

Witold Kuźnicki

Operations of the Polish Armed Forces during the ongoing crisis

Present state of affairs

Introduction

The military is one of the foundations of state security. In the Polish legal order, in accordance with many laws, such as the Act on State of Emergency or the Police Act, it is the last-resort tool of the state to protect internal security. As the crisis on the Polish–Belarusian border [in July 2021](#) escalated, troops and subdivisions of the Polish Armed Forces were sent to assist the Border Guard. Soldiers, in particular those from 16th and 18th Mechanized Divisions and from the Territorial Defence Forces, were assigned a number of policing and [reconnaissance](#) tasks. The clearly defined tasks of soldiers, however, lacked a clear and publicly available legal basis for their actions.

Background of the current situation: the use of the military in the fight against the pandemic

The current operations of the RP Armed Forces are an extension of the domestic engagement of the army in 2020. During the first phase of the battle against the COVID-19 pandemic, the RP Armed Forces were used to carry out domestic policing operations. In mid-March 2020, after the borders were almost fully closed, including those with other European Union countries, soldiers were used to support the activities of other services: the Police and Border Guards. This was done on the basis of two ordinances of the Minister of National Defense, dated [14](#) and [18](#) March, respectively, and two ordinances of the President of Poland, dated [15](#) and [18](#) March, respectively, which approved these ordinances. Given the scale of the challenges, the support was extensive. The tasks included [supporting the Border Guard in border protection, patrolling the streets, providing food support to isolated citizens, and supporting health services](#).

After almost three months of supporting border control and in view of lifting the control on the internal borders of the European Union again, on 12 June 2020 the Minister of National Defence issued an [ordinance](#) revoking an earlier ordinance on the units and subunits of the Polish Armed Forces supporting the Border Guard. From that time until the outbreak of the humanitarian crisis on the Polish–Belarusian border ([called an operation or even a hybrid war by Polish government officials](#)), the Border Guard conducted its operations without the assistance of military personnel.

Case Study: An Incident Involving the Military and Civilians

In November 2021, there were a number of high profile media incidents involving military personnel that exposed the wider public to the involvement of the Polish Armed Forces in operations against migrants. After one of these incidents, on 26 November 2021, which involved soldiers of the Territorial Defence Forces (TDF), the TDF Command issued a statement citing the legal basis for their actions. The wording of this statement was changed twice within three days.

In the first version of [the press release](#), the WOT Command cited [an undated presidential ordinance on support of the armed forces as the legal basis for their actions](#). In the second version, it cited [an ordinance dated 15 March 2020](#). In the final version, however, the order was said to be a ‘classified document’. Each of these statements had the same date of issuance.

Legal Status

The legal basis for the actions of the military assisting the Border Guard

The Armed Forces of the Republic of Poland, except for the Military Gendarmerie (hereinafter referred to as MG), do not hold independent powers to carry out law and order functions. The authority of the Military Gendarmerie is limited exclusively to the list of persons set forth in Art. 3 §2 of the Act on Military Gendarmerie and Military Law Enforcement, in particular soldiers on active military duty or persons who are not soldiers, if they collaborate with soldiers on active military duty in committing an act prohibited by law under penalty. The MG has no autonomous competence with respect to civilians who are not civilian employees of military institutions or do not collaborate with such persons. Military divisions and subdivisions may obtain broader authority to maintain public order in the country only exceptionally under selected provisions: [the Police Act](#), [the Border Guard Act](#) and [the Act on State of Emergency](#).

In the current crisis on the Polish-Belarusian border, the provisions of the Border Guard Act, particularly Art. 11b, were used from the very beginning. According to this article, military detachments and subdivisions act as assistance to the Border Guard and are coordinated by the commanding officer of the Border Guard division or the Commander-in-Chief of the Border Guard, depending on the territorial coverage of the operation. Art. 11b differs from Art. 11c in that it does not allow the Polish Armed Forces to take independent actions.

The key to the legitimacy of policing operations of soldiers in Poland is the process of authorisation by the constitutional organs of the state. Two scenarios are possible for the Art. 11b of the Border Guard Act: one based on the ordinance of the President of the Republic of Poland, issued on the motion of the Prime Minister, or – in case of urgency – another based on the decision of the Minister of National Defence, taken on the motion of the minister in charge of internal affairs. In the second case, however, again the key is the order of the President of Poland approving or revoking the decision, which should be issued immediately.

The powers and duties of the military in law enforcement operations

Soldiers deployed to support the Border Guard are granted a number of powers specific to Border Guard officers. In particular, they may conduct a personal search, check a person's identity or otherwise identify a person or detain a person in the manner and in the cases specified by the provisions of the Code of Penal Procedure and other acts. They may also search persons, objects, premises and vehicles in the manner and in the cases specified in the provisions of the Code of Penal Procedure and other laws.

Moreover, these rights are exercised according to the rules and in the manner specific to the Border Guard officers. Thus, the law imposes on soldiers obligations arising from acts and [the regulation of the Council of Ministers on the exercise of some rights by Border Guard officers](#). In particular, it is mandatory for soldiers who perform official duties to provide their rank, name and surname, in a fashion that makes it possible to record these data and the reasons for taking official actions. Additionally, at the request of the person with regard to whom the action is being carried out, the soldier is obliged to indicate the legal basis for the action.

It is worth noting that during the [incident](#) on November 16, when soldiers on duty in Wiejki near Michałow detained three photojournalists, the recordings show that they did not comply with the obligation to provide their data. Such conduct, if it occurred under the Border Guard Act, raises the question of a possible breach of duty by a public official.

Classified ordinance of the Minister of National Defence and ordinance of the President of the Republic of Poland

According to the latest version of the TDF spokesperson's statement of 26 November 2021, the ordinance of the President of the Republic of Poland, under which the Polish Armed Forces currently operate, remains classified. In past practice, Presidential orders that are published in *Monitor Polski* have never been exempted from public disclosure. The key word here is 'shall publish' from Art. 11b of the Act on Border Guard. This word should be interpreted as requirement of publication, hence transparency. While the law allows the Minister of National Defence to publish regulations in the classified edition of *Dziennik Urzędowy*, there are no such regulations for acts published in *Monitor Polski*.

Conclusion

The absence of an openly published Presidential ordinance is a serious problem for both those bound by the law and those who enforce it. While it might be advisable to file a complaint against the inaction of a government body, the history of administrative court rulings may suggest that the complaint is highly likely to be rejected, because the provisions that provide for the right to lodge a complaint concern cases where the action is addressed to a uniquely designated entity.¹ However, given Art. 231 §1 of the Penal Code, this situation may result in future legal repercussions for public officials who were required to publish the Order of the President of the Republic of Poland. The failure to promptly and transparently publish the act in *Monitor Polski*, which would have validated or repealed the decision of the Minister of National Defence, should be interpreted as a failure to carry out official duties. The possible imposition of a secrecy clause, which is not stipulated by the law, should be interpreted as a breach of such duties.

However, there is a higher risk for those directly involved in actions taken in response to the crisis on Poland's eastern borders. As demonstrated by the revisions to the 26 November statement of the Territorial Defence Forces Command, no clear guidelines were available in the Polish Armed Forces. A public officer has a primary legal obligation to become familiar with the acts that define his or her powers and duties. Thus the soldiers performing their official duties in Poland may expose themselves to charges of both abuse of power and dereliction of duty. Meanwhile, in an unclear legal situation caused by the central authorities, it is impossible to satisfy this obligation. Both the actions that exceed the powers specific to Border Guard officers, as well as those where they do not fulfil the duties specific to them, resulting from laws and relevant regulations, may be qualified as fulfilling the requirement of Art. 231 §1 of the Criminal Code. The criminal sanction for this offence is imprisonment for up to three years.

The lack of a clear and publicly available basis for the operation of the Armed Forces of the Republic of Poland in the country and their involvement in carrying out policing tasks is at odds with the constitutional principles of a democratic state of law and the civic and democratic control over the Armed Forces. It also generates the aforementioned legal risks for both soldiers and civilians. For the sake of the legal security of civilians and soldiers, de-escalation of contentious incidents, and protection of constitutional order, it should be recognised that soldiers operate under the Border Guard Act. This provides the space and framework for mutual action: complying with the powers granted to soldiers by the Act, as well as enforcing the duties under the Act. These duties include, in particular, the above mentioned requirement for an officer who is performing official duties to state their rank and first and last name in a way that makes it possible to record these data.

However, any questioning of the legal basis for the actions of public officials in the absence of the publication of the relevant President's ordinance should be made only at the judicial stage of examining disputes

1 Cf: G. Wierczyński (2016). *Redagowanie i ogłaszanie aktów normatywnych. Komentarz* [Editing and announcing normative acts. Commentary on the Act on the publication of normative acts and some other legal acts, taking into account all amendments to the Act published until 1 March 2016]. Warsaw: Wolters Kluwer.

between soldiers performing their duties under the Act and the persons in relation to whom possible actions are taken, and not during the operation itself. It is also to be hoped that the legal basis, which should be provided by the central authorities to soldiers, will be reviewed by the judiciary relatively soon.