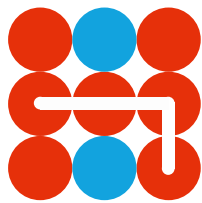

Strategic Analysis December 2017

Laws in the era of hybrid threats

TIINA FERM



Hybrid CoE

Laws in the era of hybrid threats

In the era of hybrid threats, laws have become a toolbox used to create influence by potential hostile actors. This means that laws have a new significant but very complex role in threat maps. When an adversary operates across legal boundaries and masks its actions, the decision-making processes of the opponent are undermined. – writes Tiina Ferm, Counsellor in Legislative Affairs at the Finnish Ministry of the Interior.

The legal analysis of hybrid threats involves open questions and uncertainties due to the lack of agreed definitions and the state's practice in responding to hybrid threats.

Laws create legitimacy and expectations about how others will behave. A hostile actor – state or non-state – can exploit the in-built character of our legal environment and use the law as an asymmetric capability. The notion of hybrid threats describes the multiplicity of conflicts that are affecting the whole society.

In the era of hybrid threats, laws have become a toolbox used to create influence by potential hostile actors. This means that laws have a new significant but very complex role in threat maps. When an adversary operates across legal boundaries and masks its actions, the decision-making processes of the opponent are undermined.

A hostile actor that is able and willing to act outside the norms and conventions of international law and

a responsible state's behaviour can have a real advantage if the legal aspects relating to hybrid threats are not paid better attention to.

The legal analysis of hybrid threats involves open questions and uncertainties due to a lack of agreed definitions. There is no special regulation or any case law to clarify the regulation for activities that count as hybrid threats. There is hardly any state practice on how a state should respond to challenges rising from hybrid threats. However, it is more urgent than ever that we analyse the used methods and means from a legal perspective. The most important area of development of legislation is to minimise an adversary's possibilities to exploit our legal environment as a force multiplier to achieve its goals.



The new situation requires a new level of capabilities and awareness by both internal and external bodies

Hybrid threats phenomena have changed the traditional dichotomy between external and internal security. We are used to thinking that the Defence Forces look after external security, while the Police is mainly responsible for internal security. In the new foreign and security policy environment, internal and external security are almost perfectly intertwined. The power politics exercised by states and threats posed by non-state actors may be manifested in many difficult-to-predict areas of everyday life that have close links with internal security. Hence, the new situation requires a new level of capabilities and awareness by both internal and external bodies, thus a particularly well-functioning cooperation between internal and external security authorities.

Today when a hostile state actor seeks influence and status, it will exploit the vulnerabilities and structural weaknesses – “the Achilles’ heel” – of the targeted state to achieve its own objectives. To identify the governmental actors and traditional international criminal and terrorist organisations behind action has become significantly more difficult than before. That blurs the line between serious disturbances during normal conditions and unusu-

al conditions. Especially during the priming phase, meaning a time that hostile action already exists but barely detectable, a targeted state is still in a normal state of affairs and powers available for authorities use are accordingly.

A proper statutory base for authorities to prevent, recognise and respond to hybrid threats is required so that a hostile actor is not able to exploit the shortcomings related to powers of the authorities. In the era of hybrid threats, a hostile actor – state or non-state – intentionally exploits ambiguity. The actions behind hybrid threats are difficult for a state to identify as coercive uses of force because they are designed to stay below certain legal, detection or response thresholds. Measures that the hostile actor takes are not explicitly or necessarily illegal or they can be part of normal legal activities.

Unclear situational awareness, unpredictability and insufficient powers of authorities are a challenge to the operational environment. Lack of jurisdiction or undefined situation may prevent or slow down the authorities’ ability to respond to a threat. However, clear powers can prevent the unnecessary escalation of the situation.



Potential vulnerabilities to national security can arise from the free flow of capital, goods, services and people across borders

Potential vulnerabilities to national security can arise from the free flow of capital, goods, services and people across borders. People are more interconnected internationally and employees move across borders. While the economic interdependency of countries has opened up new business opportunities, at the same time it has created a new domain for potential hostile influences.

Persons that have certain connections or liabilities to a foreign country may pose a risk to national security and defence. A foreign country may try to use liabilities or connections as a means to pressure a person to act on behalf of another country. Especially when that person has access to critical information related to public interests and who by his actions is able to endanger a government function. Meaningful liabilities or connections that could be used in this context are, for example, dual citizenships, close relationships (spouses, children, parents or other relatives in another country), property or business activity. These links to the

foreign country should be checked in the nomination process more deeply and thus evaluate the potential risk they may cause to the national security and proper management of the government duty. A legislation that obliges and allows the employer to carry out such background checks should be in place in order to safeguard national security.

Furthermore, a risk could exist if a potentially hostile actor acquires property close to strategic sites. These could be, among others, military areas, strategic roads, railway, bridge and dam structures, shipping routes, harbour structures as well as sites associated with telecommunications and electricity transmission. Strategic sites can be protected relatively well with existing mechanisms, however the surrounding areas are not yet covered well enough. The aim should be to ensure that the key national security interests and adequate legislative means are in place to minimise the potential risk for using the free transfer of immovable property to influence.



Finland is preparing to meet more multifaceted threats that have both military and non-military elements

Finland is preparing to meet more multifaceted threats that have both military and non-military elements. The preparedness to respond to military and non-military threats has developed as part of the comprehensive security concept in a joint effort by the authorities, business operators, organisations and citizens. Comprehensive security is the Finnish cooperation-based preparedness model, which is being applied also to hybrid threats. The general preparedness principles are in the Security Strategy (YTS 2017), which was updated recently. Consequently, the development of legislation on countering hybrid threats is based on a special assessment of legislative gaps or vulnerabilities on preventing, detecting and responding to hybrid threats.

The first example is approved amendments to the legislation concerning the Territorial Surveillance Act and the Criminal Code in Finland, which entered into force on 15 July 2017. The powers of the territorial surveillance authorities were reinforced so that they would better cover situations where Finland's territorial integrity is violated by a military group without insignia. The purpose of the new legislation is to bring the legislation related to the security and control of Finland's territorial integrity more comprehensively in line with the changed security situation and

new kinds of threats. In these acts, "soldiers without insignia" refers to a group similar to a military detachment working on behalf of, for or with the consent of a foreign state, which is militarily organised, equipped or armed and of which the state origin cannot be identified. According to the provisions of the act, entry into and residence in the country by such groups is absolutely prohibited and violation of this provision is punishable under the Criminal Code of Finland. The Defence Forces and the Frontier Guard may use the military means of force needed to protect Finland's territorial integrity.

Secondly, Finland has made amendments to legislation, which makes it easier to provide and receive international assistance and participate in other international activities. The primary responsibility lies with states, insofar as hybrid threats relate to national security and defence and the maintenance of law and order. However, there is a need for cooperation and a coordinated response also at EU and NATO levels as many countries face common threats.

Thirdly, amendments were made to the State Civil Service Act and to the Act on Background Checks, which the Finnish parliament adopted in November 2017. The new regulations require an authorisation to do



background checks more precisely before a person is to be nominated to governmental posts and some other posts that are relevant to vital functions of society. Background checks should be carried out if an employee will have access to important information relating to national security, defence or international relations.

The fourth example is a new legislation that improves the efficiency of information exchange between the authorities and the Government Situation Centre. The amendment enables joint information analysis including observations of incidents that can be deemed to be associated with potential attempts to influence.

There are several other legislation proposals under preparation at the moment in order to improve resilience and respond to hybrid threats.

drones that could endanger public order or security or other state's security interests. Legislation that applies to buying land and real estate will be also reviewed.

These examples show that it is urgent to continuously evaluate the changes in the security environment and improve the resilient legislation in order to counter the new threats.

The potential risks may arise from an ambiguous legal environment and lack of clear powers of authorities to counter hybrid threats. In the era of hybrid threats, an adequate collaboration and situational awareness through the whole society but especially between internal and external security authorities are crucial.

We have focused our attention on the benefits of an open democrat-

We have focused our attention on the benefits of an open democratic state system and only recently realised the legal vulnerabilities arising from the basic notion of free democratic society and rule of law.

For example, legislation concerning the power of actions of the competent authorities and provision and reception of executive assistance will be revised. The most important legislative project under way concerns civil and military intelligence, which will be sent to the parliament in January 2018.

Moreover, there is a government proposal drafted to set up legislation for unmanned aerial vehicles and

ic state system and only recently realised the legal vulnerabilities arising from the basic notion of free democratic society and rule of law.

Through careful examination of legislation, it is possible to identify new risk scenarios and prevent the hostile actors from using the legislation as an enabler for influencing.

This topic deserves further focus and could benefit greatly from the best practice examples from countries that have improved resilient legislation on countering hybrid threats. Security and the protection of fundamental rights are not conflicting aims. In the rule

of law based societies, they could be balanced through the careful legislative preparation bearing in mind that in crisis situations and emergency conditions, the legality of all activities is central so that trust in the eyes of citizens remains high.

Author

Tiina Ferm is Counsellor in Legislative Affairs at the Finnish Ministry of the Interior. Her core duties are ministerial-level issues relating to the prevention of Cyber Crime and Hybrid Threats. She is responsible for supporting and providing strategic planning, developing the preparedness to Cyber and Hybrid threats and advising on legal matters in those areas. Prior to this she has been responsible for drafting much legislation, such as the Act on Detecting and Preventing Money Laundering and Terrorist Financing, and the Passport Act in which Finnish Biometric Passports and Identification Card were introduced. She also has 10 years of experience in the Finance Sector. She is also preparing her PhD thesis in the Faculty of Law of the University of Helsinki on “Jurisdiction between judicial authorities in prevention of cyber and hybrid threats”, focusing on the norms and authorities’ powers in countering threats.

Literature:

Aurel, Sari: Hybrid Warfare, Law and the Fulda Gap (2017). Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2927773


Hoffman, Frank G: Conflict in the 21st Century: The Rise of Hybrid Wars. Potomac Institute for Policy Studies (2007)

Lehto, Marja: Legal Grounds for the Use of Force in International Relations, commentary to the Foreign Affairs committee of Parliament, (2015)

Joint Report to the European parliament and the council on the implementation of the Joint Framework on countering hybrid threats – a European Union response (JOIN (2017) 30 final)

Government proposal amending State Civil Act and Act on Background checks (HE 71/2017 vp)

Internal Security Strategy. A safe and secure Life Government Resolution (2017). Security Strategy for Society. Government Resolution (YTS 2017).



Interdependency of Internal and External Security: Will the operational culture change with the operational environment? Ministry of the Interior Publication 37/2016.

Strategic Programme of Prime Minister Juha Sipilä's Government 29 May 2015: Government Publications 12/2015.

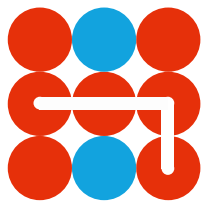
The Ministry of Defence press release 10.07.2017: "Soldiers without insignia" to be included in the Territorial Surveillance Act. Available: https://www.defmin.fi/en/topical/press_releases/soldiers_without_insignia_to_be_included_in_the_territorial_surveillance_act.8625.news

The European Centre of Excellence for Countering Hybrid Threats
tel. +358 400 253800 www.hybridcoe.fi

ISBN 978-952-7282-02-1

The European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE) serves as a hub of expertise to enhance civil-military capabilities, resilience, and preparedness to counter hybrid threats with a special focus on European security and on EU-NATO cooperation.

The responsibility for the views expressed ultimately rests with the authors.



Hybrid CoE