



The Use of Military Forces in the Protection of the Borders and Prevention of Irregular Migrations – Case Study of selected SEE Countries

BENJAMIN SADRIĆ
Faculty of Law
UNIVERSITY OF ZAGREB

Abstract

The 2015 refugee waves to Europe were a humanitarian, legal, moral and logistical crisis. Those circumstances arose ideas to call upon armies to serve at borders. This paper will analyze all elements of the refugee crisis that could legitimate or deny the use of military forces in protection of state borders. More precisely, there are international obligations for governments to protect refugees and to provide security for its citizens. In an age of terrorist threats, roles of the police and military are shifting in an unknown direction, but those international obligations remain the same. The Refugee crisis challenged not only international law, but also EU policies and ethical principles. Possible solutions were to accept all refugees or to close borders, and somewhere in between those solutions army was considered as a tool. Many have emphasized that there is no place for military personnel at state borders with or without the refugee inflow. That is why in this paper it will be examined what are the arguments for that "military ban". Furthermore, after a thorough analysis a comprehensive answer to the legal, moral and logistical legitimacy of army at borders use will be offered. With that conclusion, Hungarian, Slovenian and Croatian legislative will be commented and compared. Specially, having in mind possible future problems that could arise from differences in their legislative linked to migration and refugee inflows that may occur.

Presented at the Transatlantic Students' Conference

Addressing Diplomatic, Economic, and Migration Challenges in Southeastern Europe

James Madison University

Florence, 23-27 April 2018

1. Introduction

Error! Bookmark not defined.

2. Refugee crisis in numbers	2
3. International instruments and obligations for states	4
3.1. Legal aspects of the refugee crisis	6
3.2. Moral aspects of the refugee crisis	7
3.3. Logistical aspects of the refugee crisis	9
3.4. Can an EU state have a “closed gate” policy, and use military to impose it on the borders?	11
4. Distinction between police and army forces with regards to border competence	12
4.1. Arguments against military forces at borders	13
4.2. Arguments for military forces at borders	14
5. Legislative regarding military in Hungary, Slovenia and Croatia	16
5.1. Legislative in Hungary	17
5.2. Legislative in Slovenia	17
5.3. Legislative in Croatia	18
6. Epilogue of military at borders legislation changes	20
7. Conclusion	21

1. Introduction

In the heat of the migrant crisis of 2015 some European countries have decided to call upon their armies to serve and protect at their borders. At the time nobody was exactly sure what the armies were doing or what were their responsibilities at the state borders. Questions that arose were if Europe was closing gates for migrants and armies were there to strengthen the position and disable the passage, or if their role was supposed to be just supportive and subsidiary. The situation was more than troubled because there were a lot of elements that caused confusion and even panic within the European citizenships. There were no clear signs of any distinct political plan or agenda on the migrant crisis, no one offered answers as to what extent will the migrants be welcomed, which countries they will be situated in, and how the whole situation will evolve. Soon it was realized that among the migrants, there were also ISIL terrorists exploiting the situation which represented a great security threat. Because of that, there were problematic commentaries in international and domestic public opinions. The tensions were high, and the public was divided between acceptance of refugees or complete closing of borders for them. In those circumstances, governments of Austria and Hungary decided to send army forces to the borders. It was then that the public started to ask if that was a sign of militarization of borders and if force will be applied against people? Suddenly, there were more and more comments that military forces shouldn't be sent to the borders. Some of the opinions were based on the stand that all refugees are 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 analyze all elements of the migrant crisis that could impact the circumstances in which the role of military could be justified and in what way.

Firstly, some statistical information will be shown to stress how big of a logistical and humanitarian refugee crisis really was. With that in mind, analysis of international legal instrument and states' obligations on their borders will be brought in correlation with the numbers of legal and illegal entries and the man power necessary for that task. Especially if we have in mind how hard it was to differentiate real refugees from economic migrants. It will be argued if that situation and process fall in the scope of extraordinary. If that was the case, in extraordinary time special tolls and regimes could be recognized as a legal and legitimate

answer. Related to this, a legal theory of a social contract will be brought to this crisis. It could give answers to the legitimacy of military help on the borders and give a comprehensive solution on how to help refugees in a time where human rights are highly protected and breached.

To explain another problematic aspect of military on borders, cooperation between army and police will be taken apart to recognize some issues that may occur, especially to analyze the possibility and need for military to have police power on the borders. In addition, realistic and hypothetical examples will be given to show a different approach to this specific situation, and to explain that sometimes ideal stands cannot solve the problem. That will also help to understand the role of the governments during the refugee crisis which have serious concerns on their behalf, and they should determine how the army forces will be used to respond to all issues.

Furthermore, an analysis will be presented on how different European countries have answered on the migrant crisis, in particular Slovenia, Hungary and Croatia. The highlight will be on the military aspect of their response and how they differ from each other. This will introduce an EU perspective to the problem, but also bring up the following question. How is it possible that EU countries have so different and grave approaches to what is otherwise considered Common European Asylum System.

Bearing in mind the complex situation that migration generally is, mixed with legality, security and morality 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 migrant crisis that could affect the military aspect considered in this paper, an answer to the legitimacy and justification of their use will be offered.

2. Refugee crisis in numbers

The exact number of people who entered the EU with the migrant wave is quite hard, or even impossible to define. However, even the official and known numbers clearly emphasize the seriousness of the situation that occurred. In 2015, 1.26 million people applied for the asylum in the EU. The number got up to 2.5 million when 2016 is added to the sum.¹ But the data that frightens the most is 2.3 million illegal crossings that were detected.² Some could say that there

¹ Available on: <http://www.europarl.europa.eu/news/en/headlines/society/20170629STO78630/eu-migrant-crisis-facts-and-figures>, last checked: 21/03/2018.

² Ibid.

were people detected more than once in the illegal crossings, which is completely true. Still, that number is excessively too high that we could claim the situation was handled well and with a plan. Moreover, 2.2 million people were found illegally present (people that failed to register properly or who have left the country of the asylum claim) in the EU, and the year later, in 2016, that number dropped to 984.000.³ More interestingly, in 2015 533.000 people were ordered to return to their state but only 43% did, while a year later only a half of 494,000 ordered have returned home.⁴ In addition, the most troublesome data is that in two and a half years, from 2015 and only in the Mediterranean, around 10.000 people lost their lives trying to get to Europe. Also, 388.000 people were denied entry on the external borders of the EU, because they were considered economic migrants.⁵ That should be more than enough to describe the intense, and never seen, pressure suddenly put on the European countries' borders. This data is an obvious indicator of a logistical mess that, among all the others, stumbled upon Croatia, Slovenia and Hungary as well. This is when the use of military forces got in question. For example, we could imagine a country where snow falls only 2 days a year, but it falls so heavily that all the traffic is paralyzed. For traffic to function regularly, 300 expensive snowplows would be needed. These snowplows would obviously work only two days a year, while for the rest of the time, they would be a dead inventory. This simple example can be easily transferred to Croatia during the refugee crisis. Usually, there are only small numbers of migrants, refugees, or other illegal entries in the country, but suddenly there are 800.000 refugees passing through Croatia.⁶ In a normal year, not many employees are needed to establish an efficient border control, but during the crisis they are not enough. There is a need to employ more people, but this new employment would after the hard times, just like those 300 expensive snowplows, become an unnecessary surplus. In addition, it is needed to stress that Croatia through its history was mostly familiar with the process of emigration, not immigration. In those circumstances of unknown immigration process and with a huge lack of manpower it is not that strange to understand solutions for which governments reach. As it would be expected, most countries turn to the first field similar to the police which is usually used to help in the state of emergency - military forces.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Available at: <https://www.jutarnji.hr/vijesti/hrvatska/kako-se-odvijala-migrantska-kriza-na-pocetku-su-izbjeglice-bile-prihvacene-otvorenih-ruku-a-sada-se-zatvara-ruta-kojom-je-proslo-800.000-ljudi/29593/>, last checked: 21/03/2018.

3. International instruments and obligations for states

It is of the utmost importance for understanding of this paper to stress the complexity of the situation that the refugee crisis was. Crisis in which many intertwined problems occur on all levels of internal and international scale of one country. As it was already said, migrant waves were a legal, moral, and logistical crisis. In the following part many of the mentioned problems will be explained and grouped regarding their source. It is very hard to lay out difficulties of the crisis in an orderly fashion. The confusion that could arise after this chapter can be a good wake up call to see both sides of the crisis and to understand that it is impossible to resolve all problems by the book, in a legal or a moral view.

The most significant legal source related to the subject is the 1951 Convention Relating to the Status of Refugees (hereinafter referred to as Refugee Convention). The Convention prescribes that it is forbidden to expel or return refugees to a country where they may face persecution, with the exception if they pose a security threat for the country in question.⁷ Moreover, no refugee or the asylum seeker can be penalized because of the illegal entry. There are some presumptions for the aforementioned prescription. For example, a 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.⁸ Of course, the mentioned legal standards are interpreted broader and they are clearly applicable to the refugee crisis.⁹ The Refugee Convention was appended with 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".¹⁰ In the literature there are commentaries that the Refugee Convention was imagined as a functional compromise based on international cooperation. Compromise where neighboring countries would keep their borders opened for refugees to shelter and support them. The problem is that neighboring countries where usually poorer, so distant countries where to provide funding

⁷ Text of the Convention and the Protocol available at: <http://www.unhcr.org/3b66c2aa10>, last checked on: 21/03/2018.

⁸ Lalić Novak, G., AZIL Pravni i institucionalni aspekti, Pravni fakultet Sveučilišta u Zagrebu, Studijski centar za javnu upravu i javne financije, Zagreb, 2016, p. 55.

⁹ Ibid.

¹⁰ Op. Cit., note 7, Convention.

and help with that burden.¹¹ The real problem started when those “poor” refugees started coming to the borders of wealthier countries. No more were only Cold war, dissidents from the communist countries, applying for the asylum in the west. That was a point in time when the regime for entry in rich countries started to shift in a way that non-entrée term was introduced in legal systems.¹²

On the other side, every country has a right to defend its sovereignty and by that to protect its borders from illegal entries or any security threats. Not only that, European countries have an international (EU) obligation to protect its borders from unauthorized entries. Aforementioned obligation is proscribed by the Schengen system which is extended even to Croatia. For this reason, to enter Croatia and Europe legally, an individual must have valid traveling documents and enter through specifically designated border crossings in working scheduled time.¹³ Exceptions are always possible, and special oversights were made for possible refugees’ waves.

As it can be seen, there are two extremities in between which sovereign governments are trying to dance. On one side, there is an international obligation to accept all refugees that are on their borders, without a possibility to return them or forbid their entrance. On the other side, European countries have an obligation to all other EU states to protect their borders from illegal entrances, and with that, to protect safety of their own and EU citizens. Somewhere between those two ends, refugees are trying to reach their Convention rights - safety and security. In a process of the described “dance” every country has to bear in mind that their treatment of refugees has to comply with the European Convention for the Protection of Human Rights and Fundamental Freedoms, which in a migrant crisis where illegal entries are common can be very difficult.¹⁴ For example, articles like article 2 (right to life), article 3 (prohibition of torture and other inhuman or degrading treatments or penalties) and article 4 of Protocol 4 (prohibition of

¹¹ Leiserson, E., *Securing the Borders against Syrian Refugees: When Non-Admission Means Return*, *The Yale Journal of International Law*, vol. 42., 2017., p. 194.

¹² Orchard, P., *A Right to Flee: Refugees, States and the Construction of International Cooperation*, 2014, p. 206.

¹³ Regulation (EU) 2016/399 of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code)

¹⁴ Nazarski, E., *Protection of, or Protection from, Refugees - Reflections on Border Controls and Movement of Persons at the European Borders*, *Amsterdam Law Forum*, vol. 1, 2008, p. 38.

collective expulsions).¹⁵ The protection under those articles goes far beyond just their proclaimed name because European Court for Human Rights interprets the European Convention and they putted the protection bar sky high. It is a great achievement that protection was upgraded for 50 years, but in extraordinary times it is very hard to comply with its standards. It was already proclaimed that the refugees' crisis was not just a humanitarian one, but also a legal, moral and a logistical crisis as well.

3.1. Legal aspects of the refugee crisis

It is important to understand that there was no viable legal basis for the policy of open borders.¹⁶ It was already 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, as an example German Basic Law doesn't give a right to invoke asylum to a person coming from a country where his rights from Refugee Convention are assured.¹⁷ Furthermore, Refugees Convention' obligation to accept people is not definitive¹⁸ because there is an exception regarding security threat Also, all EU states have an obligation to check credentials of people entering EU on its external borders, especially having in mind the security risk behind terrorist threats. With that being said, this doesn't mean that countries have to close 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.

European Union is characterized as a slow bureaucratic giant that is not prepared or even not capable to create mechanisms for quick reaction for its vital interest. Long before any refugee crisis, there were already problems in the EU regarding common migration policies. Migration was a subject on which member states would call up on their sovereignty and proclaiming that they know what is best for their country.¹⁹ The final result was a compromise where "EU had a

¹⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, text available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf, last checked: 21/3/2018.

¹⁶ Peukert, A.; Hillgruber, C.; Foerste, U.; Putzke, H., To Allow or Refuse Entry: What Does the Law Demand in the Refugee Crisis at Europe's Internal State Borders, German Law Journal, Vol 18., No. 3, 2017, p. 618.

¹⁷ Ibid.

¹⁸ Op. Cit., note 11, Leiserson, E., p. 206.

¹⁹ Op. Cit., note 14, Nazarski, E., p. 39.

clear competence, such 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”.²⁰ To show how slow the EU really is, an extract from G. Papagianni paper is interesting in a way that she detected how 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.”²¹ In addition, she proposed a tighter cooperation of EU members because they have failed to react to Arab spring small number of inflows.²² Interestingly, the paper was written in 2013, two years before the real crisis, and with plenty of time to create a suitable mechanism.

As a conclusion of this paragraph, there was an evident lack of common EU mechanism which created a void, filled with uncertainty. This resulted with border EU countries “washing their hands” and going with their variation of “open borders” policy where they opened borders but just for the transition of refugees further into EU. They had no legal basis for that policy and there were procedural mistakes which resulted in infringement procedure against Croatia.²³ It can be said that governments can violate not only rights of refugees, but also of its own citizens and other EU members by reluctantly discarding international obligations and security checks. It is distinct that the EU had an extraordinary response to the refugee crisis where there was no rule of law and the result was an extraordinary legal uncertainty.

3.2. Moral aspects of the refugee crisis

Legal obligations have been explained, and a metaphor of how the Refugee Convention was imagined has been presented. It was supposed to be a compromise between already developed and still developing countries where they would bear the burden together, one side financially and the other logistically. There is a critical question arising in this paragraph - can the refugees go directly to wealthy countries? 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 decline their entry?

²⁰ Papagianni, G., Forging an External EU Migration Policy: From Externalisation of Border Management to a Comprehensive Policy, *European Journal of Migration and Law*, No. 15, 2013, p. 293.

²¹ *Ibid.*, p. 294.

²² *Ibid.*, p. 298.

²³ Available at: https://ec.europa.eu/home-affairs/what-is-new/news/news/2015/20151210_3_en last checked: 21/3/2018

It was stressed how public, and most importantly, experts said that no country can easily refuse or return a refugee, no matter where he comes from, or through which country he has passed. But is that so universally true? Do refugees have a right to choose where they will be refugees? No one can fight the rights they have, and it truly is an international obligation to provide them with safety, security and health necessities. But if a person decides that they don't 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 "thought-out" decision? If that is allowed, then there is a very thin distinction between being a refugee and an economic migrant. The health and help standard that would be offered to refugees is nowhere near the same in developing countries surrounded by war and in the developed western countries. Consequently, enormous duties and burdens could stumble upon rich countries because there are 50 million displaced people in the world from 2014 on²⁴, and only 15% of the refugees affected by the war in Syria, headed to Europe.²⁵ If all of them arrived to the developed countries, nobody could guarantee their social systems would sustain providing a high standard of help to this mass of people. Commentaries in literature say that despite the enormous probable burden that could befall rich countries, they have a moral obligation to open borders in a world where inequality between states has been much reduced.²⁶ They start with a perspective of western countries "illegitimate privilege" that their countries wealth represent for them, and that is why they need to open borders.²⁷ The real question is to what extent is this principle just a nice wish instead of a realistic ground for immigration politics. Even if we assume that countries could follow up that idea, it is clearly inapplicable in a time of huge refugee waves and crisis. Once more, 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 a way out from the refugees' crisis, but it is questionable if the way they are doing it is legal or moral. For example, Australia came up with the "stop the boats" action, where they stop refugees before they reach Australia

²⁴ Brennan, F., *Human Rights and the National Interest: The Case Study of Asylum, Migration, and National Border Protection*, Boston College International & Comparative Law Review, Vol. 39, No. 47, 2016, p. 51.

²⁵ Op. Cit., note 14, Nazarski, E., p. 41.

²⁶ Op. Cit., note 24, Brennan, F., p. 53.

²⁷ Ibid.

and offer resettlement in less desirable countries like Nauru and Papua New Guinea.²⁸ Australia's Government interprets international law in a 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.²⁹ EU also has interception programs where they try to stop boats coming from Africa, or they have deals with Turkey providing them with financial support, and in return Turkey does not let refugees through.³⁰ It is a legitimate question is it justified to publicly announce that you are in compliance with international laws but in the background make deals with countries such as Turkey, Libya and Egypt which will stop refugees' inflow even when refugees' rights are being breached.³¹

Also, if a country decides to accept only a part of the refugees, through refugee quotas, how can we justify that as moral. For example, if a million refugees need asylum but a certain EU state decides it will accept only 50,000 people, what is with the rest of them. If there is a legal obligation to allow entry to every true refugee, then increasing a quota number, while the majority is still closed on some border, cannot be morally justified. On the other hand, it was emphasized what kind of an economic, cultural and social change a huge refugee inflow could bring to a certain country. No country in this world would be able to execute such a program, so there is morality in providing help in third countries away from their borders. By all means, it is extremely hard to follow international legal and moral obligations during emergency situations and the refugee crisis in the EU countries was exactly that. There were many unanswered questions and doubts regarding the morally right thing to do. In other words, the refugee crisis was clearly an extraordinary moral test for both the public and the governments.

3.3. Logistical aspects of the refugee crisis

Usually there are no major, extraordinary shifts at the state borders in time of peace. For that reason, border police have the number of personnel that is sufficient to do its' primary duty and monitor possible illegal entries in the country. In Croatia, that number amounts to 6000, precisely to 4700 policemen at external boundaries on 2300 km of land border.³² What happens

²⁸ Ibid., p. 54.

²⁹ Ibid., p. 57.

³⁰ Op. Cit., note 11, Leiserson, e., p. 208.

³¹ Op. Cit., note 14, Nazarski, E., p. 41.

³² Staničić, F., Izazovi zaštite državne granice u migrantskoj krizi, 201. Tribina Pravnog fakulteta i Kluba pravnika Grada Zagreba, 2016, p. 28.

in extraordinary situations when the scope of border police work extends their personnel possibilities? For example, in a time of a refugee crisis. To exemplify a situation that occurred, a land border between Croatia and Serbia can be analyzed as a proof of the extraordinary conditions in the refugee crisis. Land border between Croatia and Serbia is approximately 300 km long. In the event of “closing borders” policy, refugees and migrants would have to group in front of some country’s boundaries. Let's say that happens along 300 km of the Croatia-Serbia border. Official numbers state that 6500 refugees passed daily through that land border.³³ With that intensity of refugees’ inflow, in two weeks there would be around 100,000 refugees. If that number is applied to the length of the land border, it would mean that there would be one refugee on every three meters of Croatia-Serbia border. Moreover, it is unthinkable to understand how 4,700 police officers could stop that number of refugees from possible illegal entries in Croatia. Once again, that is the number of police personnel for the whole country, not just Croatia-Serbia border.

Furthermore, refugees that once entered Croatia would need help settling and acquiring basic health necessities. Government shouldn't count on civil society or international organizations support, and it would need to ensure refugees with enough people to provide 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 ground reason to close border gates, otherwise their country could end up overwhelmed with the chaotic refugee inflow. This just shows that, for example Croatia, was not only unprepared to stop illegal entries, it was unprepared to logistically help refugees in efficient way. But it cannot be forgotten that all states have an international obligation to help refugees that ask for aid in front of their borders if they are not a security threat. That is why closing borders is not the right response, but enough personnel to accomplish international obligations is a solution.

That argument should offer a new perspective on military forces at state borders, it is an easy and justifiable reason why governments call upon army forces to serve at country gates. Clearly, army forces have war connotations linked to them. Therefore, their jurisdiction, mission and goals must be well presented to the public and refugees. Next paragraph will analyze

³³ Available at: <http://www.nacional.hr/proteklu-2015-godinu-u-hrvatskoj-obiljezila-i-izbjeglicka-kriza/>, last checked: 22/03/2018.

different possibilities in which army forces could serve at borders, and most importantly - can military be a justified mean for “closing gates” policy.

3.4. Can an EU state have a “closed gate” policy, and use military to impose it on the borders?

There are two main starting points for this argument. Firstly, a country has 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 entries or allow entry to possible security threats or economic migrants pretending as refugees. Those two main principles can easily be conflicted. In a great refugee wave, there is a possible collision of those two starting points with two solutions. Government can recognize the extraordinary situation and lack of personnel to handle a refugee crisis and decide to ignore the security threat and allow entry to everyone at their borders. In that solution, government has ignored its’ legal obligations and has possibly allowed entry to many economic migrants and possible terrorists. With the second decision, country can decide to ignore its obligation to grant asylum to refugees, but by closing gates no terrorist or “unwanted” economic migrant can enter.

Army forces could be used to impose both solutions, but to what extent can that be legal, legitimate and moral? In the first case, borders are opened and military (if there is a legal ground in the legislative for their actions) can be used for logistical help to refugees. Especially if otherwise, because of personnel shortage, that standard of help couldn’t be achieved. That kind of use is legal, legitimate and moral. Prior to answering if military can be used to impose second solution, the “closed gates” policy, the reality of that policy must be tested.

That test can effectively be shown on the example of the refugee crisis in Croatia. It has been said that the refugee inflow was 6500 person a day on Croatia-Serbia border. In the event of closing borders, every day there would be more and more refugees waiting. Bear in mind, refugees from Syria have passed half of the world to get to the gates of Europe, and they will not just turn around, which is understandable from their point of view. In a matter of few weeks, there could have been hundreds of thousands refugees at state borders, all eager to continue their journey to EU security. In that situation, too many refugees could group and it would be impossible to restrain their journey. No fences, personnel, or policy could stop them. Aforementioned example of 100,000 refugees at Croatia-Serbia border can be a good test.

Refugees could spread in a way that there would be one of them on every 3 meters of the Croatia-Serbia border. At one point of time, some of them would pass the fences and patrols. Soon, a great number of refugees could follow. Particularly if they would group themselves and spread to other unsupervised borders.³⁴ Armies could be sent to strengthen borders and stop them, but as the number of refugees would increase so would the pressure on borders. Naturally, the force to apprehend refugees that army should use would increase as well. At some point, lethal force could be needed to stop refugees. That scenario, of army shooting at refugees can be easily described as a war on refugees. That is a breaking point where army use on borders becomes excessive and questionable.

Country could close borders under safety and security reasons. They could say that the refugee inflow is too great to handle their domestic and international border obligations. It could be used as a reason to temporarily close states gates and send army to impose the rule of law on borders. A possibility of a great number of terrorist hidden in the refugee waves exists, and that is a scenario where army use in closing gates is legal, legitimate and moral. But what if they need to use lethal force on refugees to assure integrity of borders. If that possibility is not acknowledged in a time of a refugee crisis, then international obligations of security and safety formed in the rule of law on the borders cannot be acknowledged as well. Meaning, the only solution in a migrant wave is to let them through and risk the security and safety border duty. That decision would not need military at the borders, and questions and troubles that come with it.

4. Distinction between police and army forces with regards to border competence

Arguments that indicate the seriousness of the refugee crisis have been shown. No country could be able to orderly respond to the crisis with the personnel they normally dispose. The question and reason of calling upon military forces have arisen in the public and this paper. Still, wherever such a suggestion breaks, it gets fierce response. To indicate all benefits and possible troubles from military interference, both sides of the proposition must be examined.

³⁴ Op. Cit., note 32, Staničić, F., professor had reached the same conclusion regarding the impossibility of closed gates policy

4.1. Arguments against military forces at borders

The mere thought of the military is associated with assault guns and war zones. But are thoughts like that enough to stop proposition of army forces at borders or are objective and reasonable arguments needed as well? As far as this research has gone, there are not a lot of arguments that would deny the justification for military in this case. Primarily, arguments against military at borders are connected to the basic separation between army and police. Military forces have traditionally been used for attacking or defending other countries through wars, far away from homeland. The second main duty was defending the sovereignty and people of their own state against external aggressions. Only the police were imagined as a legitimate force to impose laws and will of their own government, not military. That is why armies cannot serve at borders and impose the state's rule of law.

Historically, police dealt with internal threats, it contained and stopped riots, enforced the legal regime, but with less force to soften and hide the use of sovereign power, as opposed to the military.³⁵ If armies are allowed to border, that would be characterized as a militarization of borders. Consequently, militarization of borders is a part of a broader process to militarize the state authorities, and that can never be a positive matter for citizens and democracy.³⁶ After terrorist attacks in the USA, the distinction of army-police competence started to lose importance in favor of militarization. However, people of USA do not want their soldiers to be policemen, or policemen to be soldiers, as Bert Tussing recognized the inexplicable mindset embedded in people.³⁷ There is one historic connotation that could explain a mindset as that in the USA. The Posse Comitatus Act, a federal law that sets the limits for army personnel to execute law enforcement activities at home.³⁸ It was originally introduced in 1878 to stop federal army to impose legislative on southern states, but with time it overtook different notion. Today, it is the main argument in the USA against military in domestic tasks. Chambers attributes that thought

³⁵ Jones, R.; Johnson, C., Border militarisation and the re-articulation of sovereignty, *Transactions of the Institute of British Geographers* 41 (2), 2016, p. 189.

³⁶ *Ibid.*

³⁷ Tussing, B., New Requirements for a New Challenge: The Military's Role in Border Security, *Homeland Security Affairs*, Vol. 4, No. 3, 2008, p. 4.

³⁸ Chambers, L. S., *Force Multiplier: The Military's Future Role in U.S. Border Protection*, USAWC Strategy Research Project, U.S. Army War College, 2013, p. 12.

to public aversion from army in the states jurisdiction, and to the desire of military leaders to withhold their personnel from participating in domestic emergencies.³⁹

There are lot of evidences for the border militarization in the EU, as well. For example, interception programs on external EU borders are conducted by military or paramilitary groups from non-EU countries.⁴⁰ Also, images from Hungary in the heat of the refugee crisis are hard to forget. Hungary has built a “110 mile long fence” at their border, and has used extreme measures against migrants.⁴¹ 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 the borders of the EU in the past decade.⁴² It is clear that roles of both police and military are changing, limits of the change are still unknown, but the number of deaths is rising along with the money budgets for “border militarization”.⁴³

4.2. Arguments for military forces at borders

The world is changing, everyday it's smaller and faster. Many connected issues are progressing and new challenges are emerging. Harsh developments have affected borders as well. Old system of borders and sovereign states is challenged by cross-border movements of capital, goods and people.⁴⁴ Also, new threats for states, like terrorism have arisen, and borders have been transformed to sites for military security activities, focused on preventing violent threats from entering.⁴⁵ Current age is time where total wars are a thing of the past, and armies' function is shifting in accordance with that process. For example, refugees have been used as tools in a modern warfare many times, and that is why they are characterized as a security threat.⁴⁶ Therefore, army function should shift towards refugees managing, and consequently to 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

³⁹ Ibid., p. 13.

⁴⁰ Op. Cit., note 35, Jones; Johnson, p. 193.

⁴¹ Ibid.

⁴² Ibid., p. 195.

⁴³ Ibid., p. 191.

⁴⁴ Op. Cit., note 35, Jones; Johnson, p. 195.

⁴⁵ Ibid., p. 187.

⁴⁶ Sanderson, M. J., The Need for Military Intervention in Humanitarian Emergencies, *International Migration Review*, Vol. 35, No. 1, 2001, p. 121.

successful entry.⁴⁷ Data estimates that the odds for the apprehension in any illegal crossing in 2011 was just 20 percent.⁴⁸ Best instrument for restraint of illegal entries in the country is the physical presence of people. Most of the world's states already have the needed personnel in their military branches.⁴⁹ While army functions on external fields are reducing, a moderate shift of their personnel duties to border security could be the correct measure. Otherwise, it is not logical to expect from the public to duplicate governments' assets and capabilities already contained in the military that can fulfill the assignment.⁵⁰

Moreover, when somewhere in the world breaks out a crisis, public and governments easily justify the use of its own armies to intervene in a country across the Earth. In other words, there aren't major problems in employing its military personnel to breach some countries sovereignty under pretenses of helping the domicile citizens. Reports clearly indicate, when armies are used outside domestic lands, in humanitarian refugee crisis, there is always another agenda.⁵¹ Frequently, military interventions as that end up breaching someone's sovereignty or individual human rights.⁵² Still, humanitarian, and refugee crisis cannot pass without military presence helping civil organizations. Their role was often portrayed as a "norms entrepreneur" where they "established a policy of consensus around the protection of the forcibly displaced, their individual rights protection and created an ethic of intervention".⁵³ Simple conclusion emerges, if military has become an inherent element for refugee help abroad, why shouldn't they assist with same duties at home. Although army help is always considered as a last resort solution, under properly legislative circumstances, military intervention could steer the refugee crisis in the right direction. Simply by stopping the illegal entries and logistically helping refugees seek asylum there would be less concerns and problems.

In a refugee crisis there is always a large group of people crossing borders, and often it is hard to implement the rule of law and cooperate with them. Experience has shown that in crisis as that there is a demand to enforce governments rule. While enforcing power on a group of

⁴⁷ Op. Cit., note 38, Chambers, p. 11.

⁴⁸ Ibid.

⁴⁹ Ibid., p. 20.

⁵⁰ Op. Cit., note 37, Tussing, p. 16.

⁵¹ Weil, C., The Protection-Neutrality Dilemma in Humanitarian Emergencies: Why the need for Military Intervention?, *International Migration Review*, Vol. 35, No. 1, 2001, p. 80.

⁵² Ibid., p.82.

⁵³ Ibid., p. 84.

people as refugees “the real nature of dynamics of violence” exists and must be recognized.⁵⁴ Otherwise, government will not be prepared and if they don't impose the rule of law on the borders of EU, a possible result may be chaos. 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 good and precise legal ground.⁵⁵ Legislative that prescribes military presence in everyday life must pass a thorough parliament and public discussion. Everyone addressed by that law, refugees and citizens, should know army's role in the crisis.⁵⁶

EU states like Hungary have not negotiated military's function on the borders with the public, beside violence that is one of the reasons why international public and governments condemned the use of military in the refugee crisis. But it is forgotten or neglected that the EU through EUBAM (EU Border Assistance Missions) program that operates under “Security and Defence” pillar is militarizing the refugee crisis as well. For example, one of EUBAM programs is to train 500 of Libya military personnel for border operations, and there are many other programs with the EU support that are executed by military or paramilitary groups.⁵⁷ Army presence at borders was labeled as an anomaly, but from what is demonstrated it is clear it will be a recurring anomaly.⁵⁸ Therefore, legislative must be adjusted for the new military roles in humanitarian crisis, abroad and at home.

5. Legislative regarding military in Hungary, Slovenia and Croatia

In last three years some states in the EU decided to respond to the refugee crisis by sending military to borders. Hungary, Slovenia and Croatia are representative models how governments differently resolved the problem of sending army troops to the borders. All three countries are members of the EU, although asylum and migration system is in the EU jurisdiction, these states have unlike models.

⁵⁴ Op. Cit., note 46, Sanderson, p. 123.

⁵⁵ Mason, C. R., *Securing America's Borders: The Role of the Military*, Congressional Research Service Report for Congress, 2013, p. 3.

⁵⁶ Op. Cit., note 51, Weil, p. 102.

⁵⁷ Op. Cit., note 35, Jones; Johnson, p. 194.

⁵⁸ Op. Cit., note 37, Tussing, p. 14.

5.1. Legislative in Hungary

Hungary had grave changes in its legislature regarding refugees and border security. Their parliament passed on a Law that amended the Police Act and the National Defense Act. Hungary restricted entry for refugees to the maximum extent and in addition it decided to severely oppose any attempt of illegal entry.⁵⁹ Consequently, military forces were appointed with dangerous and serious powers that could be used in securing borders and against illegal refugees. The Law allowed army to assist police in checking passports, controlling the flow of migrant traffic and to detain suspects. However, the law also permits military forces to use non-lethal force, such as rubber bullets, for border control.⁶⁰ TV news and reports from Hungarian border in which force was used against refugees or in which people desperately climbed across the wired fence have aired all around the world and aroused disturbed comments everywhere. Hungarian government repeated their stand of securing borders with no-patience for illegal entries attempts. Still, comments were against any harsh powers imposed on refugees, what showed the tough possible solutions to the crisis. With great difficulties can someone explain as to where is the thin line when the open borders policy stops tolerating illegal entries in compliance with international borders obligations.

5.2. Legislative in Slovenia

Slovenia amended their Defence Act adding article 37.a which prescribes extraordinary competence for army forces. It says that if the security situation demands, their parliament can, based on the government's proposal, decide to call upon military forces to secure the borders. To pass the proposal, Slovenian parliament must vote on it with $\frac{2}{3}$ majority.⁶¹ Activation of the extraordinary competence would appoint following powers to the military at the borders: 1) warning orders, 2) instructing orders, 3) temporal apprehension, 4) control on groups of people. Aforementioned powers usually are not in the military's competences, but on the government/parliament proposal they can act upon them for maximum of three months, if they

⁵⁹ <https://www.reuters.com/article/us-europe-migrants-hungary-law/hungary-beefs-up-border-with-army-warns-migrants-to-stay-away-idUSKCN0RL1K220150922?feedType=RSS&feedName=topNews>, last checked on: 24/03/2018

⁶⁰ <http://www.jurist.org/paperchase/2015/09/hungary-lawmakers-approve-use-of-non-lethal-weapons-on-refugees.php>, last checked on: 24/03/2018.

⁶¹ Amendments on the Slovenian Defence Act, text available at: <https://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2015-01-3750?sop=2015-01-3750> (on Slovenian), last checked on: 24/03/2018.

are not extended.⁶² The amendments to the Defense Act came after the crisis “exceeded all manageable possibilities”, but the extraordinary competence were not abused on the refugees, and the act had a thorough public and legislative procedure.⁶³ Result of the legislative was an Act that gives adequate enough powers for the military to help in the crisis without hidden agendas that could militarize borders or the society and provoke a serious public critique.

5.3. Legislative in Croatia

Croatia has also amended its laws, allowing military to serve at borders, but with considerably differences considering what Hungary and Slovenia did. Croatian government proposed, and the parliament passed on the amendment to the Defence Act and Border Control Act. Article 62.a of the Defence Act now allows military to give support to the police in securing the border. Minister of defence suggests the military use but the government must allow it with prior permission from the President of The Republic of Croatia.⁶⁴ Army can support police accordingly to the Border Control Act, article 5, prescribing that military can be called upon borders because of security or humanitarian reasons. In addition, the Act clearly says that army forces have to oblige police commands while serving at borders.⁶⁵

Background to amendments in both Hungary and Slovenia were security reasons, where governments realized that the refugee crisis has become logistically impossible to regulate in accordance with border security obligations. That was the main reason to send additional personnel through military forces to borders. To fight any illegal attempts or threats and help in the arrangement of refugee transfers through their territory. The same background existed in Croatia, but it was unusual how amendments have not provided military with police powers like in Slovenia. Croatia had frequent needs for military intervention in its past, and in any humanitarian and environmental extraordinary situation they are called to serve. Consequently, seeing army forces on first lines in extraordinary situations was not strange in the public, it was even expected from them to arrive and support. Moreover, the Croatian Constitution allows

⁶² Ibid.

⁶³ Available at: <https://www.theguardian.com/world/2015/oct/21/slovenia-calls-in-army-refugee-crisis-borders-europe>, last checked on: 24/03/2018.

⁶⁴ The Defense Act, Official Gazette 73/13, 75/15, 27/16, 110/17, available in Croatian at: <https://www.zakon.hr/z/334/Zakon-o-obrani>, last checked on: 25/03/2018

⁶⁵ The Border Control Act, Official Gazette 83/13, 27/16, available in Croatian at: <https://www.zakon.hr/z/450/Zakon-o-nadzoru-dr%C5%BEavne-granice>, last checked on: 25/03/2018

military forces to aid police and other public bodies in extraordinary situation.⁶⁶ Throughout this whole paper, the extraordinary in legal, humanitarian and logistical sense of the refugee crisis was emphasized. Therefore, for the purpose of this paper and to clear any misunderstanding, Ministry of the Interior was contacted to determine intentions and goals behind aforementioned Croatian amendments to the laws.

Questions addressed to the Ministry had to clarify if there is a possibility for military to use force at borders, or if they can help in any way against illegal activities, and if not, what are armies possible duties at borders.

First question said “In your interpretation of the Border Control Act, can military forces have police powers at state borders?”. The Ministry responded that “upon providing support to the police in border security, military forces are not allowed to exercise police powers”. Which would mean that Ministry officials are familiar with the legislative regime, and the possible consequences if new migrant waves arrive. Secondly, “In the event of a new migrant wave, can military forces be used to restrain any illegal entries in Croatia?”. Answer says “military forces would not be used in tasks and sites where they can have a direct contact with illegal migrants.”. Lastly, they resolved the question of what duties would army personnel have at borders, where they provided a broad list of possible tasks. For example, military would help in the migrant transport, data collection, supervision with and without technology, air surveillance, food and water deliveries, help and rescue missions, infrastructure works, sea patrolling etc.⁶⁷

Now that the EU has already accepted a minimum of 1.5 million refugees and migrants, it is a fair question if the new refugee wave would be welcomed. Especially after knowing about interception programs, and EU-Turkey deal. In Croatian surrounding, two EU members have given police powers to the military, and in case of “closed gate” policies implemented throughout EU, they are prepared to stop any illegal attempt to enter their territory. That would mean that under current legal regime, Croatia could easily end up as a hotspot for refugees and migrants as a EU frontier. That is not necessarily unwanted, if they won't to allow refugees to

⁶⁶ The Croatian Constitution, Official Gazette 56/90, 135/97, 8/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, available in Croatian at: <https://www.zakon.hr/z/94/Ustav-Republike-Hrvatske>, last checked on: 25/03/2018

⁶⁷ Their responses were given by the Sector for Public Relations of the Ministry of the Interior through email correspondence. There were more questions, and few more were answered but only significant abstracts were taken in this paper.

their territory and aid them if they seek help. However, Croatian government has repeatedly stated that they do not intend to become a refugee hotspot, and even with military that would have police powers it would be hard to implement “closed gate” policy, and without that, it would be logistically impossible.

6. Epilogue of military at borders legislation changes

Firstly, difference between arguments for army forces at borders that are articulated in the USA or in the EU must be stressed. The USA is confronted with a continuous and vast migrant inflow. In addition, in the USA there are mostly economic migrants at borders, not refugees as in EU. Justification for military use is not the same, in the USA there are no extraordinary issues, the migrant inflow is steady and long standing. The solution for border control is not in sending army forces to borders, military should be contained for warfare and extraordinary domestic matters. The EU, refugee crisis is an entirely different issue. Refugee wave of millions persons in two years is an extraordinary situation that calls for extraordinary measures.

Any sovereign country has international obligation that by the principle of the rule of law must be obliged. Refugees that are not security threats must be granted an asylum, and illegal entries across borders should be stopped. Thus, if both of mentioned standards are followed, in a refugee crisis equalized with an extraordinary situation, military forces can be used. Most important is to stop extremism, bans and fear on one side and illegal entries, activities or impossible expectations on the other side. The theory of the social contract should be used as a groundwork for a solution. First societies, the people, have decided to waive some of their rights originated from the absolute freedom, in exchange for security. If they all have an absolute freedom they are all judges for themselves. Because life as that is unsustainable, they abdicated absolute freedom by abandoning some of the rights and freedoms in the name of security presented as a sovereign and legitimate rule they accept.⁶⁸ In the 2015 crisis, refugees that until then accepted another culture and states sovereign, arrived in great number to EU. Groups of refugees were so vast that extraordinary measures were necessary, and entirety of them sought not only safety they were deprived in their homeland, they sought rights from a sovereign they did not acknowledged before. In other words, vast groups of refugees by invoking asylum and

⁶⁸ Rousseau, Jean-Jacques, *On the Social Contract*, (editor) Negri, Paul, Dover Publication Inc., 2016, p. 8-10.

rights of that country, concluded a new social contract with a new sovereign rule they accept. Therefore, they must be clear that by invoking new rights they accept new obligations. If they are able to acquire rights only because of the extraordinary situation, then their rights are extraordinary and consequently so can be their obligations. Because of that, domicile citizens that revolt against refugees must be familiar with that concept. If refugees are getting benefits they “do not deserve”, they can be balanced with the obligations that will ease EU citizens, for example measures securing safety that ordinarily may not be imposed on them. On the other hand, people that reject refugees, and call for “closed gates”, need to understand that they have the same social contract with the same sovereign that refugees want to conclude. Nobody was allowed to interfere with their contract, and in the same way they are not entitled to that action. Because no one can stop another person in achieving his rights and place of living, if they all abandoned absolute freedom for the same sovereign, the same security and obligations.

After the analysis of all elements of the refugee crisis that could impact on the justification of military use at borders, the solution is simple. The use of military forces in extraordinary situations at borders is legal, legitimate and moral if basic international obligations are obliged. But as for the army role in the “closed gate” policy, it can be legal and legitimate if the safety of its own citizen cannot be assured. But, as of the moment that lethal force is needed to stop the refugees, when the war on refugee engages, it is impossible to morally rationalize and justify the use of military forces.

7. Conclusion

In the end, not to repeat the deduction from the last paragraph, only some considerations must be emphasized. The refugee crisis was a legal, humanitarian, logistics and moral crisis. The number of people that chaotically arrived to the EU raised many questions and uncertainties. Mostly no solutions were offered, and those that were, had a divided support. There are obligations and rights as for refugees and as for countries. For the answer, the theory of the social contract proposes a well-balanced aspect to the refugee crisis and it should be recognized in the future. For now, wars all still waged, refugees still exist, and only 15% of those that are affected by the war in Syria arrived in the EU. If a new migrant wave reaches Croatia their government will have troubles, but with right military policies they could avoid them. Only if

international obligations are fulfilled, refugees are safe under the asylum protection, and safety measures and a social contract are conducted at the state border.