



German Institute
for Human Rights

Analysis

Responsibility for basic and human rights following the withdrawal from Afghanistan

On Germany's duty to protect particularly
vulnerable Afghans

Hendrik Cremer | Catharina Hübner



The Institute

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The Authors

Dr. jur. Hendrik Cremer is a researcher at the German Institute for Human Rights where he focuses on the right to asylum, rights in migration and the right to protection against racism. He studied law in Marburg and Hamburg, after which he worked as a lawyer specialising in residence and social law.

Dr. jur. Catharina Hübner, LL.M. is a researcher at the German Institute for Human Rights' monitoring body for the UN Convention on the Rights of Persons with Disabilities. Her work focuses on promoting and monitoring the application of the UN Convention on the Rights of Persons with Disabilities in the *Land* of Berlin, protection against discrimination and equality laws. Her doctoral thesis was entitled *The Legitimacy of the Afghan Amnesty Law under International Law*.

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Foreword

Military intervention in Afghanistan began following the declaration of the NATO alliance on 7 October 2001 with 'Operation Enduring Freedom' (OEF), which was in response to the terrorist attacks of 11 September 2001. After the fall of the Taliban, the International Security Assistance Force (ISAF) was dispatched to Afghanistan on the basis of UN Security Council Resolution 1386 of 20 December 2001. This mission was followed at the end of 2014 by the Resolute Support Mission, which ended in summer 2021.

More than 5,000 German soldiers were stationed in Afghanistan at certain times as part of the International Security Assistance Force (ISAF) and the Resolute Support Mission. Germany provided the third largest troop contingent after the USA and the United Kingdom.

In August 2021, the countries involved in Resolute Support withdrew from Afghanistan after two decades of military involvement there, leaving its people to the Taliban despite the warnings of those who have advocated an Afghanistan in which people, especially women, can live freely with their human rights respected. Images of desperate people hoping in vain to be evacuated from Kabul airport circled the world.

The international military mission has ended, but Germany, like the other nations involved, continues to have a duty to protect particularly vulnerable people in Afghanistan. By the time the evacuation flights from Kabul had ceased at the end of August 2021, Germany had managed to fly only a small number of local staff (*Ortskräfte*) who had worked for German ministries and organisations and other particularly vulnerable people out of

Kabul and take them to safety. The German Foreign Minister then stated, "The military evacuation is now over. But our work continues and will continue until everyone in Afghanistan for whom we are responsible is safe."

This paper demonstrates the extent to which Germany has a duty to protect the basic and human rights of people in Afghanistan as a consequence of the international military mission and the withdrawal of international troops. This duty is about protecting people who are in physical and mortal danger. It stems from the right to life and physical integrity enshrined in Germany's Basic Law and in human rights treaties.

Such protection obligations are due not only to local staff who worked for German institutions like the German Armed Forces and the German Society for International Cooperation (*Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ*). This paper explains the extent to which Germany also has a duty to protect the basic and human rights of other particularly vulnerable people in Afghanistan. This duty to protect entails an obligation for Germany to assist people trying to leave Afghanistan, which may in turn result in granting them the right to visas for entry into Germany.

NATO countries, including Germany, have the duty to ensure that particularly vulnerable Afghans continue to be able to leave Afghanistan and enter their respective countries by regular means, even now that troops have been withdrawn from Afghanistan.

Professor Dr Beate Rudolf

Director of the German Institute for Human Rights

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Summary

In August 2021, NATO members withdrew after their two-decade military campaign, leaving the people of Afghanistan to the Taliban. As international troops were being withdrawn, many other people hoped in vain to be evacuated so that they could escape the country.

NATO's international military mission has ended, but Germany, like the other nations involved, continues to have a duty to protect particularly vulnerable people in Afghanistan. Because of the rights to life and physical integrity enshrined in Article 2 Paragraph 2 Sentence 1 of its Basic Law (*Grundgesetz*) and in human rights treaties, Germany has a duty to protect those Afghans who worked as local staff (*Ortskräfte*) for German ministries and organisations. Conditions exist for extraterritorial protection duties to apply, because local staff are now exposed to situations of physical and mortal danger for which the German state is responsible. The reason for their particular endangerment is the close ties that came about in their work situations with organisations such as the German Armed Forces and the German Society for International Cooperation (*Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ*) - these links having arisen as a result of conduct attributable to Germany. The particular threat to local staff has become even more acute since the Taliban seized power. Germany therefore has a legally binding duty to protect them. In particular, local staff and their family members have the right to enter Germany for their protection.

Germany's duty to protect other particularly vulnerable Afghans and their family members also stems from the rights to life and physical integrity enshrined in basic and human rights law. The na-

tions involved in the international military operation carry a special responsibility towards people who are exposed to physical and mortal danger as a result of the Taliban's seizure of power because they worked to achieve the objectives of the campaign. Although this particular responsibility is shared by the other countries involved in the international military campaign, this does not diminish the responsibility of each individual nation concerned.

The duty to protect applies to those whose particular vulnerability is due to the fact that, through their activities and/or publicly expressed opinions, they have been committed developing a country in which human rights are respected. These people include human rights defenders, journalists, judges, cultural professionals, former members of the security forces and members of the government, and girls and women who are particularly at risk because they have taken on public roles and similar. These are people who, as a result of the Taliban's seizure of power, are subject even more than before to particular physical and mortal danger. The nations involved in the international military mission have therefore been the cause, at least indirectly, for the persecution of these people.

According to the protection duties which fall upon Germany under basic and human rights law, Germany must offer protection to other particularly vulnerable people from Afghanistan as well as former local staff. After the Taliban took power, the threat to certain people in Afghanistan began to worsen and continues to do so. Like other nations involved in the international military mission, Germany has a human rights duty towards them.

1 Introduction

When the Taliban took power in Afghanistan in August 2021, a disaster unfolded which the international community and the world at large cannot ignore. While the international forces rushed to withdraw from Afghanistan, other people hoped in vain to be evacuated and brought to safety. Some even desperately clung to, then fell from, an international military aircraft as it took off. All this happened despite the warnings of those in Afghanistan who are now subject to Taliban violence, despite the warnings of those who have campaigned for an Afghanistan where people, especially women, can live freely with their human rights respected.¹

The images of people trying in vain to get onto flights at Kabul airport confronted the nations involved in the international military mission, which include Germany, with an inescapable question: what responsibility results from their actions? NATO members withdrew after two decades of military operations and left the people, fearful and unprotected, to the Taliban.

It was not until events unfolded during the Taliban's capture of Kabul in August 2021 that the German government, after months of internal dispute² and disregard for the dangerous and deteriorating situation in Afghanistan,³ took the decision to bring local Afghan staff working for German ministries and organisations and other particularly vulnerable Afghans to Germany, some without visas, to protect them from the Taliban's revenge.⁴ Some local Afghan staff had already permission to enter Germany before that, but only a small number.

According to the German government, when its evacuation flights from Kabul ceased at the end of August 2021, Germany had only managed to fly out a small number of local staff and other particularly vulnerable people from Kabul.⁵ The German Foreign Minister then stated, "The military evacuation is now over. But our work continues and will continue until everyone in Afghanistan for whom we are responsible is safe."⁶

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- 1 See for example Deutschlandfunk Kultur (19.08.2021): Afghanistans Zukunft. Taliban predigen Emirat light. The article reports on the Afghan Malalai Habibi, who campaigns for women's rights in her home country and, angry about inaction prior to the Taliban takeover, stuck a plaster over her mouth during a BBC live interview: "Because we had called out so much and warned about this situation. We said these things would happen. We heard from younger people all over the country that the situation was not good, the Taliban were getting more powerful. We asked for international help, for political agreements, but no-one listened to us. No media, no politicians, no nation. Nobody wanted to hear our voices. And now I keep getting asked for interviews. That is why I am so disappointed. What can I say now that I haven't already predicted? That's why I was so angry at that moment, I just wanted to be silent and tell the world, 'Hey, we really wanted to talk to you, but you didn't look and now I'm not talking any more.'" https://www.deutschlandfunkkultur.de/afghanistans-zukunft-taliban-predigen-emirat-light.979.de.html?dram:article_id=501891 (retrieved on 16.12.2021).
 - 2 Süddeutsche Zeitung (18.08.2021): Flucht aus Afghanistan: Wie Bürokratie das Ausfliegen von Ortskräften verhinderte. <https://www.sueddeutsche.de/politik/afghanistan-flucht-ortskraefte-1.5385870>; ZDF (18.08.2021): Ortskräfte aus Masar-i-Scharif – Ausfliegen im Juni scheiterte an Visa-Streit. <https://www.zdf.de/nachrichten/politik/afghanistan-evakuierung-masar-i-scharif-gescheitert-100.html> (both retrieved on 16.12.2021).
 - 3 tagesschau.de (16.08.2021): Maas on the situation in Afghanistan: "We misjudged the situation." <https://www.tagesschau.de/inland/innenpolitik/maas-afghanistan-lage-101.html>; welt.de (16.08.2021): Maas on Afghanistan. "We misjudged the situation." <https://www.welt.de/politik/ausland/article233176635/Maas-ueber-Afghanistan-Wir-haben-die-Lage-falsch-ingeschaetzt.html>; Zeit Online (20.08.2021): Ein Lagebild, das beispiellos daneben lag. https://www.zeit.de/politik/deutschland/2021-08/afghanistan-eroberung-taliban-bnd-fehleinschaetzung-lage?utm_source=pocket-newtab-global-de-DE (all retrieved on 16.12.2021).
 - 4 The worsening situation in August 2021 led to the Federal Government temporarily suspending its efforts to deport people to Afghanistan. The Federal Ministry of the Interior, Building and Community (11.08.2021): Press release: Rückführungen nach Afghanistan zunächst ausgesetzt. <https://www.bmi.bund.de/SharedDocs/pressemitteilungen/DE/2021/08/aussetzung-abschiebung.html> (retrieved on 16.12.2021).
 - 5 tagesschau.de (30.08.2021): Bisher 138 Ortskräfte ausgeflogen. Ein gewagtes Schutzversprechen. <https://www.tagesschau.de/inland/innenpolitik/ortskraefte-afghanistan-111.html>; tagesschau.de (29.08.2021): Maas in der Türkei. Hilfe bei Wiederaufbau des Flughafens Kabul. <https://www.tagesschau.de/ausland/maas-afghanistan-121.html> (both retrieved on 16.12.2021).
 - 6 Ibid.

This is the background against which this paper discusses the extent to which Germany has and must fulfil basic and human rights duties to protect people in Afghanistan as a consequence of the international military mission and the withdrawal of international troops. These duties apply not only to local staff who worked for German organisations such as their Armed Forces and the German Society for In-

ternational Cooperation (*Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ*). It also discusses the extent to which Germany has a duty to protect the basic and human rights of other particularly vulnerable people in Afghanistan, and from that duty an obligation to assist people trying to leave Afghanistan, which may in turn result in granting them the right to visas for entry into Germany.

2 The obligations of basic and human rights – the duty to protect and the requirements of its fulfilment

After the terrorist attacks on 11 September 2001, and following the declaration of NATO's alliance on 7 October 2001, international troops led by the USA invaded Afghanistan in Operation Enduring Freedom (OEF). More than 5,000 German soldiers were at times stationed in Afghanistan under NATO leadership as part of the subsequent International Security Assistance Force (ISAF, 2001 to 2014)⁷ and the Resolute Support Mission (end of 2014 onwards). Germany provided the third largest troop contingent after the USA and the United Kingdom.⁸ Peter Struck, then Minister of Defence, justified the Bundestag mandate for the mission in 2002 by saying that Germany's security should be defended "even in the Hindu Kush."⁹

Germany's duty under the Basic Law to protect particularly vulnerable Afghans is based ultimately on the exercise of German sovereignty. Basic rights are comprehensively binding upon German decision-makers, including vis-à-vis other nationals in extraterritorial scenarios.¹⁰ The same applies to foreign and security policy. Basic rights can therefore apply to people affected in Afghanistan.¹¹ Not only is Germany bound by the fundamental rights of its own Basic Law, but also by

international laws to which it is subject, which include human rights treaties such as the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR).¹² The rights codified in these agreements also apply to the exercise of German state authority outside its own territory.¹³

A distinction must be made between extraterritorial duties to uphold basic and human rights when they are violated, and the conditions required before extraterritorial obligations to protect actually arise. This particular case concerns the duty to protect arising from the right to life and the right to physical integrity. These protection duties are enshrined in Article 1 Paragraph 1 and Article 2 Paragraph 2 Sentence 1¹⁴ of Germany's Basic Law, Articles 2 and 3 of the European Convention on Human Rights, and Articles 6 and 7 of the International Covenant on Civil and Political Rights.

The Federal Constitutional Court has not yet clarified the circumstances under which basic rights can be used as a foundation for duties to protect people living abroad, but in a decision it reached in March 2021, it discussed as a potential

7 Federal Agency for Civic Education (14.10.2021).

8 See in more detail Federal Agency for Civic Education (07.06.2021); Nachtwei (2020).

9 Speech by the Federal Minister of Defence, Dr Peter Struck, to the German Bundestag in Berlin on 20 December 2002, on the continued involvement of armed German soldiers in the deployment of the International Security Assistance Force in Afghanistan. <https://www.bundesregierung.de/breg-de/service/bulletin/rede-des-bundesministers-der-verteidigung-dr-peter-struck-784328> (retrieved on 16.12.2021).

10 Cf. Federal Constitutional Court (2020): judgement on 19.05.2020, ref. 1 BvR 2835/17, recital 88 et seq.; Federal Constitutional Court (2021): decision on 24.03.2021, ref. 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20, recital 175.

11 Cf. Maruhn / Mengeler / Strobel (07.10.2021); Azizi / Atal / Salomon (2021).

12 Cf. Federal Constitutional Court (2020): judgement on 19.05.2020, ref. 1 BvR 2835/17, recital 93 et seq.; Maruhn / Mengeler / Strobel (07.10.2021).

13 See regarding the ECHR, with references to the case law of the European Court of Human Rights: Mayer-Ladewig / Nettesheim (2017a), recital 30 et seq.; regarding the ICCPR and references to the case law of the UN Human Rights Committee: Schabas (2019), Art. 2 CCPR, recital 31 et seq.; Federal Constitutional Court (2020): judgement on 19.05.2020, ref. 1 BvR 2835/17, recital 93 ff.

14 Cf. Starck (2018a), recital 208, 229; Starck (2018), recital 196; Rixen (2021), recital 24; Höfling (2018), recital 48 et seq.; Federal Constitutional Court (2021): decision on 24.03.2021, ref. 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20, recital 99.

connecting factor the fact that the impairment of legally protected rights was caused (or jointly caused) by Germany.¹⁵ In a November 2020 ruling, the Federal Administrative Court deemed a sufficiently close connection to the German state to be required for there to be a duty to protect arising from Article 2 Paragraph 2 Sentence 1 of the Basic Law in the event of a violation of the life or physical integrity of basic rights holders.¹⁶ As a consequence, the duty to prevent the impairment of legally protected rights requires that a dangerous situation has definitely and in an essential respect arisen within the area of responsibility of the German state authority.¹⁷

The responsibility of Germany which entails a duty to protect therefore depends on threats to interests protected by basic legal rights arising from actions attributable to Germany. If Germany participates in dangerous military action in the territory of another state by deploying its Armed Forces there, it may end up being obliged to act.¹⁸ Duties to protect are not only intrinsic to the rights of the Basic Law. They are a key component of human rights,¹⁹ especially the rights to life and physical integrity enshrined in the European Convention on Human Rights and the International Covenant on Civil and Political Rights.²⁰ Extraterritorial duties to protect can stem from these as they do from the Basic Law. They stipulate that the impairment of legally protected rights can be ascribed to a signatory state if it has substantially contributed to that impairment by virtue of its conduct.²¹

The measures required to fulfil a duty to protect under basic and human rights depend very much

on the particular protection needs that the endangered interests legally protected under basic rights have. It also depends on the extent to which the people concerned can escape the danger themselves,²² and how great the threat is to the specific interests protected under basic rights.²³

If it is the right to life and physical integrity that must be protected, and thus existential legally protected rights, the duties are generally far-reaching.²⁴ The greater the threat to these legally protected rights, the greater the obligation is to ensure that the threat is actually averted.²⁵

All this said, we will now discuss which people in Afghanistan are the beneficiaries of protection duties. We will highlight the extent to which certain situations of physical and mortal danger fall under the responsibility of German state authority, and what Germany's duties to act are as a result of the protection obligations that exist.

2.1 Duties to protect local staff

In the case of local staff (*Ortskräfte*), it is clear that Germany now has a duty to protect their life and physical integrity. Local staff means people who worked for German ministries or organisations. Their work has given them a particularly close relationship with Germany.

The conditions under which duties to protect arise as set out by the Federal Administrative Court are met, since local staff have become subject to situations of physical and mortal danger that are the responsibility of German state authority. Their

15 See in particular Federal Constitutional Court (2021): decision on 24.03.2021, ref. 1 BvR 2656/18 – 1 BvR 78/20 – 1 BvR 96/20 – 1 BvR 288/20, recital 175.

16 Cf. Federal Administrative Court (2020): judgement on 25.11.2020, ref. BVerwG 6 C 7.19, recital 45 et seq.

17 Cf. *ibid.*, recital 46; cf. also on the aspect of responsibility in the sense of Germany impairing of legally protected interests, Federal Constitutional Court (2021): decision on 24.03.2021, ref. 1 BvR 2656/18 – 1 BvR 78/20 – 1 BvR 96/20 – 1 BvR 288/20, recital 175.

18 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

19 For more details see Stahl (2012); especially regarding the rights of the ECHR: Jaeckel (2001).

20 See Stahl (2012), especially p. 335 et seq.

21 See regarding the ECHR: Mayer-Ladewig / Nettesheim (2017a), recital 30 et seq.; regarding the ICCPR: Schabas (2019), Art. 2 CCPR, recital 31 et seq.

22 Cf. Federal Administrative Court (2020): judgement on 25.11.2020, ref. BVerwG 6 C 7.19, recital 25.

23 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

24 Cf. Federal Constitutional Court (1975): judgement on 25.02.1975, ref. 1 BvF 1,2,3,4,5,6/74, BVerfGE 39, 1 (42); Federal Constitutional Court (1993): judgement on 28.05.1993, ref. 2 BvF 2/90 and 4, 5/92, BVerfGE 88, 203 et seq.; European Court of Human Rights (1989): judgement on 07.07.1989, application no: 14038/88, recital 88.

25 On all of this cf. Stahl (2012), p. 335 et seq., with further references.

situation of danger is closely linked to the international military mission, which involved long-lasting and at least partially effective territorial domination by participating NATO countries, and the withdrawal of the international troops – decisions for which the German state was jointly responsible.²⁶ Moreover, local Afghan staff are people without whose work for German organisations such as the Armed Forces, Germany’s mission in Afghanistan would not have been possible.²⁷

For example, in order to be able to communicate with the populace, Afghan security forces and local politicians, officers of the German Armed Forces relied on Afghan interpreters. The German Armed Forces also needed local support to maintain the infrastructure of the quarters where they were stationed. Vulnerable people for whom Germany bears a special responsibility include those who worked for the German Armed Forces at Masar-i-Sharif.²⁸ This is highlighted by the example of the wife of a chef who had worked for the German Armed Forces and who pleaded for help via WhatsApp at the end of August: “My husband’s life is in danger. Everyone in our neighbourhood knows that he worked for the Germans. Everyone keeps asking why we don’t leave the country. I wish he had never worked for the Germans. If the Taliban or the Islamic State abduct my husband, there will be no-one left to look after me and my children. I’ve already lost my parents, I don’t want to lose my husband as well.”²⁹

The international military mission was not just about security interests in the strictest sense. And more specifically, it was not just about deploying the German Armed Forces and military assets. It was also about creating the conditions for eco-

nomie development, the establishment of stable social, political and state structures, and measures designed to promote social democratisation.³⁰

Afghans therefore acted as local staff not only for the German Armed Forces, but also for organisations such as the German Society for International Cooperation (*Deutsche Gesellschaft für Internationale Zusammenarbeit, GIZ*) as part of development policy projects. Germany’s particular responsibility for an Afghan working for the *GIZ*, his wife and their three children was brought before the Berlin Administrative Court in August 2021.³¹ The Berlin Administrative Court ruled that a local staff member who worked for the *GIZ* in Afghanistan until 2017, along with his wife and their children, could claim visas to enter Germany. The person in question had worked for the *GIZ* until September 2017, because of which he considered himself under threat and therefore applied for a visa to come to Germany. Germany rejected his application on the basis that his work had ended in 2017.

The man who had worked for the *GIZ* pointed out that he was still in danger because of his previous employment, that the Taliban were looking for him, and that he had already been shot once in 2016. His family, he said, was also in danger because of the practice of collective punishment. Germany responded by rejecting his right to entry, arguing that if it did not, any Afghan citizen who was under threat would be entitled to such rights. The Administrative Court for its part pointed out that the case did not concern ‘any number of Afghan nationals’, it was about a local employee and his family. It also emphasised that the danger to local staff had increased as a result of the Taliban takeover.³²

26 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

27 See for example Düe / Foster (2019).

28 See for example tageschau.de (10.11.2021): In Afghanistan zurückgelassen: Fluglotse klagt gegen Deutschland. <https://www.tagesschau.de/investigativ/kontraste/fluglotsen-klage-afghanistan-101.html>; Der Tagesspiegel (22.09.2021): Afghanische Ex-Mitarbeiter der Bundeswehr demonstrieren vor Camp. <https://www.tagesspiegel.de/politik/masar-i-scharif-afghanische-ex-mitarbeiter-der-bundeswehr-demonstrieren-vor-camp/23102170.html> (both retrieved on 16.12.2021).

29 tageschau.de (25.08.2021): Lage am Kabuler Flughafen: Verzweifelt Warten auf Platz im Flieger. <https://www.tagesschau.de/ausland/asien/afghanistan-taliban-kabul-101.html> (retrieved on 16.12.2021).

30 Speech by the Federal Minister of Defence, Dr Peter Struck, to the German Bundestag in Berlin on 20 December 2002, on the continued involvement of armed German soldiers in the deployment of the International Security Assistance Force in Afghanistan. <https://www.bundesregierung.de/breg-de/service/bulletin/rede-des-bundesministers-der-verteidigung-dr-peter-struck-784328> (retrieved on 16.12.2021).

31 Berlin Administrative Court (2021): decision on 25.08.2021, ref. VG 10 L 285/21.

32 Cf. also Marauhn / Mengeler / Strobel (07.10.2021).

The Administrative Court thus rightly accepts that Germany has a special duty to protect people who worked for German organisations as part of the international military mission, for which reason they are being persecuted by the Taliban as collaborators. It is precisely such connections with members of the Afghan population as a consequence of the international military mission that are being taken by the Taliban as reasons to attack local staff.³³ Germany cannot evade its obligations, as it attempted to at the Berlin Administrative Court, on the basis that somebody was employed some time ago. It was argued there that the plaintiff's work had already ended in 2017. The court did not accept this argument, especially given that the Federal Government had by then already changed the criteria defining local staff entitled to protection such that it recognised people to be at risk who had been employed by the Federal Armed Forces or federal ministries at any time since 2013. And regardless of this change of criteria by the Federal Government, reference to the time of employment of local staff can only impact a decision if it were to affect the actual risk to the person, i.e. if employment longer ago were to mean no risk. This, however, would presuppose that the Taliban only pursued people who had worked for German organisations from a certain time onwards. And the Taliban would have to obey this criterion reliably.

Whether a person worked directly for a German Federal department or for a German organisation working for the German state it is not determinative either. The Taliban are not about to differentiate depending on whether somebody's work was done on the internal basis of a direct employment contract, a contract for work and services or a subcontract. To make such a distinction ourselves would therefore be inappropriate in view of the specific dangers involved and the associated basic

and human rights protection needed by the people concerned, which is what is at issue.³⁴

For this reason, the right to protection also extends to family members of local staff, and this should not be limited to minors, especially since the Taliban may also target adult children for acts of revenge.³⁵ It should be borne in mind that the right to family life, which is one of the basic and human rights, does not extend solely to the protection of relations to minors. The principle of family integrity³⁶ enshrined in basic and human rights also protects connections between adults and their parents and connections between siblings.³⁷ Aside from that, the protection of family life enshrined in basic and human rights law can under some circumstances extend beyond the protection of the nuclear family, if, for instance, important ties to other family members have to be taken into account.³⁸ It should also be remembered that the Taliban's practice of collective punishment and the associated threat to life and physical integrity can also extend to other family members, such as siblings and parents.

Germany therefore has a basic and human rights obligation to protect people whom, through its conduct, it has directly exposed to the risk of serious violations of rights. The bar for proving the need for protection must not be made excessively high. Instead, Germany must fulfil its duty towards people who are in danger of persecution, terror and violence only because they worked for German ministries and organisations.³⁹ This danger has become much more acute since the Taliban seized power. Germany therefore has a legally binding responsibility to protect them. In particular, they and their family members have the right to enter Germany to seek protection.⁴⁰

33 Cf. Azizi / Atal / Salomon (2021), p. 2; see also Patenschaftsnetzwerk Afghanische Ortskräfte e.V. (2021). <https://www.patenschaftsnetzwerk.de> (retrieved on 16.12.2021).

34 On all of this cf. Azizi / Atal / Salomon (2021), p. 3 et seq.

35 Cf. Berlin Administrative Court (2021): decision on 25.08.2021, ref. VG 10 L 285/21.

36 Cf. UNHCR Germany (15.10.2021).

37 Cf. UNHCR Germany (2017); Antoni (2018), recital 6; Cremer (2018).

38 Cf. Mayer-Ladewig / Nettessheim (2017), recital 54 et seq., with references to the case law of the European Court of Human Rights (ECHR); Antoni (2018), recital 6; UNHCR Germany (2017), p. 138 et seq.

39 So too Sangi (23.09.2021).

40 So too *ibid.*

2.2 Duties to protect other particularly vulnerable Afghans

It is not just the lives and physical integrity of local staff that are especially endangered as a result of the 20-year international military mission and the subsequent withdrawal of international troops. The threat is not limited to people who worked for German ministries and organisations. In actual fact, states like Germany which were involved in the international military mission in Afghanistan have a special duty towards other particularly vulnerable Afghans. These are people who are now in danger because they collaborated in and actively supported the goals that the states involved in the international military mission put forth as part of their mission, which is why the Taliban are now persecuting them. These people are thus exposed to physical and mortal dangers that also fall under the responsibility of German state authority. Although this responsibility is shared by the other states involved in the international military mission, this does not diminish the responsibility of each individual state that participated.⁴¹

From the very outset, the countries involved in the international military mission have linked this mission, which was justified on the basis of security interests, to the aim of building structures pertaining to civil society and the rule of law, and thus striving to improve human rights in the country.⁴² In order to achieve this goal, the nations involved built trust among the people of Afghanistan by en-

couraging them to commit themselves to the setting-up of structures conducive to civil society and the rule of law. As a result, many Afghans worked to make the basic concept of human rights and democracy in their country real.

Notwithstanding, and despite spending more than two decades in Afghanistan, the nations involved failed to bring about the substantial steps that would be required to create conditions in which enduring state structures could emerge to protect the people of the country against serious human rights abuses.⁴³

So it was that shortcomings were already evident in the Bonn Agreement of 2001,⁴⁴ and these continued thereafter. The Agreement emerged from a round of talks and negotiations which took place in Bonn in 2001 following the overthrow of the Taliban regime by the United States and its allies. The approach reflected in the Agreement was based on an expectation that postponing justice and accountability would lead to peace and stability.⁴⁵ Thus, unlike other UN-backed peace agreements, the Bonn Agreement, negotiations which did not involve representatives of victims, women's groups or human rights organisations, did not contain any reference to accountability for human rights violations.⁴⁶ This meant that past crimes under international law remained unpunished and the most serious human rights abuses were not investigated. Instead, perpetrators were allowed to take up official positions.

41 On all of this cf. Maruhn / Mengeler / Strobel (07.10.2021).

42 Talks and negotiations were held in Bonn in 2001, after the United States and its allies had overthrown the Taliban. Those attending the meeting, which was convened by the United Nations, included selected Afghan groups, but not the Taliban. The negotiations culminated in the "Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions," - which became known as the Bonn Agreement (UN, Security Council (05.12.2001): Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions ("Bonn Agreement"), S/2001/1154. <http://www.unhcr.org/refworld/docid/3f48f4754.html> (retrieved on 16.12.2021). Its stated objectives were "to end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country" and to install an interim administration. It also stated that "The Interim Administration shall, with the assistance of the United Nations, establish an independent Human Rights Commission, whose responsibilities will include human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions."

43 Hippler (21.04.2016).

44 UN, Security Council (05.12.2001), loc. cit.

45 Anderson, Paul (14.02.2005): Calls grow to tackle Afghan war crimes. In: BBC News. http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/4258343.stm (retrieved on 16.12.2021); Gossman (2003), p. 1; Hartmann / Klonowiecka-Milart (2010); Human Rights Watch (2011), p. 4 et seq.

46 See Hübner (2021), p. 204 et seq.; Benish (2008), p. 10; Wardak / Saba / Kazem (2007), p. 77; Winterbotham (2012), p. 17; Niland (2010), p. 933, 936; Rubin (2003), p. 570.

This widespread impunity led to continued violence and permanently hampered the political peacebuilding process.⁴⁷ None of the subsequent international conferences on Afghanistan addressed the massive human rights violations and ongoing situation of impunity.⁴⁸ Furthermore, no serious steps were taken towards demobilisation, i.e. the disarmament of people and their reintegration into society.⁴⁹ In the end, when the Taliban seized power in August 2021, it revealed that the nations involved in the international military mission had not done enough in the 20 years of their deployment to enable the establishment of functioning state structures that would protect the people from serious human rights abuses by the Taliban.

In terms of this investigation, what is in the end decisive is that considering as a whole their actions and the consequences thereof, the nations involved in the international military mission bear a special responsibility towards those people in

the country who are now at increased risk because of their withdrawal. They are especially responsible for those people who, now that the Taliban have seized power, are in mortal and physical danger because they worked to achieve the objectives of the international military mission.⁵⁰

The rights to life and physical integrity enshrined in basic and human rights law therefore result not only in a duty to protect local staff, but also other particularly vulnerable Afghans. It stems from people's need for basic and human rights protection which can be attributed to the dangerous behaviour of the countries involved in the prior international military mission.⁵¹ The duty to protect applies to those whose particular vulnerability is due to the fact that, through their activities and/or publicly expressed opinions, they have been committed developing a country in which human rights are respected. These include human rights defenders,⁵² journalists,⁵³ judges,⁵⁴ cultural professionals,⁵⁵ former members of security forces

47 Khan (2009), p. 12; Gossman, Patricia (26.12.2011): Kabul's stealth attack on human rights. <https://www.nytimes.com/2011/12/27/opinion/kabuls-stealth-attack-on-human-rights.html> (retrieved on 16.12.2021); Human Rights Watch (2011a), p. 4 et seq.; Afghanistan Justice Project (2005), p. 155; Mani (2003), p. 1, 38; Human Rights Watch (2011), p. 5 et seq.; Winterbotham (2012), p. 23 et seq.; Wisner (2008), p. 1 et seq.; Hippler (21.04.2016).

48 Cf. German Federal Foreign Office (2011): Weichen für die Zukunft Afghanistans stellen. International Conference on Afghanistan, Bonn 2011. https://web.archive.org/web/20111201192518/http://www.auswaertiges-amt.de/DE/Aussenpolitik/RegionaleSchwerpunkte/AfghanistanZentralasien/Bonn_Konferenz_2011/Bonn-Konferenz-Einstieg-node.html (retrieved on 16.12.2021); The London Conference on Afghanistan (04.12.2014): Afghanistan and international community: commitments to reforms and renewed partnership. <https://www.gov.uk/government/publications/communique-from-the-london-conference-on-afghanistan>; Brussels Conference on Afghanistan 4-5 October 2016: Partnership for prosperity and peace: communiqué of the participants. <https://www.consilium.europa.eu/en/press/press-releases/2016/10/05/afghanistan-conference-joint-communique/> (both retrieved on 16.12.2021).

49 Hübner (2021), p. 261 et seq.

50 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

51 Cf. also Marauhn / Mengeler / Strobel (07.10.2021).

52 Amnesty International (September 2021): The fate of thousands hanging in the balance: Afghanistan's fall into the hands of the Taliban. <https://www.amnesty.de/sites/default/files/2021-09/Amnesty-Briefing-Afghanistan-Taliban-Menschenrechtsverletzungen-September-2021.pdf>; UN News (03.11.2021): 'Climate of fear' prevails for human rights defenders in Afghanistan. <https://news.un.org/en/story/2021/11/1104822>. Human rights defenders at heightened risk include activists campaigning for LGBTQ rights. Because of this, the UK received 29 such activists at the end of October 2021 and announced that it would accept more people from the LGBTQ community in the coming months. Spiegel-online (30.10.2021): Großbritannien nimmt Afghanen der LGBTQ-Bewegung auf. <https://www.spiegel.de/ausland/grossbritannien-nimmt-afghanen-der-lgbtq-bewegung-auf-a-b4db606f-c861-4717-8bc9-bddd3161a2f> (all retrieved on 16.12.2021).

53 Deutsche Welle (18.09.2021): Dringender Hilferuf von Journalisten aus Afghanistan. <https://www.dw.com/de/dringender-hilferuf-von-journalisten-aus-afghanistan/a-59224417>; faz.net (25.09.2021): Das Mediengesetz der Taliban. <https://www.faz.net/aktuell/feuilleton/medien/taliban-schraenkt-pressefreiheit-in-afghanistan-ein-17553680.html> (both retrieved on 16.12.2021).

54 tagesschau.de (07.10.2021): Richterinnen in Afghanistan. "Diese Männer versuchen, sich zu rächen". <https://www.tagesschau.de/ausland/asien/afghanistan-richterinnen-101.html>; Spiegel-online (25.08.2021): Drohungen gegen afghanische Richterinnen. "Ich weiß, wo du bist. Ich werde bald freikommen. Wir kriegen dich." <https://www.spiegel.de/ausland/afghanistan-drohungen-gegen-richterinnen-wir-kriegen-dich-a-640dd341-47b0-41fc-99e3-cfbc94a01745> (both retrieved on 16.12.2021).

55 faz.net (06.09.2021): Wir dürfen sie nicht im Stich lassen. <https://www.faz.net/aktuell/feuilleton/debatten/hilfe-afghanischer-kuenstler-petition-an-kulturministerin-gruetters-17523715.html>; Deutsche Welle (08.09.2021): Kulturschaffende fordern Schutz für afghanische Kollegen. <https://www.dw.com/de/kulturschaffende-fordern-schutz-f%C3%BCr-afghanische-kollegen/a-59125531> (both retrieved on 16.12.2021).

and members of the government,⁵⁶ and girls and women⁵⁷ who are particularly at risk because, for example, they have taken on public roles.⁵⁸ They are some of the people who, as a result of the Taliban's seizure of power, are even more exposed to mortal and physical danger than they were before. The nations involved in the international military mission have therefore been the cause, at least indirectly, that has led to the persecution of these people and therefore of their attempts to flee.⁵⁹

While the countries involved in the international military mission succeeded in evacuating nearly all of their own nationals from Afghanistan in August 2021 under dramatic and chaotic circumstances, they fulfilled their duty to protect particularly vulnerable Afghans only in a very small number of instances. Germany, like other countries, evacuated only a few particularly vulnerable Afghans and brought them to safety.⁶⁰ Germany did remain active after the end of the evacuation, and local staff and other particularly vulnerable Afghans have since found safety in Germany as a result. Many Afghans, however, remain in severe danger in Afghanistan, while the nations involved in the international military mission remain bound to protect them.⁶¹

2.3 Obligations to act that fulfil duties to protect

We will now discuss in more detail which obligations to act Germany has towards former local

staff and other particularly vulnerable people in order to continue to meet the protection duties that it continues to have after the end of the military evacuation, and which options are available to Germany in this regard.

Until all of the troops were withdrawn at the end of August 2021, existing protection duties were fulfilled for a short time mainly by evacuation flights from Kabul to Germany with stops in Uzbekistan. To this end, Germany had been able to reach an agreement with Uzbekistan, in which the latter authorised people's entry for their onward journey. Uzbekistan insisted that people would only be allowed to stay for six hours and only in the airport at Tashkent.⁶²

2.3.1 Enabling people to leave Afghanistan

The situation of former local staff and other people threatened by serious human rights abuses in Afghanistan is currently that neighbouring states have basically closed their borders to people seeking refuge, so that people cannot flee despite being persecuted. This situation does not mean that the countries involved in the international military mission, such as Germany, can do nothing. The countries must continue to fulfil their protection duties. Even if neighbouring states violate the principle of non-refoulement⁶³ set out in the Geneva Refugee Convention and in human rights treaties by turning away people seeking protection, the states involved in the international military mission cannot abdicate their responsibility

56 tagesschau.de (20.08.2021): UN warnen vor Racheaktionen der Taliban. <https://www.tagesschau.de/ausland/asien/afghanistan-rache-taliban-101.html>; Amnesty International (05.10.2021): Press release: Afghanistan: Sicherheitskräfte der ehemaligen afghanischen Regierung außergerichtlich getötet. <https://www.amnesty.de/allgemein/pressemitteilung/afghanistan-taliban-toeten-sicherheitskraefte-der-ehemaligen-afghanischen-regierung>; Human Rights Watch (30.11.2021): "No forgiveness for people like you." Executions and enforced disappearances in Afghanistan under the Taliban. <https://www.hrw.org/report/2021/11/30/no-forgiveness-people-you/executions-and-enforced-disappearances-afghanistan>; zdf heute (05.12.2021): EU und USA "zutiefst besorgt" - Afghanistan: Berichte über Hinrichtungen. <https://www.zdf.de/nachrichten/politik/hinrichtungen-in-afghanistan-usa-besorgt-ueber-berichte-100.html> (all retrieved on 16.12.2021); Amnesty International (2021), p. 13.

57 Amnesty International (06.12.2021): Press release: Afghanistan: Frauen und Mädchen droht Vergeltung freigelassener Gewaltstraftäter. <https://www.amnesty.de/allgemein/pressemitteilung/afghanistan-frauen-und-maedchen-droht-vergeltung-durch-freigelassene-gewalttaeter> (retrieved on 16.12.2021).

58 welt.de (22.11.2021): Der Anruf des Botschaftsmitarbeiters kam ihr seltsam vor. <https://www.welt.de/politik/ausland/plus235195752/Afghanistan-Der-Anruf-des-Botschaftsmitarbeiters-kam-ihr-seltsam-vor.html> (retrieved on 16.12.2021).

59 Cf. Maruhn / Mengeler / Strobel (07.10.2021).

60 See above under 1.

61 Cf. Maruhn / Mengeler / Strobel (07.10.2021). See also below under 2.3.1.

62 zdf.de (24.08.2021): Taschkent als Zentrum der Luftbrücke. <https://www.zdf.de/nachrichten/politik/afghanistan-taschkent-luftbruecke-100.html> (retrieved on 16.12.2021).

63 For more details on the ban on rejection see Cremer (2016).

to protect by citing the behaviour of these neighbouring states. In such circumstances, failing to rescue these people is equivalent to refoulement by the nations involved in the international military mission and to leaving them behind unprotected against grave mortal and physical danger.⁶⁴

What this means is that states such as Germany are legally obliged to use every course of action available to them and all their diplomatic powers to ensure that particularly vulnerable Afghans whom they have a duty to protect can enter neighbouring countries. If it is possible for people to leave Afghanistan by flying to other countries, Germany must also include this as one of its possible actions.⁶⁵

What this especially requires is negotiations with the countries involved in order to persuade them not to keep their borders closed to particularly vulnerable Afghans. If such countries are only prepared to do this if states like Germany will themselves accept migrating people and offer them protection, then what Germany must first do is give those countries an undertaking that it will accept the people so that they approve their entry.⁶⁶

Germany has already taken such an approach.⁶⁷ The German government, with the help of civil organisations, identified particularly vulnerable Afghans who were not local staff, for whom there is

a special application procedure.⁶⁸ But the practice of identifying particularly vulnerable Afghans so as to enable them to enter Germany was discontinued once the troops had been withdrawn,⁶⁹ despite there being no internal connection between the withdrawal and the protection duties of the nations involved in the international military mission. Germany's duty to protect particularly vulnerable Afghans therefore did not end with the withdrawal of security forces from Afghanistan.⁷⁰ Not only was it unrealistic to expect the German government to have identified every particularly vulnerable Afghan across the country, it ended up being impossible. It was, after all, impossible to determine exactly who would be in physical and mortal danger, especially immediately after the Taliban took power.⁷¹ In spite of this, aside from former local staff, the only particularly vulnerable Afghans who have since been assured admission to Germany are those found on a list drawn up by the Federal Government at short notice in the course of the dramatic developments of August 2021.⁷²

Germany, however, must continue to fulfil its protection duties, which have not gone away. If Afghans who are in Afghanistan can demonstrate to Germany's competent authorities – if needs be with the aid of third parties such as civil organisations – that Germany has a duty to protect them under its Basic Law, resulting from the rights to life and physical integrity (Article 2 Paragraph 2

64 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

65 See German Bundestag (14.10.2021), p. 6. According to the Federal Government on 14.10.2021, after the end of the evacuations, four flights from Kabul to Doha and a number of land border crossings to Pakistan enabled more than 600 people to depart; see also Spiegel-online (10.11.2021): Erster deutscher Charterflug bringt 329 Personen aus Afghanistan heraus. <https://www.spiegel.de/ausland/afghanistan-erster-deutscher-charterflug-bringt-329-personen-heraus-a-6c18ac43-14b5-44b0-9770-b3bab12c8dfd> (retrieved on 18.12.2021); see also Federal Foreign Office (23.12.2021): "Aktionsplan Afghanistan". According to the Federal Foreign Office on 23 December 2021, Germany enabled just under 5,000 people to leave Afghanistan after the evacuation had ended. After that, 774 people managed to leave on their own charter flights via Qatar, and Qatar carried 430 people to safety on its own flights for Germany. According to the report, 3,360 people were flown from Islamabad to Germany. <https://www.auswaertiges-amt.de/de/aussenpolitik/laender/afghanistan-node/aktionsplan-afghanistan/2503582> (retrieved on 23.12.2021).

66 If the country requires a visa to be shown before it will permit entry, then such people will have to be enabled to apply for one digitally and must then wait for it.

67 For more detail on the practice of the Federal Government, see German Bundestag (14.10.2021), p. 6 et seq.

68 See, for example, Federal Ministry of Economic Cooperation and Development (2021): Informationen für afghanische Ortskräfte der deutschen Entwicklungszusammenarbeit. <https://www.bmz.de/de/laender/afghanistan/ortskraefte> (retrieved on 16.12.2021).

69 Particularly vulnerable Afghans were identified within a short period of time that ended with the withdrawal of German security forces. The Federal Government drew up a conclusive list. Particularly vulnerable Afghans were therefore nominated for the list by non-governmental organisations under extreme time pressure.

70 Cf. Marauhn / Mengeler / Strobel (07.10.2021).

71 See for example welt.de (22.11.2021): Der Anruf des Botschaftsmitarbeiters kam ihr seltsam vor. <https://www.welt.de/politik/ausland/plus235195752/Afghanistan-Der-Anruf-des-Botschaftsmitarbeiters-kam-ihr-seltsam-vor.html> (retrieved on 16.12.2021).

72 According to the German Federal Government on 14.10.2021, this relates to approximately 2,600 people, or at least 6600 people including their immediate families. See German Bundestag (14.10.2021), p. 7.

Sentence 1 of the Basic Law), they have a right to protection, as do their family members if applicable. If, for instance, German embassies and consulates in neighbouring countries are asked for protection by endangered former local staff or by other particularly vulnerable people who are in physical and mortal danger in Afghanistan as a consequence of the Taliban's seizure of power, they must be given assistance in leaving the country. This must include an assurance of their admission to Germany, if neighbouring states keep their borders closed and only allow people through who have been given prior assurances of admission to Germany.

As well as this, Germany must assure particularly vulnerable Afghans who get in touch digitally that a visa will be granted for admission to Germany, so that on that basis they can cross the border of the respective state and can then, once issued with a visa in that country, be admitted to Germany. It is also important to inform the people concerned about possible ways of leaving Afghanistan for another country. This can be important to them because if there is more than one option, they can then decide which route within Afghanistan is feasible or at least less dangerous.

Should there be direct flights from Afghanistan to Germany, this option, together with the digital issuing of visas, should also be considered by Germany when it considers how to meet its obligations towards particularly vulnerable Afghans.

The duty to protect particularly vulnerable Afghans falls on all of the nations involved in the international military mission, which means at times that some are asked for protection more than others. It would be possible for the states involved in the international military mission to share the task of receiving people seeking protection, and to reach agreements to that end, so that there can be a

quantitatively balanced sharing of responsibility. And indeed, a number of countries, including Germany, announced in August 2021 that they would continue to bring particularly vulnerable Afghans to safety after the troop withdrawal.⁷³ But a lack of agreement on the sharing of responsibility for particularly vulnerable Afghans cannot be used by individual nations as an argument with which to evade their protection duties.

2.3.2 Issuing visas in neighbouring and other countries

There is also the question of whether visas should be granted to particularly vulnerable Afghans who have already fled to a neighbouring country (or some other country) without any prior assurance that a visa will be granted for admission to Germany, and who then apply there for a visa. If such a person is a former local employee, then a visa should be granted to them and, if applicable, their family members, on account of their particular vulnerability and Germany's special responsibility towards them. In the case of local staff who worked for German ministries or organisations, the right to protection extends to the right to enter Germany for that protection.⁷⁴

If a person in such circumstances is not a former local employee, the question is, does Germany still have a duty to protect them and thus have to issue them a visa? The answer certainly needs to consider whether the person is actually safe in their new country, in the sense of their life and physical integrity not being endangered. If the person has not been able to find such safety in the country to which they first fled, because, for example, they are threatened with deportation to Afghanistan,⁷⁵ then Germany continues to have a duty to protect them. This is because the reasons for their situation can still be traced back to their reasons

73 UNHCR (20.08.2021): Afghanistan: Mehr Unterstützung für humanitäre Hilfe dringend benötigt. <https://www.unhcr.org/dach/de/68457-afghanistan-mehr-unterstuetzung-fuer-humanitaere-hilfe-dringend-benoetigt.html>. See also, for example, Spiegel-online (30.10.2021): Großbritannien nimmt Afghanen der LGBTQ-Bewegung auf. <https://www.spiegel.de/ausland/grossbritannien-nimmt-afghanen-der-lgbtq-bewegung-auf-a-b4db06f-c861-4717-8bc9-bddf3161a2f>; Spiegel-online (04.12.2021): Frankreich holt 330 Menschen aus Kabul. <https://www.spiegel.de/ausland/afghanistan-frankreich-fliegt-rund-330-menschen-aus-kabul-aus-a-cf5a496b-fad2-4d70-a0b2-d413e2096c1d> (all retrieved on 16.12.2021).

74 See above under 2.1.

75 See for example tagesschau.de (17.11.2021): Afghanische Flüchtlinge im Iran. Zwischen Ausbeutung und Abschiebung. <https://www.tagesschau.de/ausland/asien/iran-flucht-afghanistan-101.html>; Zeit Online (26.11.2021): Frauen aus Afghanistan: "Alle Journalistinnen, die ich kontaktieren konnte, weinten". <https://www.zeit.de/kultur/2021-11/frauen-afghanistan-taliban-flucht-tadschikistan-10nach8> (all retrieved on 16.12.2021).

for fleeing Afghanistan. It should also be borne in mind that decisions on entry (visas) must in principle be measured against a standard of basic and human rights, which, in the context of discretionary decisions, can mean the elimination of discretion altogether. This in turn means that all of a person's circumstances, including the conditions under which they are living in the country where they are, can be factors in decisions about visas.

If family members are already living in Germany, Germany may be obliged to issue visas for entry into the country pursuant to the right to family life enshrined in Article 6 of the Basic Law and in other human rights provisions such as Article 8 of the European Convention on Human Rights.⁷⁶ When decisions are made on issuing visas for Afghans to enter Germany, it must also be remembered that Germany shares responsibility for the things that caused people to flee as a result of the Taliban's takeover, and it is also in that regard that it should be asked whether there may be family relationships in Germany that warrant protection under basic and human rights law.

That aside, visa application procedures for the reunification of Afghans who have family members in Germany should be made easier and quicker. If the right to family life enshrined in Article 6 of the Basic Law and in other human rights provisions is to be upheld in the process of deciding to issue visas that reunite families, then Germany must simplify and speed up application procedures for Afghans, some of which – in India, for instance⁷⁷ – have been long pending.⁷⁸

2.3.3 Supporting vulnerable Afghans in neighbouring countries

As the dramatic images of the evacuations emerged in August 2021, political voices began to speak out in Germany and on a European level,

stating how important it is not to allow a situation to occur like the one in 2015, in which large numbers of people sought protection (asylum) in the European Union, particularly as a result of the civil war in Syria. They have been saying that support should go to the countries adjacent to Afghanistan where people can find shelter and protection.⁷⁹

It is a fact that people in serious danger often flee first and foremost to neighbouring countries and seek protection there. Numerous Afghans have already found protection mainly in neighbouring countries in the past. People have been escaping persecution and violent conflict in Afghanistan for four decades. Afghans are one of the largest groups of refugees in the world, and according to UNHCR, about 90 percent of them have found refuge in the neighbouring countries of Pakistan and Iran.⁸⁰ Currently, around 1.4 million Afghans are registered as refugees in Pakistan, and about 800,000 in Iran.⁸¹

Regarding the situation of the Afghans whom this paper discusses, it should however be emphasised that many of them are currently unable to leave Afghanistan because the neighbouring states have closed their borders to them. But it is nevertheless imperative that the European Union and its individual member states such as Germany support the large numbers of Afghans living in neighbouring countries. This means especially that the organisations active and responsible on the ground, such as the UNHCR, must receive the funding they need to ensure that the refugees are received with their human rights guaranteed to the greatest degree possible. The provision of such financial resources, including by Germany, continues to be urgently required. But this alone does not help to fulfil the protection duties that the states involved in the international military mission have towards those endangered and particularly vulnerable people who remain in Afghanistan.

⁷⁶ See UNHCR (2021); Council of Europe, Commissioner for Human Rights (2017); Cremer (2018).

⁷⁷ See German Bundestag (14.10.2021), p. 8.

⁷⁸ Cf. UNHCR (2021).

⁷⁹ See for example tagesschau.de (31.08.2021): EU-Innenminister zu Afghanistan: "Eine Situation wie 2015 vermeiden". <https://www.tagesschau.de/ausland/eu-innenminister-konferenz-afghanistan-101.html> (retrieved on 16.12.2021).

⁸⁰ UNHCR (2021): News 15.09.2021: How many refugees are fleeing the crisis in Afghanistan? <https://www.unrefugees.org/news/how-many-refugees-are-fleeing-the-crisis-in-afghanistan/> (retrieved on 23.12.2021).

⁸¹ UNHCR (2021): Operational data portal, refugee situations: Afghanistan situation. https://data2.unhcr.org/en/situations/afghanistan#_ga=2.252007945.1032973019.1635683224-216369429.1633784202 (retrieved on 23.12.2021).

3 Judicial enforcement of the right to protection – entitlement to visas

If Afghans who are in Afghanistan request protection in Germany but Germany does not recognise its duty to protect them, there is the question of whether they have a right to effective legal protection by which they can assert in court a claim to protection and its concomitant right to be granted a visa to enter Germany.⁸²

In reality, people in that situation in Afghanistan will be hard pressed to assert their rights, on account of their living conditions. If, despite this, some people do succeed in asserting their right to a visa in court, Germany, in fulfilling its duty to protect them (which in this instance will have been established in the court), will have to act in the sense described in this paper to ensure that they are able to leave Afghanistan. Other circumstances are also conceivable under which, for example, former local staff have fled to a neighbouring country – or possibly another country – but Germany does not recognise them as particularly vulnerable.

What has been set out so far demonstrates that Germany has a duty to protect and is not free to decide whether or not it does so. Instead, the aforementioned protection duties enshrined in basic and human rights entail a substantive legal entitlement to protection and thus to the granting of visas, not just for local staff and their family members, but also for other particularly vulnerable Afghans who are similarly subject to serious physi-

cal and mortal danger as a result of the Taliban's seizure of power. States can meet their protection obligations in different ways, sometimes without issuing visas, as happened in the evacuation flights in August 2021; but as a rule, the people concerned need visas to enter Germany.

Section 22 of the German Residence Act (*Aufenthaltsgesetz, AufenthG*)⁸³ can be considered the legal basis on which local staff and other particularly vulnerable Afghans can claim the right to be granted visas.

According to Sentence 2 thereof, a residence permit may be issued “to uphold the political interests of the Federal Republic of Germany.” This provision has been used by diplomatic missions abroad to grant visas to local staff and other particularly vulnerable Afghans. The issuing of visas in accordance with Section 22 Sentence 2 of the Residence Act demonstrates that Germany recognises its duty under basic and human rights law to protect particularly vulnerable people in Afghanistan, and that it is fulfilling its responsibility accordingly. This also affects Germany's political interests, both domestic and foreign, because it reflects upon Germany's credibility within the international community, especially in the extent of its commitment to human rights.⁸⁴ The granting of residence permits to local staff in accordance with Section 22 Sentence 2 of the Residence Act also impacts on interests of security policy. If such

82 It is worth pointing out that even in extraterritorial situations, the German state's commitment to basic rights is not limited to a mere commitment in objective legal terms. Rather, it entails an entitlement to basic rights on the part of those people who are identified by the relevant basic rights guarantees as protected bearers of basic rights. The basic rights enshrined in Germany's Basic Law do not envisage basic rights duties towards individual bearers of basic rights that are not backed up by an equivalent in subjective legal terms. A core component of protection under the Basic Law and human rights is that the rights apply to individuals. See, for example, Federal Constitutional Court (2021): decision on 24.03.2021, ref. 1 BvR 2656/18 - 1 BvR 78/20 - 1 BvR 96/20 - 1 BvR 288/20, recital 92.

83 Section 22 of the German Residence Act states: “A foreigner may be granted a temporary residence permit for the purpose of admission from abroad for reasons of international law or on urgent humanitarian grounds. A residence permit is to be granted if the Federal Ministry of the Interior, Building and Community or the body designated by it has declared, so as to uphold the political interests of the Federal Republic of Germany, that the foreigner is to be admitted.”

84 This is the sense in which the statement by the German Foreign Minister quoted above should be understood. See above under 1.

people are not afforded the opportunity of protection in Germany, it could make locals much less inclined to support the German Armed Forces or other German organisations in current and future operations.⁸⁵ Nonetheless, basing the right to the issuance of a visa on Section 22 Sentence 2 of the Residence Act is not entirely unproblematic, especially since it would have to be interpreted as meaning that the issuance of visas under that standard would be an expression of autonomous sovereignty. That said, this pertains to a mandatory regulation that is not exempt from judicial control. In the case already mentioned, the Berlin Administrative Court was correct in upholding the right to the issuing of visas and obliging Germany to grant them to the local Afghan employee, his wife and their three children in accordance with Section 22 Sentence 2 of the Residence Act.

Notwithstanding, under the circumstances concerned, it seems more relevant to use Section 22 Sentence 1 of the Residence Act (“for reasons of international law or on urgent humanitarian grounds”) as the legal basis for entitlement to the issuing of visas. This provision seems more appropriate, even if it is applied very restrictively in practice, because its wording implies that there are conditions to be met that can justify entitlement to a visa if there is no leeway for discretion.

Finally, Section 7 Paragraph 1 Sentence 3 of the Residence Act, according to which a residence permit can also be issued in justified cases for the purpose of residence not covered by the Residence Act, is also a conceivable basis for entitlement. In the cases concerned here, the purpose of residence not covered by the Residence Act would be the fulfilment of protection duties resulting from the 20-year international military mission in Afghanistan.

What ultimately matters is that Germany recognises its obligations under basic and human rights to protect particularly vulnerable people in Afghanistan and fulfils its responsibility towards them, so that they receive protection in Germany by being granted visas. One of the outcomes of the duty to protect under basic and human rights law is entitlement to the granting of visas. This is important for the people concerned, because it allows them to assert their right in court. In the end it is up to the courts to decide which legal norm they apply to enforce these rights. The choice of a legal basis for entitlements is not pivotal from the point of view of basic and human rights.

85 See German Bundestag (27.01.2015), p. 36.

4 Conclusion

According to the protection duties under basic and human rights law that Germany has to fulfil and that have been discussed herein, Germany must offer protection to other particularly vulnerable people from Afghanistan, not just former local staff. After the Taliban took power in August 2021, the threat to certain people in Afghanistan began to worsen and continues to do so. Germany – like other states involved in the international military mission – is bound under an obligation towards them.

This obligation includes the duties to act as discussed, such that it enables particularly vulnerable Afghans to leave Afghanistan and enter Germany. There is a certain leeway with regard to how Germany fulfils its duties to protect and concomitant duties to act. Conceivable options include a suitably structured reception programme or the creation of a special legal provision. Specific decrees concerning the application and interpreta-

tion of Section 22 of the Residence Act, which would specify the protection duties that exist, are also feasible. Whatever the case, immediate action is required in light of the threat posed to the people in Afghanistan. This also includes establishing procedures by which protection requests can be processed within a reasonable period of time, which means quickly; this is precisely what is needed given the danger some people are in. This in turn will require sufficient resources, especially staff, to be made available at the relevant foreign diplomatic missions and ministries.

The NATO states, including Germany, have a duty to ensure that particularly vulnerable Afghans in Afghanistan are given the opportunity to leave the country and enter other countries by regular means, even now that troops have been withdrawn from Afghanistan. Germany's aforementioned protection duties under basic and human rights law will continue for the time being.

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