КРИМИНАЛИТЕТ У СРБИЈИ И ИНСТРУМЕНТИ ДРЖАВНЕ РЕАКЦИЈЕ
ТЕМАТСКИ ЗБОРНИК РАДОВА I

CRIME IN SERBIA AND INSTRUMENTS OF STATE RESPONSE
THEMATIC COLLECTION OF PAPERS I

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ACADEMY OF CRIMINALISTIC AND POLICE STUDIES
Belgrade, 2016

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FOREWORD

Thematic collection of papers "Crime in Serbia and the instruments of state response" has originated as a result of scientific research work on the project of the same name which is being carried out by the scientific research team of the Academy of Criminalistic and Police Studies in the period 2015-2019. This project has been approved and supported by the Ministry of Interior of the Republic of Serbia, and the team members are Professor Dragana Kolarić, PhD, the Head of the Project, Professor Djordje Djordjević, PhD, Professor Dragan Vasiljević, PhD, Professor Srdjan Milašinović, PhD, Professor Milan Žarković, PhD, Professor Darko Simović, PhD, Professor Goran Bošković, PhD, Professor Sreten Jugović, PhD, Professor Biljana Simeunović-Patić, PhD, Professor Tijana Šurlan, PhD, Professor Radomir Zekavica, PhD, Professor Slaviša Vuković, PhD, Professor Zoran Djurdjević, PhD, Professor Darko Marinković, PhD, Professor Nenad Radović, PhD, Professor Dag Kolarević, PhD, Professor Aleksandar Bošković, PhD, Professor Radosav Risimović, PhD, Professor Zvonimir Ivanović, PhD, Assistant Professor Jelena Radović-Stojanović, PhD, Assistant Professor Tanja Kesić, PhD, Assistant Professor Ivana Krstić-Mistridželović, PhD, Assistant Professor Zorica Vukašinović-Radojičić, PhD, Assistant Professor Oliver Lajić, PhD, Assistant Professor Aleksandar Čudan, PhD, Assistant Professor Dragoslava Mićović, PhD, Zoran Kesić, PhD, Dragana Čvorović, PhD, Saša Marković, PhD, Božidar Otašević, PhD, Ivana Radovanović, PhD, Marija Mićović, PhD, Ivana Bodrožić, MA, Renata Samardžić, MA, Ladin Gostimirović, MA and Marta Tomić.

Heterogeneous nature of the research topic and scientific research team, as well as its five-year duration, determined the application of many scientific methods, including philosophical and general science methods, particularly empirical, as well as logical techniques. The sources of data in this research project have been the scientific papers published earlier, particularly the documents of state authorities (official documents, records, etc.) and the officers working in them, as well as other people who had knowledge on the criminal phenomena relevant for this research. As this scientific research project is both theoretical and empirical in character, so are the papers which originated in the course of its implementation both theoretical and empirical in character. They are based on the analyses of

ПРЕДГОВОР

Тематски зборник радова „Криминалитет у Србији и инструменти државне реакције“ настао је као резултат рада на научноистраживачком пројекту који под истим називом реализује научноистраживачки тим Криминалистичко-полицијске академије у периоду 2015–2019. године. Пројекат је одобрило и подржало Министарство унутрашњих послова Републике Србије, а научноистраживачки тим сачињавају: проф. др Драгана Коларић, руководилац тима, проф. др Ђорђе Ђорђевић, проф. др Драган Васиљевић, проф. др Срђан Милашиновић, проф. др Милан Жарковић, проф. др Дарко Симовић, проф. др Горан Бошковић, проф. др Сретен Југовић, проф. др Биљана Симеуновић-Патић, проф. др Тијана Шурлан проф. др Радомир Зекавица, проф. др Славиша Вуковић, проф. др Зоран Ђурђевић, проф. др Дарко Маринковић, проф. др Ненад Радовић, проф. др Даг Коларевић, проф. др Александар Бошковић, проф. др Радосав Рисимовић, проф. др Звонимир Ивановић, доц. др Јелена Радовић-Стојановић, доц. др Тања Кесић, доц. др Ивана Крстић-Мистрицеловић, доц. др Зорица Вукашиновић-Радојичић, доц. др Оливер Лајић, доц. др Александар Чудан, доц. др Драгослава Мићовић, др Зоран Кесић, др Драгана Чворовић, др Саша Марковић, др Божидар Оташевић, др Ивана Радовановић, др Марија Мићовић, мр Ивана Бодрожић, мр Рената Самарџић, мр Ладин Гостимировић и Марта Томић.

Хетерогена природа предмета овог истраживања и научноистраживачког тима, као и његово петогодишње трајање, определили су примену многобројних научних метода, укључујући филозофске и општенаучне методе, посебно емпиријске, као и логичке технике. Извори података у овом научноистраживачком пројекту јесу раније објављени научни радови, а посебно документи државних органа (службени акти, евиденције и др.) и службеници тих органа, као и друга лица која имају сазнања о криминалном феномену релевантна за предмет истраживања. Како је овај научноистраживачки пројекат теоријско-емпиријског карактера, тако су и радови који су до сада настали кроз његову реализацију теоријског и емпиријског карактера. Засновани су на анализи постојећих теоријских становишта којима се објашњава криминални феномен и указује на могућности његове успешне контроле, као и на обради прикупљених емпиријских података.

the existing theoretical standpoints which are used to describe the criminal phenomena and indicate the possibility of their successful control, as well as on the processing of the collected empirical data.

The subject of research is set broadly and includes various aspects from which the phenomenon of crime can be observed, starting from legal norms that sanction certain forms of crime, through constitutional framework for state action, until the concrete questions on the resolving of which the successful and efficient state response depends. The significance of scientific papers published in this collection reflects primarily in spreading the knowledge on the state and trends of crime as a whole, and especially its contemporary and serious forms, such as organized crime, corruption and terrorism. The knowledge at the level of description and systematization, the research presented in this collection of papers can complement the knowledge on phenomenological, etiological and victimological dimensions of crime. Considering that the material abounds in numerous terms that have not been used in our country so far, the knowledge gained through this research can enrich the literature and conceptual-categorical set of teaching subjects within which the police work is studied, as well as deviant and criminal behaviour in general.

Special justification for the research on this topic results from the dangers and consequences that crime causes at both individual and social levels. Analyzing the state of crime in the Republic of Serbia and the instruments of state response, particularly the position and role of the police, the existing methods used for the analysis of crime and prognosis of its development can be improved, as well as current legal solutions related to the fight against crime.

A prerequisite for efficient state response to problems of crime and security in a wider sense is an adequate legal framework for conduct of the authorities in charge of the fight against crime. In order to improve the existing normative legal solutions for the fight against crime, the collected papers are directed at:

– The analysis of substantive criminal legislation in the Republic of Serbia in order to evaluate the application of current incriminations of the Criminal Code, determine the need for new incriminations or decriminalization of some currently incriminated forms of behaviour, including the evaluation of penal policy;

Предмет истраживања је широко постављен и обухвата различите аспекте са којих се феномен криминалитета може посматрати, почев од правних норми које санкционишу поједине облике криминалитета, преко уставноправних оквира за деловање државе, све до конкретних питања од чијег решавања зависи успешна и ефикасна државна реакција. Значај научних радова објављених у овом зборнику огледа се, пре свега, у ширењу знања о стању и трендовима криминалитета у целини, а посебно његових савремених и тешких облика, као што су организовани криминалитет, корупција и тероризам. Својим сазнањима, на нивоу дескрипције и систематизације, истраживања у оквиру овог зборника могу употпунити знање о феноменолошкој, етиолошкој и виктимолошкој димензији криминалитета. С обзиром да материја обилује бројним, код нас до сада некоришћеним терминима, сазнања добијена овим истраживањем могу обогатити литературу и појмовно-категоријални апарат наставних предмета у којима се изучава деловање полиције, као и девијантно и криминално понашање уопште.

Посебна оправданост истраживања на ову тему произилази из опасности и последица које криминалитет проузрокује на индивидуалном и друштвеном нивоу. Анализирањем стања криминалитета у Републици Србији и инструмената државне реакције на њега, а посебно положаја и улоге полиције, могу се унапредити постојеће методе које се користе за анализу криминалитета и прогнозу његовог развоја, као и тренутна правна решења која се односе на супротстављање криминалитету.

Предуслов за ефикасну државну реакцију на проблеме криминалитета и безбедност у ширем смислу јесте адекватан правни оквир за поступање органа који су надлежни за супротстављање криминалитету. С циљем унапређења постојећих нормативно-правних решења за супротстављање криминалитету, радови које садржи овај зборник усмерени су ка:

– анализи кривичног материјалног законодавства у Републици Србији с циљем евалуације примене тренутних инкриминација у Кривичном законику, утврђивања потребе за новим инкриминацијама или декриминализацијом неких тренутно инкриминисаних облика понашања, укључујући и евалуацију казнене политике;

- The analysis of criminal procedural legislation in the Republic of Serbia in order to evaluate the application of legal provisions which govern the conduct of police (evaluation of the concept of prosecutorial investigation, problems in the application of new procedural institutes, standards of work with evidence material);
- The analysis of strategies, laws and by-laws which closely govern the manner of police work, especially within the context of implementation of new strategies and methods of work with a view of more successful prevention and repression of crime (for instance, Instructions for suppression of crime, Instructions on apprehended and detained persons, etc.);
- The analysis of laws and by-laws which closely govern the organization of police work (Law on Ministries; Law on Police; Directive on the principles of internal organization and job planning in the ministries, special organizations and services; Directive on the principles of internal organization of the Ministry of Interior; Book of rules on internal organization and job planning in the Ministry of Interior);
- The analysis of legal framework for international operative crime investigation cooperation (conventions, bilateral agreements).

This collection of papers contains twenty two papers referring to almost all mentioned aspects of observation of state response to certain forms of crime. Their authors attempted in their analysis of some phenomena to be not only descriptive but to present many suggestions and guidelines in order to improve and solve the challenges brought before the contemporary community.

In accordance with the previously said, this collection of papers represents a good basis for further research.

September 2016

Head of the Project
Professor Dragana Kolaric, PhD

– анализи кривичног процесног законодавства у Републици Србији с циљем евалуације примене законских одредби којима се уређује поступање полиције (евалуација тужилачког концепта истраге, проблеми у примени нових процесних института, стандарди рада са доказним материјалом);
– анализи стратегија, закона и подзаконских аката којима се ближе уређује начин рада полиције, посебно у контексту имплементације нових стратегија и метода рада с циљем успешније превенције и репресије криминалитета (на пример, Упутство о сузбијању криминалитета, Упутство о доведеним и задржаним лицима, итд);
– анализи закона и подзаконских аката којима се ближе уређује организација рада полиције (Закон о министарствима; Закон о полицији; Уредба о начелима за унутрашње уређење и систематизацију радних места у министарствима, посебним организацијама и службама; Уредба о начелима за унутрашње уређење Министарства унутрашњих послова; Правилник о унутрашњој организацији и систематизацији радних места у Министарству унутрашњих послова);
– анализи правног оквира за међународну криминалистичко-оперативну сарадњу (конвенције, билатерални уговори).

Овај тематски зборник садржи двадесет два рада који се односе на готово све поменуте аспекте сагледавања државне реакције на поједине облике криминалитета. Њихови аутори настојали су да у анализи појединих појава не остану само при њиховој дескрипцији, већ су износили и бројне предлоге и смернице с циљем унапређења и решавања изазова који се намећу савременој заједници.

У складу са напред наведеним, овај зборник представља добру основу за даља истраживања.

Септембар 2016. *Руководилац пројекта*
проф. др Драгана Коларић

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Уводни радови

Introductory Papers

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THE DEVELOPMENT OF THE EUROPEAN CRIMINAL LAW AND ITS IMPACT ON NATIONAL CRIMINAL LEGISLATIONS

Dragana Kolaric, PhD[1]
Academy of Criminalistic and Police Studies, Belgrade

Abstract: In this paper the author deals with the possibilities of unification in the field of substantive criminal law of the EU observing that with the Treaty of Lisbon coming into effect a new stage started in the development of the EU criminal law, which reflects on national criminal legislations. It has changed to a degree the legal and institutional framework within which the EU functions. At the very beginning the author is sceptical regarding harmonization of the EU substantive criminal law, acknowledging though that European harmonization is possible to implement more easily at least at the level of acceptance of basic principles than at the level of the entire international community. This is why the author further deals with basic principles and postulates of criminal law, i.e. nullum crimen nulla poena sine lege principle and its effect at the European level, but also regarding direct implementation of international agreements. The author insists upon subsidiary character of criminal law pointing out that it is ultima ratio and indicates to which degree this feature of criminal law has been endangered within the European context, and particularly taking into account the provisions of Articles 82 and 83 of the Treaty on the Functioning of the European Union. Finally, it has been stated that the European criminal law suffers from partialization and solving of current problems, being therefore still far away from the claim that it is scientifically founded and ordered doctrine.

Keywords: Criminal Code, European criminal law, European integrations, ultima ratio, rule of law, the Treaty of Lisbon, EU.

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Introductory Remarks

The topic *European integration and substantive criminal legislation* enables the author a dual approach – the first one critical, dogmatic, which implies systematic scientific study of legal solutions and provisions of EU acquis, and the second one ollowed by the expression of satisfaction that Serbia is on the path of the European integration and that some forms of harmonization in the area of criminal law have been implemented.

The author has opted for the first approach, not avoiding commending the things that are good in the process of the European integration. It is obvious that, at the EU level, there is no single criminal law that symbolizes a state, such as is the case with national legislations. The creators of "the European legislation" are also aware of this. Article 5 of the Treaty on EU[2] stresses that in accordance with the principle of subsidiarity, in the areas which do not fall within its exclusive competence, the Union acts only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local levels, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. Thus, the principle of subsidiarity means that in implementation of its competencies, the Union may act only if the goals of the proposed actions cannot be sufficiently achieved by the measures undertaken by Member States. With this, actually, it has been acknowledged that the EU criminal law is subsidiary in relation to national criminal law, i.e. that it acts only when necessary for the protection of mutual values and principles. In theory, in terms of Article 5, it has been emphasized that it actually represents protection of the European federalism.[3]

The second approach is risky and there is a danger of falling into a trap of populist action, which is characterized by intertwinement of politicized approach and selective choice of questions in the area of criminal law that are being given priority in the process of EU accession, although these are behaviours for which adequate criminalizations already exist – legal provisions which have been a part of the internal criminal law for years. Our Criminal Code still belongs to the modern codes, with clear criminal

2 *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83, 30 March 2010.*
3 S. Melander, Ultima ratio in European Criminal Law, *Onati Socio-Legal Series*, Onati International Institute for the Sociology of Law, 1/2013, p. 48.

and political postulates, but it has found itself in the middle of a tornado called "European integration", which slowly sucks in in its whirlpool the uniqueness, authenticity and distinctiveness of the criminal justice system of Serbia.

One of the main reasons for establishing the EU is the idea of economic cooperation, that is, the creation of a common, single market with free movement of people, goods, services and capital. This indirectly influences the development of the EU criminal law, followed by harmonization of national legislations with *acquis communautaire*.

The topic of this paper refers to the Chapter 23. The matter discussed in this Chapter refers to four thematic areas: reform of judiciary, anti-corruption policy, fundamental rights and rights of the EU citizens. There is but a few regulations at the EU level regulating this area. Unlike the Chapter 24, where *acquis communautaire* are very extensive, in Chapter 23 they for the most part are not in a uniform manner regulated by the EU regulations, but consist of international documents and best practices (conventions of the UN, European Council, etc.). However, bearing in mind that since recently the contents of the Chapter 23 has been observed within the Chapter 24, there are no obstacles to also address combating organized crime, human trafficking, terrorism, drug abuse and some other issues that are the subject of negotiations within the Chapter 24. Although when it comes to the reform of judiciary and its independence, impartiality, professionalism and efficiency, almost every criminal offence from the Special part of the Criminal Code can be addressed.

But, before considering some of these issues, the author will give an overview of the European criminal law, i.e. of its (non)existence.

Tempora Mutantur

Times change and so do we. This statement is accurate and can be viewed from the standpoint of the development of European criminal law. It is difficult to talk about a European criminal law in the true sense of the term. Actually, this term appears too pretentious and unrealistic.

If one were to accept the term European criminal law, this would imply at least three things. Firstly, an appropriate doctrinal basis on which

a consensus should exist, much like the national criminal law has its scientific basis, secondly, a supranational legislature, and thirdly, it would be necessary that this new legislator, i.e. the EU, has the right to *iuspuniendi,* i.e. that European criminal code exists. The right to punishment belongs only to the state. Exercising of this right is based on state's coercion, and therefore criminal law as a branch of law and a part of public law is highly a state law.[4]All the previously mentioned reasons are in a mutually correlative relation,but many other issues that stand in the way of the development of the European criminal law can be listed as well, such as language barrier, terminological differences, differences between the continental and common (Anglo-Saxon) legal approach, different approaches in creating basic principles and systematization of criminal justice system.[5]

For these reasons, the discussion about the European criminal law will be reduced to some provisions of substantive criminal law that derives from the EU's activities.

By entry into force of the Treaty of Lisbon,[6] a new phase in the development of the EU law has begun, and hence its impact on national criminal legislations has been more intense. To some extent it changed the legal and institutional framework in which the EU acts. Namely, the legal foundations of the European integration today are the Treaty on EU and the Treaty on the Functioning of the EU.[7] Besides the traditional interests and priorities of the Union, the Lisbon Treaty for the first time more intensely emphasizes the fundamental human rights dimension. It assigns to *the Charter of Fundamental Rights of the EU* the power of binding legal norm by incorporating it in the integral text of the Lisbon Treaty.[8] All three legal documents are formally and legally equal.

4 З. Стојановић, *Кривично право – општи део*, Београд, 2015, p. 5.
5 И. Симовић-Хибер, *Систем расправа о идеји владавине права основама кривичног закона појму злочиначке групе и интернационализацији кривичног права*, Београд, 2007, p. 117.
6 It entered into force on 1December 2009. By its entry into force, the EU and the European Community have merged into one changed EU. Namely, provisions on police and judiciary cooperation were included in the Treaty on the European Community, and its name was changed into the Treaty on the Functioning of the EU, and the Treaty on EU remained in force. Since then, the EU has had legal personality. Earlier, it was only the European Community.
7 *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83, 30 March 2010.*
8 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the European Communities, (2000/C 364/01).

Article 5 of the Treaty on EU stresses that in accordance with the principle of subsidiarity, in the areas which do not fall within its exclusive competence, the Union acts only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. Thus, the principle of subsidiarity means that in implementation of its competencies, the Union may act only if the goals of the proposed actions cannot be sufficiently achieved by the measures undertaken by Member States. With this, actually, it has been acknowledged that the EU criminal law is subsidiary in relation to national criminal law, i.e. that it acts only when necessary for the protection of mutual values and principles. It also mentions the principle of proportionality – in accordance with the principle of proportionality the actions of the EU do not exceed what is necessary to achieve the objectives of the Treaty.

Subsidiarity of the EU criminal law is closely connected to the division of competencies between the EU and Member States. It is clear that the EU should not regulate those areas in which the desired objectives can be better achieved through the national criminal legislations.

The question arises of what significance this provision is to the EU Member States. Here it can be concluded that some issues are in the exclusive competence of the EU, that in terms of some issues competencies are shared, and of some other issues there is a complementary competence of the EU. The EU has exclusive competence over those issues over which the Union acquired exclusive right to decide, thus States can no longer decide on those issues, even in the case if the EU did not solve them.The areas of exclusive competence are few, and the Lisbon Treaty lists the following: customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and common commercial policy. The Union also has exclusive competence for the conclusion of international agreements, if their conclusion is provided for in a legislative act of the EU or is necessary to enable the EU to exercise its internal competence, or if the conclusion of an international agreement may affect common rules or alter their scope. Shared competencies are those in which both the Union and Member States retain the right to legal regulation. Such norms

are peremptory, i.e. once the EU regulates an issue, Member States can no longer regulate it differently as long as a source that solves that issue at the European level exists. Most issues are in shared competence between the EU and Member States. The Treaty here lists internal market, social policy for the aspects defined by Treaty, economic, social and territorial cohesion, agriculture and fisheries, environmental protection, consumer protection, transport, trans-European networks, energy policy, the area of freedom, security and justice, and common safety issues in the area of public health. And finally, some competencies assigned to the Union, which are called complementary, do not authorize the Union for the legislative actions, but only for the support to the actions of Member States. Such situation is, for example, in the area of health protection, industry policy, culture, tourism, education, sport, civil protection, and administrative cooperation. The reason for emphasizing and clearer explanation of the division of competencies in the Treaty probably lies in the increasingly frequent objections to "silent" expansion of the Union's competencies.[9] In addition to a more clear division of competencies, the Union has also been authorized in some new areas. Thus, for example, a new legal basis for energy policy was included in the Treaty, and in the chapter dealing with the environmental protection,combating climate change was emphasized as the main objective of that policy. Space policy, sport and civil protection were also given an independent legal basis.[10]

Therefore, it is clear that the Lisbon Treaty does not mention exclusive competence in the area of criminal law. Nevertheless, it does broaden the opportunities for the EU's action through the contents of Articles 82 and 83.

Article 82 of the Treaty on the Functioning of the EU states that judicial cooperation in criminal matters in the Union is based on the principle of mutual recognition of judgments and judicial decisions and includes the approximation of the laws and regulations of the Member States in the areas referred to in Paragraph 2 and in Article 83. Paragraph 2 of Article 82 states that *to the extent necessary to facilitate mutual recognition of judgments and judicial decisions,* as well as police and judicial cooperation in criminal matters with a cross-border dimension, the European Parliament and the Council may, through directives, establish minimum rules. The remaining

9 Т. Ћапета, Европска Унија по Лисабонском уговору, *Хрватска јавна управа*, No. 1/2010, pp. 35–47.
10 *Ibidem.*

text of the Article lists things to which these rules apply (admissibility of evidence in accordance with the principle of mutuality, the rights of individuals in criminal procedure, the rights of victims of crime, other specific aspects of criminal procedure, which the Council has unanimously identified in advance, upon the consent of the European Parliament).

Paragraph 1 of Article 83 of the Treaty on the Functioning of the EU states that the European Parliament and the Council of Ministers of the EU may through *directives* adopted in the ordinary legislative procedure, establish *minimum rules* for defining criminal offences and sanctions for particularly serious crime *with a cross-border dimension* deriving *from the nature or consequences* of such offences *or from a special need* to jointly combat them. These forms of crime include: terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. And as further stated, based on the developments in crime, *the Council may adopt a decision identifying other areas of crime* that meet the mentioned criteria.

Paragraph 2 of Article 83 of the Treaty on the Functioning of the EU states that w*hen approximation of criminal laws and regulations of the Member States is essential to ensure the effective implementation of the Union's policy* in an area encompassed by harmonisation measures, directives may establish minimum rules for defining criminal offences and sanctions in that area.

It is interesting to note that framework decisions have been replaced by directives. Previously, within the EU's third pillar, the most important legal documents were framework decisions,[11] and now they are directives,[12] which indicates the legal power of a passed regulation. Also, police and judiciary cooperation have been moved from the third pillar to the first pillar, i.e. the matter of the second and third pillars to the first. As stated in Article 34 of the Treaty of Amsterdam, framework decisions did not entail direct effect, which complicated the implementation of measures from the

11 *Framework decisions* aim at harmonizing the legislation of Member States. They oblige States in terms of the results they should achieve, leaving to States to choose form and methods for achieving the set results. They are applied only after the implementation in the national legislation, which clearly derives from Article 34 of the Treaty on EU.

12 *Directives* are binding; however they cannot be applied directly, but must in an appropriate way be implemented in the national legislations of Member States. However, if directives were badly implemented or not implemented at all, the European Court of Justice developed a special mechanism with which directives can acquire direct effect.

third pillar. Here it is important to mention the opinion of the Court of Justice[13] in Pupino case[14] which in a way represents an avant-garde court decision in terms of the effect of framework decisions. The Court found that Member States are required to interpret the law in accordance with the EU law in the area of the third pillar, i.e. that when applying national law, it must be interpreted in accordance with the purpose of the framework decision, in order to achieve the wanted result. In this case, the Court of Justice has not engaged itself in the sensitive issue of supremacy of the EU law, but it has emphasized that framework decisions have indirect effect, adding what, in our opinion, is crucial – that national courts should take into account the entire national law, in order to determine to which extent it could be changed, without being contrary to the framework decision. It is clear that the Court emphasizes the importance of the framework decisions, but it does so in a careful and subtle way, with certain limitations. Nevertheless, regardless of that, the importance of this decision at the time was huge.

Member States agreed on a consensus that the EU regulations regulate only certain criminal offences, which in the end leads to the partial development of the EU substantive criminal legislation, to be specific, its special part, while one can hardly speak of the general part of the EU criminal law. This fact represents a great potential danger to a uniform application of the EU law, having in mind that some directives very explicitly require Member States to also criminalize, for example, attempt as an institute of the general part which is differently regulated in the EU Member States.

13 In accordance with Article 267 of the Treaty on Functioning of the EU, the Court of Justice of the European Union was given jurisdiction to decide on the questions raised by national courts of Member States, concerning the application of the EU law in concrete cases pending before that court. This implies that the Court of Justice decides on the question raised before it by a national court of Member State, but not on the decision on facts in main proceedings and implementation of national law.

14 In the Pupino Case, the Court in Florence raised the question to which extent the Italian Code of Criminal Procedure can be interpreted in accordance with the Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, in order to ensure that children who have suffered abuse can testify against their teacher according to the special rules of procedure, and not in regular proceedings. The Court stated that in order to achieve goals set in the framework decision, it should be ensured that national courts apply special rules, especially to vulnerable victims, at the same time taking into account the protection of the accused in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See more about this in*: А. Чавошки, Правна природа и правно дејство правних аката у трећем стубу, in: *Право и политика ЕУ из перспективе домаћих аутора*, Београд, 2009, p. 19.

(Un)Acceptable Influence of the European Legislator on National Criminal Law

The basic purpose of criminal law is to protect the society from crime. At the EU level, the same requirements should also exist in terms of prescribing the general elements of criminal offence and sanctions, with full respect of the basic principles of criminal law. However, some provisions adopted at the EU level raise doubts in this respect. Particular attention should be drawn to the fact that some terms that are generally accepted in international documents do not have the criminal law character, such as, for example, corruption,[15] and imply a whole set of behaviours, which brings into question the segment *lex certa*. In addition, when harmonizing the national legislation with the EU regulations, the traditional standpoint according to which criminal law is *ultima ratio,* is more and more threatened. Thus, for example, the Treaty on the Functioning of the EU in Article 83, paragraph 1 states that the European Parliament and the Council of Ministers of the EU may, through directives adopted in ordinary legal proceedings, establish minimum rules for defining criminal offences and sanctions for particularly serious crimes with a cross-border dimension that derive from the nature or consequences of such offences or from a special need to jointly combat them.

The mere referencing of particularly serious forms of crime in the text of the mentioned Article is not enough for full respect of the rule *ultima ratio*. Even when it comes to extremely serious criminal offences, such as, for example, terrorism, the possibility that there are other means that do

15 See: Criminal Law Convention on Corruption of the Council of Europe (the Convention was opened for signing on 27 January 1999, and entered into force on 1 July 2002. The Republic of Serbia ratified *the Criminal Law Convention on Corruption* (ETC 173) on 18 December 2002. See: Службени лист СРЈ, Међународни уговори, No. 2/2002 and Службени лист СЦГ, Међународни уговори, No. 18/2005. The Convention entered into force in Serbia on 1 April 2003. The Criminal Law Convention on Corruption has been adopted without any reserve); Additional Protocol to the Criminal Law Convention on Corruption (the Protocol was opened for signing on 15 May 2003, and entered into force on 1 February 2005. The Republic of Serbia *ratified the Additional Protocol to the Criminal Law Convention on Corruption* (ETC 191) on 9 January 2008. See: Службени гласник РС, Међународни уговори, No. 102/2008. It entered into force in Serbia on 1 May 2008. The Republic of Serbia has adopted the Additional Protocol to the Criminal Law Convention on Corruption without any reserve); the United Nations Convention against Corruption (the Republic of Serbia has ratified *the United Nations Convention against Corruption*. The Convention entered into force in the Republic of Serbia on 30 October 2005. See: Службени лист СЦГ, Међународни уговори, No. 12/2005).

not necessarily imply resorting to criminalization cannot be eliminated. In this area, for example, *the Council Framework Decision on Combating Terrorism of 13 July 2002*[16]*with changes and amendments of 2008*[17] is in contradiction with the basic principles of criminal law. It requires criminalization of public provocation to commit a terrorist offence and recruitment and training for terrorism,which many countries have done. By going over the newest international measures in the area of combating terrorism, it can be concluded that a balance must be made between the need to prevent the terrorist acts and protection of the fundamental human rights. Protection of civil society and security implies a partial interference with some of the fundamental human rights, such as, for example, freedom of association and freedom of expression. Here a crucial question emerges: Who protects us from the protectors? The fear of global terrorism leads to the transformation of the society into a surveillance society. Concerning the recruitment and training for terrorist acts, it is noticeable that the legislator is determined to elevate the preparatory actions to the rank of act of commission, which justifiably raises the question regarding the legitimacy of such criminalization. Prescribing preparation as an independent criminal offence is justifiable when the protected object is of great value, and the intensity of its endangerment is high. A criminal law norm is justifiable if a legitimate object of protection exists, and if breach or threat to a legal value can be invoked. At the same time, criminal offence must be precisely defined, which means that the legislator should set the legal norm in such a concrete way that the area of its application derives from the text, or can be determined by its interpretation. Concerning the public provocation to commit a terrorist offence, terrorist propaganda has been criminalized. When it comes to protection from potential misuses in criminal legislation, the question arises how to prevent them in the application of the new provisions. Some countries condition prosecution for these criminal offences with approval by competent authorities (in Croatia, it is the Chief State Prosecutor, in Slovenia Minister of Justice, etc.).The Republic of Serbia could also think in this direction, and for the criminal offences of public provocation to commit a terrorist offence, recruitment and training for terrorism stipulate as an additional condition a special approval by the Republic Public Prosecutor. The solution existing

16 *Council Framework Decision on Combating Terrorism, 2002/475/JHA.*
17 *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.*

in Belgium which was introduced after the model of the Convention for the Protection of Human Rights and Fundamental Freedoms should also not be dismissed. In its legislation, Belgium envisaged a clause according to which criminal offences with elements of terrorism must not be interpreted in a way that could limit human rights, such as the right to strike, the right to freedom of assembly and association, the right to freedom and other related rights stipulated by Articles 8-11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.[18] Such a clause provides protection from excessively frequent application of such provisions, which could exceed what was thought as "necessary in a democratic society" or "a special need to combat…".

Terrorism is not the only example in which there is no balance between the *ultima ratio* principle and the principle of legitimacy. Have the States, under the veil of harmonization, gone too far with their readiness to apply criminal legislation? Unfortunately, nowadays excessive criminalization is surely a commonplace.[19]

In the author's opinion, the EU has, with the Lisbon Treaty and by introducing the new legal framework, actually set for itself a greater responsibility in ensuring the *ultima ratio* principle precisely because of the possibility of establishing minimum rules for defining criminal offenses and sanctions for particularly serious forms of crime. Since there is a possibility of setting minimum standards, it is assumed that they are necessary, that there is no other way to combat these serious criminal offences. Otherwise,

18 Д. Коларић, Нова концепција кривичних дела тероризма у Кривичном законику Србије, *Crimen*, No. 1/2013, p. 69.

19 Let's take a look at the Council of Europe Convention on preventing and combating violence against women and domestic violence. In a part that relates to the substantive criminal law, it mainly contains unified phrases according to which the contracting parties "are obliged" to take the necessary legislative or other measures and ensure that a behaviour, which consists of […], is criminalized. That is why the question of the need for a separate criminalization of domestic violence arises, when they are already actions that can be classified under other criminalizations. In the last period, other provisions of the Istanbul Convention are also becoming topical, in particular rape without coercion, stalking and sexual harassment and their implementation in national legislation. So, for example, the Convention, as we have already seen, emphasizes the lack of consent in connection to rape, rather than coercion, and thus the question arises how the harmonization should be carried out and whether it is necessary. Even in the case if a new criminal offence was accepted *de lege ferenda*, which would criminalize the undertaking of rape and with it equalized act without consent of the person against whom this action is undertaken, punishment should be considerably lower considering that there is no coercion. However, this and other attempts of the criminal law expansionism directly negate the statement that the criminal law is *ultima ratio*.

if this possibility is abused, it will lead to destabilization of the basic principles of criminal law.

The Federal Constitutional Court of Germany has also given its opinion in connection with the Lisbon Treaty and some of its provisions that are important because of the impact on the national criminal legislations.[20] It seems that the Court was on the verge to proclaim the Treaty unconstitutional. Knowing what political implications this step would have, the Court emphasized the importance of the Bundestag and Bundesrat, and drew attention to some insufficiencies of the Lisbon Treaty, not avoiding pointing out that it was against of criminal law being an instrument for achieving the objectives of the EU. So, the Court, among other things, draws attention to Article 83, paragraph 1 of the Treaty on the Functioning of the EU, where it criticizes phrases "particularly serious crime with a cross-border dimension" and "a special need" to jointly combat them, pointing to their lack of precision. In addition, it emphasizes that a special need does not exist only because of the European Parliament's and the Council's will, but because of the nature or consequences of such criminal offences.

When it comes to the provision according to which "the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph", the Court points out the role of Bundestag and Bundesrat which, in relation to the expanding of the EU's competencies, must agree in the form of a law, adding that the EU regulations should not encompass the entire area of criminal offences, but only certain forms. Similarly, theoretical debates criticize the regulation of the entire area of terrorist-related criminal offences and raise the question how much it is necessary, in particular in respect of certain criminal offences that have been "declared" terrorist.[21]

The author also believes that the provision of Article 83, paragraph 1, of the Treaty on the Functioning of the EU is controversial. Firstly, for the EU to have competence, **cross-border dimension** must be identified, which stems from the nature or the consequences of that criminal offence. Secondly, if the condition of "cross-border dimension" is not met, **a special need to combat** a specific offence on a common basis should exist.

20 M. Kaiafa-Gbandi, The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law, *European Criminal Law Review*, 1/2011, Volume 1, p. 12.
21 *Ibidem*, p. 18.

In Article 83, paragraph 2, of the Treaty on the Functioning of the EU, it is emphasized that when **the approximation** of criminal legislation and other regulations of the Member States is **essential** to ensure the effective implementation of a Union policy **in an area which has been subject to harmonisation measures**, **directives** may establish minimum rules for defining of criminal offences and sanctions in that area. In connection with this paragraph, the Court points out that in this manner the way is opened to insufficiently justified harmonization, because the adoption of directives is only possible when it is indispensable for the effective implementation of EU policy in an area where harmonization measures have already been implemented.

The development of EU criminal law is often justified by the claim that unification is necessary, because there must be no "safe havens for criminals and organized criminal groups" in the European Union.[22] The uneven regulation of certain issues can lead to a situation where a criminal sanction in some Member States is considerably milder, which would make them desirable destinations. However, this argument still is untenable for several reasons. First, the assumption that perpetrators of criminal offences have the knowledge on the comparative criminal law is unrealistic and, second, if it were so, Member States with the "mildest" criminal legislation would be the primary haven for, for example, organized crime groups. For example, Nordic countries traditionally share a vision of humanistic-oriented criminal law, with milder criminal sanctions than in other countries. They should, therefore, be a safe haven for perpetrators of criminal offences. Nevertheless, organized crime is not a major problem in Nordic countries.[23]

Another category that justifies the European Union's actions related to the harmonization of the substantive criminal law, besides the cross-border dimension of crime, is **a special need to combat** some form of crime or a specific criminal offence, on a common basis. A special need may exist due to the heinous nature of some specific serious criminal offences. This category of "European criminal offences" is much easier to justify than cross-border offences. It is quite understandable that some criminal offences are so severe that it is necessary to react at the international community level. Nevertheless, it is necessary to formulate criminalizations with respect to all traditional principles which underlie criminal law.

22 S. Melander, *op. cit*, p. 48.
23 *Ibidem.*

Another issue is which criminal offences deserve to be included in the category of "particularly serious crime". Article 83 of the Treaty on the Functioning of the EU contains a list of crimes that can be subject to harmonization of the substantive criminal law. These are: terrorism, human trafficking and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, computer crime and organised crime. One has to have in mind that this Article only imprecisely lists certain forms of crime, rather than precisely defined specific elements of some criminal offences. Therefore, the question arises whether all listed forms of crime deserve the European Union's reaction.

Illicit drug trafficking, for example, covers a wide range of criminal offences and it is not certain whether all criminal offences falling under this category are particularly serious or have cross-border dimension. Organized crime is a very broad category which can contain a number of different criminal offences, of which some have a cross-border dimension, and some do not. In order to fulfil these conditions, the European Union must limit its actions to offences in the categories listed in Article 83 of the Treaty on the Functioning of the European Union, that really have a cross-border dimension or are really that serious that there is a special need to prevent them by common actions.[24]

The question unavoidably arises, since at the EU level they are proclaiming the principle of legitimacy and the *ultima ratio* principle, why they are not interested in respecting them, but the provisions of legal sources of regional and international organizations that define criminal offences are arbitrary and too wide, that is, with criminal law expansionism they violate the *ultima ratio* principle.

The discussion about the *ultima ratio* role of the criminal law has been intensified after the entry into force of the Lisbon Treaty. The Stockholm Programme, a five-year plan for the period 2010–2014 that was adopted immediately after the entry into force of the Lisbon Treaty, states that "criminal law provisions should be introduced when they are considered essential in order for the interests to be protected and, as a rule, be used only as a last resort".[25] Calling for the last resort principle clearly displays the criminal law as the last means.

24 *Ibidem*, pp. 53–54.

25 *EUROPEAN COUNCIL, EUROPEAN COUNCIL THE STOCKHOLM PROGRAMME — AN OPEN AND SECURE EUROPE SERVING AND PROTECTING CITIZENS* (2010/C 115/01), Official Journal of the European Union.

The *ultima ratio* principle has been traditionally linked to the national criminal legislation and has represented a part of "the cultural heritage" of the criminal law.[26] It, by its nature, suggests the minimum intervention by the criminal law, i.e. resorting to the criminal law repression should be the last resort. Nowadays it seems there is a different trend, where criminal law becomes *prima ratio*. The question arises whether this excessive criminal law interventionism in national criminal law is rooted at the European level, because often, when legislators prescribe some behaviour as criminal offences in the national legislation, they justify it as the need for harmonization with certain international and legal sources.

In the last decade, the reform of the criminal legislation in European countries has been characterized by prescribing a large number of new criminal offences, derogation from some of the basic principles of criminal law and application of criminal law as *sola* or *prima ratio*, rather than *ultima* or *extrema ratio*. Concurrently, vague norms have penetrated the criminal legislation. As a rule, new criminal offences are not criminal offences of damage, but offences whose consequence is a threat (in some cases only an abstract danger), or offences which do not contain a consequence in their legal description. Also, some preparatory actions (sometimes very distant) are more often being declared criminal offences.[27] They are intended to protect some general values (which are often dubious precisely from the aspect whether they are really general), rather than the most important values of individuals. These new criminalizations emerge mostly in those areas where criminal law shows its inefficiency and where even the existing criminalizations are not being applied: organized crime, corruption, terrorism, international criminal offences, etc. International and regional conventions also have an important role in the expansion of the criminal law. They easily provide for prescribing numerous criminal offences by those states that accept them. There are more and more conventions that oblige states to criminalize certain behaviours. Except the expansion of criminal law, one cannot identify anything in common and consistent in the various conventions in this respect, i.e. there is no certain criminal and political concept to start from (the question is whether it is even possible given the method of creation and nature of international agreements).

26 J. Bengoetxea, H. Jung, K. Nuotio, Ultima Ratio, is the Principle at Risk? Onati Socio-Legal Series, 1/2013, online, http://ssrn.com/abstract=2213166.

27 З. Стојановић, Д. Коларић, Савремене тенденције у науци кривичног права и кривично законодавство Србије, *Српска политичка мисао*, No. 3/2015, pp. 122–123.

Despite the unquestionable positive contribution, particularly of certain international treaties to the criminal law, it seems that it is nowadays necessary to approach ratification of conventions containing an obligation of prescribing criminal offenses with caution and reserves.[28]

It has already been mentioned that a number of countries, due to the hastiness and superficial approach to the process of accession to the EU, provide much more than what was prescribed in the relevant EU documents. Serbia's aspiration to become a full member of the European Union causes frequent legislative reforms. In the accession process, potential conditionings and situations in which one is served with the solutions that one has to accept should be avoided, because then criminal law becomes a hostage of politics and an instrument in the hands of the ruling structures. Each country should preserve the coherence of its legal system, which should follow the constitutional principles. This, on the other hand, means that one should not stubbornly insist on the distinctiveness of the national legal system, as distinctiveness alone does not represent a value, which can be seen in many cases, but criminal legislation should be a coherent system that follows the constitutional principles and ensures effective and efficient functioning of state bodies.

Unfortunately, the need for implementation of international and regional legal sources is often not accompanied by adequate legal explanations. No research is being carried out in terms of prevalence of certain illicit behaviours, it is being forgotten that the criminal law is *ultima ratio*. The most important conclusion surely is that criminalization cannot be associated only with obligations deriving from international documents.

Let's take as an example only the changes and amendments to the Criminal Code of Serbia of 2009 and changes and amendments to the Criminal Code of Serbia of 2002.

Thus, in 2009, punishment and use of criminal law for populist purposes dominate,[29] when while designing legal norms, the reality and function of

28 *Ibidem.*

29 So, for example, amendments were made in 2009, when some new provisions were added (Article 57, paragraph 2) according to which a penalty cannot be mitigated for certain criminal offences, namely: Abduction (Article 134, paragraphs 2 and 3), Rape (Article 178), Sexual Intercourse with a Helpless Person (Article 179), Sexual Intercourse with a Child (Article 180), Extortion (Article 214, paragraphs 2 and 3), Unlawful Production and Circulation of Narcotics (Article 246, paragraphs 1 and 3), Illegal Crossing of State Border and Human Trafficking (Article 350, paragraphs 3 and 4) and Human Trafficking (Article 388). Generally accepted view is that by abolishing this provision, a "foreign body" and an anomaly would be removed from the Code. For these reasons, Article 7 of

the criminal legislation are not taken into account, when the public (which is being additionally manipulated), as well as a great part of MPs do not show the wish to have better criminal law, but only to have as much as possible repressive law with punishments.[30] Citizens' fear from crime can be easily used for specific media and populist manipulations. This is noticeable not only in Serbia, but also in other countries with much longer tradition of "the rule of law".[31] In addition to a series of blunders, both technical and essential, derogations of general institutes, inconsistent penalties in a large number of criminal offenses, 2009 was dominated by unfounded enhanced repression. The issue of the criminal law expansionism emerges, because the legislator has entered into an unauthorized zone, which in the near future has led to the crisis of legitimacy of the criminal legislation. The question arises why the legislator prescribed new criminal offences (Insurance Fraud, Article 208a), when some have already been prescribed eighty years ago (the Criminal Code of the Kingdom of Yugoslavia of 1929 stipulated insurance fraud).[32] The reform of the criminal legislation of 2009 contains a number of shortcomings, which is also the case with the whole Law on Changes and Amendments to the Criminal Code of September 2009, and was certainly not comprehensive. It can be concluded that the Law on Changes and Amendments to the Criminal Code of September 2009 has dealt with the provisions of the General and Special part, that some changes were more formal than substantive in nature, because they made changes in terms of

the Draft Law on Changes and Amendments to the Criminal Code contained a provision according to which paragraph 2 of Article 57 should have been deleted. However, with the proposed and accepted amendment in the National Assembly, the controversial provision remained in the Criminal Code. The MPs who during the debate on the Law on Changes and Amendments to the Criminal Code advocated harsh penalties for paedophiles (some of them sincerely, some because it is politically profitable) failed to point to one very important fact. The Working Group has proposed to the Government deleting of the provision of Article 57, paragraph 2, also because this provision did not follow the idea on which it was based (even if it was wrong), allowing mitigation of penalty for a criminal offence that is more serious in relation to a criminal offence of the same kind that is lesser. See more about this: Д. Коларић; Кривичноправни инструменти државне реакције на криминалитет и предстојеће измене у области кривичних санкција, in: *Оптужење и други кривичноправни инструменти државне реакције на криминалитет*, Српско удружење за кривично правну теорију и праксу, Златибор, 2014, pp. 485–504.

30 З. Стојановић, Д. Коларић; Нова решења у Кривичном законику Републике Србије, *Безбедност*, 3/2012, p. 18.

31 Ј. Ћирић, Правосуђе и притисци јавности, *in: Реформа кривичног права*, Удружење јавних тужилаца и заменика јавних тужилаца Србије, Копаоник, 2014, p. 202.

32 З. Стојановић, Нова решења у кривичном законодавству Србије, њихова примена и будућа реформа, in: *Нова решења у кривичном законодавству Републике Србије и њихова практична примена*, Српско удружење за кривичноправну теорију и праксу, Београд, 2013, p. 12.

the language style of the existing provisions and harmonized it with our language. However, there are also new provisions, as well as changed penal framework for certain criminal offences. While ignoring terminological harmonization of certain provisions which occurred due to changes of legal position of the Republic of Serbia, compared to the earlier state, a greater number of amendments were made in the Special part. Firstly, a certain number of new criminal offenses have been stipulated. Secondly, changes have been made to a large number of the existing criminal offences. And thirdly, stipulated penalties have been changed for a number of offences, and a good part of these changes has been related to prescribing harsher penalties (for one third of criminal offences), even though until then Serbian Criminal Code has not been among those criminal laws with mild penalties. For these reasons, a significant part of the changes of 2012 is dedicated to the elimination of gaps and inconsistencies that have been made by the amendments to the criminal legislation in 2009.[33]

A similar situation was in 2002,[34] before entry into force of the Criminal Code of Serbia, which reflected in the parallel existence of a special chapter of the Criminal Code of Serbia entitled "Corruption-Related Criminal Offences", and corresponding criminalizations, whose purpose was combating corruption in the group of criminal offences against official duty, which could be characterized as, to put it mildly, atypical[35] and unacceptable. Firstly, because of the very title of that chapter that has no connection with the protected object. Secondly, the description of these criminal offences mainly coincided with the existing ones, which had led to the unnecessary duplication of criminalizations and serious problems in terms of differentiating the new and existing criminal offenses. If the legislator's motive was to harshen the penalties, that could have been done by amending the existing solutions.Thirdly, such causal approach is unacceptable when it comes to the criminal law norms. Fourthly, the term *corruption* was used in the title of the chapter as well as in the titles of some criminal offences, while it was not contained in the legal description of certain criminal offenses, nor was it even specified.[36]

33 Д. Коларић, Концепцијске новине у Кривичном законику Србије и адекватност државне реакције на криминалитет, in: *Суђење у разумном року и други кривичноправни инструменти адекватности државне реакције на криминалитет*, Златибор, 20015, p. 13.
34 See: *Сл. гласник РС*, No. 10/2002.
35 З. Стојановић, О. Перић, *Кривично право – посебни део*, Београд, 2009, p. 389.
36 З. Стојановић, Д. Коларић, *Кривичноправно сузбијање организованог криминалитета, тероризма и корупције*, Београд, 2014, p. 203.

These and similar criminal law interventions are used for daily political purposes, while basic standards for creating a criminal law norm, which primarily refers to the assessment of the reality and evaluation of social danger, are of secondary importance. Nowadays, unfortunately, similar moves are not uncommon, regardless of whether it is a criminal, substantive or procedural legislation, misdemeanour regulations, or even the adoption of special laws.Thus, for example, it is currently being worked on passing *the Law on the Protection from Domestic Violence*.[37] The first question that necessarily arises is whether we need such a law, given the protection provided for by the Family Act which is *prima ratio,* criminalizations of domestic violence in the Criminal Code and corresponding provisions of the Law on Public Peace and Order.[38] On this example one can see the extent of the lack of harmonization of legal texts that are passed in a short time period, almost in continuity. The Draft Law on the Protection from Domestic Violence provides for many novelties when it comes to the functioning of the police, public prosecutor's office and court, and among other things, new police powers that were not prescribed by the Law on Police of 2016 – risk assessment and urgent measures.[39] The Law stipulates that police officers can "take the potential perpetrator of domestic violence to the police station, for further action by a police officer assigned for prevention of domestic violence", as well as that a police officer in charge for prevention of domestic violence is obliged *to take a*

37 See: преднацрт Закона о заштити насиља у породици, http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php, accessed on: 13/07/2016.

38 The Law on Misdemeanours as well as the special laws which in penal provisions provide for misdemeanours do not stipulate the matter that would relate to domestic violence. However, the Law on Public Peace and Order stipulates a certain kind of misdemeanours that result in disturbance of public order, and it may happen that the perpetrator and the victim are members of a family. Their family relationship is not important for imposing a penalty (imprisonment or fine), however, according to the Law on Misdemeanours, protective measure of "denial of access to aggrieved person, facility or place where the misdemeanour was committed" can be imposed, thus in this way the damaged party, i.e. the victim of violence, can be protected from further endangerment. When statutory requirements for apprehension of the perpetrators of violence are met on the basis of the Law on Misdemeanours, in some cases, misdemeanour procedure can be more efficient than other types of court proceedings, since a person performing violence is brought before the judge of the misdemeanour court immediately after the event, with the request to initiate misdemeanour proceedings, and the proposal to pass a judgment which becomes final, before its effect. In this way, a victim of domestic violence can be quickly and efficiently protected. С. Марковић, *Улога полиције у сузбијању насиља у породици у прекршајном поступку*, НБП – Журнал за криминалистику и право, КПА, Београд, 2015, pp. 214–215.

39 See: *Сл. Гласник РС*, бр. 6/2016.

statement from "a potential perpetrator of domestic violence", gather the necessary information from other police officers, immediately conduct a risk assessment and, if necessary, impose an urgent measure of protection against domestic violence prescribed by this law, and to immediately inform the public prosecutor and the Centre for Social Welfare. Police power of detention up to eight hours may be applied against such a person. The question arises – what does the legal term "potential perpetrator of domestic violence" mean? And whether in this way preventive apprehension is being introduced into our legislation? Also, how can a police officer for prevention of domestic violence be obliged to take a statement from a potential perpetrator of domestic violence, if he/she rejects it? In which capacity a statement is taken from this citizen (for example, if a citizen is suspected of having committed a criminal offense, the rules of the Law on Criminal Procedure are applied)? Here is also evident the excessive expansionism of the rights of the potentially injured parties at the expense of "potential perpetrator of domestic violence", whoever he/she may be. One can easily imagine situations in which a person is falsely reported for domestic violence, and due to poor risk assessment he/she gets temporarily deprived of his/her basic human rights – freedom of movement and the right to property. On the other hand, it is possible that a risk assessment suggests that there will be no escalation of violence, while subsequently criminal offence of murder, or some other serious offence, is committed in that family. For this reason, the author believes that the Draft Law provides for very short deadlines for risk assessment and that the selection of police officers and their training[40] is essential for law enforcement.

40 It is envisaged that *risk assessment* and *urgent measures* (temporary removal of the perpetrator from home and temporary ban on contacting and approaching the victim) are undertaken by police officers in charge of prevention of domestic violence, who have been appointed by the head of a regional police department, and have previously completed specialized training stipulated by this law. Police officers for the prevention of domestic violence and judicial officials who perform tasks within the jurisdiction of the court or the public prosecutor's office prescribed by this Law are required to complete specialized training according to the program adopted by the Judicial Academy. Previous experience tells us, when under the influence of European legislation legal norms were adopted in the field of criminal law that guaranteed greater human rights to participants in the criminal proceedings than they were before, in practice, while implementing specialized trainings, the form was respected, but not the essence. Specifically, when dealing with the criminal proceedings where suspects in criminal proceedings are minors or victims of certain crimes are minors, legal provisions stipulated that judges, public prosecutors, their deputies and police officers should have previously completed specialized training in the field of *the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles*. Trainings typically lasted one to two days, while police officers (for example, a police

The Principle of Legality and the European Integration Processes

The principle of legality is the principle of constitutional and legislative nature. Article 34 of the Constitution of Serbia points out that no person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act. The principle of legality, in Article 1 of the Criminal Code, points to the social and legal significance of the statement according to which there is no criminal offence or punishment without law. A specific interaction between criminal and constitutional law is reflected in the principle of legality, because creators of the Constitution elevate the criminal law principle to the rank of constitutional principle.

By analysing the provisions of the Constitution in the context of the ratified international treaties and their application, the author will point to Article 16, paragraph 2 of the Constitution, which states that generally accepted rules of international law and ratified international treaties are an integral part of the legal system of the Republic of Serbia and are applied directly. It also states that ratified international treaties must be in accordance with the Constitution.

Article 145 of the Constitution is also important for the implementation of the international treaties, which, among others, states that court decisions are based on the Constitution, law, the ratified international treaty and regulation passed on the grounds of the law.

Here, the author believes that it is important also to address the European Convention for the Protection of Human Rights and Fundamental Freedoms.[41] According to Article 7, paragraph 1 of this Convention, no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international

officer with completed three-year secondary education and course for police officers), for a several hours of participation in the seminar received a certificate of acquired special knowledge in this area, which certainly is not acceptable when it comes to the sensitive sphere of domestic violence. When it comes to specialization of police officers, it must be carried out by teaching staff of a higher education institution established by the decision of the Government of the Republic of Serbia for the implementation of programs for police education, i.e. of the Academy of Criminalistic and Police Studies.

41 *Сл. лист СЦГ* – Међународни уговори, No. 9/2003, 5/2005, 7/2005-исправка and *Сл. гласник РС* – Међународни уговори, No. 12/2010.

law at the time when it was committed. Also, a heavier penalty than the one that was applicable at the time the criminal offence was committed cannot be imposed. Article 7, paragraph 2 of the same Convention points out that this Article does not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

In addition to the traditional interests and priorities of the Union, the Lisbon Treaty for the first time emphasizes more intensely the dimension of the fundamental human rights. Specifically, it assigns to *the Charter of Fundamental Rights of the EU* the power of the binding legal norm by incorporating it in the integral text of the Lisbon Treaty.[42] Article 49 of the Charter states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Also, a heavier penalty shall not be imposed than that which was applicable at the time the criminal offence was committed. If after the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable. Article 49, paragraph 2 points out that this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations. As stated in paragraph 3, penalty must be proportionate to the committed criminal offence.

Article 6, paragraph 3 of the Treaty on the EU states that fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which also derive from the constitutional traditions common to the Member States, constitute general principles of the EU.

Here the relationship between the constitutional and legal provisions of Serbia and similar provisions of international sources will be analysed, which is closely linked to at least two questions. Can the ratified treaties be applied directly? Would such Europeanization[43] jeopardize the principle of legality?

42 CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Official Journal of the European Communities, (2000/C 364/01).
43 Europeanization of the criminal law shall imply the national criminal law provisions that are under the influence of the EU law.

According to the author's opinion, which is approximately identical with certain understandings in the theory, direct application of international agreements can be reached only if the following two cumulative conditions are met: that these are provisions contained in the ratified international treaties and that these provisions are in accordance with the Constitution.[44] As the principle of legality is one of the criminal law principles that the Constitution elevated to the rank of a constitutional principle, it is clear that these provisions must comply with all the requirements in terms of segments *praevia, stricta, script* and *certa*. *Lex certa* segment represents a major problem in international treaties. From the standpoint of application of the provisions of international treaties in national legislation, this segment must also be met. This is a generally accepted standard that prevents punishment on the basis of indeterminate law, which is a guarantee for achieving fundamental freedoms and human rights. The principle of legality represents a barrier for the application of those provisions of the international treaties that have no prescribed punishment, because it is very important to respect the principle of legality in its full capacity and the overall meaning as one of the most important achievements of the rule of law.

Having also in mind Article 7, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that states that this Article does not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations, it can be concluded that the principle of legality is much stricter in the national legislation than in the provisions of the Convention. However, this does not provide sufficient grounds for concluding that our creators of the Constitution wanted to achieve the same effect when in Article 16, paragraph 2 of the Constitution of Serbia they pointed out that "only" ratified international treaties must be in accordance with the Constitution, i.e. they did not emphasize that generally accepted rules of international law must also be in accordance with the Constitution.[45] In fact, the author agrees with the view that the treaties are less disputable than the generally

44 М. Шкулић, Начело законитости у кривичном праву, *Анали Правног факултета у Београду*, No. 1/2010, p. 102.

45 Article 16, paragraph of the Constitution states that: "Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly. Ratified international treaties must be in accordance with the Constitution." See: *Сл. гласник РС*, No. 98/2006.

accepted rules of international law, so when the creators of the Constitution require that such sources must be in accordance with the Constitution, then such a requirement must also exist in relation to the generally accepted rules of international law. Thus, here it is necessary to apply the analogy.[46]

Contrary to the above stated, misconceptions can be found in practice that the Constitution of Serbia by not emphasizing that the generally accepted rules of international law must be in accordance with the Constitution wishes to emphasize that they do not have to be in accordance with the Constitution.[47] Even if that was the case, "the newly composed" criminalizations are certainly not a part of the generally accepted rules of international law, and therefore the provisions of the European Convention cannot be invoked, and the Convention must also be in accordance with the Constitution, and consequently with the principle of legality.

There are no precise information on the extent to which national courts invoke the provisions of international treaties, with which harmonization has not been carried out yet. The fact is that such judgements exist, but they are still exceptions. The basic question that needs to be answered in such cases is whether such court decisions are contrary to the principle of *nullum crimen nulla poena sine lege* with its segments *praevia, stricta, scripta* and *certa*. There are two categories of judgements. Those that are not in contradiction with the principle of legality if the conditions which have already been mentioned are met, and those that would probably be unacceptable. In fact, it is important to draw attention to the need for distinguishing two situations. The first identifies the circumstances in which, due to the application of the already existing criminalization in national law, it is necessary to determine the content of certain terms, i.e. the meaning of phrases determined by the law, which due to the legislator's omission are not in accordance with international and regional sources, as well as with some domestic bylaws. In the second situation, the national legislation does not contain specific criminalization nor has prescribed punishment for this behaviour. The first situation can be subsumed under the first group of judgements, while in the second situation the level of caution should be significantly higher bearing in mind the already identified problems in European regulations with the segment *lex certa*. Then in most cases direct application of such sources is not an option.

46 М. Шкулић, *op. cit*, p. 102.
47 М. Мајић, Начело легалитета – нормативна и културна револуција, *Анали Правног факултета у Београду*, No. 2/2009, p. 40.

Before providing an example from the court practice concerning the first situation, several explanations will be given.

With the amendments to the Criminal Code in 2009,[48] the criminal offence Unlawful Production, Circulation and Possession of Narcotic Drugs was divided into two criminal offences, namely: Unlawful Production and Circulation of Narcotics and Illegal Possession of Narcotic Drugs.

Unlawful Production and Circulation of Narcotics is a criminal offence stipulated by Article 246 of the Criminal Code of the Republic of Serbia[49] and it has several forms. The basic form of the criminal offences stipulated in paragraph 1 is committed by whoever unlawfully produces, processes, sells or offers for sale, or whoever purchases, keeps or transports for sale, or who mediates in sale or buying or otherwise unlawfully puts into circulation substances or preparations that are declared narcotics. Prescribed punishment for committing this form of criminal offence is imprisonment of three to twelve years.

The object of *actus reus* of this criminal offence are substances or preparations that are declared narcotics. Article 112 of the Criminal Code provides authentic interpretation which states that narcotic drugs shall imply substances and preparations declared by law or other regulation based on law as narcotic drugs and other psychoactive controlled substances.[50]

The list of narcotic drugs and other psychoactive controlled substances is an integral part of the Law on Psychoactive Controlled Substances.[51] Minister responsible for health determines the List at the proposal of the Commission. The List contains psychoactive controlled substances in accordance with ratified UN conventions that govern the area of psychoactive controlled substances, as well as psychoactive controlled substances identified following the proposal of the bodies responsible for the area of psychoactive controlled substances. The List is published in "the Official Gazette of the Republic of Serbia".[52] Psychoactive controlled substances from the List are classified into lists from 1 to 7, in accordance with the ratified United Nations conventions.[53] Narcotic drug is any

48 *Сл. гласник РС*, No. 72/2009.
49 *Сл. гласник РС*, No. 85/2005, 88/2005 - испр., 107/2005 - испр., 72/2009, 111/2009, 121/2012, 104/2013 and 108/2014.
50 *Criminal Code of the Republic of Serbia*, Article 112, item 15.
51 *Сл. гласник РС*, No. 99/2010.
52 *Ibidem*, Article 8.
53 *Ibidem,* Article 10.

substance of biological or synthetic origin that is on the List in accordance with the Single Convention on Narcotic Drugs, that is, a substance that primarily affects the central nervous system by reducing the sensation of pain, causing drowsiness or alertness, hallucinations, disturbances in motor functions, as well as other pathological or functional changes in the central nervous system.[54] Since according to Article 112, paragraph 15, narcotic drugs also imply other psychoactive controlled substances, it should be emphasized that according to the Law on Psychoactive Controlled Substances these include: a) psychotropic substances, which imply any substance of biological or synthetic origin that can be found on the List, in accordance with the Convention on Psychotropic Substances, that is, any substance that primarily affects the central nervous system and alters brain functions, causing changes in perception, mood, consciousness and behaviour, b) products of biological origin with psychoactive effect, and c) other psychoactive controlled substances.[55]

However, before amendments to the Criminal Code of 2012,[56] the authentic interpretation of the term *narcotic drugs* from Article 112 of the Criminal Code caused huge problems in court practice. The Criminal Code under *narcotic drugs* implied substances and preparations declared by law or other regulation based on law as narcotic drugs. Consequently, if someone was involved in illegal production and trade in psychotropic substances, it sometimes happened that the court issued a judgement of acquittal because of the narrow interpretation given in Article 112 of the Criminal Code. Thus, with the judgement of the Higher Court in Valjevo No. 30/12, of 30/05/2012, the defendant M. B., previously two times convicted by final judgements to probation for illegal possession of narcotic drugs (in 2008 and 2011), was acquitted of charges that in the period between the end-July 2011 to 05/08/2011, he committed the criminal offence of unlawful circulation of narcotics, for which he was charged by the Higher Public Prosecutor's Office in Valjevo. By searching his apartment and other premises, the police found 37.33 grams of psychotropic substance "amphetamine". He was in custody until the passing

54 *Ibidem,* Article 3, Paragraph 1, Item 1.
55 С. Марковић, Злоупотреба опојних дрога и институт (забране) ублажавања казне у пракси вишег суда у Ваљеву, in: Суђење у разумном року и други кривичноправни инструменти адекватности државне реакције на криминалитет, Златибор, 2015, p. 208.
56 *Закон о изменама и допунама Кривичног законика*, "Службени гласник РС", 121/2012.

of the first instance acquittal (from 05/08/2011 until 30/05/2012). In the court proceedings, and after the completion of the main trial, the court concluded that the defendant purchased and sold "amphetamine" for the purpose of obtaining the necessary funds for further procurement of this psychotropic substance for his own use and to sell to others. The Court has also ordered the expertise, when the court expert, a specialist in clinical pharmacology, gave his findings and opinion that "amphetamine" was a psychotropic substance, and that given its psycho-stimulatory effect, there was little difference between it and cocaine as a narcotic drug. The Court has accepted the findings and opinion of the court expert as professional, clear and given in accordance with the rules of science and profession, and they were included in the evidence. Nevertheless, the Court, based on the collected evidence and in accordance with the Law on Psychoactive Controlled Substances (which distinguishes between narcotic drugs and psychotropic substances), the Decision determining the narcotic drugs and psychotropic substances[57] passed by the Ministry of Health (which classifies "amphetamine" as psychotropic substance, not as narcotic drug), the Convention on Psychotropic Substances[58](which classifies "amphetamine" as psychotropic substance[59]) and the Criminal Code[60] (the object of *actus reus* of Article 246 is a substance or preparation that is declared narcotics), has acquitted the defendant of the charges based on Article 355, Paragraph 1 of the Criminal Procedure Code.[61]

The Court of Appeal in Belgrade, considering the appeal of High Public Prosecutor's Office in Valjevo, rendered the judgement No.1 4120/12 of 8/11/2012, changing with it the first-instance judgement of the Higher

57 "Сл. гласник РС", No. 24/2005 of 15/03/2005. Note: it ceased to exist by entry into force of the Regulation on establishing the List of psychoactive controlled substances, "Сл. гласник РС", No. 28/2013 of 26/03/2013, replaced with the new one, "Сл. гласник РС", No. 126/2014 of 19/11/2014, replaced with the new one, "Сл. гласник РС", No. 27/2015 of 18/03/2015, replaced with the new and currently valid *Regulation on establishing the List of psychoactive controlled substances*, "Сл. гласник РС", No.111/2015, of 29/12/2015.
58 *The Convention of Psychotropic Substances*, "Official Gazette of SFRY", No. 40/73. SFRY ratified the Convention on 15 October 1973.
59 See: *The Convention of Psychotropic Substances,* Article 1, Schedule II. Article 1 of the Convention states that the term "psychotropic substance" means any substance, natural or synthetic, or any natural material in Schedule I, II, III or IV, and AMFETAMINE is classified in Schedule II.
60 The Criminal Code of the Republic of Serbia, *Сл. гласник РС*, No. 85/2005, 88/2005 - испр., 107/2005 - испр., 72/2009, 111/2009.
61 S. Markovic, Problems in Court Practice with Determining Certain Elements of the Offences under the Articles 246 and 246a of the Criminal Code of Serbia, VI International Scientific Conference "Archibald Reiss Days", Belgrade, 2016.

Court in Valjevo, and found the defendant M. B. guilty, saying that M. B. "in the period from late July 2011 to 05/08/2011, in Valjevo, was capable to completely understand and control his actions and was aware that his actions were not allowed, for his personal use and further selling, illegally purchased and possessed "amphetamine" which is declared as narcotic drugs according to *the Law on Psychoactive Controlled Substances* ("Official Gazette of the Republic of Serbia", No. 99/2010) and *the Convention on Psychotropic Substances* ("Official Gazette of SFRY", No. 40/73). M. B. bought 60 grams of narcotic drugs for 150 euros in Belgrade from his acquaintance for the purpose of further selling of the narcotic in Valjevo and partly for his personal use, which he was doing until 05/08/2011 when the remained quantity of this narcotic, which he held in his apartment, was found and confiscated by the authorized police officers – the quantity of 33.7 grams. Police officers made an official report." Thus he committed the criminal offence of unlawful production and circulation of narcotics under Article 246, Paragraph 1 of the Criminal Code. The Court of Appeal sentenced him to imprisonment of three (3) years.[62]

The Court of Appeal explained in the judgement that its decision was based on the Article 1, Paragraph 1, Item j of the Single Convention on Narcotic Drugs of 1961 (which our country ratified in 1978), the Convention on Psychotropic Substancesof 1971 (which our country ratified in 1973), the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (which our country ratified in 1990) and the provisions of the Law on Psychoactive Controlled Substances, which clearly state that production of both narcotic drugs and psychotropic substances is prohibited and punishable, and that the rules regulating these criminal offenses are applied on unlawful production of psychotropic substances. As stated in the explanation, "the mere fact that provision of Article 246 of Criminal Code does not explicitly stipulate that anyone who produces psychotropic substances without authorization is making the same criminal offense as the one who produces and distributes narcotic drugs cannot have influence on the fact that the criminal offence exists and cannot support the attitude that the person involved in unlawful production of psychotropic substances is not committing criminal offense according to Article 246 of Criminal Code". ThisCourt's decision was also based on the fact that provisions of Articles 16 and 194 of the Constitution

62 *Ibidem.*

of Republic of Serbia strictly stipulate that all the laws and other general legal acts passed in the Republic of Serbia must be in compliance with the Constitution, as well as that all ratified international treaties and generally accepted rules of the international law represent part of the legal order of Republic of Serbia. The Court also concluded that the Criminal Code, as a regulation governing criminal offenses, in this case is not inconsistent with the ratified conventions.

Although guaranteed by the EU founding treaties, a major threat to the principle of legality are regulations, as secondary sources of *acquis communautaire* which have direct effect, because in this way referral norms are created that jeopardize the principle of legality. According to Article 288 of the Treaty on the Functioning of the EU, regulations have general significance, and they are fully binding and directly applicable in a Member State. Thus, they are not implemented into national legislation as they have a direct effect, so that in domestic law, it is only being referred to them. In this way referral norms are created, which from the standpoint of the principle of legality are not acceptable. They point to the EU law. So, Member States lay down in their national legislation which behaviours contrary to the EU regulations constitute criminal offences and sanctions for such behaviours, and the EU shapes the norm, that is, which behaviours are considered criminal offences. Taking into account all the above said, it is clear that this calls into question the respect of the principle of legality and its segment *lex certa*. It is interesting that the Court of Justice, when it comes to regulations, pointed out that Member States must not bring national measures for the introduction of regulations into national legislation, since it can endanger the consistent interpretation and application of regulations within the EU.[63] On the other hand, one can only imagine what legal skills are necessary for someone to find their way around in a vast number of the EU regulations, bearing in mind that the provisions are published in all official EU languages and that comparative legal interpretation is then automatically imposed as necessary.

The requirements set for the principle of legality in internal law should be the same at the European level. However, as it could be seen, this is not so. According to the Lisbon Treaty, the main kind of competence in

63 М. Матић-Бошковић, Европски кривичноправни механизми и њихов утицај на национална законодавства, *Докторска дисертација*, Универзитет у Београду, Правни факултет, 2016, p. 100.

criminal matters was established in Article 83, Paragraph 1 of the Treaty on the Functioning of the EU, and refers to a possibility to, "by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". Therefore, the segment *lex certa* should have a more complex nature, since it is applied in two stages of criminalization. One is at the European, and the other at the national level. The situation in which directives are literally transferred into national law is unacceptable, because in this way the coherence of national criminal justice systems is undermined. Also, if each Member State was to unilaterally adopt definitions of criminal offences that would lead to divergence from the actual objectives of the EU. Therefore, it is necessary to find a middle ground. The EU seeks to establish minimum rules for defining criminal offences, and *lex certa* should also oblige the European legislator, because otherwise it would be impossible for national legislators to adopt certain criminalizations in their national systems.

Concluding Remarks

Finally, it can be concluded that the area of criminal law is always closely linked to national culture, values and understandings of the complex ethical issues at the national level, or simply put, with the idea of national sovereignty. Criminal law should represent a coherent system, which can be achieved only at the level of the EU Member States. At the national level, there are different behaviours, whose social danger is graded. In this regard, there are significant differences between the national systems, because of economic, political and social conditions and moral norms in the evaluation of, for example, the right to abortion, the right to end one's life (and to get assistance from others), the way of solving the problem of drug abuse, the question whether the payment of sexual services should be punishable, etc. These differences are the result of deep-rooted attitudes, different value systems, and therefore criminal law can and should be part of the national identities of the Member States.

For these reasons, it is difficult to imagine a full and real harmonization of the EU criminal law, and the author expresses scepticism in terms of creating a single EU criminal law. There is no common EU criminal law, but 28 different criminal law systems, one German, one French, one Swedish, etc., which are to some extent harmonized by measures taken at the EU level.[64]

Also, one has to be aware that any harmonization of national criminal law with the provisions of the EU in a way undermines the coherence of the criminal justice system of the Member States.[65] Therefore, the unification of criminal law provisions of the Member States should be carried out only in exceptional cases, when it is really necessary for achieving the objectives of the EU, but even then enough space should be left for adjustment of the EU rules to the national context. The request for the coherence of the substantive criminal law at the national level actually highlights the subsidiarity principle of the EU law that has been mentioned earlier.[66]

Emphasizing the specificity of the criminal law and its basic principles at the national level does not aim to reflect the anti-European sentiment. On the contrary, the aim is to emphasize the importance of basic guiding ideas on which the criminal law is based, in order to limit its application, which would lead to highlighting the fundamental freedoms and human rights. As stated in Article 3 of the Criminal Code of Serbia, the protection of human and other basic social values represents the basis and boundaries for determining the criminal offences, the imposition of criminal sanctions and their application, to the extent necessary for the suppression of these offences. Therefore, the real protection of the fundamental freedoms and rights at the EU level depends upon its legal sources, i.e. to what extent the basic principles of criminal law are set in the centre of attention. In the author's opinion, these principles must be explicitly listed in the primary sources of the EU law, which is not the case with some.

64 P. Asp, The Importance of the Principles of Subsidiarity and Coherence in the Development of EU Criminal Law, *European Criminal Law Review*, 1/2011, Volume 1, p. 51.

65 Each state ranks criminal offences by prescribing the corresponding criminal sanctions for them. Here sizable differences between the criminal law systems may exist. Let's take the example of the abuse of narcotic drugs and the legislator's attitude towards these crimes in Sweden and the Netherlands. Also, punishments vary considerably for the same or equivalent criminal offences. Thus, for example, one state may have a 10-years punishment for murder, two years for human smuggling, and a fine for petty theft, while in another state penalties may be significantly more severe, for example, 20 years for murder, four years for human smuggling and 30 days imprisonment for petty theft.

66 P. Asp, *op. cit*, p. 53.

Here the directions of the reform will be addressed. There is a need for a greater number of interventions in the Special part. Most of them are the result of the need of harmonization with the relevant EU and EC documents and that is why it is difficult to enter into a serious criminal and political discussion as to their justification.[67]

It is necessary to make a number of changes in the chapter covering criminal offences related to the environmental protection. The reason for that is harmonization with the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008, on the protection of the environment through criminal law.

Also, harmonization with the Convention on the Protection of Children from Sexual Exploitation and Sexual Abuse[68] and Directive 2011/92/EU against Sexual Abuse and Sexual Exploitation of Children and Child Pornography awaits us.

It is also needed to make several changes in the group of criminal offences against fundamental human and citizens' freedoms and rights. In Article covering violation of equality, additional two grounds for discrimination should be added (sexual orientation and gender identity). The principle of the prevailing interest should be taken into account as the basis for excluding unlawfulness for certain criminal offences when it comes to unauthorized interference in the private sphere of the individual, which can be justified in the case of preventing or detecting serious crimes.[69] Identity theft should be introduced as a new criminal offence, since it became very frequent.[70]

There is no doubt that a number of reasons point to the fact that it is necessary to reassess criminal offences related to narcotic drugs. Provisions that existed before 2009 were much easier for application. Namely, a privileged form of offence under Article 246 existed then, which consisted of possession of narcotic drugs even when they were not intended for sale, which criminalized possession for one's own purpose. Adding into special elements of a crime the element "a smaller quantity of a substance, for

67 З. Стојановић, Могуће измене Кривичног законика Србије, in: *Реформа кривичног права*, Удружење јавних тужилаца и заменика јавних тужилаца Србије, Копаоник, 2014, p. 15.
68 *Службени гласник РС – Међународни уговори*, No. 1/10.
69 The similar was done in the European Convention for the Protection of Human Rights and Fundamental Freedoms – for example, the freedom of expression is first guaranteed by Article 10 of the Convention, and then Article 10, Paragraph 2 states in which cases and under what conditions its limitation is permitted.
70 The legislator in Montenegro did so in 2013, in Article 176, Paragraph 3.

their own personal use" (Article 246) has only created certain dilemmas and has led to uneven approach of the court practice. *De lege ferenda*, if there is a political will and awareness of the social community that combating unlawful use and abuse of narcotic drugs cannot be achieved in a way prescribed by the legislator in 2009, by seeing the citizens as "the enemies that should be neutralized", decriminalization of Article 246a should be done and things should be set as they were before 2003, when even the privileged form under Article 246, Paragraph 3 still has not been introduced (whoever unlawfully has in their possession a substance or preparation which has been declared a narcotic).[71] The corresponding EU Framework Decision also does not stipulate obligation or recommendation to criminalize possession of narcotic drugs for one's own use.[72] However, prescribing some new qualifying circumstances is necessary.[73]

The group of criminal offences against economy should be reassessed in detail, and it should be continued in the direction of changes commenced in 2015, and harmonize them with the Convention on the Protection of the EU's Financial Interests.[74]

When it comes to combating corruption, the need for introducing criminalization of *illegal accumulation of wealth* in the Serbian criminal legislation should be considered.

Finally, for the purpose of establishing a certain balance, the question of decriminalization and narrowing of criminal zone where possible, always arises, because the criminal law expansionism has multiple adverse consequences.[75]

71 When it comes to this form, possession had to be for personal use, because otherwise it would represent some form of criminal offence under Article 246, Paragraph 1. In addition, *actus reus* of unlawful possession of narcotic drugs is consumed by *actus reus* of the criminal offence unlawful circulation of narcotic drugs under Article 246, Paragraph 1, since the circulation cannot be carried out without possessing narcotic drugs at the same time, so that defendant cannot be found guilty for both Paragraph 3 and 1 od Article 246. (Judgement of the Supreme Court of Serbia,No. 843/06 of 13 May 2006).

72 *COUNCIL FRAMEWORK DECISION 2004/757/JHA* of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking.

73 When it comes to large amounts of narcotic drugs, or drugs that are very harmful to health, or when there has been deterioration in the health status of several persons.

74 The Convention was passed on 27 July 1995, and entered into force on 17 October 2002.

75 See: З. Стојановић, *Кривично право у доба кризе*, Бранич, No. 1-2/2011, pp. 27–51.

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РАЗВОЈ ЕВРОПСКОГ КРИВИЧНОГ ПРАВА И ЊЕГОВ УТИЦАЈ НА НАЦИОНАЛНА ЗАКОНОДАВСТВА

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Апстракт: Аутор се у раду бави могућностима унификације у области кривичног материјалног права ЕУ, примећујући да је ступањем на снагу Уговора из Лисабона почела нова етапа у развоју кривичног права ЕУ што се одражава и на национална кривична законодавства. Њиме је донекле измењен правни и институционални оквир у којем делује ЕУ. Аутор већ на самом почетку изражава скепсу када је у питању хармонизација кривичног материјалног права ЕУ, додуше признајући да је то европско усаглашавање могуће лакше извести, бар на нивоу прихватања основних принципа, него на нивоу целе међународне заједнице. Стога се аутор у даљем тексту бави основним принципима и поставкама кривичног права тј. принципом nullum crimen nulla poena sine lege и његовим дејством на европском плану, али и у погледу непосредне примене међународних уговора. Аутор инсистира на супсидијарном карактеру кривичног права истичући да је оно ultima ratio и указује у којој мери је та особина кривичног права угрожена у европском контексту а посебно имајући у виду одредбе члана 82. и 83. Уговора о функционисању ЕУ. На крају, констатовано је да европско кривично право пати од парцијализације и решавања тренутно актуелних проблема стога је оно још далеко од тврдње да се ради о научно утемељеној и уређеној доктрини.

Кључне речи: Кривични законик, европско кривично право, европске интеграције, ultima ratio, начело законитости, уговор из Лисабона, ЕУ.