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**Publication date**

2021

**Document Version**

Final published version

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**Citation for published version (APA):**

Atal, M. (Author), & Salomon, S. (Author). (2021). Why at-risk Afghans have a right of admission to EU member states. Web publication or website, OpenDemocracy. <https://www.opendemocracy.net/en/can-europe-make-it/why-risk-afghans-have-right-admission-eu-member-states/>

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## **Why at-risk Afghans have a right of admission to EU member states**

The protection of Afghans should not be limited to those directly employed by European governments

[Mojib Atal](#) [Stefan Salomon](#)

30 August 2021, 2.04pm



Evacuating Afghan civilians at Kabul airport, following the Taliban takeover of Afghanistan, 17 August | US Marines Photo / Alamy

**R**eactions across European states to the takeover of power by the Taliban in Afghanistan are markedly ambivalent. Politicians admit failing to speedily process admission for those Afghan employees who worked directly for European governments, while warning against irregular migration flows from Afghanistan and a repeat of the so-called 'open-door' policies seen in 2015.

The fact that people flee military interventions and wars is unavoidable. What must be avoided, however, is the collapse of the asylum systems of EU member states and the shameful lack of financial support to third countries catering for refugees. Indeed, the more than 10,000 drowned refugees in the Mediterranean since 2015 must not be repeated – and there is an obvious solution: the establishment of legal and safe pathways to Europe for Afghans in need of protection.

## Entangled sovereignty

Perhaps even more clearly than in other conflicts, the war in Afghanistan demonstrates how closely the exercise of sovereign powers by European states is entangled with the lives of the local population. Military intervention by one state in another state is the exercise of a state's sovereign powers, irrespective of whether that intervention is contrary to or in accordance with international law.

Essentially in pursuit of specific security interests, EU member states, after the USA, provided by far the largest part of military troops in Afghanistan. In his speech at the German parliament in 2002, for example, Peter Struck, former German minister of defence, justified the mandate for the deployment of the German army with the assertion that "Germany's security today is also being defended in the Hindu Kush".

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## Entanglement on several levels

When the Western coalition bombed Kabul on the basis of a Security Council mandate in September 2001 and subsequently invaded with ground troops, the number of Afghan refugees increased significantly.

On another, more complex level, the employment of European military personnel would have been "impossible and hopeless from the outset" without the support of Afghans. European military officers relied on Afghan interpreters to communicate with the population, Afghan security forces and local politicians. Likewise, the maintenance of infrastructure and food supply depended on Afghan merchants, cleaning workers

and craftsmen. It is not only difficult to wage war on an empty stomach, but also when latrines are not emptied by local employees.

Moreover, the security interests of European states in Afghanistan were not only enforced by tanks. Struck made it clear in the same 2002 speech that “the creation of conditions for economic development and societal democratisation is essential for succeeding in the fight against international terrorism.” The European Union was engaged directly in nation-building processes through its military and civilian missions, and the European Union Police Mission was one of the largest police missions deployed to Afghanistan. These missions might also have been promoting Europe’s values through ‘democratization’ beyond European borders. The work of the various European development organizations also depended on the cooperation and labour of tens of thousands of Afghan employees. In addition to those Afghans directly employed, there were many who worked on projects financed by European development funds, also aimed at realising European security interests.

### **Employment of European military personnel would have been ‘impossible’ without Afghans’ support**

By persecuting individuals who collaborated with Western governments, the Taliban are essentially attacking the link between the exercise of sovereign powers by European states and the Afghan population. These various and assorted entanglements put many Afghan lives at risk. The Taliban often persecute those Afghans who play a central role in building civil society and state structures, such as journalists, human rights activists, especially women's rights activists.

After their takeover of Kabul earlier this month, the Taliban announced a general amnesty for former employees of Western governments. But activists and journalists are less likely to be prioritized in the current evacuation process, and reports of their persecution and executions are gathering momentum.

## **Admission for former Afghan employees**

European governments have been reluctant to think about the future of their Afghan employees after the withdrawal of their military troops. Afghan employees realised this and started organising protests. When Germany’s then defence and foreign affairs

ministers visited camp Kunduz in 2013, shortly before Germany's withdrawal from that camp, around 25 translators protested at being left behind.

That year, the German government duly set up the 'local forces' (*Ortskräfte*) procedure, designed to resettle Afghans who worked directly for German federal departments and their families. Former employees were divided into several categories based on the alleged risk posed to them. Many other EU member states put in place similar admission schemes, with the UK establishing a resettlement scheme for Afghan employees who had worked in "particularly dangerous and challenging roles" in the southern province of Helmand or had faced threats to their lives, irrespective of their particular role. After announcing its withdrawal in 2012, France introduced an admission procedure for former Afghan interpreters working for the French army.

These schemes were essentially a recognition of the entanglement of the exercise of sovereign powers with the Afghan population. Afghan employees are resettled because they face serious threats to their safety due to their work for European governments. In his 2015 annual report, Germany's then-commissioner for the armed forces argued that if former employees were not given the opportunity to find protection in Germany, the danger would arise that "the willingness of the local population to support the German army in current and future missions would be massively reduced."

## Geographies of difference

On the other hand, the very design of these entry schemes constructs a geography of difference. As interpreter and PhD student Nerges Azizi points out, the notion of 'local employee' suggests that these persons are bound to that place, while their European colleagues can fly in and out of Afghanistan without much responsibility. The resettlement scheme binds a few persons to those with whom they cooperated, namely Europeans that enacted sovereign powers in Afghanistan, and thus blurs those geographies of difference.

At the same time, the practice of these entry procedures also showed up their severe limitations. The criteria of eligibility and for the assessment of the existence of individual risk are often opaque and arbitrary. For instance, eligibility criteria in Germany's 'local forces' procedure are classified as confidential, and criteria for resettlement to the UK were criticised by MPs and military staff as "arbitrary".

The French admission procedure divided Afghan employees into two categories: on the one hand, former Afghan employees for whom admission to French territory was excluded “for reasons of insufficient risk or possible difficulties to integrate (problems of assimilation or security)” and, on the other, those who faced imminent risk to their safety or life and, especially, if they had “a sociological profile of a person capable of being integrated or assimilated in France”. (Although this admission procedure was amended in 2015, such eligibility criteria remained.)

## **The Taliban do not distinguish between different types of cooperation with European governments**

Other admission procedures include cut-off dates instead of an assessment of the level of threat. For example, the UK scheme excluded former Afghan employees who quit before 19 December 2012 and the German entry scheme excluded those who quit more than two years ago prior to their application for entry. Decision-making processes were also often deadly slow, and the personal scope of entry schemes limited to persons who directly worked for a government department.

Since in principle only the core family (spouse and minor children) are granted admission to European countries, former Afghan employees are forced to choose between security and leaving their adult children behind. While adult daughters are sometimes granted an entry visa, former Afghan employees are denied visas for their adult sons.

Unlike European bureaucrats, however, the Taliban do not distinguish whether the cooperation with European governments was based on a direct employment contract or only a sub-contractual relationship. Nor do they distinguish whether European media constitute government bodies under, say, French, Italian or German constitutional law.

## **Autonomous decisions of European states?**

The entanglement of sovereign powers with parts of the Afghan population includes a broader circle of persons beyond former Afghan employees. These obligations also have concrete legal content. Like all sovereign decisions, decisions on the entry and admission of non-nationals must comply with human rights.

In M.N. and others vs Belgium, the European Court of Human Rights assessed whether the refusal of a humanitarian visa to a Syrian family by the Belgian embassy in Beirut fell within the jurisdiction of the Belgian authorities and thus triggered the human rights responsibility of the Belgian state. In principle, the European Convention on Human Rights (ECHR) applies only in the territories of the contracting parties, but if a contracting state exercises effective authority or control over an individual outside its territory, the ECHR also applies extraterritorially.

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Whether a state exercises effective controls or authority depends, as the court held in this case, on the specific link between an individual and a state, while the nature of that link depends on the concrete facts that constitute that link. The court assessed,



among others, whether the applicants resided or had family connections in Belgium, and held that the only connection between the applicants and the Belgian state would consist in the applicants entering the embassy to lodge their visa application, which would be insufficient to amount to an exercise of effective control or authority.

The essential point here is that human rights responsibility under the ECHR depends on the various factual links that exist between the exercise of sovereign power and an individual. If the actual exercise of sovereign powers by European states depends on the concrete labour of Afghan individuals, the manifold links between the exercise of sovereign power and Afghan labour cannot simply be dismissed as legally irrelevant when a state decides on the admission of Afghans.

## **Establishing regular pathways**

Of course, the military intervention by Western states in Afghanistan affected the entire population of that country. However, the extent to which the exercise of sovereign powers by European states in Afghanistan is entangled with individual lives differs between groups of people.

What is essential is that the circle of Afghans who are entangled with the maintenance of the security interests of European states in Afghanistan should be drawn broadly and not limited to those who were directly employed by European governments. If the creation of stable civil society and state structures in Afghanistan was an essential part of European security interests, it is only logical to offer protection to Afghans who are endangered by the Taliban due to their labour in developing these structures.

Offering protection to Afghans should not be limited to the current evacuation flights. Rather, regular possibilities of entry will be especially necessary once the Taliban have consolidated their power in the coming months, and Afghans who are at risk of being persecuted by the Taliban either go into hiding domestically or seek protection in neighbouring countries. As Afghan refugees in these neighbouring countries are often saddled with a precarious legal status and have few rights, financial support and humanitarian assistance alone are unlikely to sufficiently repair the situation of Afghan refugees in these countries.

**Offering protection to Afghans should not be limited to the current evacuation flights**



Indeed, the European Commission has called for the establishment of regular pathways of entering EU member states. After the extraordinary council meeting of interior ministers on 16 August 2021, the EU commissioner for home affairs, Ylva Johansson, urged member states to offer "legal, safe and organised routes to the EU" and to increase the resettlement of Afghan refugees. Already in its 2015 migration strategy and in its recent New Pact on Migration of September 2020, the European Commission recommended an enhancement of the regular means of entry and admission to the EU for persons seeking protection.

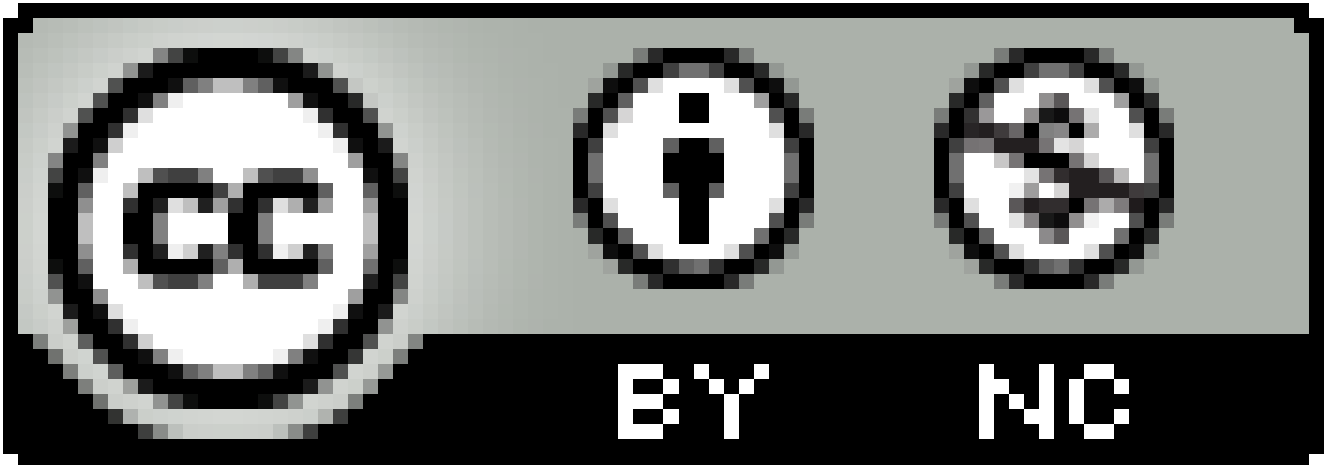
Yet, apart from the current engagement in evacuation flights, there has not been one significant action by European governments to establish regular and safe entry possibilities for Afghans, despite the broad popular support for providing protection to at-risk Afghans in some member states. A few civil society organisations have launched evacuation programs and in a recent poll in Germany, for example, two-thirds of the respondents answered that Afghans at risk should be provided with protection in Germany.

This support for creating pathways for legal and safe entry is partly also reflected at the *Länder* (state) level in Germany. On 17 August, the Berlin Senate decided to adopt a state law that would grant admission to particular groups of Afghans, including those who are chronically ill or pregnant. This was confirmed by the Berlin senator of the interior, Andreas Geisel, on 19 August in the Berlin House of Representatives. In a similar vein, Dirk Adams, the migration minister of the German state of Thuringia, has also spoken out in favour of a state-level admission scheme for Afghans who are at risk.

Although the effectiveness of these state-admission schemes requires consent by the Federal Ministry of Interior, these initiatives for creating regular entry schemes at supra-national (European Commission) and state-level may be an effective legal strategy to counter the reluctance of federal governments in EU member states to establish legal means of entry for Afghans in need of protection.

The coordinated creation of regular entry opportunities for ultimately all Afghans in need of protection in and outside Afghanistan in the coming months is an obvious solution if we are to prevent the mistakes of 2015 from being repeated.

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