

Has the Federal Republic of Germany violated its obligations of protection in Afghanistan?

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Almost 20 years after the attacks of September 11th triggered the global war on terror in the form of the so-called [Operation Enduring Freedom](#), the withdrawal of foreign troops from Afghanistan has triggered [dramatic consequences](#). The winding down of military operations in the country has coincided with the Taliban taking over factual control, in many cases having allowed the armed group to regain large swaths of territory without facing significant resistance. Taliban rule has put many people, including aid workers, local staff, teachers, media representatives and many others under constant threat to their life and limb. In regards to the withdrawal of members of the Bundeswehr (German military), the question arises whether and to what extent the Federal Republic of Germany was and is subject to obligations under constitutional and international law to protect certain endangered groups. This question should be posed not only regarding German nationals and the narrow [group of so-called local support staff](#), but also in respect of others. In consideration of the dangerous situation, the German Government attempted to bring local support staff and – besides German nationals and other citizens of the Global North – particularly endangered people out of the country via Kabul Airport with [emergency evacuations](#). The failure of a more comprehensive evacuation mission the world witnessed at Kabul airport, meant that Western allies had just days – not months – to evacuate numerous of their own citizens, local support staff and other vulnerable groups. Many could not be evacuated in time, leaving them both at risk of retribution attacks by the Taliban and vulnerable to the large scale repression Taliban rule might incite on them.

The question of responsibility for the situation and for the consequences of the hasty and in part chaotic withdrawal of troops has therefore been raised and discussed controversially over the recent weeks. In addition to the political question, there is also the question of the legal responsibility of the Federal Republic of Germany. By taking the binding effect of fundamental rights in the area of foreign and security policy as a starting point, we analyze potential duties of protection and their requirements set out by fundamental rights, as well as to what extent these are altered by international legal obligations pertaining to the termination of military interventions. In doing so, we will also discuss the duty to protect under international law and the obligation to provide assistance required by international humanitarian law. We come to the interim conclusion that the Federal Republic of Germany has not fully complied with its duties of protection required by fundamental rights – especially those for protecting life under Article 2(2) sentence 1 of the German Basic Law (Grundgesetz, hereinafter GG). According to our preliminary analysis, constitutional and international legal obligations have been violated.

The binding effect of fundamental rights in situations of extraterritoriality and the existence of a duty of protection

Starting point of this analysis is the comprehensive binding effect of fundamental rights upon German governmental authority constituted by the German Basic Law as derived from Article 1(3) GG. This binding effect must be distinguished from the specific requirements of fundamental rights in a particular case. It exists independent of a reference to the territory of the Federal Republic of Germany and it is not limited to specific exercises of governmental power. This has been clarified by the German Federal Constitutional Court (Bundesverfassungsgericht, hereinafter BVerfG) in its [Judgement regarding foreign surveillance by the Federal Intelligence Service](#), stating that the binding effect of fundamental rights is not diminished in situations of extraterritoriality. It applies equally whether the German Government exercises authority within its territory or abroad. The judgement clarifies, partially affirmed by the [decision regarding climate change](#), that the extraterritorial binding effect also applies in principle to duties of protection set out by fundamental rights, while the specific demands of fundamental rights are to be applied in gradual steps. Despite the necessary connection to German territory in principle, neither the binding effect of fundamental rights nor the existence of a duty of protection generally necessitate a specifically qualified reference to the German state. Thereby, neither the existence of German citizenship nor the personal sovereignty of German governmental authority are important, as is still partially required by older theories on duties of protection. Consequently, fundamental rights are also binding upon German decision-makers vis-à-vis foreign nationals abroad. They also apply to the benefit of those affected in Afghanistan. Furthermore, it should be noted that the Federal Administrative Court (Bundesverwaltungsgericht, hereinafter: BVerwG) recently ruled that the binding effect of fundamental rights only applies in situations where the German Government has some form of decision-making powers. This case before the BVerwG concerned [duties of protection in the context of US-drone strikes](#) in Yemen, which are coordinated via Ramstein Air Base in Germany. In our view, this requirement – while doctrinally incorrect – is at any rate fulfilled by NATO states contributing directly to the dangerous situation in Afghanistan by means of their military intervention and partial effective territorial control.

To be differentiated from the extraterritorial binding effect of fundamental rights are the factual prerequisites for the existence of an extraterritorial duty of protection. Even if the withdrawal of troops after an intervention could plausibly be classified as a state interference with fundamental rights, in this article we focus on duties of protection. In the present case, among other rights, the life and physical integrity of people in Afghanistan are affected. Therefore, a duty of protection based on Article 2(2) sentence 1 GG must be considered. As stated above, neither a sufficiently qualified link to German territory nor other special prerequisites are required for the existence of such duties of protection. Rather, the required level of care is based on threats to the fundamental rights of individuals that can arise on German territory, but also as a result of discretionary exercises of governmental powers abroad, including vis-à-vis foreign nationals. In the present case, positive

obligations for governmental action already exist as a result of the Federal Republic of Germany's involvement in military action that poses a threat on foreign territory resulting from the Bundeswehr's deployment abroad.

In respect of life and physical integrity, a duty of protection can already be derived from Article 1(1) GG and from the content of Article 2(2) sentence 1 GG. In the present case, such a need for protection extends to German nationals in Afghanistan who participated in the military intervention, who were otherwise active in missions for the German Government and those who reside in Afghanistan. The same applies to persons employed by other intervening states or otherwise working for the goals of the mission in Afghanistan. Unfortunately, and the stated objectives notwithstanding, the military intervention has not eliminated the danger of armed conflict and terrorist attacks by the Taliban and Al-Qaeda, and later by the so-called Islamic State, but has exacerbated it. With the withdrawal of Western and allied forces and the de facto rule of the Taliban, the potential danger to the lives and physical integrity of German and other foreign nationals, as well as Afghan local support staff and other particularly vulnerable groups of society and those threatened by the Taliban must also be considered. Recognizing this danger, verbal promises were made to Afghan local support staff for a possible departure to Germany by means of special visas. It is possible that contractual obligations and post-contractual duties of care must be considered here as well, which, according to our cursory assessment of the known facts, were only inadequately met. Thus, overall, a relevant need for protection of the respective fundamental rights can be stated. Therefore, in the present case a duty of protection regarding the fundamental rights of these individuals and groups can be established.

Fulfilment of the duties of protection

According to the case law of the BVerfG, German public authorities have a wide margin of appreciation for the assessment, evaluation and design of measures to ensure duties of protection are complied with. In concreto, protective measures may not be completely omitted, wholly unsuitable or downright inadequate. According to the BVerfG, the margin of appreciation is yet further extended in the area of foreign affairs. Measures designed to ensure the compliance with duties of protection must consider the particular need for protection of the endangered fundamental rights. In particular, it depends on the extent to which the individuals concerned can evade the dangerous situation themselves, to what extent the threats have been caused or intensified by the public authority obliged to protect fundamental rights and on the extent of the threat to the specifically protected fundamental right in question. In the case of Afghanistan, the starting point in assessing the measures to protect fundamental rights is the special responsibility borne by the German Government and German authorities (in cooperation with the broader intelligence community and local experts) due to [their failure to correctly assess the threats posed by the rapid advance of the Taliban](#). It was this incorrect assessment of the situation that made short-term evacuation flights by the Bundeswehr necessary in the first place, in order to enable people, in particular local support staff, to leave Afghanistan and to thereby avert imminent danger to their lives.

It is estimated that [approximately 150,000 people](#) were evacuated from Afghanistan by foreign rescue flights. According to the German Foreign Office, [only about 5,000 people were flown out by the Bundeswehr](#). It was argued that more people could not be rescued due to the factually limited resources as well as the multiple sources of threats, which in turn necessitated duties of protection regarding evacuation personnel. Thus, many Afghans who worked for German institutions and organizations and whose lives and physical integrity are endangered by acts of revenge by members of the Taliban [were left behind](#). Likely, they will now have to remain in Afghanistan – as will numerous other particularly vulnerable individuals and those at risk. All these people are thus largely at the mercy of the Taliban, lacking effective protection and the possibility of escape from the imminent danger of death.

Nonetheless, the duty of protection exists regardless of the actually delayed and chaotic nature of the evacuations. In contrast, whereas an orderly and timely evacuation would have been indicative of sufficient fulfilment of the duty of protection established by fundamental rights, the opposite has materialized. Originally, it was assumed that there would be a window of several months for the departure of German and Afghan nationals at risk after the withdrawal of troops. Informed by this timeline, individuals who fulfilled certain criteria – for instance due to being in danger after having worked in assisting foreign missions – were to go through a procedure for the issuing of a residence permit based on an admission commitment at the discretion of the German Federal Ministry of the Interior [pursuant to Section 22 Sentence 2 of the German Residence Act](#). In our view these proceedings recognize the need for protection and the existence of duties of protection towards particularly vulnerable groups and individuals in Afghanistan by German authorities. However, the Federal Government and German authorities staunchly insisted on this [restrictive and lengthy procedure](#), coupled with a predominantly self-financed departure to Germany, despite numerous warnings and demands for timely comprehensive action. A [motion in the German Federal Parliament](#) (Bundestag) to admit so-called local support staff was rejected. [Reception programs under Section 23 of the Residence Act](#) as well as further protective measures should have been established at an early stage for particularly vulnerable or jeopardized individuals and groups.

It must be pointed out that the German Government had created the legitimate expectation amongst local support staff that a departure from Afghanistan would be made possible, in any case well in advance of the Taliban seizing power. As a result, many people relied on this assurance and did not seek refuge in neighbouring countries. At the same time, because of the in fact very short window of opportunity to leave the country, a rather non-transparent procedure was set up at short notice to screen and identify individuals who were particularly at risk. Only certain individuals were evacuated from Afghanistan instead of providing comprehensive, rapid and unbureaucratic humanitarian assistance. Despite the urgent humanitarian emergency, entry and residence procedures were used to serve the political purpose of controlling and steering refugee movements, thereby failing to adequately address the need for protection under fundamental rights considerations with emergency measures adjusted to the exceptional circumstances. From the perspective of

refugee and migration law, it should also be noted that the intervening states themselves – at least indirectly – created causes that led to potential political and religious persecution by the Taliban, and thus contributed and aggravated the reasons that necessitated the affected individuals to seek refuge abroad. For it is precisely the involvement of local support staff by the intervening states that is now a major cause of persecution by the Taliban and thus an indirect cause for fleeing the country. After the *de facto* takeover of power by the Taliban and the actions of neighbouring countries had limited the possibility of escape to Kabul airport alone, the failure to rescue those under threat in Afghanistan constituted an act of rejection, wherein individuals were left behind without protection in the face of life-threatening dangers.

The impact of international law on duties of protection

The fulfilment of the duty of protection set out by fundamental rights is also influenced by international law, which shapes and determines the margin of appreciation of national authorities. International conventions and customary international law impose on the Federal Republic of Germany various obligations, which must be observed when interpreting the duty of protection, in particular because of the human rights reference in the context of the European Convention on Human Rights (ECHR). Due to the complex issues involved, human rights aspects are mentioned only in passing here. In any case, the ECHR and the International Covenant on Civil and Political Rights (ICCPR) also apply in extraterritorial situations. The duties to protect fundamental rights must be contoured and fulfilled in the light of the obligations under the ECHR and the ICCPR – insofar as these are applicable in the specific case.

In addition to the human rights perspective, however, other aspects of international law must also be considered regarding the Federal Government's duties of protection. The exercise of sovereign power – also in the context of military intervention – entails obligations under international law, which are paradigmatically expressed in the concept of the [responsibility to protect](#), notwithstanding its controversial legal nature. This concept includes the responsibility of national authorities to protect the population subject to it from the most serious human rights violations. As a further pillar, it includes international support to prevent such human rights violations. It should be recalled here that the Afghan Government had agreed to the deployment of foreign forces in Afghanistan and had reached agreements with them to withdraw. In relation to the Afghan population, both the Afghan Government and the other states having exercised control through their military deployment are thus subject to the responsibility to protect under international law. In this specific case, it resulted in the obligation to take [precautionary measures to protect the population in the run-up to the withdrawal of troops](#). For this reason, the governments involved in the foreign deployments in Afghanistan were obliged to organize an orderly withdrawal in order to prevent large parts of the population from being exposed to life-threatening dangers without protection. At the very least, sufficient protective measures had to be taken. Even with the Taliban's rapid

takeover looming, the German Government did not take these obligations fully into account because it did not exhaust all options for saving lives and, despite the humanitarian emergency, stuck to established procedures for managing and limiting opportunities to seek refuge.

Moreover, Afghanistan has been the site of a [non-international armed conflict](#) for the past two decades, in which obligations established by international humanitarian law had to be respected. Even though Afghan forces have largely surrendered the field to the Taliban without a fight, and while foreign troops had left, [international humanitarian law remains applicable for a \(controversial\) transitional period](#). This aspect is discussed under the term *ius post bellum*. Only when there is a lasting and sustainable end to the non-international armed conflict in the context of the *de facto* takeover of power by the Taliban do international humanitarian obligations in relation to the former conflict cease to apply, and thus also [regulations on the provision of humanitarian assistance](#) in connection with the preparation for the withdrawal of troops and the needs for humanitarian aid triggered by this. Insofar as the Bundeswehr was at least indirectly classified as a party to the conflict on the side of the Afghan Government, this constitutes an indication of such an [obligation to provide humanitarian assistance](#) in such a capacity. Even if there is no duty of non-conflict parties to provide assistance, there are good arguments for a right to provide assistance beyond at least indirect participation in a non-international armed conflict. It is conceivable that such a right has become an obligation in this specific case due to Germany's participation in the intervention as well as in the establishment of civilian structures in Afghanistan.

Conclusion

As a result, based on our preliminary analysis, regarding the termination of a military intervention such as the one in Afghanistan, German authorities have a duty of protection according to the German Basic Law, the fulfilment of which also requires compliance with obligations under international law. The Federal Republic of Germany has only inadequately fulfilled these duties of protection, leading to the conclusion that the duty to protect life and physical integrity has been violated at various stages of the withdrawal from Afghanistan towards various holders of fundamental rights. Regardless of whether courts would base their decisions on the aforementioned arguments, there is a constitutional responsibility on the part of the German Government to ensure that the impacts in the aftermath of a conflict are dealt with appropriately. It is desirable that the Government bases its policies on fundamental rights as a guide to action and orientation for its policy. Duties to protection continue to exist even after the complete withdrawal of troops and require [measures to protect vulnerable Afghans](#).

What has happened in Afghanistan once again highlights the manifold challenges that arise during foreign deployments. The requirements of the binding effect of fundamental rights and the duty of protection do not end with the termination of a foreign deployment. On the contrary, they intensify when a particular potential threat increases and the need for protection is triggered as well as when legitimate expectations are created that the duty of protection will be fulfilled. Sufficient

fulfilment of the duty of protection requires careful examination, precautionary and early action and consideration of early warnings, as well as short-term action in order to avoid humanitarian emergencies and threats to life, in order not to cause or even intensify them through one's own behaviour.

This text is a translation of the article, [Verletzung von Schutzpflichten durch die Bundesrepublik in Afghanistan?](#), by Michael Borgers.

