LEGISLATIVE MEANS TO COMBAT INSTRUMENTALISED MIGRATION? – CASE FINLAND

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The views expressed in the article are the author's own and do not necessarily represent the official view of the Finnish Border Guard.

Abstract. *The aim of the study is to analyse, how to properly respond to instrumentalised migration by means of legislation – can the state invoke national security to respond to the phenomenon? Is it possible to deviate from international agreements by referring to "fundamental change of circumstances" (e.g. Article 62 of Vienna Convention on the Law of Treaties)? The article analyses, as an example, how Finland – a state governed by the Rule of Law – has tried to respond to hybrid operations, such as instrumentalised migration, through legislative means. These include, for example, changes to the Border Guard Act, the Emergency Powers Act and lastly, the Act to combat instrumentalised migration (constitutional enactment), which is in conflict with international obligations (the right to apply for asylum). The article represents legal research, combined with military sciences (military and operational law). First, the article problematizes briefly the question of the relationship between international law, EU law and national law, considering the topic. After this, Finland's national legislative measures to respond to hybrid operations will be presented. Lastly, conclusions shall be summarized. The research indicates that states are even more ready to appeal to their national interests, ignoring their international obligations. This poses a challenge to the sustainability of the international treaty system, requiring a new interpretation of the treaty texts – or changes to the treaties.*
Keywords: *hybrid operations, instrumentalised migration, international obligations, law, legislation, national security*

Introduction

This article examines the possible means of legislation to respond to hybrid operations, especially instrumentalised migration, which e.g. Russia and Belarus have targeted against the member states of the European Union (EU). At the end of 2023 Finland's eastern border became target of instrumentalised migration. The President of the European Commission, Ursula von der Leyen, described the phenomenon as a "hybrid attack" while visiting in Finland in April 2024. In a similar way, Poland, Latvia and Lithuania were affected by the phenomenon on their border with Belarus in 2021. Previously a similar phenomenon occurred in the eastern border of Finland in Lapland in 2015–2016.

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The research question/problem of this article is, whether states can on the grounds of national security enact laws that are (potentially) in conflict with international obligations? The article represents legal research, combined with military sciences. The main research method used is legal positivism. In the beginning of the article, sovereignty and national security from the perspectives of international law, EU law, and constitutional law are examined. After this, the article focuses on examining Finnish legislation: what kind of legislative solutions has Finland sought in order to ensure national and border security and to respond to hybrid operations, especially instrumentalised migration?

Research results indicate that states, in order to guarantee their national security, are ready to challenge the established interpretations when it comes to international agreements. For the sake of the sustainability of the international treaty system, international cooperation is required, both at the levels of international law and international politics.

The article is partly based on the author's ongoing (2023–2025) master's thesis in military sciences (military and operational law).

Sovereignty and National Security

The most significant characteristic of a State is its independence and self-determination – sovereignty. Sovereignty is related to the ideas of independence, i.e. external sovereignty and self-determination, i.e. internal sovereignty (Koskenniemi, 2007). Territorial sovereignty is a key pillar of the global legal order, manifested as an inviolable constitutional paradigm, enjoying utmost sanctity in the international legal order. In this sense, territorial sovereignty is indivisible and reflects the fact that "territory" is not only an attribute of state power, but a fundamental element of statehood: a state has power over its own territory and *is* at the same time its own territory (Kohl 2019). In international law, there are two indisputable doctrines concerning states: sovereignty as a form of law and the state's right to national security (Morris, 2020). The International Court of Justice (ICJ) has explicitly stated that it is *"quite obvious that a state has a legal interest in protecting its territory from any external harmful activity"* (*Nuclear Tests,* 1978).

When it comes to the law of the European Union, according to Article 4(2) of the Consolidated Version of the Treaty on European Union (TEU), national security remains solely as the responsibility of each member state. The Article is supplemented by Articles 36, 72 and 346 and 347 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), which partly safeguard the national security obligations of the member states, although they rather refer to the maintenance of public order

and the protection of internal security. However, they are important when defining the concept of national security in EU law. Even though under Article 4(2) TEU the Union does not have competence in the area of national security, the provision does not make Union law irrelevant in matters of national security. In the light of the jurisprudence of the Court Justice of the European Union (CJEU), when the state invokes national security, it must be able to demonstrate the factual need for the invocation (C-601/15).

With regard to what is expressed in the Article 4(2) TEU, the CJEU has also held in its jurisprudence that EU rules cannot be interpreted in such a way that they would prevent, for example, the armed forces of the member states from carrying out their tasks – this could cause harm to the preservation of the state's territorial integrity and the guarantee of national security (C-742/19). The CJEU has also considered that the objective of guaranteeing national security, read in the light of Article 4(2) TEU, may be hierarchically more important than the objective of a secondary right of the EU, possibly thus justifying measures that interfere with fundamental rights more seriously than measures that would justify some other objectives achievement (C-162/22 and C-140/20).

The General Court of the European Union (EGC) has stated that it is the responsibility of the member states to define their own key security interests and has considered this to be an essential freedom of the members states from the point of view of sovereignty, although member states are at the same time required to be able to justify and disclosure threats to their national security (T-26/01 and C-423/98; see also C-715/17, C-718/17 and C-719/17).

Union law must take due account the specific characteristics of each Member State, such as – for example – the state's geopolitical position, geographic location and historical context. These have also been recognized accordingly in the Commission's guidelines regarding the application of Article 346 TFEU, which contains a secrecy exemption and an armaments exemption. The CJEU has indeed shown a tendency to take into consideration the differences between member states and their use as a justification for measures at different levels to protect the same rights (C-742/19; C-384/93; C-3/95; see also Mikkola 2024). In the light of jurisprudence, however, the justifications and concrete dangers presented by the member state must therefore be quite significant. As such, it is *possible* that, for example, serious threats of hybrid operations could also meet the court's criteria.

When it comes to the European Convention on Human Rights (ECHR), The European Court of Human Rights (ECtHR) has stated that the concept of "national security" cannot be defined precisely or exhaustively, as it may be subject to many kinds of threats that are difficult to predict or define in advance. In the case of *Esbester v. United Kingdom* (1993), the court stated

that *"many laws, which by their subject-matter require to be flexible, are inevitably couched in terms which are to a greater or lesser extent vague and whose interpretation and application are questions of practice."* For this reason, the court has considered that the clarification of the concept must primarily be left to national practice, and states are therefore left with quite a wide margin of discretion in matters related to national security. (See also *Al-Nashif v. Bulgaria*, 2001; *Kennedy v. United Kingdom,* 2010; *Leander v. Sweden,* 1987; *Konstantin Markin v. Russia,* 2012; *Moiseyev v. Russia,* 2008; *Ireland v. United Kingdom,* 1978; *Brannigan and McBride v. United Kingdom*, 1993.) The ECtHR, on the other hand, remains largely responsible for evaluating the legal basis, necessity and proportionality of the measures. (See *Janowiec and Others v. Russia,* 2013; *Klass and Others v. Germany,* 1978; *Handyside v. United Kingdom,* 1976).

The limitation clauses of the ECHR have been interpreted as a means of self-defence by the state against threats to the state functions. Such activities can include hostile military actions as well as various illegal harassment and influence efforts aimed at, among other things, undermining the functioning of the democratic system (see also Widlund, 2020). Such activity is also an interference in the internal affairs of another state (*domaine reservé*), constituting an infringement of sovereignty.

Whereas serious threats of hybrid operations could possibly serve as grounds for limitation in EU law (deviation from obligations) based on the jurisprudence of the CJEU, they would also at least be grounds for limitations in the context of the ECHR, and depending on the severity and extent of the impact ("scale and effects") of the operations, also a derogation ground according to Article 15 of ECHR, i.e. deviating from contractual obligations in the event of a national emergency. Although the ECtHR has stated that the court has the competence to assess the existence of a state of emergency and thus considers it to be a legal matter *de jure*, the wide margin of discretion shows that the court considers the matter *de facto* a highly politicized issue (Honko, 2017). The ECtHR has rarely questioned states' views that the intervention has taken place for reasons related to national security. This is partly influenced by the fact that national security has been considered to be part of state sovereignty (*Bucur and Toma v. Romania,* 2013). For this reason, the concept has been defined loosely or openly in the national legislations of the member states, with concepts and terminologies also varying between member states (Honko, 2017).

Finnish legislation and recent legislative amendments

The Finnish legislation is based on the basic idea that different types of disruptions require and should be subject to different regulations. Thus, for

example, the seriousness of the threat and its possible effects, the interest to be protected, the urgency of the measures and the extent of their effects come up for assessment. Our crisis legislation – *Emergency Powers Act 2011* and *State of Defence Act 1991* – give powers to authorities only in those matters that are expressly regulated, at the same time setting the legal basis for managing crises. In this way, they can also be considered to be operational plan implementation tools at the same time. In Finland, legal preparedness is also part of the authorities' preparedness obligations, according to Section 12 of the Emergency Powers Act 2011. For this purpose, legislative amendments have been made in Finland in order to prepare for different kind of possible hybrid operations – such as instrumentalised migration – and to ensure and maintain both national and border security.

Section 16 of the *Border Guard Act 2005* was amended already in the summer of 2022. According to Section 16, subsection 1, the Government may decide to close a border crossing point or restrict border crossing traffic for a fixed period or until further notice, if the closure or restriction is necessary in order to combat a severe threat for public order, national security or public health. According to the provisions of the law, a serious threat to public order could mean a situation where entering the country causes a significant increase in crime, organized crime or extremist activity, which manifests e.g. as an increase in the number of violence or serious crimes, terrorist attacks or similar acts, or various types of riots based on tensions between different population groups or tensions between a certain population group and the authorities. Extensive human trafficking related to immigration can also pose a serious threat to public order and security. The situations mentioned above can also pose a threat to national security at the same time. (HE 94/2022 vp.) The regulation was applied for the first time in November 2023 on the Finnish-Russian border, when the external borders were closed to protect national security due to instrumentalised migration.

The Emergency Powers Act 2011 was also amended in the summer of 2022 – a so-called "hybrid provision" was added to the law. After the law amendment, according to Section 3, subsection 1, point 6 b, a threat, action, event or the combined effect of these to the maintenance of border security or public order and security, as a result of which the functions necessary for the proper functioning of the society are substantially and extensively prevented or paralyzed, or in any other manner comparable in seriousness to these substantially endangers the ability of society to function or the survival of the population, constitutes a State of Emergency.

On 5th of July 2024, The Finnish Border Guard was granted new powers in the *Border Guard Act 2005* to carry out surveillance based on radio technology (*radio technical monitoring*), meaning the right to detect, locate, recognise, identify and monitor radio-frequency electromagnetic waves and

radio equipment by means of the properties of electromagnetic waves. This enables carrying out technical surveillance and surveillance based on radio technology in the vicinity of the national border, in the maritime area, on the coast, in airspace, at border crossing points and in their immediate vicinity, and in areas under the control of the Border Guard and in their immediate vicinity. Further it enables forming a real-time situational picture for the needs of the core tasks of the Border Guard, i.e. border surveillance and maintaining border security. At the same time, these national legislative amendments have been enacted to combat serious and organized crime, ensure national security and maintain public order and security.

On 16th of July, the President of the Republic approved the bill for the *Act on Temporary Measures to Combat Instrumentalised Migration 2024*. The act is what is called an exceptive act (*Constitutional Enactment*). The Finnish Constitution provides that exemptions from the constitution can be made if the issue is determined to be urgent by five-sixths of the members of parliament. The legislative proposal must then be approved by two-thirds of the voting members of parliament. These exceptive acts may be used to enact limited exceptions to the Constitution itself for compelling reasons only. The aim of the act is to ensure national security, improve border security and ensure that Finland has effective means at its disposal to combat instrumentalised migration, which is being used to put pressure on Finland. Finland's eastern border is the longest external border that both the EU and NATO have with Russia. It is therefore not only about the security of Finland, but the security of the entire Union and NATO as well.

If the act is applied, applications for international protection would not, apart from certain exceptions, be received in the area subject to the restriction, and instrumentalised migrants would be prevented from entering the country. A migrant who has already entered the country, would be removed without delay and instructed to travel to a place where applications for international protection are being received. Applying the act requires highly exceptional and pressing reasons. Doing so requires knowledge or a justified suspicion that a foreign state is attempting to influence Finland in a way that poses a serious threat to Finland's sovereignty and national security and no other means are sufficient to resolve the situation. A decision to apply the act may be made for up to one month at a time. It has been recognized that the law is in a "state of tension" with international obligations (PeVL 24/2024 vp). Views have also been expressed that the law violates both international human rights treaties, such as Convention Relating to the Status of Refugees (United Nations, 1951) and the law of the European Union, especially the EU Asylum Procedures Directive (Directive 2013/32/EU). On the other hand, e.g. the Finnish Ombudsman, the Chancellor of Justice of Finland and the Supreme

Administrative Court of Finland have stated in their opinions to the (draft) law that the jurisprudence of the European courts has not dealt with a situation completely similar to the instrumentalised migration referred to in the law (HE 53/2024 vp).

The latest legislative amendment, a new border procedure, which is in accordance with the EU Asylum Procedures Directive, was also added to the Finnish legislation in the *Aliens Act 2004* on 1 September 2024. The procedure will allow asylum applications submitted by persons who have already arrived in the country to be processed near the border if certain preconditions are met. The purpose of the border procedure is to enhance the examination of unfounded applications and the return of applicants whose application has been rejected. In addition, this will prevent secondary movements of asylum seekers to other EU countries.

Conclusions and suggestions

Studying and understanding security (and especially war) as a phenomenon is always connected to a specific temporal and cultural context. As Sun Tzu stated in his own time in The Art of War, just as water does not have a permanent form, war does not have permanent conditions either (Giles, 2000). As we strive to respond to the changes in our operating environment, our security thinking must be in a dynamic state. The world and our security environment have changed and are constantly in the process of change. This is inevitably reflected in the legislation as well, as can be seen from the previously presented legislative changes.

When it comes to legislative acts specifically designed to combat instrumentalised migration, similar kind of legislation has also been enacted not only in Finland, but in other European Union countries as well. Modern phenomena that threaten (national) security – especially when talking about hybrid threats – are not unambiguous and they cannot always be placed in any single, specific "compartment". At the same time, citizens' and societies' expectations towards authorities to combat various threats more and more effectively have grown. The primary task of the state is to protect its own citizens. As states protect their national security from contemporary security threats, while at the same time possibly deviating from their international obligations, the international legal treaty system is being challenged: national security, which is an integral part of sovereignty, can be difficult to fit with the wording of international agreements, especially in the era of hybrid operations.

Should – and could – international agreements be interpreted today in a different way from the established ones? According to the Vienna Convention on the Law of Treaties (VCLT), a party may not invoke the

provisions of its internal law as justification for its failure to perform a treaty (United Nations, 1969, art. 27). But is it possible to deviate from international agreements by referring to "fundamental change of circumstances", as it is stated in the Article 62 of VCLT, in situations such as instrumentalised migration? When the Geneva and Hague Conventions were adopted, for example, no one knew such concepts as "hybrid operations" or thought of the possibility of such things as "instrumentalised migration" – the *weaponization of migrants*, as some have conceptualized the phenomenon. As Petty states, "where weaponized migration fits into the international law framework remains unsettled" (Petty, 2022). The same applies to the law of the European Union.

One could also speculate that the threshold of the U.N. Charter's prohibition on the use of force might be fulfilled in case of instrumentalised migration through the sending of people, if it is by nature deliberate and sufficiently extensive to destabilize the receiving state's ability to manage internal security in its territory or to secure its territorial integrity (see e.g. *Fisheries Jurisdiction,* 1998). Such a situation could be the case when another state sends ("weaponizes") a large number of people, equips them with the means of using force or incites them to violence in the territory of the receiving state. However, it must be noted that instrumentalised migration does not reach the level of the use of force in an instant (if at all), and its evaluation can be difficult, if not impossible even – and ultimately, it might be a political, not a judicial, decision.

As of now, instrumentalised migration is a matter of internal security – and a question of national security. Since it is a matter related to border security, in Finland the competent authority is the Border Guard, which, despite being militarily organized, is a civilian authority in peacetime – it is not part of the armed forces. In Finland, the legislation does not allow the use of armed forces in the situation. The Finnish Defense Forces may, however, give executive assistance (which does not include use of military force) to the Border Guard, in accordance with Section 79 of the *Border Guard Act 2005*.

If the tensions between international agreements and national legislations cannot be removed through interpretation, should the agreements be changed to reflect modern times, then? If so, in order to preserve the international treaty system, international cooperation is required, both at the levels of international law and international politics. In a globalized world, solutions must be sought together.

The inflexibility of laws could make them harmful at worst. Should thus fundamental rights and the principles of the Rule of Law be reinterpreted in the current social conditions? In nations governed by the Rule of Law this does not, and should not, mean that the law falls silent in times of crises.

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