DO WE NEED A EUROPEAN CONFLICT-OF-LAWS RULE REGARDING SUBSIDIARY PROTECTION?

A GERMAN VIEWPOINT

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I. The Problem

1. The legal situation in Germany

The German *Asylum Act* (*Asylgesetz*) lays down the substantive rules governing the legal protection of foreigners (including stateless persons). The *Asylum Act* differentiates between three protection categories: 1) the (political) *asylum status*, based on German national law, 2) the *refugee status*, based on International law and European law, and 3) the *status of subsidiary protection*, introduced by European Law.[1] The German *Residence Act* (*Aufenthaltsgesetz*) grants autonomous protection in exceptional cases[2] and permits temporary residence to foreigners with refugee or subsidiary protection status (§ 25 (2) Residence Act).

The entitlement to asylum is based on Article 16a (1) Basic Law (*Grundgesetz*) which grants third-State nationals (and stateless persons) an individual constitutional right to political asylum. The qualification for asylum, i.e. the entitlement to asylum, comes into existence *ex lege* (by operation of law). The constitutional right doesn't depend on any constitutive formal recognition act. Such a formal administrative or judicial recognition has only (declaratory) effect regarding the alien-law status of a beneficiary of asylum. There is no rule under German law compelling a civil court to abide by such a recognition in determining the law applicable to a person entitled to asylum. The same legal situation applies to refugees. Pursuant to Article 12 [Geneva] *Convention Relating to the Status of Refugees* of 1951 (Geneva Refugee Convention - GRC), in force in Germany and almost all other EU Member

[1] In Germany, prior to the transposition of Directive 2011/95/EU no special protection status existed for persons not covered by the national rules on political asylum (Article 16a *Basic Law*) or by the Geneva Refugee Convention. In some cases, removal was prohibited based on § 60 *Residence Act*.

[2] Under autonomous German law, a person who is seeking protection may not be returned if return to the destination country would constitute a breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms (§ 60 (5) Residence Act) or a considerable concrete danger to life, limb or liberty exists in that country (§ 60 (7) Residence Act).

States,[3] the personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence. Article 1 A GRC[4] defines 'refugee' as any person who fulfils the conditions prescribed (i.a.) in subsection (2). Thus, the status of 'refugee' comes into existence by operation of law (*ex lege*) when the conditions of the definition are fulfilled. Neither the Geneva Refugee Convention nor German law contain a rule compelling civil courts to mandatorily respect, in determining the law applicable to a protection-seeking person, a pertinent (positive or negative) administrative or judicial decision on the protection status of that person.

Neither German law nor the relevant European Directives contain any conflict-of-laws rule regarding persons qualifying for international protection. In contrast, the Geneva Refugee Convention[5] does contain in Article 12 (1) an (auxiliary) conflict rule, which replaces for personal matters of refugees in the meaning of Article 1 A (2) GRC (herein after: 'Convention Refugees') the connecting factor 'nationality' (*lex patriae*) with 'domicile' or – in the absence thereof – with 'residence' (*lex domicilii*). The Geneva Convention does neither institute an international authority to decide whether the conditions of Article 1 A (2) GRC for the status of refugee are fulfilled nor determine national procedures for this purpose. As § 2 of the German Asylum Act[6] declares the Geneva Convention generally applicable to persons eligible for (political) asylum status under Article 16a of the German Basic Law ('*Asylberechtigte*'), Article 12 GRC applies to these persons.[7] In contrast, the Geneva Convention does not cover persons eligible for the status of subsidiary protection (herein after: 'Directive refugees') as these persons neither directly fulfil the conditions for the application of the said Convention nor do they benefit from a pertinent referral to the Geneva Convention. This difference matters for Germany because it traditionally uses 'nationality' as connecting factor regarding the matters covered by the Geneva Convention, even though there is a strong legislative tendency to substitute the *lex patriae* with the *lex domicilii*. Consequently, the *lex domicilii* replaces (*ex lege*) the *lex patriae* only regarding persons qualifying for the status of asylum or Convention refugee. In Germany, there is no comparable national conflict rule with respect to persons qualifying for subsidiary protection. Hence, the law applicable to numerous personal status matters is in Germany actually permanently determined, for these

[3] Sweden has made a reservation to article 12, paragraph 1, to the effect that the Convention shall not modify the rule of Swedish private international law, as now in force, under which the personal status of a refugee is governed by the law of his country of nationality.

[4] Article 1 A GRC: "For the purposes of the present Convention the term 'refugee' shall apply to any person who (1) … (2) [As a result of events occurring before 1 January 1951 and] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out-side 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 [as a result of such events], is unable or, owing to such fear, is unwilling to return to it."

[5] in conjunction with Article I of the Protocol of 31/1/1967.

[6] § 2 Asylgesetz: Rechtsstellung Asylberechtigter. (1) Asylberechtigte genießen [*ex lege*] im Bundesgebiet die Rechtsstellung nach dem Abkommen über die Rechtsstellung der Flüchtlinge. (2) … (3) …; misleading English version published by the German Federal administration: Section 2 Asylum Act: "Legal status of persons granted asylum status. (1) In the federal territory, persons granted asylum status shall enjoy the legal status pursuant to the Convention relating to the status of refugees. (2) … (3)…".

[7] § 1 of the now repealed Act Concerning Humanitarian Aid for Refugees of 11/7/1980 (*Gesetz über Maßnahmen für im Rahmen humanitärer Hilfsaktionen aufgenommener Flüchtlinge,* BGBl. 1980 I 1057) referred, regarding the refugees covered by this Act, to Articles 2 to 34 of the Geneva Convention, so that these refugees were enjoying the legal status of Convention Refugees.

persons, by reference to their nationality,[8] namely legal capacity and capacity to contract (Article 7 (1) Introductory Act to the German Civil Code - EGBGB), declaration of death (Article 9 EGBGB), name (Article 10 EGBGB), marriage (Article 13 (1) EGBGB), general effects of marriage (Article 14 (1) 1 EGBGB), matrimonial property regime (Article 15 (1) EGBGB), descent (Article 19 EGBGB), adoption and consent (Articles 23 and 22 (1) EGBGB), and guardianship, protective care and curatorship (Article 24 EGBGB). Thus, Directive Refugees would – in contrast to Convention Refugees to whom Article 12 GRC applies – remain subject, in respect of all the listed matters, to the personal status law of the country from which they fled. And this *lex patriae* governs the personal status of the Directive refugees permanently – even when they have been granted subsidiary protection. In Germany, hundreds of thousands of people are affected by this legal situation. The following statistical data illustrate the high practical relevance.

2. Legal facts (*Rechtstatsachen*) in Germany[9]

	Positive Decisions		Negative decisions
	Refugee Protection (Art. 2(d) Dir 2011/95/EU + Art. 16a GG)	Subsidiary Protection (Art. 2(f) Dir 2011/95/EU)	
2015:	137.136 = 48, 5 %	1. 707 = 0,6 %!	91.514 = 32,4 %
2016:	256.136 = 36, 8 %	153. 700 = 22,1 %	173.846 = 25,0 %
4/2017	61.373 = 21,5 %	51.978 = 18,2 %	106.232 = 37,2 %

(100 % = all decisions)

The data show a sudden substantial shift from decisions granting refugee status protection to those granting subsidiary status protection. The initially extremely high proportion of persons granted refugee status protection is probably due to the excessive number of applicants which did not allow the authorities to work with the necessary accuracy regarding the situation of the individual applicant. One may easily get the impression that, under the pressure of the enormous number of people arriving within a very brief period, numerous decisions were made hastily and hence not seldom rather fortuitously.[10] In our context, it is important to state that the number of persons granted subsidiary protection has considerably increased and now nearly equals the number of persons granted refugee status. As time goes on, the proportion of persons granted subsidiary protection status will probably grow further. As a result, the personal law of persons granted international protection in Germany will be largely split and several hundred thousand immigrants will be permanently governed by the law of the State they fled while German law will be applied to the rest. Such a splitting may even happen in one and the same family, for instance regarding family members who arrived partly before and partly after the obvious shift of the administrative practice of the *Federal Office for Migration and Refugees* from regularly granting refugee status to a more differentiated granting practice.

[8] Cf. *Thorn,* in: Palandt, BGB, 76th ed. (2017), Anhang EGBGB Art. 5, no. 5.

[9] Cf. *Federal Office for Migration and Refugees, http://www.bamf.de/DE/Infothek/Statistiken/Asylzahlen/asylzahlen-node.html.*

[10] For instance, between 5 September and 10 September 2015, about 37.000 refugees arrived in Munich by train, cf. Münchner Merkur 10/9/2015.

Is the identified different determination of the law governing the personal status for Convention refugees (*lex domicilii*) on the one hand and Directive Refugees (*lex patriae*) on the other hand justified? I don't think so because both groups of persons seeking international protection fled their home country for substantially the same reasons, i.e., the violation of human rights. Both Convention refugees and Directive refugees have broken with their home country and, therefore, most probably don't want to be governed by the law of the country they fled any longer.

3. A glimpse at the legal situation in EU Member States other than Germany

In some other EU Member States, the legal situation resembles that of Germany, meaning that 1) the law applicable to personal status matters is traditionally determined by the connecting factor 'nationality', and 2) there exists no special conflict-of-laws rule regarding protection-seeking third-State nationals, but 3) the Geneva Convention applies. This is the situation, e.g., in Croatia[11], Portugal[12], Slovakia[13], and Spain[14]. The situation doesn't change for those other EU Member States which have transposed into their national law Article 12 GRC, covering refugees but not persons qualifying for (only) subsidiary protection. This is the case for, e.g., Belgium[15], Estonia[16], and Italy[17].

By contrast, several other Member States have enacted special conflict-of-laws rules covering not only Convention refugees but also persons eligible for subsidiary protection, a term introduced by European law. The first State to introduce such a provision was Austria[18] which enacted as early as 1978, i.e. 17 years before becoming an EU Member State (1995), a PIL rule which determines the personal status for a Convention refugee or for a person whose relations with the home state are broken off for similarly severe reasons by referral to the law of domicile or, in the absence thereof, to the law of habitual residence. Obviously, this wording covers persons qualifying for subsidiary protection. In the aftermath of the adoption of the *Qualification Directive* 2011/95/EU[19] (QDir) in 2004, the number of Member States that passed similar special PIL rules has increased. However, the pertinent provisions

[11] Act Concerning the Resolution of Conflicts of Laws with the Provisions of Other Countries in Certain Matters (1991).

[12] Articles 31, 25 Codigo civil.

[13] Article 3 Act on Private International Law and Rules of International Procedure (1993).

[14] Article 9 Codigo civil (1889).

[15] Code de droit international privé (2004): Article 3 § 3 "Toute référence faite par la présente loi à la nationalité d'une personne physique qui a la qualité d'apatride ou de réfugié en vertu de la loi ou de traités internationaux liant la Belgique, est remplacée par une référence à la résidence habituelle."

[16] Private International Law Act (2002) § 11 (3) "If this Act is to be applied to a stateless person, a person whose citizenship cannot be ascertained or to a refugee, the residence of the person shall be taken into consideration instead of their citizenship."

[17] Private International Law Act (1995, as amended in 2014), Article 19 "(Apolidi, rifugiati e persone con più cittadinanze) 1. Nei casi in cui le disposizioni della presente legge richiamano la legge nazionale di una persona, se questa è apolide o rifugiata si applica la legge dello Stato del domicilii o, in mancanza, la legge dello Stato di residenza. 2. …"

[18] Private International Law Act (1978) § 9 (3) "The personal status of a person who is a refugee in the sense of international conventions in force in Austria or whose relations with his home state are broken off for similarly severe reasons, is the law of the state, where she or he has his domicile, in the absence thereof, her or his habitual residence; a referral of that law to the law of the home state is irrelevant."

[19] 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 (recast), OJ L 337/9 of 20/12/2011; in force in all EU member states except Denmark, Ireland, UK.

differ regarding the moment in which the application of the *lex domicilii* (instead of the *lex patriae*) is triggered. Pursuant to Article 3 of the Polish Act on Private International Law of 4 February 2011[20], capacity and personal status of a person who was granted protection in a country other than the country of his nationality (home country) because the links with this country were broken due to violations of fundamental human rights committed in that country, are governed by the law of the country of his place of domicile and in the absence thereof by the law of the place of his habitual residence. According to § 28 of the Czech Act on Private International Law of 25 January 2012[21] the personal status of a refugee or beneficiary of subsidiary protection or of an applicant for international protection is determined as if the applicant were a Convention refugee, i.e., the application triggers the replacement of the *lex patriae* with the *lex domicilii*. Pursuant to section 17 (1) Book 10 of the Dutch Civil Code (2012)[22] the personal status of an alien who has been granted a residence permit under sections 28 or 33 of the Aliens Act 2000,[23] or of an alien who has been accorded equivalent residence status in another State, shall be governed by the law of his domicile, or, if he has no domicile, by the law of his residence. Hence, under Dutch law, the granting of a residence permit triggers the application of the *lex domicilii* to the personal status of a person beneficiary of an international protection status. Finally, there are EU Member States which ordinarily apply to personal matters either the *lex domicilii* or the law of the habitual residence. Accordingly, in these EU Member States the *lex domicilii* governs also all beneficiaries of national or international protection statuses (persons qualified for statuses of asylum, refugees or subsidiary protection).[24] Thus, the fact that the Geneva Convention confines itself to refugees is irrelevant for these Member States. They do not need a special conflict-of-laws rule in respect of persons qualifying for subsidiary international protection.

One must conclude that there is no common approach among the EU Member States regarding the determination of the law governing the personal status of persons qualifying for international subsidiary protection. Whether one of the reported national solutions in

[20] Article 3 – "Capacity and personal status of stateless persons and refugees - (1) If the statutory law provides that the law of a person's nationality shall apply, and the nationality of this person cannot be determined, or this person is not a national of any country, or the content of his national law cannot be ascertained, then the law of the country of his place of domicile shall apply; in the absence of the place of domicile, the law of the place of his habitual residence shall apply. (2) Paragraph (1) shall accordingly apply to a person who was granted the protection in a country other than the country of his nationality due to the fact that his links with the country of nationality were broken because of violations of fundamental human rights in that latter country."

[21] § 28 (4): "If someone is an applicant [has applied] for international protection, refugee or beneficiary of subsidiary protection or is homeless under other legislation or international agreement shall be governed by his personal status under the provisions of international agreements governing the legal status of the legal status of refugees and stateless persons."

[22] Since 1st January 2012 Dutch Private International Law has been incorporated into the Dutch Civil Code as Book 10. Article 10:17: "Civil status of aliens - 1. The civil status of an alien (foreigner) to whom a residence permit as meant in Article 28 or 33 of the Aliens Act 2000 is granted and of an alien (foreigner) who has obtained an according resident status in a foreign country, is governed by the law of the State where his domicile is located or, when he has no domicile, by the law of the State where his habitual residence is located. - 2. The rights acquired by such alien (foreigner) in the past and which result from his civil status, in particular the rights resulting from marriage, shall be respected."

[23] Under Dutch law, a residence permit is issued for beneficiaries of international protection (Convention refugees, persons granted subsidiary protection status).

[24] E.g. the newly established Baltic States: Lithuania (Civil Code 2001), Latvia (Civil Code 1997), partly Scandinavian countries.

force can serve as a persuasive legislative model for a pertinent uniform European conflict rule will be discussed below (sub II. 2. b)).

II. Conceivable Solutions

1. Universal solution on the international level?

Theoretically, the Geneva Refugee Convention of 1951 could be applied *per analogiam* to persons qualifying for subsidiary protection. However, this approach does in no way guarantee a common solution because an analogy would not be possible in those Member States with explicit (diverging) special conflict-of-laws rules and in the Member States without such a special conflict-of-laws rule any judge would be free to accept this solution or not.

In contrast, a common solution could be easily reached by extending Article 12 GRC to persons granted subsidiary protection. To that end, it would suffice to add, in Article 1 A GRC, which defines, for the purposes of the Convention, the term 'refugee', a new sub-paragraph (3) which could copy *mutatis mutandis* the definition in Article 2 (f) QDir[25]. However, such a technically small amendment of the actual wording in Article 1 A GRC would constitute a fundamental redesign of the Convention regarding its personal scope and necessitate the adoption by a Diplomatic Conference, and the agreement of non-EU States whose law does not necessarily provide for subsidiary protection. In view of the uncertainty whether States Parties would be willing to accept such an important regime change and considering the lengthy period generally needed to prepare, adopt and implement international conventions such a universal approach seems rather unrealistic.

2. Solution on the EU level?

a) *Integration as an objective of the EU refugee policy*

The Proposal for the recast of the original Qualification Directive of 2004 clearly states that "the amendments aim to remove all differences in the treatment of the two categories [of protection] which cannot be considered as objectively justified, thus progressing towards uniformity of protection [emphasis added] while maintaining the distinction between the two statuses."[26] In the same direction goes Recital 13[27] of the eventually adopted version of the Qualification Directive 2011/95/EU which implements articles 78 TFEU and 18 of the Charter of Fundamental Rights of the European Union and emphasizes "the approximation of rules on the recognition and content of refugee and subsidiary protection status" as an objective of the Directive. And recital 33 QDir reads: „Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention." Finally, recital 39 QDir clearly states: „… with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees [emphasis

[25] Article 2 (f) QDir: " 'person eligible for subsidiary protection' means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;"

[26] COM (2009) 551 final, p. 5.

[27] Cf. also recital 14.

added] under this Directive, and should be subject to the same conditions of eligibility." Consequently, Article 2 (a) QDir defines 'international protection' as a term englobing both refugee and subsidiary protection statuses and, accordingly, the expression 'beneficiary of international protection' includes beneficiaries of refugee status as well as of subsidiary protection status (Article 2 (b) QDir). Consistently, the term 'application for international protection' means a request which can be understood to seek refugee status or subsidiary protection status (Article 2 (h) QDir). In accordance with these recitals and definitions, Article 20 (2) QDir provides that the chapter on the content of international protection (Articles 20-35 QDir) "shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated." Thus normally the same regime applies to refugees and beneficiaries of subsidiary protection. In this context, the personal scope of the integration-Article 34 QDir is of major importance. The provision applies to all beneficiaries of international protection and reads: „Access to integration facilities. In order to facilitate the integration of beneficiaries of international protection into society, [emphasis added] Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes." Thus, the final objective of the Qualification Directive is the integration into society of all beneficiaries of international protection. Conclusion: The 2011 recast version of the Qualification Directive, in force, is clearly intending a single international protection status. Only in few areas refugees and persons qualifying for subsidiary protection status may be treated differently.[28]

Following the same policy, the *Proposal for a Qualification Regulation* (July 2016)[29] confirms, in principle, the equal treatment of refugees and other nationals of third-countries in need of international protection (beneficiaries of subsidiary protection) as regards the content of the protection. The Proposal expressly intends to "ensure an equality of treatment of beneficiaries of international protection" (recital 1) [emphasis added] and defines in recital 7 as main objective of the Regulation "to ensure that a common set of rights is available for those persons [in need of international protection] in all Member States." And recital 8 proclaims the "further approximation of rules on the recognition and content of refugee and subsidiary protection status …" [emphasis added]. Furthermore recital 53 reads: "To facilitate the integration of beneficiaries of international protection [emphasis added] into society, beneficiaries of international protection shall have access to integration measures, modalities to be set by the Member States." Accordingly, Article 22 of the Proposal provides that the Chapter on the content of international protection "shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated." And, with respect to access to integration measures, Article 38 of the Proposal doesn't differentiate between refugees and beneficiaries of subsidiary protection.

[28] The Member states may deviate from the general uniform regime only in a few cases, e.g. regarding Social assistance (Article 29) and Residence permits (Article 24).

[29] Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, submitted by the European Commission on 13 July 2016, COM (2016) 466 final.

Thus, the substantive rules of the Qualification Directive and of the Proposal for a Qualifcation Regulation clearly reflect the objective of the EU refugee policy to integrate all third-State nationals in need of protection.
It seems reasonable and even compelling to complement these integration-friendly European substantive rules by corresponding European conflict-of-laws rules.

b) *Conflict-of-laws rules as a means of integration*
The divergent solutions on the level of the Member States (*lex patriae; lex domicilii;* special conflict rules regarding protection-seeking persons differing in respect of personal and temporal scope) argue in favour of a uniform EU conflict-of-laws rule.
From the very beginning, all genuine immigration countries, like Australia or the USA, have applied the *lex domicilii* not only to domestic people but also – as a means of facilitating integration – to all immigrants. By contrast, genuine emigration countries, especially in Europe, have applied in the past and partly still apply today the *lex patriae* regarding personal affairs. However, in recent times, most European countries have increasingly become immigration countries. This is particularly true for Germany.[30] Therefore, it seems a logical and even a compelling consequence to adjust the conflict-of-laws rules to the changed factual situation.
The easiest technical way to end the actual splitting of PIL rules for third-State nationals seeking protection in the EU would be to replace on the EU level the connecting factor 'nationality', regarding personal matters, with the connecting factor 'habitual residence' in respect of everyone. Such a change would take into account the transformation of European States from emigration States to immigration ones. Under such a regime Article 12 GRC would be a prevailing *lex specialis*. However, it is rather unlikely that Member States with a strong tradition in favour of the *lex patriae* in personal matters would accept this radical solution. But those EU Member States should at least adjust the pertinent conflict rules by replacing, as far as necessary for integration, the connecting principle of nationality with that of habitual residence for all protection-seeking nationals of third-States. Theoretically, it would even be possible to autonomously define, for determining the applicable law, the personal scope of such a special conflict-of-laws rule, i.e. to specify which persons are encompassed by the special (auxiliary) conflict rule. But such a definition would not be autonomous because it would be legally predetermined by the definition of refugees in Article 1 A (2) GRC and, in respect of third-State nationals qualifying for subsidiary protection, the personal scope could hardly deviate from the definition in Article 2 (f) QDir. Thus, the pertinent conflict-of-laws rule and the substantive law provisions should correspond with respect to their personal scope.
Such a correspondence of substantive and PIL provisions could be reached on the EU level by a special conflict-of-laws rule restricted to third-State nationals eligible for international protection in the meaning of the Qualification Directive. Could one of the above-mentioned Member States' special conflict-of-laws rules serve as a model for a European conflict-of-laws provision? Sure, they provide legal certainty regarding the temporal applicability of the *lex domicilii*, but they present at the same time grave disadvantages. According to § 28 of

[30] In Germany, emigration and immigration have a long history beginning with the Reformation, 500 years ago. Since World War II million of refugees and other immigrants came to Germany because of the war or triggered by political repressions in communist and fascist States but also by economic crises. In the 1950s and 1960s foreign 'guest workers' were actively recruited by Germany but expected to go back to their home countries after some years. In fact, many of them did not return but remained permanently. That means, that post-war Germany became an immigration country at least since 1950, that is, since more than 2 generations.

the Czech Act on Private International Law (2012) the sole lodging of an application for being granted international protection triggers the applicability of the law of habitual residence, i.e., normally of the law of the host country. However, such an application shows evidence only of the willingness to stay in the host country but doesn't give any indication about the justification of the application. For instance, in Germany, the number of rejected applications is considerable (e.g. 37,2 % = 106.232 from January to April 2017). Hence, according to the special Czech conflict-of-laws rule, unsuccessful applicants would be governed, regarding personal matters, by the law of the host country, despite the fact that they are not entitled to permanently stay in the host country and that they will eventually be sent back to their country of origin. Additionally, the Czech approach implies a change in the applicable law (*Statutenwechsel*) during the applicant's stay in the host country. I don't think that such a provision should serve as a model for a European conflict rule. The Polish and Dutch approaches avoid the problem of applying the *lex domicilii* (= *lex fori*) to unsuccessful applicants by mandatorily requiring either the grant of a protection status (Poland)[31] or of a residence permit (Netherlands)[32] for triggering the application of the *lex domicilii*. However, prior to the granting of such a triggering decision – and the procedure may take a long time which cannot be shortened by protection-seeking persons – civil courts must apply to all these persons, regarding personal matters, the law of the country they fled. Thus, an internal *Statutenwechsel* is unavoidable for both the Polish and Dutch approaches so far as they adhere to 'nationality' as ordinary connecting factor in personal matters and make the applicability of the *lex domicilii* dependent on a granting decision. And all three special approaches deprive the civil judge of its competence to autonomously assess whether the conditions for the applicability of the *lex domicilii* are fulfilled or not. By contrast, the special Austrian PIL rule abstains from making this assessment of the civil judge dependent on a private or official act. The Austrian approach seems to be preferable also for other reasons: It respects the different objectives of asylum and aliens laws, on the one hand, and of private international law, on the other hand. The first laws are, more or less, oriented towards public common good and individual physical wealth, while Private International Law looks at the legal status and the personal legal relations of private individuals. And the personal scope of the Austrian rule rightly encompasses any person seeking international protection. As experience shows, most immigrants, whether Convention or Directive refugees, will permanently or at least for a longer period remain in the host country. Consequently, it doesn't make sense to differentiate between third-State nationals qualifying for the refugee status and those eligible for the status of subsidiary protection. And those people who eventually go back to their countries of origin will not be harmed by a temporary application of the *lex domicilii,* a regime which constitutes the ordinary personal statute in a considerable number of States, especially but not exclusively in the Common-Law area.

A European conflict-of-laws rule, which follows the Austrian approach, could read as follows:

> "The personal status of a third-State national who is eligible [qualifying] for [asylum or] international protection in the meaning of Article 2 (a) of the Directive 2011/95/EU shall be governed by the law of her/his habitual residence in the EU, or,

[31] See supra Fn. 19.
[32] See supra Fn. 21.

> if she/he has no habitual residence in the EU, by the law of her/his residence in the EU."

An alternative version could refer to Article 12 GRC:

> "Article 12 of the [1951 Geneva] Convention Relating to the Status of Refugees applies to third-State nationals who are eligible [qualifying] for [asylum or] international protection in the meaning of Article 2 (a) of the Directive 2011/95/EU.

Rationale:
Both versions are conceived as complementary to the substantive provisions on international protection established by the Qualification Directive 2011/95/EU. Therefore, the conflict-of-laws rule should be inserted into the Qualification Directive 2011/95/EU or the proposed Qualification Regulation designed to replace the Directive.
Such a rule would be a declaratory one for those Member States which are generally using domicile or habitual residence as connecting factor regarding personal affairs. By contrast, for Germany and the other Member States in which the connecting factor 'nationality' determines personal matters, such a European PIL rule would change the law applicable to persons eligible for subsidiary international protection in the meaning of the Qualification Directive 2011/95/EU.
According to this proposal, the law governing the personal status of protection-seeking third-State nationals is determined by her/his (habitual) residence from the moment in which the conditions for a protection status (asylum, refugee, subsidiary protection) are met. Also, one could imagine situations where it would be justified – in order to avoid a *Statutenwechsel* – to apply that law retroactively, i.e. from the moment when the person(s) concerned left their home country.
Whether a third-State national is a refugee in the meaning of Articles 1 A (2) and 12 GRC or is eligible for international protection in the meaning of Article 2 (a) of the Directive 2011/95/EU is assessed not in a centralized (administrative) procedure but by the civil court seized. In this assessment, the court is not bound by any (positive or negative) decision taken by a domestic or foreign administrative authority[33] or by any other formal act – unless a competent legislator has compelled civil courts to comply with such decisions, acts or assessments. Neither the Geneva Refugee Convention nor the Qualification Directive contain any rule compelling civil courts, when determining the law applicable to protection-seeking third-State nationals in respect of personal matters, to abide by pertinent administrative (declaratory) decisions[34] or assessments. Only some Member States (Czech Republic, Netherlands, Poland) have enacted rules which make dependent the application of the *lex domicilii* to protection-seeking persons on an administrative decision/act. Thus, unless otherwise indicated by a competent legislator, the determination of the applicable civil law in personal matters is independent of any administrative decision regarding the alien law (public law) status of the person concerned. Pertinent administrative decisions/acts have at best indicative effect for the determination of the applicable law by the civil court seized. Such decisions may render superfluous a further examination, by the hearing civil court, of the qualification for an international protection status as a prerequisite for applying the *lex*

[33] Dominant opinion in German legal literature and practice regarding Article 12 GRC: Cf., e.g., *Lorenz,* in: BeckOK [Online commentary] BGB, EGBGB Article 5 Recital (*Randnummer)* 28 with references ibid.; *Thorn,* (supra fn. 7) Anhang EGBGB Art. 5, no. 22.
[34] Cf. recital 21 QDir (verbatim corresponding to recital 14 Council Directive 2004/83/EC) and recital 18 of the Proposal for a Qualification Regulation, which qualify the recognition of the refugee status as declaratory.

domicilii. And the lodging of an application for asylum or for any other form of international protection may give evidence for the intention of a person to stay in the host country. In sum, the civil court seized is competent to independently assess whether a third-State national fulfils the conditions for being eligible for a protection status as prerequisite for applying the *lex domicilii* (*lex fori*).[35] That means that the personal scope of the special (auxiliary) conflict-of-laws rule proposed here covers all third-State nationals seeking any form of protection in the EU: national asylum or international protection (refugee or subsidiary protection). According to the proposed EU auxiliary conflict-of-laws rule, the *lex domicilii* (habitual residence) applies if a person is eligible for any status of international protection; if not, the ordinary PIL rule determines the applicable law. This approach which focuses on the eligibility (qualification) of third-State nationals for international protection avoids any potential internal change of the law applicable (*Statutenwechsel*) to the personal status of protection-seeking third-State nationals in a host country.

3. Fall-back solution on the national (Member States') level?

If a solution on the EU level fails, Member States lacking a specific conflict-of-laws rule regarding third-State nationals eligible for subsidiary protection should introduce such a rule on the national level to redress the disparate treatment of Convention refugees and persons qualifying for subsidiary protection. This should be done in a spirit of harmonization within the EU. However, a voluntary parallel enactment of a common uniform conflict rule in all EU Member States concerned seems to be rather illusory, especially in view of the diversity of the pertinent special PIL rules already in force in some Member States. Therefore, in practice, a spontaneous harmonization in the EU seems unrealistic.

For Germany, one could integrate the proposed special conflict-of-laws rule into the pertinent provision of the EGBGB. Hence, Article 5 (2) EGBGB could read:

> "If a person is stateless or if his nationality cannot be identified or if he is eligible for an international protection status as referred to in section 3 or 4 of the Asylum Act applies the law of the country in which the person has his habitual residence or, in the absence thereof, his residence."

[35] Cf. German Bundesgerichtshof 11.10. 2006 XII ZR 79/04 BGHZ 169, 240 Rn. 9 (for asylum seekers): „§ 2 Abs. 1 AsylVerfG bestimmt lediglich, dass Asylberechtigte im Bundesgebiet die Rechtsstellung der Flüchtlinge nach dem Abkommen über die Rechtsstellung der Flüchtlinge vom 28. Juli 1951 (BGBl. 1953 II S. 559) haben, so dass die Anerkennung als Asylberechtigter für die Anwendbarkeit des Article 12 der Flüchtlingskonvention eine erneute Überprüfung der Flüchtlingseigenschaft im Sinne dieser Konvention überflüssig macht (… reference). Daraus kann aber nicht der Umkehrschluss gezogen werden, die rechtskräftige Ablehnung eines Asylantrages oder gar die noch ausstehende Entscheidung darüber schließe den Status eines Konventionsflüchtlings aus. In diesen Fällen ist die Flüchtlingseigenschaft vielmehr vom Zivilgericht eigenständig zu prüfen (… reference)…."

III. Summary

1. The conflict-of-laws rule in Article 12 of the Geneva Refugee Convention designating the *lex domicilii* for personal matters, in force in all EU Member States, covers refugees only, not third-State nationals granted subsidiary protection or eligible/applying for subsidiary protection.
2. Pertinent conflict-of-laws rules on the EU level do not exist.
3. Pertinent conflict-of-laws rules on the level of the Member States differ as follows:
   3.1 Personal matters are generally governed by the *lex domicilii* (habitual residence/residence) [+ Art. 12 GRC]; in these countries, special conflict-of-laws rules regarding third State nationals eligible [qualifying] for subsidiary international protection are not needed.
   3.2 Personal status matters are generally governed by the *lex patriae* [+ Art. 12 GRC].
   3.3 Special conflict-of-laws rules regarding personal status matters designate the *lex domicilii* for third-State nationals who
      3.3.1 are granted protection status (PL)
      3.3.2 are granted residence permit (NL)
      3.3.3 have applied for international protection (CZ)
      3.3.4 are eligible for international protection (AT)
4. A European special conflict-of-laws rule regarding personal status matters of third-State nationals seeking international protection in the EU seems necessary especially to unify the legal situation for all these persons and to avoid internal *Statutenwechsel*. The rule should adopt Art. 12 GRC (in substance) or refer to Art. 12 GRC (governance of the *lex domicilii*).
5. Such a rule should encompass all persons in need of international protection and could read:
   "The personal status of a third-State national who is eligible [qualifying] for [asylum or] international protection in the meaning of Article 2 (a) of the Directive 2011/95/EU shall be governed by the law of her/his habitual residence, or, if she/he has no habitual residence in the EU, by the law of his residence."
   Or, alternatively
   "Article 12 of the [1951 Geneva] *Convention Relating to the Status of Refugees* applies to a third-State national who is eligible [qualifying] for [asylum or] international protection status in the meaning of Article 2 (a) of the Directive 2011/95/EU".
6. Whether the conditions of application of such a common European conflict rule are fulfilled must be assessed by the civil court seized independently of any other private or official act in an administrative procedure.
7. Such a conflict-of-laws rule could be codified in an amended Qualification Directive or the proposed Qualification Regulation.

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