, 2018). Still, in cases of crisis it is hard to achieve a shared approach to the problem, as will be shown in the overview of the selected SEE countries.

Bearing in mind the complex situation that mass migration generally is, combined with legality and security uncertainties, there are some objective conclusions around which a comprehensive solution and policies should be built. That is why, after a thorough analysis of all the elements of the refugee crisis that could affect the military aspect considered in this paper, an answer will be offered regarding the legitimacy and justification of their use.

2. Literature Overview

Although the topic of the refugee crisis was widely covered and of interest to many people and the media, there are few academic articles that cover this subject and that of facilitating border security with the use of military forces. There are almost no articles that analyse the domestic use of military forces at borders, and those that are used in this paper are mostly based on examples from the USA. Fortunately, there was no need to address this question with regard to the EU and EU borders for a very long time. With that in mind and in an attempt to contribute to the quality of this paper, examples from other countries were used. All arguments that will be provided in this analysis are applicable to the EU, regardless of their external (non-EU) origin. There is a distinction between migration to the US and the EU refugee crisis, which will be addressed at the end of the paper. However, all arguments are valid and they emphasize all possible aspects and arguments that can be used with regard to the immigration/refugee crisis and will help provide an overall picture of this problem. With that in mind, Brennan (2016) was a suitable reading choice as an introduction to this complex subject. Some ideas may sound surprising but this work contains thoughts on the essence of the topic of international instruments for refugees. An even better explanation of the Refugee Convention as a fundamental legal act can be found in Leiserson (2017), which will often be cited in this paper. Moreover, if we are seeking a general overview of international instruments, very interesting conclusions

appeared in the Nazarski (2008) paper regarding the European Convention for the Protection of Human Rights and Fundamental Freedoms. A recurring question in this paper is whether the use of the military can be a legitimate tool in a refugee crisis. All the authors in this paragraph have recognised the problem of “interception programmes” and that some of them have been conducted with military assistance. Interestingly, another recurring thought in this paper is the conflict of “open borders” and “closed gates” policies, and it was intriguing to read Papagianni’s (2013) work published two years before the refugee crisis, which referred to many EU problems. Now, as Staničić (2016) concludes, it is practically impossible to impose a “closed gates” policy but the alternative has many issues as well.

The core issue of the paper is the use of the military to protect borders. As has already been noted, no academic papers have been published on this subject in the EU, but Jones and Johnson (2016) provide a good summary of arguments for and against the use of army forces at the US border with regard to militarisation. Tussing (2008) and Chambers (2013) have recognised, as did Sanderson (2001), that wars have changed; today there are no more “total wars” and the function of the army needs to change in accordance with this.

3. International Instruments for the Protection of Refugees and Security of State Borders

To understand this paper, it is of the utmost importance to stress the complexity of the situation brought about by the refugee crisis: a crisis in which many intertwined problems occurred at all legal and political levels of any one country. As has already been noted, incoming waves of refugees presented a humanitarian and logistical crisis. In the following section many of these problems will be explained and grouped according to their source. It is very hard to present the difficulties of the crisis in an orderly fashion. The confusion that could arise following this chapter could serve as a wake-up call for the reader to see both sides of the crisis and to understand that it is impossible to resolve all problems by the book from a legal or a logistical perspective.

The most significant legal source related to the subject is the United Nations Convention and Protocol Relating to the Status of Refugees of 1951 (hereinafter referred to as the Refugee Convention). The convention pre-

scribes that it is forbidden to expel or return refugees to a country where they may face persecution, an exception being if they pose a security threat for the host country. Moreover, no refugee or asylum-seeker can be penalised because of illegal entry. There are some preconditions for this, for example, direct entry from a country where their life is threatened, valid reasons for illegal entry, and an obligation to contact the administrative bodies of that country (Lalić Novak, 2016, p. 55). Of course, these legal standards are interpreted more broadly and they are clearly applicable to the refugee crisis (Lalić Novak, 2016, p. 55). The Refugee Convention was appended by the 1967 Protocol Relating to the Status of Refugees. Article 33 says: “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (1951 Convention and Protocol). It has been said in the literature that the Refugee Convention was conceived as a functional compromise based on international cooperation, a compromise whereby neighbouring countries would keep their borders open to refugees to shelter and support them. The problem is that neighbouring countries were usually poorer, so distant countries were to provide funding and help with that burden (Leiser-son, 2017, p. 194). The real problem started when those “impoverished” refugees started arriving at the borders of wealthier countries. No longer was it only Cold War dissidents from communist countries applying for asylum in the West. That was the point when entry regimes in rich countries started to shift and the term *non-entrée* was introduced into legal systems (Orchard, 2014, p. 206).

Moreover, the protection of refugee status has evolved and today there are several instruments that can be used by refugees. The most recognisable one is asylum, which along with subsidiary protection constitutes international protection (Croatian International and Temporary Protection Act of 2015 and amended in 2017). However, in 2001 the EU enacted the Directive on Temporary Protection (Directive 2001/55/EC) as a response to mass influxes of displaced persons from the former Yugoslavia. The instrument of temporary protection was designed as an exceptional measure, meant to provide displaced persons from non-EU countries who are unable to return to their country of origin with immediate and temporary protection. It is meant to apply in particular when there is a risk that the standard asylum system is struggling to cope with demands of a mass influx and risks having a negative impact on the processing of claims (Temporary Protection, EU Commission).

On the other hand, every country has a right to defend its sovereignty and thereby protect its borders from illegal entry or any security threats. In addition, European countries have an international (EU) obligation to protect their borders from unauthorised entry. This obligation is proscribed by the Schengen system, which extends to Croatia. For this reason, to enter Croatia and Europe legally, an individual must have valid traveling documents and enter at specifically designated border crossings during scheduled working hours (Regulation (EU) 2016/399). Exceptions are always possible and they were made for possible waves of refugees.

It can be seen that there are two extremities between which sovereign governments are trying to balance. On the one hand, there is an international obligation to accept all refugees at their borders, without the option of sending them back or forbidding them entrance. On the other hand, European countries have an obligation to all other EU states to protect their borders from illegal entry and thereby protect the safety of their own and EU citizens. Somewhere between those two opposite poles, refugees are trying to realise their convention-guaranteed rights: safety and security. During this “dance” every country has to bear in mind that their treatment of refugees has to comply with the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms, which can be very difficult in a refugee crisis when illegal entries are common (Nazarski, 2008, p. 38). For example, articles like Art. 2 (right to life), Art. 3 (prohibition of torture and other inhuman or degrading treatments or penalties) and Art. 4 of Protocol 4 (prohibition of collective expulsions) (European Convention for the Protection of Human Rights and Fundamental Freedoms) are difficult to follow in a time of crisis. Protection under these articles goes far beyond simple words because the European Court of Human Rights interprets the European Convention and they set the protection bar sky high. It is a great achievement that protection has been evolving for 50 years but in extraordinary times it is very hard to comply with its standards. It has already been said that the refugee crisis was not just a humanitarian one, but also legal and logistical.

4. Contemporary Forced and Irregular Migrations to the EU along the Western Balkan Route

The exact number of people who entered the EU in the refugee wave in 2015-16 is quite hard or even impossible to define; however, official and

recorded numbers clearly emphasize the seriousness of the situation. In 2015, 1.26 million people applied for asylum in the EU. The figure rises to 2.5 million when 2016 is added (European Parliament, 2017). But the most frightening data refer to the 2.3 million illegal crossings that were detected (European Parliament, 2017). It could be said that some people were detected more than once in the illegal crossings, which is completely true. Still, that number is too high to claim the situation was handled well and with a plan. Moreover, in 2015 2.2 million people were found to be illegally present in the EU (people who had failed to register properly or who had left the country of the asylum claim) and the following year, in 2016, that number dropped to 984,000 (*ibid.*). More interestingly, in 2015, 533,000 people were ordered to return to their country of origin but only 43% did, while a year later only half of the 494,000 who were ordered to return home did so (*ibid.*). Even though in 2017 the pressure of refugee waves declined along the “Balkan Route”, there were still around 650,000 first-time asylum applicants in the EU (Eurostat, 2018). In addition, the most troublesome data show that in the two and a half years since 2015, only in the Mediterranean around 10,000 people have lost their lives trying to reach Europe. Also, 388,000 people were denied entry at external EU borders because they were considered economic migrants (EU Migrant Crisis: Facts and Figures, 2017). That should be more than enough to describe the intense and unprecedented pressure suddenly exerted on the borders of European countries. These data are an obvious indicator of a logistical mess that, among other countries, affected Croatia, Slovenia, and Hungary. This is when the question of the use of military force arises. For example, let us imagine a country where it snows only 2 days a year but so heavily that all traffic is paralysed. For traffic to function regularly, 300 expensive snowploughs would be needed. These snowploughs would obviously be in use only two days a year, while the rest of the time they would be idle capital. This simple example can easily be transferred to Croatia during the refugee crisis. Usually, there are only small numbers of migrants, refugees, or other illegal entrants into the country, but suddenly there were 800,000 refugees passing through Croatia (Zrinjski, 2016). In a regular year, few employees are needed to establish efficient border control but in a crisis they are not enough. There is a need to employ more people, but these new employees would, after the hard times, become an unnecessary surplus – just like those 300 expensive snowploughs. In addition, it must be stressed that throughout its history Croatia was mostly familiar with the process of emigration as opposed to immigration. In such circumstances, faced with an unfamiliar immigration process and a huge

lack of manpower, it is not that difficult to understand solutions for which governments reach. As would be expected, most countries turn to the first area similar to that of the police and which is usually used to secure help in a state of emergency – military forces.

4.1. Legal Aspects of the Refugee Crisis

It is important to understand that there was no viable legal basis for the policy of open borders, insofar as open borders means letting anyone enter without verifying their documents and other necessary legal requirements (Peukert et al., 2017, p. 618). It has been said that a country has to allow entry to refugees who seek shelter and are in danger in their home country. On the other hand, for example, German Basic Law does not give the right to grant asylum to a person coming from a country where his or her rights are assured by the Refugee Convention (Peukert et al., 2017, p. 618). Furthermore, the obligation in the Refugees Convention to accept people is not definitive (Leiserson, 2017, p. 216) because there is an exception regarding security threats. Also, all EU states have an obligation to check the credentials of people entering the EU at its external borders, especially given the security risk behind terrorist threats. This, however, does not mean that countries have to close the gates because there are possible threats; it just emphasizes that there is an obligation to check every individual in the process of providing security and shelter for refugees.

Public perception often characterises the European Union as a slow bureaucratic giant that is not prepared or not even capable of creating mechanisms for quick reactions to protect its vital interests. Long before any refugee crisis, there were already problems in the EU regarding common migration policies. Migration was a subject regarding which member states would call on their sovereignty and proclaim that they knew what was best for their country (Nazarski, 2008, p. 39). The final result was a compromise where the “EU had a clear competence, such as in a case of visa policy, for the rest it has limited itself to a mere coordinating role of disparate national actions of willing member states” (Papagianni, 2013, p. 293). Illustrating how slow the EU really is, an extract from the Papagianni paper is interesting insofar as she detected that EU policy “is to a large extent a series of either unrelated or overlapping initiatives with no proper follow up, or attempts to react to *ad hoc* problems and is largely focused on security related aspects.” (Papagianni, 2013, p. 294) In ad-

dition, she proposed tighter cooperation between EU members because they had failed to react to the small inflow of people during Arab Spring (Papagianni, 2013, p. 298). Interestingly, the paper was written in 2013, two years before the real crisis, and with plenty of time to create a suitable mechanism.

To conclude this section, there was an evident lack of a common EU mechanism, which created a void filled with uncertainty. This resulted in EU border countries “washing their hands of the matter” and going with their variation of the “open borders” policy whereby they did open the borders but just so the refugees could transition further into the EU. They had no legal basis for that policy and there were procedural mistakes which resulted in an infringement procedure against Croatia (European Commission, 2015). It can be said that governments can violate not only the rights of refugees but also of their own citizens and other EU members by reluctantly discarding international obligations and security checks. It is clear that the EU had an extraordinary response to the refugee crisis where there was no rule of law and the result was extraordinary legal uncertainty.

4.2. Logistical Aspects of the Refugee Crisis

The legal obligations have been explained and a metaphor of how the Refugee Convention was conceived has been presented. It was meant to be a compromise between the already developed and still developing countries whereby they would share the burden, one side taking on the financial responsibilities and the other the logistical ones. If we assume that refugees want to go directly to the more developed and wealthy countries, is that a problem? Moreover, what if transit countries decide that it is better for them to transfer refugees than to have them at their doorstep, trying to proceed by force? Can developed countries deny them entry?

It was stressed that the public and, most importantly, experts said that no country could easily refuse or return a refugee, no matter where he or she comes from or through which country he or she has passed. But is that so universally true? Do refugees have a right to choose where they will be refugees? No one can dispute the rights they have and it truly is an international obligation to provide them with safety, security, and health necessities. Yet if a person decides that they do not want to be a refugee in a poor country, but rather a refugee in a developed state on another continent, do they become an economic migrant because of that “reasoned” decision? If that is

allowed, there is a very thin line between being a refugee and an economic migrant. The health and help standard that would be offered to refugees is vastly different in developing countries surrounded by war and in developed western countries. Consequently, enormous obligations and burdens could befall rich countries because there have been 50 million displaced people in the world since 2014 (Brennan, 2016, p. 51) and only 15% of the refugees have reached Europe (Nazarski, 2008, p. 41). If they all arrived in developed countries, nobody could guarantee the social systems of these countries would sustain a high standard of providing help to such numbers of people. Comments in the literature say that despite the enormous probable burden that could befall rich countries, they have a moral obligation to open their borders in a world where inequality between states has been much reduced (Brennan, 2016, p. 53). Their starting point is a perspective of western countries' "illegitimate privilege" represented by the wealth of their countries, which is why they need to open their borders (Brennan, 2016, p. 53). The real question is to what extent this principle is just a noble wish instead of a realistic foundation for immigration politics. Even if we assume that countries could follow up on that idea, it is clearly inapplicable at a time of huge refugee waves and crises. It bears repeating that there are 50 million displaced people in the world and creating systems that could sustain inflows of this volume is nearly impossible.

That is the main reason why developed countries look for ways out of refugee crises but it is questionable if the way they are going about it is legal. For example, Australia came up with the "stop the boats" policy, whereby they stopped refugees before they reached Australia and offered them resettlement in less desirable countries like Nauru and Papua New Guinea (Brennan, 2016, p. 54). The Australian government interprets international law in the way that refugees have the right to seek a country and invoke asylum procedures, but no one has the right to enter or remain in a country in which they are not a national (Brennan, 2016, p. 57). The EU has also had interception programmes whereby they tried to stop boats coming from Africa or deals with Turkey as part of which the EU provides financial support and in return Turkey does not let refugees through (Leiserson, 2017, p. 208). It is a legitimate question if it is justified to publicly announce that you are in compliance with international laws, while simultaneously making deals in the background with countries such as Turkey, Libya, and Egypt, which will stop refugee inflows even when the refugees' rights are being breached (Nazarski, 2008, p. 41).

The logistical aspect on a global scale has been presented but there are even simpler examples of logistical concerns regarding massive waves of

refugees regularly arriving at state borders. Usually, there are no major, extraordinary shifts at state borders in times of peace. For that reason, border police have the number of personnel sufficient to do their primary duty and monitor possible instances of illegal entry into the country. In Croatia, that number amounts to 4,700 policemen along the 2,300 km of external land border (Staničić, 2016, p. 28). What happens in extraordinary situations when the scope of border police work exceeds their personnel capabilities – for example, in a refugee crisis? To exemplify, the land border between Croatia and Serbia can be analysed as proof of the extraordinary conditions in a refugee crisis. The land border between Croatia and Serbia is approximately 300 km long. In the event of a “closed gates” policy, refugees and migrants would have to group at one country’s border. Let us say that happens along the 300 km of the Croatia–Serbia border. Official numbers state that 6,500 refugees crossed that land border daily (HINA, 2016). With that intensity, in two weeks there would be around 100,000 refugees. If that number were distributed along the length of the land border, it would mean one refugee every three meters along the Croatia–Serbia border. It is impossible to imagine how 4,700 police officers could stop so many refugees from possibly entering Croatia illegally. Once again, that is the number of police personnel for the whole country, not just the Croatia–Serbia border.

Furthermore, once the refugees have entered Croatia, they would need help settling in and acquiring basic health necessities. The government should not count on the support of civil society or international organisations, and it would need to ensure enough people to provide refugees with basic help. It is obvious that EU countries were not equipped with enough personnel to cope with the refugee crisis. Some may think that this would be a sound reason to close the border, otherwise their country may end up overwhelmed by the chaotic refugee inflow. This just shows that Croatia, for example, was not only unprepared to stop illegal entries, it was unprepared to logistically help refugees in an efficient way. However, we must not forget that all states have an international obligation to help refugees who ask for aid at their borders, if they are not a security threat. That is why closing the borders is not the right response, but enough personnel to comply with international obligations is a solution.

This argument should offer a new perspective on military forces at state borders. It is an easy and justifiable reason why governments call upon military forces to serve at country gates. Clearly, military forces are linked to connotations of war; therefore, their jurisdiction, mission, and goals must be clearly presented to the public and to refugees. The following

section will analyse different scenarios in which military forces could serve at borders and most importantly – if the military can be a justified means of imposing a “closed gates” policy.

4.3. Can EU Member States have a “Closed Gates” Policy and use the Military to Impose it at the Border?

There are two main starting points for this argument. On the one hand, countries have a legal commitment to aid and allow entry to every refugee at their border. On the other hand, no sovereign state needs to tolerate illegal entry or allow entry to possible security threats or economic migrants pretending to be refugees. These two main principles can easily come into conflict. In the midst of a great wave of refugees, these two starting points may easily clash, with two possible outcomes. The government can recognise the extraordinary situation and lack of personnel to handle a refugee crisis and decide to ignore the security threat and allow everyone at the border entry. In that case, the government has ignored its legal obligations and has possibly allowed many economic migrants and possible terrorists entry. In case of the second decision, the country can decide to ignore its obligation to grant asylum to refugees, but by closing its gates it makes sure no terrorist or “unwanted” economic migrant can enter.

Military forces could be used to impose both solutions, but to what extent can that be legal and legitimate? In the first case, the borders are open and the military (if there is legal ground in the legislation for their actions) can be used to provide refugees with logistical help, particularly if that standard of help could not be achieved otherwise because of a lack of personnel. That kind of use is legal and legitimate. Prior to answering if the military can be used to impose the second solution, the “closed gates” policy, the reality of that policy must be tested.

That test can effectively be carried out using the example of the refugee crisis in Croatia. It has been said that the refugee inflow reached 65,000 people a day at the Croatia–Serbia border. If the borders had been closed, there would have been more and more refugees waiting every day. It must be borne in mind that refugees from Syria had crossed half the world to get to the gates of Europe, and they would not just have turned around, which is understandable from their point of view. In a matter of a few weeks there could have been hundreds of thousands of refugees at the state border, all eager to continue their journey to the security of the EU. In that situation, too many refugees could have grouped together

and it would have been impossible to restrain them from continuing on their journey. No fences, personnel, or policy would have stopped them. The earlier example of 100,000 refugees at the Croatia–Serbia border is a good test. The refugees could spread out so that there is one person for every 3 meters of the Croatia–Serbia border. At some point, some would go past the fences and patrols and soon a great number of refugees could follow, particularly if they grouped together and spread to other unsupervised sections of the border (Staničić, 2016, p. 28).⁴¹ The army could be sent to reinforce the border and stop the refugees, but as their numbers increased so would the pressure on the border. Naturally, the force that the army would have to use to apprehend refugees would increase as well. At some point, lethal force might be needed to stop the refugees. The scenario of the armed forces shooting at refugees can be easily described as a war on refugees. That is the breaking point at which the use of the military at the border becomes excessive and questionable.

A country could close its borders for safety and security reasons. It could say that the refugee inflow is too great for the country to handle its internal and international border obligations. This could be used as a reason to temporarily close the gates and send military forces to impose the rule of law at the border. The possibility of a great number of terrorists hidden in waves of refugees does exist and in that scenario the use of the military to close the gates is legal and legitimate. However, what if it were necessary to use lethal force against refugees to assure border integrity? If that possibility is not acknowledged in a refugee crisis, then international obligations of security and safety at the borders, known as “the rule of law”, cannot be acknowledged either. This means that the only solution in a refugee wave is to let them through and risk the security and safety border obligations imposed by the EU. That decision would not require military forces at the border, nor any of the attendant questions and problems.

5. Distinction between Police and Army Forces with Regard to Border Competence

Arguments that indicate the seriousness of the refugee crisis have been shown. No country could respond to such a crisis in an orderly fashion

⁴¹ Staničić reached the same conclusion regarding the impossibility of the “closed gates” policy in the work cited here.

with the personnel they normally have at their disposal. The issue of calling on military forces and possible reasons for doing so have been raised both by the public and in this paper. Still, whenever such a suggestion is made, it receives a strong response. To indicate all the benefits and possible problems arising from military interference, both sides of the proposition must be examined.

5.1. Arguments Against Military Forces at Borders

The general public commonly associates the military with assault guns and war zones but are such perceptions enough to prevent the idea of military forces at borders, or are objective and reasonable arguments required as well? As this research has shown, there are a few arguments that would oppose the justification of using military forces in this case. Primarily, arguments against the military at borders are connected to the basic separation between the army and the police. Military forces have traditionally been used to attack or defend other countries in wars, far away from the country they serve. Their second main duty was to defend the sovereignty and people of their home state from external aggressions. Only the police was meant to constitute a legitimate force to impose the laws and will of their own government – not the military. That is why armies cannot serve at borders and impose the rule of law of the state they serve.

Historically, police has dealt with internal threats, contained and stopped riots, and enforced the legal regime, but with less force than the military in order to soften and hide the use of sovereign power (Jones & Johnson, 2016, p. 189). If armies were allowed at the border, that would be characterised as the militarisation of borders. Consequently, the militarisation of borders is part of a broader process to militarise state authorities, which can never be a positive matter for citizens and democracy (Jones & Johnson, 2016, p. 189). Following terrorist attacks in the USA, the distinction between the competence of the army and the police started to lose importance in favour of militarisation. However, US citizens do not want their soldiers to be policemen nor do they want policemen to be soldiers: a deeply ingrained and inexplicable mindset identified by Tussing (Tussing, 2008, p. 4). There is one historical argument that could explain the US mindset – the Posse Comitatus Act, a federal law that sets the limits within which army personnel may execute law enforcement activities at home (Chambers, 2013, p. 12). It was originally introduced in 1878 to prevent the federal army from imposing legislation on the southern states but took

on a different notion over time. Today, it serves as the main argument in the USA against the use of the military in domestic tasks. Chambers (2013, p. 13) attributes that thought to public aversion to the involvement of the army in state jurisdiction and to the desire of military leaders to withhold their personnel from participating in domestic emergencies.

There is significant evidence for border militarisation in the EU as well. For example, interception programmes at external EU borders were conducted by military or paramilitary groups from non-EU countries (Jones & Johnson, 2016, p. 193). Also, images from Hungary in the midst of the refugee crisis are hard to forget. Hungary built a “110-mile-long fence” along their border and used extreme measures against refugees and migrants (*ibid*). In addition, Jones and Johnson stress that US Border Patrol agents shot and killed 28 people from 2010 to 2014, while there were 20,000 deaths at EU borders over the past decade (*ibid*, p. 195). It is clear that roles of both the police and the military are changing. The extent of the change is still unknown but the number of deaths is on the rise, along with budget provisions for “border militarization” (*ibid*, p. 191).

5.2. Arguments for Military Forces at Borders

The world is changing and becoming a smaller and faster place day by day, with the aid of technology and human progress. Many connected issues are progressing and new challenges are emerging. Harsh developments have affected borders as well. The old system of borders and sovereign states is challenged by cross-border movements of capital, goods, and people (Jones & Johnson, 2016, p. 195). In addition, new threats, like terrorism, have arisen and state borders have been transformed into sites of military security activities, focused on preventing those who present a violent threat from entering (*ibid*, p. 187). Total wars are now a thing of the past and the function of the army is shifting in accordance. For example, refugees have been used as tools in modern warfare many times, which is why they have been characterised as a security threat (Sanderson, 2001, p. 121). Therefore, the function of the army should shift towards refugee management and consequently the protection of state borders.

Studies have shown that the majority of migrants who attempt to enter the United States illegally eventually succeed. Generally, they are apprehended more than once prior to their successful entry (Chambers, 2013, p. 11). According to data, it is estimated that the odds for apprehension in any illegal crossing in 2011 were just 20 per cent (Chambers, 2013, p. 11).

The best instrument for the prevention of illegal entry into a country is the physical presence of people. Most countries worldwide already have the necessary personnel in their military branches (Chambers, 2013, p. 20). While the functions of the army outside the country are being reduced, a moderate shift in their personnel duties to border security could be a good move. Otherwise, it is not logical to expect of the public to justify the duplication of government assets in the form of additional police officers, if the military has sufficient resources to fulfil the assignment. (Tussing, 2008, p. 16).

Moreover, when a crisis breaks somewhere in the world, the public and governments easily justify the use of their own armies to intervene in a country halfway across the globe. In other words, they see no major problems in employing their military personnel to breach another country's sovereignty under the pretence of helping the local citizens. For example, reports clearly indicate that when armies are used outside domestic territory, in a humanitarian refugee crisis, there is always an additional agenda (Weil, 2001, p. 80). Frequently, such military interventions end up breaching a country's sovereignty or individual human rights (Weil, 2001, p. 82). Still, humanitarian and refugee crises cannot unfold without the presence of the military, helping civil organisations. Their role has often been portrayed as that of a "norms entrepreneur" whereby they "established a policy of consensus around the protection of the forcibly displaced, their individual rights protection and created an ethic of intervention" (Weil, 2001, p. 84). A simple conclusion emerges: if the military has become an inherent element of providing refugees with help abroad, why should they not they assist in the same duties at home? Although the help of the military is always considered a last resort solution, under the proper legislative circumstances military intervention could steer a refugee crisis in the right direction. Simply stopping illegal entry and helping with the logistics of refugees seeking asylum would result in fewer concerns and problems.

In a refugee crisis there are always large groups of people crossing borders and often it is hard to implement the rule of law and cooperate with them. Experience has shown that in such crises there is a need to enforce governmental rules. While enforcing power over a group of people like refugees, "the real nature of [a] dynamics of violence" exists and must be recognised (Sanderson, 2001, p. 123). Otherwise, governments will not be prepared and if they do not impose the rule of law at EU borders, chaos may result. However, to perform a military intervention that would be legal, legitimate, and moral, some preparations are required. Firstly,

military presence and jurisdiction must have a sound and precise legal basis (Mason, 2013, p. 3). Legislation that prescribes military presence in everyday life must undergo a thorough parliamentary and public discussion. Everyone addressed by that law, both refugees and citizens, should know the role of the military in a crisis (Weil, 2001, p. 102).

EU states like Hungary did not negotiate the function of the military at the border with the public. In addition to the use of violence, this was one reason why the international public and governments condemned the use of the military in the refugee crisis. But it is often forgotten or overlooked that the EU was militarising the refugee crisis as well, through the EUBAM (EU Border Assistance Missions) programme that operates under the “Security and Defence” pillar. For example, one of EUBAM activities included the training of 500 Libyan military personnel for border operations and there have been other programmes with EU support that are executed by military or paramilitary groups (Jones & Johnson, 2016, p. 194). Army presence at borders used to be labelled as an anomaly, but from what has been demonstrated it is clear that it will be a recurring anomaly (Tussing, 2008, p. 14). Therefore, legislation must be adapted to new military roles in humanitarian crises, both abroad and at home.

6. Overview of Selected SEE Countries: Hungary, Slovenia, and Croatia

Over the last three years some EU states decided to respond to the refugee crisis by sending military forces to their borders. Hungary, Slovenia, and Croatia represent different models of how governments resolved the problem of sending army troops to the borders. All three countries are EU members and although the asylum and migration system is within EU jurisdiction, these states have dissimilar models.

6.1. Legislation in Hungary

Hungary introduced substantial changes to its legislation governing refugees and border security. Their parliament passed a law that amended the Police Act and the National Defence Act. Hungary introduced maximum restrictions in terms of granting refugees entry and it also decided to severely oppose any attempt at illegal entry (Dunai, 2015). Consequently,

military forces were granted dangerous and serious powers that could be used to secure borders and used against illegal refugees. The law allowed the army to assist the police in checking passports, controlling the flow of migrant traffic, and detaining suspects. However, the law also permits military forces to use non-lethal force for purposes of border control, such as rubber bullets (Jones, 2015). TV news and reports from the Hungarian border in which force was used against refugees or in which people desperately climbed across a wire fence were broadcast all around the world and raised worried comments everywhere. The Hungarian government reiterated their stance on securing borders with no patience for attempts at illegal entry. Public comments directed against any harsh powers imposed on refugees continued and this showed that any possible solution to the crisis would be difficult. With aforementioned comments against force at borders, only with great difficulties can someone explain as to where is the thin line when the open borders policy actually begins to stop tolerating illegal entries and gets in compliance with international borders obligations.

6.2. Legislation in Slovenia

Slovenia amended their Defence Act adding Article 37a, which prescribes extraordinary competence for army forces. It says that if the security situation calls for this, their parliament can, based on a government proposal, decide to call on military forces to secure the borders. For the proposal to pass, the Slovenian Parliament must vote on it with a two-thirds majority (Slovenian Defence Act). Activation of extraordinary competence would grant the following powers to the military at the borders: 1) issuing warnings, 2) giving instructions, 3) temporary apprehension, 4) control over groups of people. These powers are usually not within the competences of the military, but if the government/parliament proposes thus, they can act upon them for a maximum of three months, unless the powers are extended (Slovenian Defence Act from 2015). The amendments to the Defence Act came after the crisis “exceeded all manageable possibilities”, but the extraordinary competences were not abused with regard to the refugees and the act had a thorough public and legislative procedure (Agence France-Presse, 2015). The result of the legislation was an act that gives the military adequate powers to help in a crisis, without hidden agendas that could militarise the borders or society and provoke serious public criticism.

6.3. Legislation in Croatia

Croatia also amended its laws, allowing the military to serve at the borders, but with considerable differences compared with Hungary and Slovenia. The Croatian government proposed and the parliament passed an amendment to the Defence Act⁴² and the Border Control Act⁴³. Art. 62a of the Defence Act now allows the military to provide support to the police in securing the border. The minister of defence suggests the military be used, but the government must allow this with prior permission from the Croatian president. The army can support the police according to the Border Control Act (Art. 5), which prescribes that the military can be called to the border because of security or humanitarian reasons. In addition, the act clearly says that army forces have to follow police orders while serving at the borders.

The background to the amendments in both Hungary and Slovenia were security reasons, i.e., the governments realised that the refugee crisis had become logistically impossible to regulate in accordance with border security obligations. That was the main reason for sending additional personnel to the border in the form of military forces: they were meant to fight any illegal attempts or threats and help in the arrangement of refugee transport across their territory. The same background existed in Croatia, but it was unusual that the amendments did not provide the military with police powers like in Slovenia. Croatia had had frequent need of military intervention in the past and they are called to serve in any extraordinary situation of humanitarian and environmental character. Consequently, seeing army forces on the front line in extraordinary situations was not strange to the public; on the contrary, it was expected that they would arrive and provide support. Moreover, the Croatian Constitution (Art. 7) allows military forces to aid the police and other public bodies in extraordinary situations. This paper has constantly emphasized the extraordinary aspect of the refugee crisis in a legal, humanitarian, and logistical sense. Therefore, for the purposes of this paper and to clear up any possible misunderstanding, the Ministry of the Interior was contacted to determine the intentions and goals behind the amendments to the laws described in this and the previous paragraph.

⁴² The Defense Act (Croatian), Official Gazette 73/13, 75/15, 27/16, 110/17.

⁴³ The Border Control Act (Croatian), Official Gazette 83/13, 27/16.

The correspondence between the author and the ministry intended to clarify if there is a possibility for the military to use force at the border or if they can help in any way against illegal activities, and if not, what the army's possible duties at the border are. The questions were sent by email and only relevant information and answers are included in the paper.

The first question said: "In your interpretation of the Border Control Act, can military forces exercise police powers at state borders?" The ministry responded that "upon providing support to the police with regard to border security, military forces are not allowed to exercise police powers." This would mean that ministry officials are familiar with the legislative regime and possible consequences if a new wave of refugees were to arrive. The second question was: "In the event of a new refugee wave, can military forces be used to prevent any illegal entries in Croatia?". The answer says: "Military forces would not be used in tasks and on sites where they can be in direct contact with illegal migrants." Lastly, they resolved the question of the duties that army personnel would have at borders, where they provided a broad list of possible tasks. For example, the military would help with migrant transport, data collection, supervision with and without technology, air surveillance, food and water deliveries, help and rescue missions, infrastructural works, sea patrolling, and other tasks.⁴⁴

Now that the EU has already accepted a minimum of 1.5 million refugees and migrants, it is fair to ask if a new massive wave of refugees would be welcomed, particularly taking into account the interception programmes and the EU–Turkey deal. Two EU members in close proximity to Croatia have given police powers to the military and if "closed gates" policies were to be implemented throughout the EU, they would be prepared to stop any illegal attempt to enter their territory. That would mean that under the current legal regime, Croatia could easily end up a part of the EU frontier which is a hotspot for refugees and migrants. That is not necessarily undesirable if Croatia wants to allow refugees access to its territory and to aid them if they seek help. However, the Croatian government has repeatedly stated that it does not intend for the country to become a refugee hotspot. Even if the military had police powers it would be hard to implement a "closed gates" policy, but if that were not the case it would be logistically impossible.

⁴⁴ The responses were provided by the Sector for Public Relations of the Ministry of the Interior by email correspondence. There were more questions and a few more were answered but only significant extracts were included in this paper.

7. Conclusion

Having analysed all the elements of the refugee crisis that could impact on the justification of the use of military forces at borders, a possible solution is presented. The use of military forces in extraordinary situations at borders is legal and legitimate if basic international obligations are complied with. As for the role of the army in the “closed gates” policy, its use can be legal and legitimate if the safety of the country’s own citizens cannot otherwise be assured. However, as soon as lethal force is needed to stop the refugees, i.e., when war is waged on refugees, it is impossible to rationalise and justify the use of military forces.

Moreover, the differences between arguments for army forces at borders that are articulated in the USA and those in the EU must be stressed. The USA is confronted with a continuous and vast migrant inflow. In addition, in the case of the USA there are mostly economic migrants at the border, not refugees like in the case of the EU. Justification for the use of the military is not the same; in the USA there are no extraordinary issues and the migrant inflow is steady and long-standing. The solution to border control does not lie in sending army forces to borders; the use of the military should be limited to warfare and extraordinary domestic matters. The refugee crisis in the EU was an entirely different issue. Waves of refugees numbering millions of people in two years is an extraordinary situation that calls for extraordinary measures.

To conclude, some considerations must be emphasized. The refugee crisis was a legal, humanitarian, and logistics crisis. The chaotic arrival of so many people in the EU raised many questions and uncertainties. Generally speaking, few solutions were offered and they had divided support. Both refugees and countries have obligations and rights. To address this, a well-balanced approach to the refugee crisis is needed. For now, wars are still being waged, refugees still exist, and only 15% of misplaced persons arrive in the EU (Nazarski, 2008, p. 41). If a new refugee wave were to reach Croatia and the EU, these governments would experience trouble but with right military policies trouble could be avoided. Only if international obligations that support some of the “closed gates” policy arguments (security and the rule of law) and “open gates” policy arguments (asylum protection and integration of refugees) are fulfilled, can a comprehensive solution be reached under which both refugees and EU citizens are safe and content. To make that possible in extraordinary situations such as refugee waves, the advantages of military use must be recognised and the military must therefore be properly used.

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THE USE OF MILITARY FORCES IN THE PROTECTION OF THE BORDERS AND PREVENTION OF IRREGULAR MIGRATIONS IN SELECTED SOUTH EAST EUROPEAN COUNTRIES

Summary

The 2015 refugee crisis in Europe was a humanitarian, legal, and logistical crisis. New circumstances gave rise to ideas of calling upon armies to serve at borders. This paper analyses all the elements of the refugee crisis that could serve to legitimise or oppose the use of military forces in the protection of state borders. Governments' international obligations to protect refugees and providing security for their citizens came into conflict during the crisis. In an age of terrorist threats, the roles of the police and the military are shifting in an unknown direction, yet these international obligations remain. The refugee crisis challenged not only international law but also European Union policies and ethical principles. The possible solutions were either to accept all refugees or to close the borders entirely and somewhere in between these opposing solutions the army was considered as a tool. Many have emphasized that there is no place for military personnel at state borders regardless of refugee inflow. Hence, this paper examines the arguments for a "military ban". Furthermore, a thorough analysis follows on the legal and logistical legitimacy of army usage at borders. At the end, Hungarian, Slovenian, and Croatian legislation are discussed and compared with a view to problems that could arise from the differences in the legislation regarding possible future migration and refugee inflows.

Keywords: refugee crisis, military, army, borders, Schengen, European Union, migrations

UPOTREBA VOJNE SILE U ZAŠTITI GRANICA I SPRJEČAVANJU ILEGALNIH MIGRACIJA U ODABRANIM ZEMLJAMA JUGOISTOČNE EUROPE

Sažetak

Izbjeglička kriza u Europi 2015. godine imala je humanitarne, pravne i logističke aspekte što je dovelo do pojave ideja o upotrebi vojski na granicama. Analiziraju se svi elementi izbjegličke krize koji bi mogli opravdati ili dati argumente protiv upotrebe vojske u čuvanju državnih granica. Međunarodne obaveze država da zaštite izbjeglice i sigurnost vlastitih građana dolaze u međusobni sukob za vrijeme izbjegličke krize. U doba terorističkih prijetnji uloge policije i vojske mijenjaju se u nepoznatom pravcu, ali te međunarodne obaveze ostaju nepromijenjene. Izbjeglička kriza je izazov međunarodnom pravu, ali i politikama i etičkim načelima Europske unije. Upotreba vojske je srednje rješenje između prihvata svih izbjeglica i potpunog zatvaranja granica. Mnogi se protive vojnicima na državnim granicama neovisno o priljevu izbjeglica. U radu se analiziraju argumenti za takvu zabranu vojske. Slijedi detaljna analiza pravne i logističke opravdanosti upotrebe vojske na granicama. Na kraju se ispituje mađarsko, slovensko i hrvatsko zakonodavstvo pri čemu se posebno ističu problemi koje bi zakonodavne različitosti mogle prouzročiti u budućem priljevu migranata i izbjeglica.

Ključne riječi: izbjeglička kriza, vojska, granice, Schengenski režim, Europska unija, migracije