Human Rights Law and the Obligation of States to Grant Asylum to Displaced People

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Table of Contents

§1: Introduction

The regulation of migration between states and the dealing of states with migrants, especially immigrants, is a genuinely international matter. If one contemplates global justice in a world where people move from one state to another, one needs to conceive of a just manner to handle migration. Therefore, it is expectable that there are already various debates in philosophy on the ethics of migration. Some discuss whether there is something like a human right to

migration[1], others discuss whether states have a right to exclude people and control their border[2], whether there is a right to leave one's country[3], or discuss migration policies and to what extent they are discriminating[4]. However, migration is a very broad term and one class of migrants that is mostly treated only as a side issue in these discussions are people which are forced to migrate by armed violence, persecution, or other life-hostile circumstances, so-called "displaced people". It seems plausible that states have a more extensive moral responsibility to take in people in need than others. Moreover, in reality, such migrants in need are a minority. Thus, it might seem reasonable that they are only an accessory topic in the discussions within ethics of migrations.

Unfortunately, the admittance of displaced people to resettle in their host countries is usually smaller than that of other migrants which seems rather questionable regarding the idea of global justice and the plausibility of a broader moral responsibility of states to accept these people. Let me elucidate these claims with some numbers: Although the overwhelming majority of people stay in their country of birth, millions of people leave their countries every year for various reasons. The number of migrants increased during the last years in total (2000: 150 Mio. people; 2020: 272 Mio. people) as well as in relative numbers (2000: 2.8% of the world population; 2020: 3.5% of the world population).[5] While most of them migrate voluntarily and in regular ways such that it involves almost no trouble neither for the migrants nor the states involved, there is a considerable number of people who are internationally displaced (2020: 34.4 Mio. people).[6] This means that they fled their country because they feared a threat to their lives or because they lost or never had a basis of existence and are in need of protection or aid. Although they are granted protection for some time in a host country, most of them are sent back. Of all the displaced people in 2020, only 34'400 were allowed to resettle in a secure and livable (part of their) country, while over 3 million people went back to their place of origin, either voluntarily or because it was decided by their host country. That the people in need are generally less accepted by countries than other migrants can be illustrated by the fact that in 2017 of all

[1] E.g. Miller (2016); Oberman (2016).
[2] E.g. Carens (1987); Miller (2005); Wellman (2008).
[3] E.g. Stilz (2016)
[4] E.g. Fine (2016)
[5] Cf. International Organization for Migration (IOM) (2019), *World Migration Report 2020* (WMR 2020), p. 10. Remark on the citation of organizations and official documents: The first time I refer to an organization I write the whole name and the official acronym in brackets. Afterward, I only write the acronym. For citing reports and official documents with long titles, I write the first time the whole name of the text and an abbreviation in brackets that I use in the subsequent citations of the same text. In the bibliography, all texts are to find under the full name of the organization and the year of publication.
[6] Cf. UN High Commissioner for Refugees (UNHCR) (2021), *Global Trends: Forced Displacement in 2020*, p 2. It is to notice that the majority of all displaced people are so-called internally displaced people (2020: 48 Mio. people). This means that it is also true for displaced people that they stay mostly in their country of origin.

globally displaced people 102'800 were admitted for resettlement in a secure and livable country, while in the same timespan Canada *alone* admitted over 286'000 new permanent residents.[7]

The debates in ethics of migration are often about migration in general, thereby discussing primarily the migration of people who are not in need of being accepted as immigrants in another country. On the contrary, one might argue that they are rather privileged to be able to go to a different country of their choice for working and living. From this perspective, the ethics of migration is rather discussing the ethics of some privileges of a small number of the human population while an even smaller share of migrants who are actually in need to be accepted as immigrants by states are barely accepted. However, if one deliberates about a right of states to exclude or a human right to migration, it might influence the outcome of the deliberation drastically whether one has in mind the image of displaced people or university alternating academics. Therefore, I take it to be of utter importance to differentiate precisely about what form of migration one is contemplating.

I want to focus in this paper on internationally displaced people. The question I want to investigate is: How could one argue for an obligation of states to grant asylum[8] to internationally displaced people which do not qualify as refugees under international refugee law (IRL) on the basis of international human rights law (IHRL)? The goal is to point towards possible arguments why states should also grant asylum to people who fled miserable economic or environmental conditions due to their obligations under IHRL. These obligations might be moral or legal in kind. In my view, the investigation is about arguments for moral obligations of states which, however, are preferably viable within the framework of international law. Therefore, I presuppose two premises that I will not further examine but which an ethicist who wants to refine the outlined line of argumentation maybe needs to address for obtaining a convincing argument for moral obligations.

The two presupposed premises are first, that by ratifying a contract one imposes moral obligations on oneself to comply with the contract. Thus, by ratifying human rights conventions and by participating in the legal framework of international law states have imposed the obligations upon themselves to comply with these conventions and the rules of international law. This principle of pacta sunt servanda is not only the main pillar of international law[9] but also the intuitive presupposition of (maybe) all social contract theories and consent theories

[7] Cf. IOM (2019), WMR 2020, p. 111 and UNHCR (2018), *Global Trends: Forced Displacement in 2017*, p. 3.
[8] I do not refer to a technical meaning of "granting asylum" in this paper. I take it to be the intuitive notion of being granted to stay and not being sent back to the same or similar circumstances one fled. See Owen (2020), p. 58 ff. for a first step towards the technical differentiation in law.
[9] Cf. Kälin et al. (2016), p. 9.

concerning moral or political obligations. The second assumption is that in many instances of legislative contracts — which are contracts that establish abstract general rules — the codified rules are thought to contribute to the implementation of a just institution or as a minimally moral standard. Therefore, they are an expression of what the parties think is ethically right. This seems to be particularly true for human rights law. As Luban[10] points out, IHRL cannot be decoupled from the idea of moral human rights due to the fact that the most common reaction to the enforcement deficit of IHRL is the mobilization of shame that comes about because human rights matter to people morally.

However, even without the two premises, some of the proposed lines of argumentation might be useful for actually arguing for legal obligations of states. It needs to be remarked, though, that in this paper I am only focusing on the central treaties of IHRL and IRL with global scope and their interpretation in law. All the regional treaties of these two branches in international law are mostly not taken into consideration in this paper. Furthermore, it is worth mentioning that the legal practice as it is at the moment would in most cases not yield the result in court which I am going to argue it ought to. This is mainly due to the restrictive definition of refugeehood in IRL, the circumstance that there is barely any norm hierarchy in public international law, and last but not least the narrow conception of "dignity" in international law.

The investigation proceeds as follows. In §2 I elaborate on the restrictive definition of "refugee" under IRL and introduce the principle of non-refoulement. In §3 a conception of the most basic human rights as they are found in the two main human rights conventions is presented, the non-refoulement principle under the right to life is introduced and it is pointed out that the human rights obligations of states also relate to asylum-seekers and not only to their citizens or inhabitants as some might incorrectly assume. §4 explains why the current legal opinion holds that there is no genuine norm conflict between IRL and IHRL. Based on these three sections, in §5 I sketch two strategies how one might argue for an obligation of states under IHRL to legally assure asylum to displaced people who fled from miserable economic or environmental circumstances. §6 concludes and addresses briefly some possible concerns some might have with my proposition.

[10] Luban (2015), p. 266 ff.

§2: Who is a Refugee under IRL?

The most important conventions in IRL are the 1951 *Geneva Convention Relating to the Status of Refugees*[11] (hereafter *Refugee Convention)* and its 1967 additional *Protocol Relating to the Status of Refugees*[12] (hereafter *Additional Protocol)*. Both are ratified by around 146 states.[13] The still predominant definition of a refugee is given in Art. 1A(2) of the *Refugee Convention*, but it was restricted only to people who were displaced and fulfilled the condition to be a refugee before 1951. Therefore, the *Additional Protocol* was drawn up to abolish this restriction, such that the definition of a refugee under international law reads as follows:

> [A refugee is a person who] (…) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence (…), is unable or, owing to such fear, is unwilling to return to it.[14]

This definition is remarkably restrictive. It excludes all displaced people who are not persecuted for one of the mentioned reasons. All who are forced to leave their home due to natural catastrophes, famines or draughts, life-threatening poverty, poisoning or privatization of their drinking water, forced relocation, or any other possible comprehensible reasons for fleeing are not granted refugee status under IRL. From the mere wording, it is not even clear whether people who flee situations of armed conflict fall under this definition. It is only the *Guideline on International Protection No. 12* of the UNHCR which clarifies that fleeing from a situation of armed conflict *can be* in many cases a reason for being regarded as a refugee.[15] In the regional regulation of the EU, Art. 2(d) of *Directive 2011/95/EU*[16], there is in addition to the refugee status the "eligibility to subsidiary protection" for people who do not qualify as refugees under the *Refugee Convention* but have well-founded reasons for believing that they would face

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[11] UN General Assembly (UNGA) (1951), *Convention Relating to the Status of Refugees* (Refugee Convention).
[12] UNGA (1967), *Protocol Relating to the Status of Refugees* (Refugee Protocol).
[13] See the Website of the United Nations Treaties Collection: https://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&clang=_en (22.07.2021).
[14] Art. 1A(2) *Refugee Convention* adapted according to Art. 1(2) *Additional Protocol*. The "(…)" mark the omissions determined by the *Additional Protocol*. The starting phrase in square brackets is my addition to improve the natural readability.
[15] UNHCR (2016), *Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions* (Guidelines on International Protection No. 12), para. 11-13.
[16] European Union (EU) (2011), *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* (Directive).

serious harm if they return to their country of origin. However, this provision also reveals how strict the conditions for qualifying as a refugee are, because in Art. 15 of the *Directive* "serious harm" is defined as:

> (a) the death penalty or execution; or
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

To sum up and spell it out bluntly who is considered a refugee under IRL it can be said that only people are considered refugees who have to fear that they will be actively persecuted in their country either by the official state of that country or another state or non-state party who controls that relevant part of the country such that the official state is unwilling or unable to protect them from persecution. Moreover, the persecution needs to constitute a threat of killing, torture, or other inhuman or degrading treatment.

The rest of the *Refugee Convention* determines the minimal rights and duties refugees should have in their host country, as for example: the right to non-discrimination (Art. 3), access to courts (Art. 6), right to work (Art. 17-19), housing or education (Art. 21-22) or administrative assistance (Art. 25). However, the most important for the further discussion is Article 33:

> *Art. 33 Refugee Convention* – Prohibition of Expulsion or Return (Refoulment)
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

It is one of the instances of the codification of the so-called principle of non-refoulement. It is a non-derogable right in IRL, which means that it cannot be suspended in any way.[17] Furthermore, it is an indication that sending back people to certain inhumane situations can be considered a misdemeanor and is condemnable within the international community and even triable under international law.

[17] UNHCR (2007), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, para. 12.

§3: Basic Human Rights, Non-Refoulement and the Applicability of IHRL to Displaced People

IHRL is grounded in several covenants belonging to the body of public international law. The most important due to their global scope and the almost universal degree of ratification are the *International Covenant on Civil and Political Rights* (ICCPR)[18] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[19]. Both are ratified by over 170 countries.[20] As the Committee on Economic, Social and Cultural Rights outlines in its *General Comment No. 12* the obligations derived from the treaties are of three types, namely to respect, protect and fulfill human rights.[21] To respect human rights a state cannot violate them by its own laws or acts, to protect them a state needs to ensure that human rights are not violated by others, and to fulfill human rights a state needs to pro-actively adopt measures to strengthen the guarantee of human rights. On the one hand, the obligations are owed to all the other states who signed the treaties (erga omnes partes) but on the other hand also to human individuals directly.[22] While the former follows formally from the act of concluding a contract, where the parties to the contract are accountable to each other to comply with the contract, the latter arises from the content of the contract since the human individuals are not parties to the contract.

The human rights that are warranted by these two covenants are extensive. The rights I want to focus on are those which I would frame as the most basic human rights. Therefore, in the further course of this paper "most basic human rights" or "basic human rights" shall encompass the rights, I am going now to submit. That they are the most basic human rights is discernable by their legal conception as non-derogable and to a certain degree unexceptional. This means there is no excuse of any sort for parties to these contracts not to comply with their obligation to realize these rights. Furthermore, they are all linked quite intuitively (though not technically) to the human right to life. Following this comprehension, the basic human rights include the non-derogable rights of the ICCPR and those rights established in the ICESCR (especially Art.

[18] UNGA (1966a), *International Covenant on Civil and Political Rights* (ICCPR).
[19] UNGA (1966b), *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
[20] See on the Website of The Office of the High Commissioner for Human Rights (OHCHR) for the most up-to-date status: https://indicators.ohchr.org/. (July 22, 2021)
[21] Committee on Economic, Social and Cultural Rights (CESCR) (1999), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)* (GC 12), para. 15.
For a critical analysis of the framework cf. Karp (2020).
[22] Cf. UNGA (1966a), ICCPR, Art. 2; Human Rights Committee (CCPR) (2004), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant* (GC 31), para. 2; CESCR (1990), *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)* (GC 3), para. 5.

11 and 12) which give rise to the "core obligations" of parties to the contract as defined by the CESCR in its *General Comments No. 3* and *No. 14*.

The non-derogable rights are designated in Art. 4(2) ICCPR, namely:

- The right to life (Art. 6)
- The right of not being tortured or treated in a different degrading or inhumane way (Art. 7)
- The right of not being held in slavery or servitude. (Art. 8(1-2))
- The right of not being convicted or sanctioned without a trial (Art. 11, 15, 16)
- The right to freedom of thought, conscience, and religion. (Art. 18)

Prima facie, these are the rights that the refugee definition under IRL is trying to encompass and to protect. A person who flees her country because her freedom of thought, conscience, or religion is violated and, therefore, has to fear torture, enslavement, imprisonment or death would supposedly fall in many cases under the respective definition. However, the appearance is deceitful. Not only because e.g. the freedom of conscience is often not warranted – for example in Switzerland a person who is persecuted in his country of origin because he refused mandatory military service is explicitly not recognized as a refugee[23] – but first and foremost because the right to life has to be understood not merely as the right of not being killed by the state or of being protected by the state from killing attempts by other groups or individuals. Instead, in its *General Comment No. 36* the CCPR has put on record that the right to life has to be understood in a broader sense as a right to a life with dignity.[24] Hence, they further specify that for fulfilling the obligations under the right to life states need to protect people from "reasonably foreseeable threats and life-threatening situations that can result in the loss of life"[25]. Consequently, they introduce something like a principle of non-refoulement under IHRL, when they write:

> The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries in which there are substantial grounds for believing that a real risk exists that their right to life under article 6 of the Covenant would be violated. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State, except in the most extreme cases. […]

[23] Swiss Law (1998), *Asylgesetz* (AsylG), Art. 3.
[24] CCPR (2019), *General comment no. 36, Article 6 (Right to Life)* (GC 36), para 3.
[25] CCPR (2019), GC 36, para. 7.

> The obligation not to extradite, deport or otherwise transfer, pursuant to article 6 of the Covenant, may be broader than the scope of the principle of non-refoulement under international refugee law, since it may also require the protection of aliens not entitled to refugee status. [26]

This shows that there is a certain obligation under IHRL not to send people back into dangerous situations if it would violate their right to life. The formulation of the principle also allows the understanding of the right to life as a right to a life with dignity! Admittedly, the second sentence invokes strong restrictions and the whole *General Comment No. 36* seems to constrain the understanding of a "life with dignity" to a bare minimum. Moreover, nothing is said in the document about the economic or social implications of the right to life.

However, the CESCR has specified in their *General Comment No. 14* on the right to health which they link closely to the right to a life with dignity[27] what they take to be the core obligations of state parties concerning the economic, social, and cultural rights of human beings. These include[28]:

- Minimal provision of food that is nutritionally adequate
- Access to safe and potable water
- Basic housing and sanitation
- Access to health facilities, goods, and services
- Prevention, treatment, and control of epidemic and endemic diseases
- Provision of essential drugs and vaccination
- Provision of maternal and child health care

In *General Comment No. 3*, where the CESCR first introduced the idea of the core obligations, they emphasize that any State Party to the contract has to comply with these obligations to the maximum of their available and appropriate means.[29] Even in cases where they can verify that they are unable to realize this minimal form of the respective rights, they still must aim for a situation where the rights can be realized. All these rights constitute, what I would call, the most basic human rights. They are non-derogable, until a certain minimal degree of realization without exception, and all linked quite intuitively (but not technically) to the right to life.

An important question in this context is how broad the scope of the human rights obligation of states is: Towards which human individuals do states have these human rights obligations? It is

[26] CCPR (2019), GC 36, para. 30 and 31.
[27] CESCR (2000), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)* (GC 14), para. 1.
[28] CESCR (2000), GC 14, para. 43-44.
[29] CESCR (1990), GC 3, para. 10.

quite obvious that a state cannot be obliged to guarantee the human rights of all human beings on the planet. It might be said that this is quite directly inferable from the well-known and broadly accepted Kantian "ought implies can"-principle. The limits of their obligations under the ICCPR are specified therein in Article 2(1) which states that:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In the *General Comment No. 15* of the CCPR it is stated that aliens do have the same rights under the covenant as far as the covenant does not state something different.[30] Furthermore, in the *General Comment No. 31* the Committee explicates that every human being under the effective control of a Party to the contract falls under the provisions of the contract even if not within the official territory of the Party, thereby also explicitly including "asylum seekers, refugees, migrant workers, and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party".[31] In their comment on the right to life, the CCPR even writes explicitly that state parties to the contract have to take special measures of protection towards vulnerable persons, thereby explicitly mentioning, displaced persons, asylum-seekers, refugees, and stateless people.[32]

As Coomans encapsulated it quite well, in the case of the ICESCR the international dimension of the obligations is even more distinctive.[33] Not only is there no reference in the covenant to a territorial or jurisdictional constraint on its range of effect but, moreover, it explicitly demands international collaboration and the deployment of all "appropriate means" to realize the codified rights.[34] Furthermore, the CESCR as well as the International Court of Justice (ICJ) have established the "effective control"-doctrine for the ICESCR by some of their statements in connection with the Israel-Palestine-Conflict.[35]

Therefore, it is generally beyond debate that states which have ratified these covenants have legal and moral obligations under IHRL towards displaced people who are looking for protection and livable circumstances in these states.

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[30] CCPR (1986), *General Comment No. 15: The Position of Aliens Under the Covenant* (GC 15), para. 1-2.
[31] CCPR (2004), GC 31, para. 10.
[32] CCPR (2019), GC 36, para. 23.
[33] Coomans (2007), 362f.
[34] See, UNGA (1966b), ICESCR, Art. 2(1).
[35] ICJ (2004), *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Para. 112.
CESCR (1998), *Concluding Observations on Israel 4. December 1998*, para. 8.

§4: Norm Conflict Between IRL and IHRL?

Despite the foregoing explanations the application of IHRL to aliens within the effective control of a state party to the contracts does not legally imply that displaced people who fled for other reasons than those mentioned in the refugee definition in IRL have a claim to stay in their host country and not be sent back. The reasons for this are manifold. For one, there is no general norm hierarchy in international law except for the precedence of jus cogens (= compelling international law) and the UN-Charter over treaties and customary law.[36] Hence, all human rights obligations which do not belong to jus cogens do not have precedence over the treaties in IRL. Where putative norm conflicts occur the principle of harmonization has to be utilized: The interpretation of the sources has to be conducted such that norm conflicts are avoided as effectively as possible.[37] Human rights which are usually considered jus cogens are covered by the refugee definition in IRL. Furthermore, the CCPR explicitly states in its *General Comment No. 15* that there is no right of aliens recognized within the ICCPR to enter or stay in the territory of a Party.[38] Article 13 of the ICCPR prohibits the expulsion of aliens without a legal basis,[39] therewith, however, implying that states are allowed to expel foreigners based on domestic and other international law.

Probably, the best prospect to evade legal expulsion for a displaced person who cannot be categorized as a refugee in IRL is the right to life under the ICCPR. However, as already mentioned, although the right to life has to be understood as a right to a life with dignity, this entitlement is not understood in a very broad sense, especially when it comes to the protection from expulsion. As already seen, the CCPR invokes strong constraints on the non-refoulement principle. With reference to case law, they state that the risk of a violation of the right to life in the country of the expelled person needs to be personal in nature and cannot only be constituted by the general circumstances in that country, except in most extreme situations.[40] A glimpse into the respective case law reveals that it has to be a situation of indiscriminate violence.[41] Thus, the rights codified in the ICCPR under their current interpretation do not assure asylum to displaced people.

The core obligations derived from the ICESCR do not help in this concern either. From a legal point of view, the core obligations and the right to life are not directly connected and the ICESCR does not have relevant implications for IRL. Moreover, the rights codified in it do

[36] Cf. Kälin et al. (2016), p.83f.
[37] Ibid., 88f.
[38] CCPR (1986), GC 15, para. 5.
[39] UNGA (1966a), ICCPR, Art. 13.
[40] CCPR (2019), GC 36, para. 30.
[41] European Court of Human Rights (2008), *N.A. v. United Kingdom*, para. 115.

legally not entail a right to asylum nor any reasons for the non-refoulment of aliens. Instead, it is required that states collaborate for achieving the realization of the rights in all of them. Thus, one can follow lines of argumentation that states may not have an obligation to admit displaced persons into their territory but rather need to locally support the people where they come from.[42] Certainly, one has to admit that this legal interpretation of the international contracts leads still to inhumane consequences (at least in the non-technical meaning of the word). Many displaced people are not recognized as refugees and from those who are recognized even less are admitted for resettlement.[43] The result of this is that people are deported into circumstances that are insufficient to warrant a life with the benefit of the most basic human rights as conceived above.[44]

§5: Two Strategies for the Assurance of Asylum to Displaced People

As far as I overlook it, on the basis provided until here two lines of argumentation are possible to argue for a legal assurance of asylum for internationally displaced people with reference to the self-imposed obligations of states by ratifying the human rights treaties. In the following two subsections, I want to outline them, make some proposals on how they could be pursued further, and give my assessment which strategy I deem to be more promising.

§5.1 IHRL as higher norms

The first strategy one might take to argue for an assurance of asylum for internationally displaced people under IHRL is to strengthen the status of human rights. As mentioned in §4, there is almost no norm hierarchy in international law. Hence, one might hold that human rights should be higher up in the norm hierarchy of international law (or law in general). There could be arguments in jurisprudence or ethics that the protection, respect, and fulfillment of human rights are radically more relevant than the compliance with norms from different treaties. Intuitively, it seems plausible that an international convention on air traffic or free trade agreements should be lower in the norm hierarchy than human rights conventions. Given that the Conventions from IRL are not considered to be part of the corpus of IHRL,[45] the importance to ensure human rights to displaced people would trump the other agreements from IRL. An argumentation in this direction can draw on various deliberations. I only sketch two options that are not mutually exclusive.

[42] Cf. e.g Miller (2005); Wellman (2008).
[43] Cf. e.g. UNHCR (2021), *Global Trends: Forced Displacement in 2020*, p 2.
[44] Kleist & Bob-Milliar 2013; Dako-Gyeke & Kodom (2017)
[45] This is usually the case but is also debated. See for a discussion e.g. Chetail (2014).

Regarding the functioning of the international legal system, a rather pragmatic line of thought might be expedient. It can be brought forward that to improve the enforcement of human rights they should be considered higher norms in international law. Since the mechanism of reciprocity is significant in the enforcement of international law but does not work properly for human rights law as it does for other branches[46], it could enforce broader compliance to vest it with a special status in international law. The details of such a special status and its implications would, however, require much more thought and investigation than I can deliver in this paper.

An alternative way to go would be to appeal more to political philosophy or jurisprudence, thereby insisting on the sheer essentiality of human rights for the legitimacy of law. If the legitimacy of a domestic legal system can be doubted when not compatible with the assurance of a minimal standard of life as held out in prospect by basic human rights, then the legitimacy of an international legal system might as well. Therefore, human rights would have to be regarded as higher law whose compatibility with the other legal rules is decisive for the legitimacy of the latter. Apart from the ethical deliberations for such an argument, this is already given to a certain extent in international law. Severe violation of human rights may undermine a state's inner sovereignty and serve as a legitimate reason for a "humanitarian intervention" into that state, as happened e.g. in Yugoslavia 1999 or Libya 2011.[47] Here again, the details of the argumentation would probably turn out complex and require more elaboration than I can put forward in this paper.

However, even though a sound argumentation in this direction of elevating human rights might be brought forward, it could not cause a difference in actual results without a major change in legal practice. The reason is that the norm hierarchy is only adduced to resolve a norm conflict if there genuinely occurs one. As we have seen, the current legal opinion is that there is no norm conflict between IHRL and IRL. Therefore, even if it was officially acknowledged that IHRL was higher in the norm hierarchy than other international treaties, the current practice would not change. Hence, it might become apparent that this line of argumentation is theoretically correct but, nevertheless, without any practical impact. This is the main reason why I deem the second line of argumentation more preferable.

§5.2 Challenge the current interpretation of "a life with dignity"

The second strategy could be a possibility to achieve a legal assurance of asylum for internationally displaced people with the current legal practice and international covenants as

[46] Cf. e.g. Posner (2010).

[47] The justification of humanitarian interventions is highly controversial and also the two cases mentioned in the text are very different from a legal point of view. See for rather new contributions to the discussion Coady, Dobos & Sanyal (2018).

they are (as far as I overlook it). It comprises the expansion of the restrictive interpretation of the concept of a "life with dignity" which should be protected, respected, and fulfilled by states, according to the interpretation by the CCPR of the right to life under Art. 6 ICCPR. If it would include substantially more than merely the right not to be killed, tortured, or treated otherwise in an inhumane or degrading manner or not being exposed to an extreme situation of indiscriminate violence it could be the reason brought forward to allow a displaced person to stay, even if she does not qualify as a refugee under IRL. Establishing a connection between the right to life and the core obligations from the ICESCR seems especially desirable for this purpose.

Admittedly, it is disputable whether such an expansion in the meaning of the concept "life with dignity" is plausible in practice in the realm of international law. As many authors repeatedly remark the concept of dignity in law is vague and intentionally so.[48] Furthermore, the EU continues to petrify the narrow understanding with its *Charter of Fundamental Rights of the European Union* wherein the first chapter is dedicated to "Dignity" and expresses distinctly a narrow understanding of dignity.[49] However, also for this line of argumentation there seem to be at least two separate but not mutually exclusive options, whereof one stays rather in the realm of jurisprudence while the other belongs more to the realm of philosophy.

The first option would be the recourse to the preambles of the two human rights treaties which both declare explicitly that the codified rights are derived from human dignity[50] and which have to be taken into consideration in the interpretation of the articles according to the *Vienna Convention*.[51] Although it might not amount to the claim that the principle of non-refoulement should expand so far as to prevent every expulsion into a country that does not respect, protect and fulfill all codified human rights, it could, nevertheless, be a strong intimation that a life with dignity encompasses more than the current practice in international law suggests. Since the non-refoulement under the current interpretation of the right to life only protects rights codified in the ICCPR but the ICESCR refers also to the derivation of its codified rights from human dignity, an argument may be contrived that for a life with dignity at least the basic human rights have to be guaranteed.

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[48] Griffin (2008), 5f., 21; Lohmann (2010), p.49; Luban (2015), p.274; Pollmann (2010), p.27f.; Waldron (2015), p.128.

[49] EU (2012), *Charter of Fundamental Rights of the European Union*, Art. 1-5.
This is especially apparent in its formulation of Art. 3(1): "Everyone has the right to respect for his or her physical and mental integrity". Considering the "respect, protect and fulfill"-framework introduced in §3, this formulation strongly suggests only negative obligations deriving from this right.

[50] See Waldron (2015), 125f. or Pollmann (2010) for discussions about the relation between human rights and human dignity.

[51] United Nations (1969), *Vienna Convention on the Law of Treaties*, Art. 31(2).

In light of the restrictions invoked by the CCPR in their formulation of the principle of non-refoulement, namely that the risk of a violation of the right to life has to be personal or arise from an extreme situation, the principle should then apply to people who fled from countries where these basic rights are not guaranteed under at least one but preferably both of the following requirements: One needs to argue convincingly (1) that this restrictive statement by the CCPR is rather a description of case law than a normative statement and/or (2) that a situation where the basic human rights are not guaranteed should always be regarded as an extreme situation.

The second option is to analyze the concept of dignity more thoroughly, therefrom deducing what a life with dignity implies. For this purpose, some naturalist account on human rights which also include welfare rights as e.g. Griffin's[52] or Liao's[53] might be helpful, because, as Waldron[54] pointed out accurately, although the concept of dignity is notoriously vague and one might doubt whether it really is the foundation of human rights, the world community committed itself to this conceptual connection not only ones but throughout various contracts. Alternatively, Martha Nussbaum refers frequently to dignity in her capabilities approach on justice.[55] So, it might also be a starting point for a thorough analysis of the dignity concept.

A further aid of orientation in this undertaking could be to think about what we would consider legal circumstances brought about by states which are close to life without dignity as for example imprisonment or what minimal provisions are also demanded by states in exceptional situations as for example armed conflicts and situations of occupation. With a glance into the law of armed conflict, especially its provisions on prisoners of war[56] or the treatment of civilians in occupied territory[57], one will find that the provisions encompass at least if not even more than basic human rights. Since the right to a life with dignity is non-derogable and also has to be guaranteed for persons convicted of the most serious crimes, one can make the argument that sending people back to circumstances where these minimal provisions are not guaranteed which are even guaranteed in situations of emergency or after conviction for the worst crimes, that the principle of non-refoulement as stated by the CCPR should also apply to displaced people who fled such circumstances. However, the two issues for the interpretation of the principle of non-refoulement mentioned above have to be addressed again.

[52] Griffin (2000); (2008).
[53] Liao (2015).
[54] Waldron (2015), 124-125.
[55] Nussbaum (2006), p. 161f., p. 291f.
[56] International Committee of the Red Cross (ICRC) (1949a), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*.
[57] E.g. ICRC (1949b), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, Art. 47-78.

Either option of this second strategy should suffice to achieve a legal assurance of asylum for internationally displaced people within the current legal practice and international covenants as they are. IRL only gives a minimal standard concerning who has to be granted protection by means of refugee status and to whom the principle of non-refoulment is applicable. However, nothing prevents states to widen their terms for granting asylum to displaced people and the state obligations from the right to life already constitute a minor expansion of the principle of non-refoulment. Therefore, if their domestically set standard is over IRL but below the obligation to ensure a life with dignity in a broader sense, they would be obliged by their ratification of the ICCPR to grant asylum to displaced people who have fled circumstances that do not allow for such a life. This is due to the non-refoulment principle as it is derived from the right to life and Art. 27 of the *Vienna Convention*[58] which is part of international customary law and determines that a state cannot appeal to domestic law to excuse the non-fulfillment of its obligations derived from international law. That it does not rely on a major change in legal practice and works within the given framework of international law makes it in my opinion the more favorable strategy.

§6: Conclusion

In this paper, I have proposed some strategies for arguing that states have either legal or moral obligations under IHRL to assure asylum to internationally displaced people within their effective control. For this purpose, I have first described the legal landscape around the core treaties of IRL and IHRL and afterward sketched two possible lines of argumentation which could be pursued for establishing the asserted obligations.

The first line of argumentation was based on the idea to lift IHRL in the norm hierarchy of international law. While it might work as an argument for the respective moral obligations of the states parties to the human rights conventions, it is unfavorable on the legal level. This is due to the current legal understanding that there is no genuine norm conflict between IRL and IHRL and therefore, without a major change in legal practice, the norm hierarchy would not be adduced in legal considerations.

The second line of argumentation draws on the right to life with dignity as codified in Art. 6 ICCPR and interpreted in *General Comment No. 36* of the CCPR. Confronting the extremely narrow interpretation of this right to a life with dignity, I proposed to challenge this current interpretation either by recourse to the concept of dignity in the preambles of the treaties,

[58] United Nations (1969).

thereby establishing a connection between the right to life and the core obligations form the ICESCR or by a thorough analysis of the concept of dignity.

From the two strategies, I considered the latter to be preferable because apart from making a good argument for moral obligations it might also work as an argument for actual legal obligations of states to grant asylum to displaced people, or at least not to send them back to the circumstances from which they fled in the first place.

It needs to be noted again that the basis for these outlines were only the core treatise and tools of interpretation of IRL and IHRL with global scope. Neither regional regulations nor additional tools of interpretation were considered. Thus, some relevant pieces of the puzzle may be missing.

Some might worry that this argumentation, when successful and implemented, may lead to a boundless flow of migrants from poor to rich countries with undesirable up to catastrophic consequences. I think that worry is not justified for three reasons:

First, the circumstances from which people flee still need to be disastrous and their state of origin needs to be unable or unwilling to guarantee basic human rights and could be charged by the other states for not complying with its obligations. As long as such circumstances are not given, the argument would not lead to a legitimate entitlement to asylum (at least if I would try to carve it out in more detail).

Second, as mentioned in the introduction, most people stay where they are. This is also true for displaced people of whom most stay in their country of origin and are categorized as internally displaced people. Additionally, statistics demonstrate quite well that even if displaced people cross the border, they still prefer to stay close to their home country.[59] I do not see any reason to believe that this preference should change owing to a technical adjustment in international law.

Third, if the flows of migration would actually increase as feared and lead in consequence to the point where rich countries would not be able anymore to comply with their obligation under domestic and international law, the obligation argued for would become void.

Therefore, I think it might be morally valuable and academically interesting to further pursue the project initiated in this paper and not to give too much importance to the worries which are almost reflexively uttered against it.

[59] UNHCR (2021), *Global Trends: Forced Displacement in 2020*, p 19.

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