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Legal Aspects of the Agreement Between the Government of the Republic of Poland and the Government of the United States of America on Enhanced Defense Cooperation – 2020

Abstract

On August 15, Mariusz Błaszczak, Minister of National Defense, and Michael Pompeo, U.S. Secretary of State, signed an agreement to strengthen the permanent presence of U.S. troops in Poland. The agreement was signed in the presence of the President of the Republic of Poland Andrzej Duda.

The agreement sets the legal framework for the presence of U.S. troops in Poland. The adopted principles are based to a large extent on regulations common to all NATO members, i.e. the NATO SOFA agreement of 1951, which Poland adopted with its membership in the North Atlantic Alliance.

The agreement, which replaces the existing agreement from 2009, has been concluded for an indefinite period, and both parties can terminate it after informing the partner.

This article details the provisions of the new international agreement, comparing its provisions with the existing legal regulations in the field of Polish-American cooperation.

Key words: agreement, government, NATO, cooperation, defence

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The Armed Forces of the Republic of Poland serve to protect the independence of the state and the integrity of its territory and to ensure the security and inviolability of its borders. They shall maintain neutrality in political affairs and shall be subject to civilian and democratic control¹. Being the basic element of the national defense system, they participate in the implementation of security policy and defense policy of the Republic of Poland².

The Polish Armed Forces (PAF), as the guarantor of national security, also cooperate with the armed forces of other countries of the North Atlantic Treaty Alliance³ (NATO)⁴, Partnership for Peace⁵, and the United Nations⁶. In addition to guaranteeing the defense of the state, countering aggression within the framework of allied obligations, and participating in the processes of maintaining the global peace and security, PAF's primary task is to support internal security and provide assistance to the society. Thus, the PAF play the most important role in the chain of constitutional maintenance of internal state security, not only in times of war or peace, but also in times of crisis –

1 The Constitution of the Republic of Poland of April 2, 1997, Art. 5 and 26, Journal of Laws of the Republic of Poland (abbreviated Dz.U.) 1997, no. 78, item 483, as amended.

2 See <https://www.gov.pl/web/obrona-narodowa/sily-zbrojne-rp> [access: 30.01.2021].

3 Military cooperation between NATO Member States is regulated in the Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, done in London on June 19, 1951. Poland signed and ratified NATO SOFA on 27th May, 1999 (Act of Ratification, Dz.U. 2000, no. 21, item 257).

4 The Republic of Poland joined the North Atlantic Treaty Organization on March 12, 1999, which makes it one of now 30 members of NATO, a military alliance concluded on August 24, 1949, under the North Atlantic Treaty signed on April 4, 1949.

5 Partnership for Peace is a framework program of cooperation between NATO countries and countries aspiring to join NATO or those that do not want to belong to it, but want to cooperate with it, such as Finland or Ireland. These countries take part, for example, in military exercises organized by NATO. Partnership for Peace was set up in a form of an international agreement, Agreement between the Parties to the North Atlantic Treaty and other States participating in the Partnership for Peace regarding the status of their forces, and its Additional Protocol, done in Brussels on 19 June 1995. See https://www.nato.int/cps/en/natolive/topics_50349.htm [access: 19.12.2020].

6 The Charter of the United Nations, the statutory document of the United Nations, explicitly states that the signatory states shall cooperate for the maintenance of international peace and security and the promotion of the economic and social advancement of all peoples (UN Charter, Preamble). The UN Charter was signed at San Francisco on 26 June 1945. The amendments included here are: Amendments to Art. 23, 27 and 61, 557 UNTS 143, adopted by the General Assembly Resolutions 1991A and B (XVIII) of 17 December 1963, entered into force on 31 August 1965 for all Members; Amendment to Art. 109, 638 UNTS 308, adopted by the General Assembly Resolution 2101 (XX) of 20 December 1965, entered into force on 12 June 1968 for all Members; Amendment to Art. 61, 892 UNTS 119, adopted by the General Assembly Resolution 2847 (XXVI) of 20 December 1971, entered into force on 24 September 1973 for all Members.

state of natural disaster, emergency and martial law, as set forth in the text of the Polish Constitution, and other lower-level acts.

The Republic of Poland actively participates in international security and defense activities and exercises its sovereign independence. In accordance with Art. 6 of the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 providing that: „Each State shall have the capacity to conclude treaties”, it enjoys the inherent power of self-determination and the capacity to enter into international agreements⁷. *Ius tractatum* entails freedom of shaping internal and external policy by sovereign states, including through conclusion of bilateral or multilateral defense agreements. Proper, effective cooperation between military systems of allied countries requires the regulation of important legal aspects, such as crossing national borders, the use of weapons and ammunition, the operation of a general logistical support system, and last but not least issues of criminal and disciplinary jurisdiction.

In recent years the PAF, exercising the executive prerogatives of the Government of the Republic of Poland, have been conducting intensified military cooperation with the United States Armed Forces (US AF). In many aspects, the US AF has become a model for the PAF, which is obvious given the proportions characterizing the size of the armed forces, their ability to operate in different parts of the globe or the equipment capabilities the US AF possess.

The Polish American cooperation is extremely important for the security of Europe and especially for the entire eastern flank of NATO. Both countries are members of NATO, being military allies, for many years have participated together in NATO military exercises in Europe, as well as NATO international peacekeeping or stabilization operations such as International Security Assistance Forces (ISAF) in the Republic of Afghanistan, Operation Enduring Freedom in Iraq, or coalition military operations such as the Global Coalition in the State of Kuwait, the Republic of Iraq, and the State of Qatar to combat the growth of the Islamic State and the Levant (ISIS or Daesh).

For over 25 years, the US AF have been supporting the development of the Polish military under the State Partnership Program (SPP). They have also mentored the creation and organization of the Polish Territorial Defense Forces, an equivalent of the US National Guard Corps. Under Foreign Military Sales (FMS) procedures, they are the largest supplier of military equipment for the Republic of Poland, such as the 5th generation F-35A Lightning II multi-role

7 Dz.U. 1990, no. 74, item 439.

aircraft, or Patriot missile batteries in 3+ configuration with IBCS system, used exclusively by the U.S. and Poland.

In accordance with the provisions of the National Security Strategy of the Republic of Poland of 2020, the primary factor shaping the security of Poland is its strong commitment to transatlantic and European structures, as well as the development of bilateral and regional cooperation with key partners, including the strategic partnership with the United States of America. Poland's security is also strengthened by developing cooperation with the United States of America not only in the area of security and defense, but also in the area of energy, trade, investment, and research and development⁸.

The process of strategic adaptation of the North Atlantic Alliance has led to the strengthening of the allied policy of deterrence and defense, including through the presence of allied forces on Polish territory. In recent years, this enhanced military presence has been the implementation of the most significant provision of the 2016 NATO Summit in Warsaw, which – as part of the international response to the aggression of the Russian Federation on the territory of Ukraine – became the deployment of new military bases in Central Europe, including on the territory of the Republic of Poland.

The US AF actively participate in the implementation of the NATO obligations and assurances and have been stationed in the Polish territory for many years. According to the political declarations of Presidents Andrzej Duda and Donald Trump, as well as the political circles close to the new U.S. President Joe Biden, the presence of U.S. forces in the Polish territory will be permanent and intensified. The clearest example of the development of relations in the military field is the establishment in Poland of the V Corps of the U.S. Land Forces⁹.

The need to re-regulate the principles of Polish American military cooperation in such a new geopolitical environment led to the conclusion of the Agreement between the Government of the Republic of Poland and the Government of the United States of America on Enhanced Defense

⁸ *The National Security Strategy of the Republic of Poland*, Warszawa 2020.

⁹ For details, see <https://wiadomosci.onet.pl/tylko-w-onecie/mike-pompeo-w-polsce-umowa-wojskowa-podpisana-szczegoly-nie-sa-znane/8p2nc7t> [access: 28.12.2020]. M. Szopa, *Gen. Joks zastępcą dowódcy V Korpusu US Army*, <https://defence24.pl/general-joks-zastepca-dowodcy-v-korpusu> [access: 29.03.2021].

Cooperation (EDCA) in 2020. The entry into force of the EDCA resulted in the repeal of the following legal acts¹⁰:

1. Agreement Between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the Territory of the Republic of Poland, signed at Warsaw December 11, 2009;

2. Agreement of December 21, 2018, between the Government of the Republic of Poland and the Government of the United States of America amending the Agreement of July 15, 2015, between the Government of the Republic of Poland and the Government of the United States of America on agreed facilities and areas on the territory of the Republic of Poland;

3. Agreement of July 15, 2015 between the Government of the Republic of Poland and the Government of the United States of America on agreed facilities and sites on the territory of the Republic of Poland.

International cooperation in the military field requires detailed and difficult legal regulations, which are always preceded by lengthy negotiations¹¹. The legislation of the cooperating states often requires that international agreements on cooperation regulate important questions concerning the status of, and rules under which armed forces of the sending state will be present on the territory of the receiving state. The Constitution of the Republic of Poland defines ratified international agreements as one of the most important sources of law in the Polish legal system¹². International treaties enjoy a special place in the Polish legal system: after being promulgated in the Journal of Laws of the Republic of Poland, they constitute part of the domestic legal order and are directly applicable, unless their application depends on the enactment of a statute. However, an international treaty ratified with prior consent granted by statute shall take precedence over a statute if the statute cannot be reconciled with the treaty¹³. For this reason, the Polish legislative procedure for international treaties that relate to, among other things, peace, alliances, political agreements, or military agreements requires prior consent

10 EDCA (Dz.U. 2020, item 2153), Art. 37, para. 3.

11 The national aspects of concluding international treaties by Poland are set forth in the International Agreements Act (*ibidem*, item 127). They will be discussed in detail below.

12 Polish Constitution..., Art. 87, para. 1: „The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations”.

13 *Ibidem*, Art. 91, para. 1.

expressed in a statute of a parliament¹⁴, nationally staffed in accordance with the procedure set forth in the International Treaties Act¹⁵.

The minister in charge of the department of government administration responsible for the matters covered by an international agreement, having consulted the draft agreement and the negotiating instructions with the minister of foreign affairs and with other interested ministers, shall submit to the Prime Minister a motion to authorize the commencement of negotiations on an international treaty¹⁶.

Subsequently, the body competent to conduct negotiations or the minister in charge of the department of government administration competent for the matters covered by the international agreement (which, in the case of agreements on military cooperation, is the Minister of National Defence), after agreeing with the interested ministers, submits to the Council of Ministers, through the minister of foreign affairs, a motion to ratify or approve the international treaty¹⁷. Finally, the ratified international treaty, together with government declarations pertaining to it, with a translation into Polish if necessary, shall be promulgated with no delay in the Journal of Laws of the Republic of Poland¹⁸.

The Republic of Poland, due to close political and military cooperation in the field of defense with the United States of America, has the most extensive regulations regarding the stay of American troops among the NATO countries¹⁹.

14 Ibidem, Art. 89, para. 1(1).

15 International Treaties Act..., Art. 2 provides that: „Within the meaning of this Act: 1) international agreement means an agreement between the Republic of Poland and another subject or subjects of international law, governed by international law, regardless whether it is contained in a single document or in more than one document, regardless of its name and regardless of whether it is concluded on behalf of the state, the government or the minister in charge of the department of government administration responsible for the matters covered by the international agreement, 2) concluding an international agreement shall include: commencing and conducting negotiations, accepting the text of the agreement, giving consent to the signing of the agreement, and signing the agreement if its effect is not to bind the Republic of Poland to the international agreement, 3) being bound by an international agreement includes all actions provided for in international law, and in particular in the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (Dz.U. 1990, item 439), as a result of which the Republic of Poland becomes a party to that agreement”.

16 International Treaties Act..., Art. 5, para. 1.

17 Ibidem, Art. 14, para. 1.

18 Ibidem, Art. 18, para. 1.

19 The newly concluded EDCA further develops and replaces the regulations of SOFA Supplemental. Detailed analysis of the major differences is conducted below.

Cooperation in this area is strictly dictated by Poland's geopolitical location and both countries' membership in NATO. On 11 December 2009, in Warsaw, Stanisław Komorowski, Undersecretary of State for Defense Policy of the Polish Ministry of Defense, and U.S. Ellen Tauscher, Undersecretary of State for International Security and Arms Control, signed the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of the Republic of Poland²⁰. This treaty, referred to in the military jargon as SOFA Supplemental, was negotiated between September 2008 and November 2009, and entered into force on 31st of March, 2010.

SOFA Supplemental contained regulations concerning the following issues: 1) use of agreed facilities and areas; 2) ownership of property within agreed facilities and areas including with improvements and works made by the US AF; 3) military exercises conducted by US AF outside of agreed facilities and areas; 4) use of uniforms and carrying and use of weapons; 5) entry, stay, and departure of persons who are soldiers in the US AF, and civilian personnel thereof; 6) professional licenses, concessions, and permits required from soldiers in the US AF Army, civilian personnel and contractors thereof; 7) recognition of licenses and movement of vehicles, aircraft and vessels in air, land and water traffic; 8) criminal jurisdiction over specified in the SOFA Supplemental categories of US citizens present in the territory of Poland, as well as military discipline, right to arrest, investigate, prosecute and trial thereof; 9) claims for damages relating to misconduct and any manifestation of acts considered and settled in accordance with Article VIII of the NATO SOFA; 10) customs procedures for official and private purposes, regulations on customs duties on imports and exports, and details of tax exemptions related to these situations; 11) military support service activities; 12) military postal services and telecommunications; 13) logistics support and utilities; 14) currency used by the US AF; 15) security issues; 16) environment and safety; 17) healthcare services provided to the US soldiers; 18) contracting procedures and status of contractors of the US AF

20 Commonly referred to in the military circles as SOFA Supplemental. SOFA Supplemental contains more detailed regulations than NATO SOFA, which sets forth the framework of military cooperation between NATO Member States.

during the provision of services regulated by NATO SOFA; 19) labor of civilian employees; 20) implementation and dispute settlement.

As indicated in the official Governmental Explanatory Memorandum to the SOFA Supplemental, due to the general nature of the NATO SOFA, as well as the specific and evolving conditions of bilateral cooperation among NATO member states over time, it has become common practice for Alliance members to enter into agreements supplemental to the NATO SOFA to further regulate bilateral and multilateral relations among states²¹.

As part of the developing political-military cooperation between the Republic of Poland and the United States of America, on August 15, 2020, U.S. Secretary of State Mike Pompeo and Polish Minister of National Defense Mariusz Błaszczak signed the Enhanced Defense Cooperation Agreement (EDCA)²². The treaty was ratified by the Polish President Andrzej Duda on October 15, 2020²³.

Pursuant to Art. 37 para. 3 of the EDCA, its entry into force repeals the following legal acts: 1) Agreement Between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the Territory of the Republic of Poland, signed at Warsaw December 11, 2009; 2) Agreement

21 Doc no. 2677 dated 13 January 2010 of the Sejm (IV term) including the draft Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of the Republic of Poland, signed in Warsaw on 11 December 2009, p. 4. The Republic of Poland had already in 2000 concluded a similar agreement with the Republic of Germany: Agreement between the Government of the Republic of Poland and the Federal Government of Germany on the Status of the Armed Forces of the Federal Republic of Germany in the territory of the Republic of Poland, signed in Warsaw on 23 August 2000 (Dz.U. 2002, no. 206, item 1750).

22 The initiative to conclude the EDCA came from the US side. This agreement aims to regulate three main aspects of the Polish-American strategic partnership: defense cooperation with the United States of America, the functioning of the US AF in Poland, and infrastructural and logistic support for these forces in Poland. Assurances made by the U.S. side demonstrate the appreciation of the Polish contribution to the American presence both in Europe and in Poland. As underlined by US Secretary of State Michael R. Pompeo on 12 February 2019: „Our alliance cannot be at full strength without robust contributions from all allies. President Trump is grateful for Poland’s leadership in contributing its fair share to our common defense”.

23 On 30 September 2020, Polish Senate authorized the President to ratify the EDCA, President Andrzej Duda signed it on 15 October 2020, see: Doc no. 573 dated 276 August 2020 concerning the ratification of the Agreement between the Government of the Republic of Poland and the Government of the United States of America on Enhanced Defense Cooperation, signed in Warsaw on 15 August 2020.

of December 21, 2018, between the Government of the Republic of Poland and the Government of the United States of America amending the Agreement of July 15, 2015, between the Government of the Republic of Poland and the Government of the United States of America on agreed facilities and areas on the territory of the Republic of Poland; 3) Agreement of July 15, 2015 between the Government of the Republic of Poland and the Government of the United States of America on agreed facilities and sites on the territory of the Republic of Poland.

Substantive development of the military cooperation in the field of defense was tied to, inter alia, the establishment of the Forward Headquarters of the V Corps of the U.S. Land Forces in Poznań, Poland²⁴, the likely further increase of the number of the US troops stationed in Poland and the related need for a new legal framework regulating the conditions of the US military presence in the country²⁵.

Additional important reasons for the Polish side to sign EDCA included economic incentives – it is estimated that US AF spending, in particular the costs of training, equipping and deploying U.S. forces in Poland, would boost the Polish economy and outweigh the costs Poland incurs in supporting U.S. forces²⁶ – as well as geopolitical issues, such as strengthening the security and

24 Forward Headquarters of the V Corps of the U.S. Land Forces is located in Poznań, the formation process started in October 2020. The number of US soldiers stationed in Poland will increase by at least 1,000 and reach at least 5,500 troops. V Corps is stationed in Fort Knox and the Forward HQ will function on rotational basis. See „Polskie” wysunięte dowództwo V Korpusu już w służbie, <https://www.defence24.pl/polskie-wysuniete-dowodztwo-v-korpusu-juz-w-sluzbie> [access: 9.12.2020]. According to the US DOD: „The EDCA will enable an increased enduring U.S. rotational presence of about 1,000 personnel, to include the forward elements of the U.S. Army’s V Corps headquarters and a Division headquarters, intelligence, surveillance and reconnaissance capabilities, and the infrastructure to support an armored brigade combat team and combat aviation brigade. This is in addition to the 4,500 U.S. personnel already on rotation in Poland”. See *Secretary of Defense Statement on Completion of the U.S.-Poland Enhanced Defense Cooperation Agreement Negotiations*, Aug. 3, 2020, <https://www.defense.gov/Newsroom/Releases/Release/Article/2297502/secretary-of-defense-statement-on-completion-of-the-us-poland-enhanced-defense/> [access: 9.12.2020].

25 See *Umowa o wzmocnionej współpracy obronnej pomiędzy Polską a USA podpisana*, 15.08.2020, <https://www.gov.pl/web/obrona-narodowa/umowa-o-wzmocnionej-wspolpracy-obronnej-pomiedzy-polska-a-usa-podpisana> [access: 9.12.2020].

26 As underlined in the statement of the Polish Minister of National Defense, Mariusz Błaszczak: „On the basis of the agreement concluded on August 15, on this symbolic day, we are guaranteed that the developed infrastructure will allow us to host up to 20 thousand American soldiers. If, of course, there is such a need. [...] The agreement gives Poland security. This is the most important benefit. It also brings economic benefits as the presence

deterrence potential on the Alliance's eastern flank²⁷. In the preamble to the EDCA, the Republic of Poland and the United States of America explicitly refer to the change in the geopolitical situation, which has resulted in new global and regional challenges for the protection of vital interests of the Parties and the need to strengthen existing military cooperation between the Parties. The EDCA is intended to bring about the possibility of both individual and joint defense against potential security threats, which will have a real impact on ensuring proper implementation of the UN Charter and the North Atlantic Treaty, as well as expanding the existing cooperation as compared to the SOFA Supplemental²⁸. EDCA is intended to augment NATO SOFA provisions, define in more detail the status and conditions governing the stay of US AF on the territory of the Republic of Poland, while preserving the sovereignty of each Party over its territory and relevant forces, as well as the right of each Party to self-defense, in accordance with accepted acts and principles of international law concerning the conduct of hostilities, in Poland referred to as the International Humanitarian Law of Armed Conflicts²⁹

One of the most significant changes between the SOFA Supplemental and the EDCA is the strong emphasis on the right to access agreed facilities and areas. The amended provision of Art. 3.2 of the EDCA Agreement provides that, after consultation between the Parties, the US AF, U.S. contract contractors, employees of U.S. contract contractors, local civilian employees of the US AF, family members, and vehicles, vessels, and aircraft used by or for the US AF are authorized unimpeded access to and use of agreed facilities and areas for purposes related to, i.e. visits, training, and exercises. The Republic of Poland has authorized the US AF to control access to agreed facilities and areas under the Agreement exclusively, thereby ceding the security system for such sites to the US AF. Furthermore, it was agreed that Poland will not provide the host nation support to US activities undertaken outside of the agreed facilities and areas, while identifying a catalog

of American troops in a country always gives an impulse for economic development. As far as the military is concerned, first of all it is about perfecting and improving skills, joint exercises and interoperability, that is cooperation, knowledge of mutual procedures. Quite simply, together we are stronger". See *Umowa o wzmocnionej współpracy obronnej...*

27 The United States has similar agreements with other NATO Member States in the central and eastern European area, such as Bulgaria, Hungary, and Romania.

28 Preamble of the EDCA explicitly recalls both Parties commitment to strengthening cooperation in view of new threats and the need to ensure security.

29 The core of LOAC are the Four Geneva Conventions and the two Additional Protocols thereto. For a comprehensive intro to LOAC in Polish, see *Międzynarodowe prawo humanitarne konfliktów zbrojnych*, eds. Z. Fałkowski, M. Marcinko, Warszawa 2014.

in which the US AF will be interested, listing the following: state-owned land and facilities, local government-owned land and facilities, and private land and facilities, which will result in a significant burden on the state budget³⁰. The parties also extended the authority of the US AF to perform modifications and repair work on the agreed facilities and areas³¹. Before the entry into force of the EDCA, the Polish side, as the host country, has had greater authority over the agreed facilities and areas that have been entrusted to the US AF. Many of the issues related to use required prior negotiations or obtaining appropriate permits from the relevant state or territorial authorities. The aforementioned EDCA regulations resulted in a significant expansion of U.S. authority in the territory of the Republic of Poland, as previously under the provisions of the Supplemental SOFA the US AF were authorized to access and use the agreed facilities and areas subject in particular to the internal regulations of the national law of the Republic of Poland³². The Parties have also envisioned potential future consultations regarding the possible transfer

30 Issues related to infrastructure, logistics and tenders have been regulated in the Acquisition And Cross-Servicing Agreement (US-POL-02) Between the Department of Defense of the United States of America and the Minister of National Defense of the Republic of Poland (ACSA). The Agreement covers mainly the financial aspects. The Polish decision to cover the costs in the aforementioned scope will result in the burdening of the state budget calculated in millions of zlotys annually, depending on the scale of the undertaking and the notified needs. The costs incurred by the Polish side will be calculated and determined individually each time. Some costs will be fixed, e.g. maintenance of the agreed facility. Others are hard to estimate in advance, for instance the rental of private areas that are to be used for temporary training (e.g., farmland for the duration of an exercise) will depend on the area used, the duration of use and the costs of any damage and compensation claims.

31 Under the EDCA, the US AF have been authorized to conduct construction activities with the obligation to provide the designated Polish executive body with documentation, although at the same time they were released from the obligation to comply with Polish zoning regulations or to conduct construction works, limiting the legal requirement to a provision stipulating the assurance of technical and construction standards consistent with the requirements and standards of both Parties to the Agreement. Furthermore, under Art. 10 of the EDCA, Poland „shall not require members of the U.S. forces, U.S. contractors, or U.S. contractor employees to obtain professional licenses issued by the Republic of Poland in relation to the provision of services provided as part of their official or contractual duties to U.S. forces, dependents, U.S. contractors, U.S. contractor employees, or other persons as mutually agreed”.

32 EDCA, Art. 3.

or purchase of equipment determined to be excess, as may be authorized by U.S. law and regulations³³.

From a legal perspective, the most important issues related to criminal jurisdiction over members of the US AF³⁴. The practice of negotiations of international treaties and soft law instruments³⁵ shows that the issues of jurisdiction, financial settlement and possible claims for damages are of crucial importance, and as such attract most attention and time of all the Parties³⁶.

Comparison of SOFA Supplemental and EDCA provisions clearly shows that the procedures for waiver of the right to exercise sovereign jurisdiction have changed. SOFA Supplemental required Poland to honor requests made by U.S. military authorities except in cases of special interest to Poland. A request by the U.S. to Poland to waive its priority to exercise jurisdiction was submitted to the Minister of Justice of the Republic of Poland, while a Polish request to the U.S. to waive the latter priority to exercise jurisdiction had to be submitted to the appropriate U.S. military authority, in violation of the general legal principle of equality of rights of contracting parties, thereby effectively placing the Minister of Justice on an equal footing with the military command³⁷.

Under EDCA, in turn, in specific cases of particular importance to Poland, the authorities of the Republic of Poland may withdraw the waiver by

33 Ibidem, Art. 4.

34 Art. 1 para. 1 of the Polish Criminal Code provides that: „Penal liability shall be incurred only by a person who commits an act prohibited under penalty, by a law in force at the time of its commission”, while the exclusion of Polish jurisdiction is allowed under Art. 5 of the Polish Criminal Code pursuant to which „The Polish penal law shall be applied to the perpetrator who committed a prohibited act within the territory of the Republic of Poland, or on a Polish vessel or aircraft, unless an international agreement to which the Republic of Poland is a party stipulates otherwise”, in conjunction with Art. 87 and 91 of the Polish Constitution.

35 Jurisdiction is often temporarily excluded through agreements, for instance during international military exercises.

36 When conducting negotiations, the Polish Ministry of National Defense always seeks to maintain exclusive criminal jurisdiction over the Polish Armed Forces operating abroad as part of international exercises or Polish Military Contingents. The renunciation of jurisdiction by the host country results in criminal or disciplinary liability only before the Polish law enforcement authorities. The U.S. on the other hand, virtually always secures exclusive criminal jurisdiction over its military personnel, wherever its stationed.

37 SOFA Supplemental, Art. 13. Soft law and courtesy are very important concepts in international law and practice, alongside the hard law. This is the reason why, for example, when drawing up agreements in two language copies, the rule of signature is applied interchangeably, i.e. it is assumed that the home language version of the agreement is signed on the left-hand side by an authorized representative of the state in whose language the agreement is presented for signature and vice versa.

providing a statement in writing to the competent U.S. forces authorities not later than thirty days after receipt of the notification concerning the existence of concurrent jurisdiction, as well as prior to receipt of such notification.

Subject to particular arrangements that can be made for minor offenses, US forces shall promptly notify the appropriate Polish authorities of any criminal or disciplinary proceedings initiated against their soldiers who have committed a crime in the Polish territory. Provisions on mutual assistance in investigating, prosecuting, and bringing to justice members of the US AF, civilian personnel, or family members who should incur criminal liability under Polish or U.S. law remain in effect³⁸.

Relevant authorities of either Party are obliged to take into consideration all evidence collected by the other Party, and investigation reports prepared thereby. Changes to the right to waive jurisdiction have also resulted in related amendments to the provisions on detention, surveillance and access to persons within the remit of the EDCA.

In comparison to the SOFA Supplemental, representatives of the US AF have been granted the right to be present at all procedural activities conducted by the Polish law-enforcement authorities, including interrogations, involving a member of the US AF or civilian personnel or a family member thereof if they are victims or witnesses of a crime. US AF authorities have also been granted access to the testimony of the aforementioned persons and their records, as well as to rulings and reports of law enforcement agencies in cases where members of the US AF, civilian personnel, or family members are victims in the case³⁹. The authorities of the Republic of Poland are also obliged to ensure the presence of an interpreter at all activities regulated by the Criminal Procedure Code (procedural, investigative, and interrogation activities), regardless of the status in the case of a member of the US AF. Polish authorities are also under an obligation to provide a written translation of documents produced in the course of criminal proceedings. Persons covered by the EDCA are also granted the right to make statements in English. Finally, the Parties agreed that should a sentence of imprisonment be imposed by a court of the Republic of Poland

38 EDCA, Art. 14.

39 Ibidem, Art. 16, para. 4.

on a member of the US AF, civilian personnel, or family member thereof, such a sentence will be served in the penal institutions of the United States⁴⁰.

Regulations concerning settlement of tort claims have been substantially changed as well⁴¹. As agreed by the Parties in Art. 18 para. 1 „Members of the force or of the civilian component shall not be subject to any proceedings for civil claims or administrative penalties arising out of acts or omissions by such persons in the performance of their official duties. Such claims may be presented to the appropriate authorities of the Republic of Poland and processed according to the provisions contained in Art. VIII of the NATO SOFA”⁴².

SOFA Supplemental regulations, in turn, referred explicitly to Art. VIII NATO SOFA⁴³. Within the framework of the above-mentioned provisions, we distinguish tort liability and contractual liability, which resulted in an infinite number of situations, thus creating an impossible to catalog area of legal considerations, encompassing variety of claims including resulting from damages to agreed facilities and areas, military property or private property⁴⁴. The processing of claims under the provisions of Art. VIII of the NATO SOFA depends on, among other things: 1) General principles of tort and contractual liability; 2) Who's the damage been done by (military personnel, civilian personnel or a contractor); 3) Damages related to the stay of foreign troops; 4) Liability for damages incurred in the performance of official duties and outside the performance of official duties; 5) Liability for damage to state property used by the armed forces of the other state; 6) Damages resulting from the use of a vehicle, vessel or aircraft; 7) Liability for damages caused to

40 Ibidem, para. 10.

41 Claims (pol. roszczenia) – a formal request by a person entitled to compensation for damage caused to a third party by conduct amounting to tort (including criminal offences, misdemeanors and negligence and their consequences) from a person or administrative authority obliged to compensate for the damage. As pointed out by J. Stochel, *Odpowiedzialność za szkody wyrządzone przez wojska obce na terytorium Polski w świetle prawa międzynarodowego*, Warszawa 2017, p. 99: „For non-criminal liability, it concerns liability both for damage caused by failure to perform or the improper performance of a duty, and for damage caused by tort”.

42 For more on settlement of claims in the military practice in general, see *ibidem*.

43 SOFA Supplemental, Art. 17, para. 1.

44 See J. Stochel, *op. cit.*, p. 99.

persons; 8) Liability for damage to other government property; 9) Liability for damage caused to third parties⁴⁵.

Settlement of claims, procedures for their relinquishment, principles of cost sharing are regulated by NATO SOFA, the provisions of which, in accordance with the EDCA, will apply to the US AF in the territory of the Republic of Poland.

One of the most important changes concerning the logistics is set forth in Annex B to the EDCA. These provisions concern the strengthening of the current military presence and the need to provide infrastructural and logistical support⁴⁶. The Parties, in furtherance of the purposes and principles set forth in the Preamble and the Joint Declarations, and in consideration of the preexisting provisions, have agreed to the following locations for the planned increased U.S. military presence: 1) Forward Headquarters of the V Corps of the U.S. Land Forces are to be located in Poznań; 2) Combat Training Center is to be located in Drawsko Pomorskie; 3) The primary operating location for U.S. Forces Aerial Port of Debarkation will be Wrocław Strachowice; 4) The primary operating location for U.S. Forces Remotely Piloted Aircraft Base will be in Łask; 5) U.S. Forces Aviation, Logistics, Special Operations and Air Defense will be in Powidz; 6) U.S. Forces SOF will be in Lubliniec; 7) U.S. Forces Armored Brigade Combat Team will be located in Żagań/Świętoszów⁴⁷.

As the authors pointed out above, the Parties, decided to substantially expand the cooperation of their armed forces, which will translate not only into a strengthening of the defense potential, but also will leave a significant mark on the Polish legal system. Before signing the EDCA, the list of agreed facilities and areas included only the following locations⁴⁸: 1) Air Base in Łask; 2) Army

45 Art. VIII of the Agreement among the States Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace regarding the Status of their Forces, and its Additional Protocol.

46 EDCA, Annex B.

47 See *Umowa o wzmocnionej współpracy obronnej...*

48 According to Annex B of the EDCA, the list of agreed facilities and areas includes: Air Bases in Łask, Dęblin and Mirosławiec, training areas in Drawsko Pomorskie, Ustka, Czarne, Wędrzyn, Nowa Dęba and Żagań, and military complexes in Żagań, Karliki, Trzebień, Bolesławiec, Świętoszów, Skwierzyna, Poznań, Lubliniec, Toruń, Orzysz/Bemowo Piskie, and airports: Wrocław, Kraków Balice, Katowice.

Combat Training Center in Drawsko; 3) Military Complex Skwierzyna K-2629; 4) Military Complex Ciechanów K-0166; 5) Military Complex Choszczno⁴⁹.

According to Annex B to the EDCA, Poland-Provided Infrastructure (PPI)⁵⁰ includes in-kind contributions to the construction, improvement and equipping of infrastructure. These regulations do not apply, however, to the Redzikowo Ballistic Defense site and NATO Enhanced Forward Presence (eFP) activities⁵¹. Given the purpose of the NATO advanced battalions, their deployment, and the presence of U.S. troops within them, this is an unusual decision for the US AF. Monetary contributions for logistic support provided by Poland are to be spent on development of design criteria packages, design oversight, construction oversight, and implementation of logistic support provided by the Republic of Poland⁵².

With respect to the security of the US AF in the territory of the Republic of Poland, the Parties agreed that authorities will cooperate to ensure the protection, security, and safety of the USAF, U.S. contractors, employees of U.S. contractors, and their family members. The Republic of Poland has committed, to the best of its ability, to take all reasonable and necessary measures to ensure their protection, security and safety. Under the terms of the EDCA, the Republic of Poland bears general responsibility for ensuring security on its territory. As indicated earlier, the concept of Force Protection has been extended by the Parties in favor of the US AF by granting them all rights and powers necessary to use, exploit, defend, or control agreed facilities and areas, including taking appropriate measures to maintain or restore order and to protect the US military and civilian personnel and their family members. The

49 List of agreed facilities and areas under the Agreement of December 21, 2018, between the Government of the Republic of Poland and the Government of the United States of America amending the Agreement of July 15, 2015, between the Government of the Republic of Poland and the Government of the United States of America on agreed facilities and areas on the territory of the Republic of Poland.

50 Art. II and following of the EDCA, Annex B.

51 NATO Forward Presence – an initiative adopted during the 2016 NATO summit in Warsaw to maintain a limited military presence in the territory of NATO countries in the form of battalion battle groups in order to guarantee security on the so-called eastern flank of NATO. There are two groups stationed in Poland: Multinational Division North East in Elbląg and NATO Battalion Battle Group in Poland assigned to 15 Mechanized Brigade and dislocated in Orzysz.

52 EDCA, Annex B.

US AF are obliged, however, to coordinate security plans with the appropriate authorities of the Republic of Poland⁵³.

As indicated in the official explanatory memorandum prepared as part of the process of EDCA ratification, the EDCA provides for, depending on the subject matter, either the possibility or the obligation to conclude implementing agreements between the Parties or their authorized representatives. These agreements will specify the provisions of the EDCA in a manner that is not inconsistent with it, e.g. by establishing procedures for cooperation in individual areas governed by the EDCA or model forms and certificates. The character and mode of binding the Republic of Poland with such agreements will depend on their content⁵⁴.

In accordance with the provisions of EDCA, the remaining Implementing Arrangements of the Republic of Poland-US SOFA, which supplement the legal basis for the presence of U.S. military forces in Poland, will remain in effect. In the legal system of the Republic of Poland there are normative documents which additionally specify the provisions of the SOFA Supplemental – the so called Implementing Arrangements⁵⁵ between the Government of the Republic of Poland and the Government of the United States of America, which regulate, inter alia, the following matters: 1) certificate of Entitlement to operate private motor vehicles⁵⁶; 2) the terms of reference for the Joint Commission established under the agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland⁵⁷; 3) the procedures for the processing of claims

53 Ibidem, Art. 30 provides the US AF with much greater powers in this regard than the SOFA Supplemental did.

54 Doc no. 573 dated 26 August 2020 of the Sejm (IX term) including the draft Agreement between the Government of the Republic of Poland and the Government of the United States of America on Enhanced Defense Cooperation, p. 7.

55 As of late 2020, 17 such arrangements were signed by the Parties.

56 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning the certificate of Entitlement to operate private motor vehicles, signed in Stuttgart, 20th May 2013.

57 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America creating the terms of reference for the Joint Commission established under the agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status

for damage caused by the Armed Forces of the United States of America in the territory of the Republic of Poland⁵⁸; 4) registry of Vehicles, Trailers and Semi-Trailers of the United States Forces and United States Contractors⁵⁹; 5) registration and Technical Inspection of Private Vehicles⁶⁰; 6) custom procedures⁶¹; 7) official tax exemptions⁶²; 8) Labor Subcommittee in the Framework of the Joint Commission and Procedures for the Resolution of Employment Disputes and Employee Complaints⁶³; 9) Financial institutions⁶⁴;

of the Armed Forces of the United States of America in the territory of Poland, signed in Warsaw, 9th October 2013.

58 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Settlement of Claims on Account of Damages Caused by the United States Forces in the Territory of Poland, signed in Warsaw, 7th February 2014.

59 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Registry of Vehicles, Trailers and Semi-Trailers of the United States Forces and United States Contractors, signed 1st July 2014.

60 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Registration and Technical Inspection of Private Vehicles, signed in Warsaw, 1st July 2014.

61 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Customs Procedures, signed in Warsaw, 23rd October 2014.

62 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland regarding official tax exemptions, signed in Warsaw, 27th April 2015.

63 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning the Labor Subcommittee in the Framework of the Joint Commission and Procedures for the Resolution of Employment Disputes and Employee Complaints, signed in Warsaw, 27th April 2015.

64 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America

10) Contracting procedures⁶⁵; 11) Military Service Support Activities⁶⁶; 12) Telecommunication⁶⁷; 13) procedures for the determination of flights⁶⁸; 14) environmental matters⁶⁹; 15) use of agreed facilities and areas and property ownership⁷⁰; 16) security⁷¹; 17) Medical Support⁷².

In the near future, the implementation of the EDCA will demonstrate the need for new regulations in the areas covered by some of the above-

on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Financial Institutions, signed in Warsaw, 27th April 2015.

65 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Contracting Procedures, signed in Warsaw, 27th April 2015.

66 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Military Service Support Activities, signed in Warsaw, 27th April 2015.

67 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning telecommunication, signed in Warsaw, 27th April 2015.

68 Implementing Agreement on the status of the Armed Forces of the United States of America on Republic of Poland territory on procedures for the determination of flights (dated 4th November 2015).

69 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning environmental matters, signed in Warsaw, 24th June 2016.

70 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning use of agreed facilities and areas and property ownership, signed in Warsaw, 24th June 2016.

71 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning security signed in Warsaw, 22nd March 2017.

72 Implementing Arrangement between the Government of the Republic of Poland and the Government of the United States of America to the Agreement between the Government of the Republic of Poland and the Government of the United States of America on the Status of the Armed Forces of the United States of America in the territory of Poland concerning Medical Support signed in Warsaw, 22nd March 2017.

mentioned Implementing Arrangements. The substantive changes regarding logistics, support, contract procedures and Force Protection outlined in the EDCA, will most likely require substantial revision of many arrangements, and such legislative work will need to be conducted swiftly, to meet the new reality of the Polish-American cooperation.

Taking into account the fact that SOFA Supplemental has been in force in the Polish legal system and economic circulation for over 10 years, it is logically justified to conclude that the newly concluded and ratified EDCA will result in the strengthening of military relations and cooperation. The presence of American troops in the number of over 4,500 to about 5,500 soldiers serving in permanent rotation, and up to as many as 20,000 soldiers in the territory of Poland during military exercises or in case of a threat situation will also result in a strong strengthening of the national economy, as the logistical needs will have to be met also by Polish enterprises. The American presence will also constitute a real increase in the defensive potential of the eastern flank of NATO. The new defense infrastructure will be provided not only to meet the exclusive needs of the U.S. military, but in large part will be operationally usable (or shared) with the PAF, and will significantly enhance Poland's ability to accommodate allied NATO forces (not just U.S.) in the event of a crisis. National capabilities to ensure sufficient weapons and munition storage, to store and distribute fuel and to provide lodging for additional military personnel will increase significantly. However, day-to-day practice will verify to what extent the provisions of the EDCA will correspond to reality and whether and if how many aspects of day-to-day cooperation will need to be adjusted.

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Aspekty prawne umowy o wzmocnionej współpracy obronnej między Polską a Stanami Zjednoczonymi z roku 2020

Streszczenie

Mariusz Błaszczak, minister obrony narodowej, i Michael Pompeo, sekretarz stanu, 15 sierpnia 2020 roku podpisali umowę o wzmocnieniu trwałej obecności wojsk Stanów Zjednoczonych Ameryki w Polsce. Umowa została podpisana w obecności Prezydenta RP Andrzeja Dudy.

Umowa ustala uregulowania prawne obecności amerykańskich wojsk w Polsce. Przyjęte zasady opierają się w dużym stopniu na regulacjach wspólnych dla wszystkich członków NATO, czyli umowy NATO SOFA z 1951 roku, którą Polska przyjęła wraz z członkostwem w Sojuszu Północnoatlantyckim.

Umowa, zastępująca dotychczas obowiązujące porozumienie z 2009 roku, została zawarta na czas nieokreślony, a obie strony mogą ją rozwiązać po poinformowaniu partnera.

Autorzy artykułu szczegółowo omawiają postanowienia nowej umowy międzynarodowej, porównują jej postanowienia z dotychczasowymi regulacjami prawnymi dotyczącymi współpracy polsko-amerykańskiej.

Słowa kluczowe: umowa, rząd, NATO, współpraca, obrona