Ultima Ratio in European Criminal Law

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Abstract

The ultima ratio principle is one of the most well known traditional principles of criminal law. The principle has emphasized the repressive nature of the criminal justice system and positioned it as the last resort of the legislator. The principle has been developed mainly in legal scholarship with a national undertone, while criminal law has traditionally been seen as a pronounced national branch of law. However, criminal law has recently been strongly internationalized and Europeanized. This development necessarily needs to affect the principles that legitimate the use of the criminal justice system. There is a need for developing principles that could legitimate criminal law (cooperation) that surpasses the national level. The article, thus, examines whether there is a role for the ultima ratio principle in European criminal law. The main focus is on EU criminal law. The article suggests that there are several signs of recognizing the ultima ratio principle in EU criminal law. The principle is recognizable in the principle of subsidiarity, within which ultima ratio may have a federal dimension. Most of all, the principle of proportionality shares several similarities with the ultima ratio principle. If these dimensions were fully examined and utilized, there is a possibility that legitimizing principles for EU criminal law could be formulated at considerable depth.

I. Introduction

The notion of '*ultima ratio*' in criminal law is somewhat troublsome. This being so, it surely manifests the classical position on the repressive nature of the criminal justice system that was adopted during the Age of Enlightenment and the need to impose restraints on the use of criminal law. The practical significance and influence of the principle has, however, often been questioned since criminal law is often used without properly considering alternative legislative solutions. Its character as a legal principle has been questioned in scholarly literature, which may diminish its role or at least affect the way in which it could operate. Despite this, the Europeanization and internationalization of criminal law may considerably affect the role of a principle that is traditionally associated with the national criminal justice systems.

Criminal law is repressive by nature and there is a need for some principles that impose limits on criminal legislation. The basic foundation of these limits is the very nature of criminal law, which allows the state to use imprisonment, the most intrusive means of enforcement.[1] In addition, the allocation of criminal responsibility to an individual and the imputation of criminal liability by a court decision are

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[1] See, e. g., *Nils Jareborg*, Criminalization as Last Resort (*Ultima Ratio*), 2 Ohio State Journal of Criminal Law (2004), at p. 526 (521—534).

not irrelevant when the intrusive and repressive nature of criminal justice system is being reasoned. The labelling of the offence is also of crucial importance, inter alia, with regard to the offender, since it may affect his future actions, in fact or symbolically.[2] These crudely simplified notions of the nature of the criminal justice system suffice here for argument as to why criminal law deserves special justification.[3]

At a national level, there has been quite a long history of developing limiting criteria for criminal law. Perhaps the most widely known attempt is the German *Rechtsgut* theory (the theory of legally protected interest).[4] There is a large body of German literature on the ultima ratio principle as well.[5] In the Nordic countries, there has been considerable interest in criminalization and limiting criteria for criminalization in recent times. Traditionally, the Nordic literature on this issue has relied heavily on the German literature, but contemporary literature has adopted influences from a wider range of sources, among which limitations derived from fundamental rights and constitutional aspects play a crucial role.[6] The Nordic literature, especially the Finnish, has, however, a relatively long history in formulating limiting criteria for criminalization and in forming "a theory of criminalization"[7]. The topic of criminalization and the need to limit the scope of the punishable acts have been widely accepted today, whereas previously the subject has been said to have been "under-analysed".[8] Today, it is almost commonplace in criminal law literature to talk about 'overcriminalization' and by the same token, to admit that states have perhaps gone too far with their willingness to use the criminal justice system.[9] Beside overcriminalization, the problematic question of overpunishment

[2] See, e. g., *James Chalmers/Fiona Leverick*, Fair Labelling in Criminal Law, 71 Modern Law Journal (2008), pp. 223—239 (217—246).

[3] There is, of course, a huge amount of literature on justification of criminal justice system that is, however, mainly focused on the justification of punishment. See, for instance, *HLA Hart*, Punishment and Responsibility: Essays in the Philosophy of Law (Oxford University Press 1968), in which Hart elaborates the general justifying aim of the criminal justice system as well as the justification of punishment.

[4] The German *Rechtsgut* theory is substantial in amount and has a long history, dating back to the early 1800s. For an overview of the theory, see *Claus Roxin*, Strafrecht. Allgemeiner Teil. Band I. Grundlagen. Der Aufbau der Verbrechenslehre (4. Aufl. Verlag C. H. Beck, München 2006) pp. 14—15 and *Claus Roxin*, Rechtsgüterschutz als Aufgabe des Strafrechts?, in Roland Hefendehl (Hrsg.), Empirische und dogmatische Fundamente, kriminalpolitischer Impetus: Symposium für Bernd Schünemann zum 60. Geburtstag (Carl Heymanns Verlag, Köln – Berlin – München 2005), at p. 140 (135—150). For an overview from an American point of view, see *Markus Dirk Dubber*, Theories of Crime and Punishment in German Criminal Law, 53 American Journal of Comparative Law (2006), pp. 679. The theory has, however, also been criticized. See, e. g., *Jareborg*, supra note 1, at p. 524—525, who states that the history of Rechtsgutslehre "seem[s] to have resulted in more confusion than clarity".

[5] For a book summarizing the literature, see *Young-Cheol Yoon*, Strafrecht als ultima ratio und Bestrafung von Unternehmen (Peter Lang, Frankfurt am Main 2001).

[6] *Claes Lernestedt*, Kriminalisering: Problem och principer (Uppsala 2003) and *Sakari Melander*, Kriminalisointiteoria: Rangaistavaksi säätämisen oikeudelliset rajoitukset (Helsinki 2008).

[7] Generally see *Kimmo Nuotio*, Theories of Criminalization and the Limits of Criminal Law: A Legal Cultural Approach, in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo, Victor Tadros (Eds.), The Boundaries of the Criminal Law (Oxford University Press 2010), pp. 257—258 (238—261).

[8] *Nicola Lacey*, Contingency and Criminalisation, in Ian Loveland (ed.), Frontiers of Criminality (Sweet & Maxwell, London 1995), pp. 1—27.

[9] *Douglas Husak*, Overcriminalization (Oxford University Press 2008). See also *Andrew Ashworth*, Is the Criminal Law a Lost Cause?, 116 Law Quarterly Review (2000), pp. 225—256 and *William J. Stuntz*, The Pathological Politics of Criminal Law, 100 Michigan Law Review (2001), pp. 505—600.

has been raised.[10] Common to all this theorizing is the shared notion of the need to limit the scope of criminal legislation and thus to improve its quality. At the same time, there is inevitably an aspiration to make the criminal justice system more just by limiting its scope. The concept of 'overcriminalization' and 'overpunishment' as such, serve as justification for the need of limiting principles or criteria for criminal law.

The aim of this article is to examine the role and position of the ultima ratio principle in European criminal law. The scope of European criminal law is wider, encompassing Council of Europe influences on criminal law as well (ECHR, ECtHR and CoE Conventions etc.). The main focus of this article is, however, on EU criminal law. Section II of the article will briefly summarize the notions relating to the ultima ratio principle in EU criminal law. In section III, the main content, nature and various dimensions of the principle are discussed. Section IV discusses subsidiarity, one dimension that ultima ratio may have, especially in EU criminal law, and more explicitly the exercise of powers between the EU and the Member States. Section V examines another possible dimension, proportionality. In section VI, some conclusions are drawn. Finally, one conceptual clarification needs to be made. In the following text, the expressions "ultima ratio principle" and "last resort principle" will be used synonymously.

II. Traces of ultima ratio in EU criminal law

In European criminal law there is no consensus or common understanding on the need to limit the scope of criminal law and criminal legislation. One could say that the situation is quite the contrary—the Europeanization of criminal law has so far rather extended and deepened the scope of substantive criminal law and striven toward more effective procedural cooperation between the authorities of the Member States. One might suspect that effectiveness has been emphasized at the expense of coherence and adequate legal safeguards and human rights protection.[11] While there has also been previous interest in the formulation of certain principles of EU criminal law in the EU,[12] the question of criminalization or, as is perhaps more properly defined at EU level, justifying the harmonization of substantive criminal law has only recently gained more attention with regard to criminal law cooperation within the EU. Principles and boundaries imposing limits and restrictions on the use of criminal law have not been widely developed within the

[10] *Carol S Streiker*, Criminalization & the Criminal Process, in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo, and Victor Tadros (eds.), The Boundaries of the Criminal Law (Oxford University Press 2010), pp. 27—58.

[11] See, e.g., *Sionaidh Douglas-Scott*, A Tale of Two Courts: Luxemburg, Strasbourg and the Growing European Human Rights *Acquis*, 43 Common Market Law Review (2006), at p. 664 (629—665).

[12] Most importantly, see COM(2005) 583 final (Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 Commission v Council)), where the Commission seeks to identify certain principles derived from the EC law in order to secure the legitimate scope of the (restricted) criminal law competence of the former I Pillar.

regime of EU criminal law or European criminal law—if adopting a broader definition.

We have recently, however, witnessed a remarkable turn, first emerging in criminal law literature, that has been demanding a more coherent and principled approach toward European criminal law. The "*Manifesto on European Criminal Policy*" has been published[13] under the "European Criminal Policy Initiative" project.[14] The Manifesto has also had practical influence. It was, for example, mentioned in the recently published Commission communication on EU criminal policy,[15] a document that is of great importance in the process of trying to form the legitimate scope and structure of EU criminal law. It is, however, worth recognising that scholarly literature in EU criminal law has not welcomed the Manifesto with unanimous joy.[16]

Among the possible principles of criminalization in EU criminal law, the ultima ratio principle may have a special position. This is because many references to this principle may be located in a variety of official Union documents. It could, therefore, be stated at the outset that the ultima ratio principle has a special position in EU criminal law, although—as indicated more thoroughly below—the substance of the principle is not clear. One of the most influential considerations in this regard was issued by AG Mazák in the ship-source pollution case C-440/05, *Commission v. Council*. In considering the position of criminal punishment within EU law and the purposes and objectives of criminal law and criminal punishment, AG Mazák notes that criminal law is the "*ultimum remedium* of the law".[17] In other words, Mazák recognises the special character of criminal law within the legislative means available to the legislator. The view of AG Mazák is intimately related to the position that criminal punishment has with regard to national identity—a notion that is traditionally connected to criminal law and its close connection to national sovereignty. AG Mazák states that the objectives of criminal law may vary in relation to the community in question, deterrence not being the sole objective.[18] It would seem then that the notion of ultima ratio embraced by Mazák relates to the notion that the deterrent effect of criminal punishment is best evaluated in the Member States, although the view on approximation of criminal offences with an instrument of the former I Pillar adopted in C-176/03, *Commission v. Council*, was not challenged.[19] The CJEU adopted the view elaborated in Mazák's opinion, but made no reference to the ultima ratio principle.

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[13] See http://www.crimpol.eu/, last visited 2/1/12, and "A Manifesto on European Criminal Policy", *4 Zeitschrift für Internationale Strafrechtsdogmatik* (12/2009) (http://www.zis-online.com), pp. 707—716.

[14] See http://www.crimpol.eu/, last visited 2/1/12.

[15] COM(2011) 573 final (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS. Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law), at p. 3.

[16] *Andre Klip*, Editorial: European Criminal Policy, 20 European Journal of Crime, Criminal Law and Criminal Justice (2012), at p. 11 (3—12).

[17] Opinion of AG Mazák, 28. 7. 2007, in C-440/05, *Commission v. Council*, para 71.

[18] *Ibid*.

[19] *Ibid*., paras 106—108.

The ultima ratio principle also had a position in the initial strivings toward the Constitutional Treaty for the European Union. Working Group X "Freedom, Security and Justice", the task of which was to draft the new Treaty provisions on the area of freedom, security and justice, made reference to ultima ratio principle in sketching the foundations of ancillary competence currently prescribed in Article 83(2) TFEU. The Working Group was of the opinion that, with regard to crimes against the union's interests, approximation of criminal legislation would only have been possible if other potential means were insufficient.[20] This view is an obvious example of the substance of the ultima ratio principle,[21] which explicitly favours other means than criminal law and thus concedes the character of the criminal justice system as the most repressive means vested in the powers of a legislator.

The ultima ratio principle is also mentioned in several other EU documents that are more closely related to the formation of the EU criminal justice policy. The Stockholm Programme, adopted immediately after the Lisbon Treaty became effective, stresses the role of the protection of fundamental rights in creating the area of Freedom, Security and Justice, while at the same time security seems to be the main concern of the Programme, e. g., when the need for the internal security strategy for Union is highlighted.[22] The Stockholm Programme clearly advocates mutual recognition as a primary form of criminal law cooperation, and approximation of substantive criminal law is seen to serve the objectives of mutual recognition.[23] With explicit regard to the approximation of substantive criminal law, the programme defines some essential criteria that have an overt connection to principles of criminalization. The Programme 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."[24] The reference to the last resort principle clearly regards criminal law as ultima ratio while the notion of essentiality in order for interests to be protected could be linked to the principle of protected interest (*Rechtsgut*).

It is also worth noting that the Council has, in its 2009 adopted model provisions guiding the Council's criminal law deliberations, adopted the same formulation on the introduction of criminal law provisions, which also stresses the use of the

[20] CONV 426/02 WG X, at p. 10.

[21] The similar view is adopted by *Kimmo Nuotio*, On the Significance of Criminal Justice for a Europe 'United in Diversity', in Kimmo Nuotio (ed.), Europe in Search of 'Meaning and Purpose' (Helsinki 2004), p. 187—188 (171—210).

[22] On the emphasis on fundamental rights, see the Stockholm Programme p. 5 which states that "the area of freedom, security and justice must, above all, be a single area in which fundamental rights and freedoms are protected" (The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4. 5. 2010, pp. 1—38). However, the Programme heavily stresses the role of security by, for example, demanding a wide internal security strategy for the Union (at p. 5 and p. 17 pp.).

[23] The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4. 5. 2010, at p. 14.

[24] The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 4. 5. 2010, at p. 15.

criminal law as a last resort.[25] What, however, slightly diminishes the role of these model provisions is that the Commission did not agree with the Council Conclusions adopted. The Commission took the view in its statement that the model provisions described in the Council Conclusions are premature and, as such, will restrict the interpretation of Article 83 TFEU. The Commission therefore declared that the model provisions are without prejudice to its right of initiative described in TFEU.[26]

The Commission has, however, very recently published a crucial document relating to approximation of criminal law in the European Union. The aim of the Commission is to present a framework for further development of EU criminal justice policy. Whereas crime is still considered to be a major problem in the Union and a more effective fight against crime is considered to be in the interest of EU citizens, the communication still contains important aspects relating to potential limiting criteria for EU criminal law.[27] The Commission Communication, in terms of possible principles of criminalization, pretty much resembles the principles sketched out in the Stockholm Programme and the model provisions adopted by the Council. The last resort principle is actually mentioned twice[28] in the Commission Communication. First, it is stated that while criminal law consists of rules that may have a serious impact on people, and this, together with the fact that criminal law must always remain a last resort, requires that new criminal law legislation should always respect fundamental rights.[29] This view seems to imply that there is something in the very nature of criminal law that produces the principle of last resort. Secondly, the Commission regards the last resort principle as being related to the principle of proportionality, albeit this view is also connected to the nature of criminal law just described. The Commission however states that the fact that criminal law must always remain a measure of last resort is reflected in the general principle of proportionality. This means that the use of criminal law is essential in achieving the goal of effective implementation of a Union policy.[30] This second understanding of the principle is, of course, essentially related to the ancillary competence regulated by Article 83(2) TFEU. In these situations, the union legislator must, as stated in the communication, always consider whether the implementation of the union policy is effective enough by using other means which are not as coercive as criminal law, such as administrative or civil sanctions.[31] The second understanding of the last resort principle, although related in the communication to the first understanding, seems to be almost solely concerned with effectiveness. Criminal law is seen merely as a means to an end, the view of

[25] Council Document 16542/2/09 REV 2 JAI 868 DROIPEN 160, at p. 4.
[26] Council Document 16798/09 JAI 886 DROIPEN 163, at p. 3.
[27] COM(2011) 573 final, at p. 2.
[28] In fact, there are four mentions of the principle in the communication but it appears in two different contexts and thus is given two different meanings.
[29] COM(2011) 573 final, at p. 6.
[30] COM(2011) 573 final, at p. 7.
[31] COM(2011) 573 final, at p. 7.

criminal law which is also apparent in the wording of Article 83(2) TFEU. This is quite a narrow view of criminal law that neglects some of its essential value-laden characteristics.

As the brief overview of the status of the ultima ratio principle in the official documents of the Union shows, it clearly has a position within EU criminal law. Sometimes, the principle is referred to as a value-laden principle describing the special position of criminal law within the variety of different legal domains and within the legislative alternatives that the legislator is theoretically free to use. Sometimes, the principle is used in a manner that manifests merely an instrumental view of the use of criminal law, which seems to undermine the character of the principle and to grant it a merely technical role. The ultima ratio principle, however, presupposes something crucial from the nature of criminal law and criminal justice system. This important aspect is neglected if the principle is granted only an instrumental position.

III. The dimensions of ultima ratio

The ultima ratio principle has its origins in the classical criminal law thinking of the 1800s—indeed, it may have an even longer history. In the early 1900s, *Karl Binding* introduced the notion of the fragmentary nature of criminal law which, he claimed, was necessary in order to limit the scope of punishable acts. Binding stated that, understanding the fragmentary character of criminal law was absolutely necessary in order to understand the systematic nature of the criminal law and its scope.[32]

The German understanding of the principle has a long history, but the exact character of the principle is not entirely clear. Whether the principle has a legal status or a merely political or declarative one has been debated. These views are perhaps mostly linked to the notion that the legal discussion on the principle is not as clear as it should be, or that the (legislative) practice shows that the principle is not considered to be binding.[33] There are, however, compelling reasons to claim that the principle is a legal one in German criminal law. The most convincing argument comes from the German Constitutional Court and its case-law. The German Constitutional Court (Bundesverfassungsgericht, BVerfG) has stated in its practice that criminal law is the ultima ratio of the legislator.[34] Criminal law

[32] *Karl Binding*, Lehrbuch des Gemeinen Deutschen Strafrechts. Besonderer Teil. Erster Band (2. Aufl. Leipzig – Verlag von Wilhelm Engelmann 1902), at p. 20: "Zum Verständnis dieses ganzen Baues [systematischer Ausbau unserer Strafgesetzbücher] aber und zum Verständnis derer, die darin wohnen sollen, ist eine Beobachtung vom größten Werte: die des fragmentarischen Characters aller Strafgesetze."

[33] *Cornelius Prittwitz*, Das deutsche Strafrecht: Fragmentarisch? Subsidiär? Ultima Ratio?, in: Vom unmöglichen Zustand des Strafrechts (Peter Lang, Frankfurt am Main 1995), at p. 387 (387—405).

[34] BVerfGE 39, p. 1 (at p. 47): "Die Strafnorm stellt gewissermaβen die "ultima ratio" im Instrumentarium des Gesetzbegers dar". See also BVerfGE 88, p. 203 (pp. 257–258). For a detailed analysis see *Young-Cheol Yoon*, Strafrecht als ultima ratio und Bestrafung von Unternehmen (Peter Lang, Frankfurt am Main 2001), pp. 44—58. See also *Panu Minkkinen*, 'If Taken in Earnest': Criminal Law Doctrine and the Last Resort, 45 Howard Journal of Criminal Justice (2006), at p. 524—527 (521—536).

literature on the ultima ratio principle also draws its argument from constitutional law relatively often.[35]

Without going into details, it could be stated that the ultima ratio principle is regarded as a legal principle in this article. There is a strong connection between the ultima ratio principle and (the system of) fundamental rights. When fundamental rights are restricted, a general proportionality requirement needs to be respected. Criminal legislation, as such, is connected to fundamental rights in any case, at least in terms of criminal punishment, where imprisonment relates to the right to liberty and a fine relates to the protection of property.[36] Fundamental rights should be infringed by the least intrusive means possible. Given the special character of criminal law as the most intrusive means available to the legislator, it should be regarded as a last resort in this proportionality test.

Traditionally, the essence of the ultima ratio principle has been connected to the relation between criminal law and other less intrusive legislative means. Even if the principle in this article is considered to be a legal principle, given its connection to the system of fundamental rights, this inevitably has implications for the moral dimension of the principle by assuming something of the moral character of criminal law, its ability and eagerness to deliver harm, and its evil nature[37]. However, this evil of the criminal justice system could also be disguised in legal form through recourse to fundamental rights. The criminal justice system allows the state to infringe the fundamental rights of morally culpable agents in a manner the intensity of which is unmatched by any other legal means. This is the core of the traditional understanding of the ultima ratio principle, which situates criminal law in relation to other legislative means and other legal domains. This dimension of ultima ratio could thus be described as the *outer dimension of ultima ratio*.

Given this content, understood to contain an outer dimension that proportions the criminal justice system to other means, the ultima ratio principle turns into a legal principle with a clearly moral tone that ultimately demands that criminal law be the ultima ratio of the legislator. The principle thus, when related to the system of fundamental rights, is one with a critical attitude toward criminal law.[38] The outer dimension of the ultima ratio principle also seeks the coherence of the legal system. This is evident in its striving to proportionalise the intrusive means of the legislator in relation to each other with a partly moral

[35] E.g., *Jürgen Baumann* (Fortgeführt von Ulrich Weber – Wolfgang Mitsch), *Strafrecht Allgemeiner Teil. Lehrbuch* (10. neubearbeitete Auflage. Verlag Ernst und Werner Gieseking, Bielefeld 1995), at p. 14 and *Eberhard Schmidhäuser*, Strafrecht. Allgemeiner Teil. Studienbuch (J.C. B. Mohr (Paul Siebeck), Tübingen 1982), at p. 33.

[36] Report of the Constitutional Committee of the Finnish Parliament 23/1997, pp. 2—3. See also COM(2011) 573 final, at p. 7, where it is stated that criminal punishments may lead to deprivation of liberty, which requires that the legislator needs to pay special attention to criminal law.

[37] This notion of 'evilness' is inspired by *Ari Hirvonen/ Janne Porttikivi*, Law and Evil: Philosophy, Politics, Psychoanalysis (Routledge 2009).

[38] See also *Panu Minkkinen*, If Taken in Earnest: Criminal Law Doctrine and the Last Resort., 45 Howard Journal of Criminal Justice (2006), at p. 533 (521—536): "If the last resort principle is taken in earnest, all criminal law doctrine would, in a manner of speaking, be critical criminal law."

assumption of the most intrusive nature of criminal justice system. Understood in this light, the ultima ratio principle thus maintains the coherence of a legal system.

The ultima ratio principle could also be understood to contain an *inner dimension* which does not make the criminal justice system proportionate to other legislative means but operates to guarantee proportionality within criminal law or the criminal justice system. The purpose is to guarantee the inner coherence of the criminal justice system.[39] The penalties provided for offences in Penal Codes should reflect the abstract blameworthiness of the offence criminalized. Similarly, the sentence imposed on the offender should reflect the blameworthiness of the criminal act committed. This proportionality, in general, is thus connected to the local coherence of the criminal justice system. In terms of the ultima ratio principle, the inner dimension manifested by proportionality means that the ultima ratio principle could, for instance, contain a general demand for the reduction of the general level of criminal sanctions and punishable behaviour. If the objective pursued is to be achieved by criminalizing less, criminalization should not be too expansive. If the objective pursued could be achieved by a penalty scale containing only the power to fine, this penalty scale should be adopted, and so on. Similarly, the inner dimension could contain a demand that could be called a principle of caution, which would mean, for instance, that an attempt of a crime should not be criminalized unless this were absolutely necessary with regard to the objective pursued. The inner dimension of ultima ratio generally imposes demands on the legislator. The legislator always has to choose a less repressive solution, whereas other solutions need to be carefully reasoned and argued.

IV. Ultima ratio in European criminal law: Exercise of powers under subsidiarity

The European Union as constructed and understood today could not exist without the idea of the division of competences and the principle of subsidiarity.[40] *Robert Schütze's* recent contribution states that the principle of subsidiarity is a safeguard of European federalism.[41] Subsidiarity as a principle with a *federal dimension* refers to a situation in which subsidiarity operates to defend smaller public communities against larger ones, whereas its *liberal dimension* defends private freedom against public intervention.[42] Precisely the federal dimension of the principle is important with regard to the exercise of powers within the

[39] *Marcel Alexander Niggli*, Ultima Ratio? Über Rechtsgüter und das Verhältnis von Straf- und Zivilrecht bezüglich der sogenannt «subsidiären oder sekundären Natur» des Strafrechts, Schweizerische Zeitschrift für Strafrecht 1993, pp. 238—239 (236—263).

[40] *N. W. Barber*, The Limited Modesty of Subsidiarity, 11 European Law Journal (2005), pp. 308—325, who suggests that subsidiarity is a central part of the constitutional identity of the EU and is thus crucial to an understanding of the European project.

[41] *Robert Schütze*, From Dual to Cooperative Federalism (Oxford University Press 2009), at p. 242.

[42] *Ibid*., at p. 246.

competences in the European Union and thus with regard to legitimizing the very existence of the European Union as we know it. The European Union is facing a constant struggle between securing the federalist European project striving toward unity and an ever-deepening integration on the one hand, and maintaining decision-making close to its citizens on the other, which in the best case could legitimize the federalist or confederalist action of the Union in some fields. The principle of subsidiarity is the key to securing this federal dimension of the EU, and may thus operate as a super-principle of the Union. The Union is therefore dependent on the Member States in two respects. First, the principle of conferral limits the action of the Union to competences conferred on it by the Member States in the Treaties. Secondly, the use of these competences in areas of shared competence is controlled by the principle of subsidiarity, whose guardians are the Member States, and most obviously the Parliaments of the Member States.

The principle of subsidiarity, as is well-known of course, has its legal basis in Article 5(3) TEU, which states that "in areas which do not fall within its exclusive competence, the Union shall act 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 rather, by reason of the scale or effects of the proposed action, can be better achieved at Union level".[43]

The principle of subsidiarity has had a relatively minor role within the criminal law cooperation of the EU. It has even been claimed that the principle has (or had) virtually no legal relevance in (the former III Pillar) criminal law cooperation, its significance being purely political.[44] As illustrated above, the principle of subsidiarity is, however, often mentioned in the documents of the European Union relating to criminal law and often also directly linked to the ultima ratio principle. The last resort principle was explicitly mentioned in the Stockholm Programme, while the Commission Communication on implementing the Stockholm Programme does not mention the last resort principle, stressing instead the importance of respecting subsidiarity. The Commission states that criminal law is a novel area of EU action in which subsidiarity, inter alia, should guide the approximation of legislation.[45]

More importantly, in its recent contribution to forming a coherent criminal justice policy for the EU, the Commission has strongly stressed the role of the principle of subsidiarity as perhaps the first principle to be taken into account when considering EU action in the approximation of substantive criminal law. When

[43] On the history of the principle, see *Schütze*, supra note 41, pp. 242—243.

[44] *Helmut Satzger,* Internationales und Europäisches Strafrecht (2. Aufl. Nomos, Baden-Baden 2008), at p. 115. In the newest edition of his book, Satzger has, however, adopted a different kind of position toward the general principles of EU law. See *Helmut Satzger*, Internationales und Europäisches Strafrecht (5. Aufl., Nomos, Baden–Baden 2011), at p. 101.

[45] COM(2010) 171 final (COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: Delivering an area of freedom, security and justice for Europe's citizens. Action Plan Implementing the Stockholm Programme), at p. 5.

considering the fundamental question of what principles should guide EU criminal legislation, subsidiarity is the first discussed. The Commission states that the general requirement on subsidiarity should be given special attention with regard to criminal law. This means, according to the Commission, that the EU can only legislate if the goal pursued cannot be achieved more effectively through the action of the Member States, the scale or effects of the proposed measure indicating that the objectives pursued could be better achieved by the Union.[46]

It is not entirely clear what the notion of the Commission means. Of course it is a repetition of the traditional formation of the principle of subsidiarity. What remains open is the precise meaning of that reiteration in the EU criminal law context. The original idea of subsidiarity is to safeguard an adequate legislative space for the Member States by restricting EU action. The relevant rule legitimizing EU action here is the "only if" threshold. This threshold is inevitably, as Robert Schütze has illustrated, related to the "how" question: can the objective pursued be better achieved by the Union?[47] In any case, subsidiarity when understood as illustrated has a federal dimension in EU criminal law as well. It is a question of federal proportionality.[48]

In connection with the theme of this article, the ultima ratio principle could also be said to have a federalist dimension in EU criminal law. This dimension links the principle explicitly to subsidiarity. Subsidiarity, in turn, is explicitly related to the division of the exercise of powers between the Member States and the Union. In terms of criminal law cooperation in the EU, this federal dimension of ultima ratio mainly makes demands on the EU legislator. If there is a need to criminalize or harmonize the substantive criminal law of the Member States, the EU should not adopt measures if the objectives pursued could be more effectively achieved through the acts of the Member States. And if EU action is considered to be more effective with regard to the objective pursued, the main focus should be on the "only if" and "how" questions.

If action of the Member States is considered more effective, could the principle of subsidiarity mean that the Member States are free to choose whether they carry out any legislative action, since they have the power to legislate in the matter? This could mean that in such a situation Member States are not obliged to use the means of the criminal justice system, i. e., to criminalize. The situation is, however, not so straightforward. It must be kept in mind that basically the EU would be competent to act in the field but for some reason or other, it has been considered that the Member States could achieve the objectives of the pursued action more effectively. The Member States are therefore obliged to observe the principle of sincere cooperation (Article 4(3) TEU).[49] This may mean that the Member States in any

[46] COM(2011) 573 final, at p. 6.

[47] *Schütze*, supra note 41, at p. 263. Schütze claims that subsidiarity understood this way is, in fact, a matter of federal proportionality.

[48] *Ibid*.

[49] In this connection, of course, the principle of assimilation formulated in the *Greek Maize* case (C-68/88 *Commission v. Greece*), must also be remembered.

case are obliged to activate their criminal justice systems although the principle of subsidiarity—the federalist dimension of the ultima ratio principle—has been activated. What, however, is perhaps most striking is that the result of this dimension of ultima ratio is probably the divergence in Member State action. Federal proportionality in the criminal law connection thus seeks to secure a close connection between criminal law and national sovereignty, while it may also simultaneously be pushing toward disintegration.

The principle of subsidiarity, the federal dimension of ultima ratio, is incorporated in the legal basis of the approximation of substantive criminal law. Article 83 (1) TFEU lists the so-called "Euro crimes"[50] and sets out certain general criteria that need to be fulfilled in order to get into the wanted and notorious group of "Euro crimes". First of all, the Member States have agreed that the Union shall have the power to establish minimum rules on the definition of offences and sanctions relative to certain kinds of offences. This implies that the principle of subsidiarity had to some extent already been taken into account when the current Treaties were drafted. Article 83(1) TFEU contains general criteria on criminality with regard to which the competence of the Union relative to the principle of subsidiarity is presumed in the basic treaties.[51] These criteria are common to all "Euro crimes" listed in the article. Firstly, these crimes need to have a cross-border dimension, either resulting from the nature or the impact of the offence. Secondly, if the offence does not share the requirement on the cross-border dimension, there should be a special need to combat the offence in question on a common basis.

With regard to the principle of subsidiarity, the cross-border dimension of the offence may seem to be more easily reasoned. It may be tempting to think that cross-border criminality is generally something more effectively prevented by the criminal law action of the European Union than by divergent legislative action by Member States. One often repeated justification of EU criminal law when cross-border criminality is at stake is that there should be no safe havens for criminals and criminal organizations in the European Union. It is assumed that if there are loopholes in the European-wide criminalization of a certain act or omission or if the criminal penalty provided for such an act is considerably milder in some Member States, criminal organizations would find their way to those States, which would be detrimental to whole Union.[52]

This argument is not, however, convincing. Firstly, it assumes that offenders or at least criminal organizations possess extensive information and knowledge on comparative criminal law.[53] Even if they might sometimes possess information on the

[50] The term "Euro crimes" has been used, for example, by the Commission in COM(2011) 573 final, at p. 5.

[51] Of course it must be remembered that the Area of Freedom, Security and Justice is an area of shared competence (Article 4(2) TFEU). This relates to the fact that Article 83 TFEU refers to establishing common minimum rules—that is, more extensive national rules on a similar topic are possible— which means that the decision of the Union to legislate on the matters mentioned in Article 83 TFEU does not completely set the legislative competence of the Member States aside.

[52] See, for instance, the argument adopted by Commission in COM(2011) 573 final, at p. 5.

[53] See also *Klip*, supra note 16, at p. 4.

criminal codes and criminal justice systems of the Member States, the assumption seems not to be on solid ground. If criminal law professors and legal officials do not usually possess detailed information on the criminal justice systems of all 27 Member States, would it be realistic to assume that criminal organizations do? Secondly, if criminal organizations and offenders had such information, the Member States with the mildest criminal justice systems should be the primary haven for criminal organizations. Traditionally, for example, the Nordic countries have shared the vision of humane criminal justice policy and at least the basic assumption could be that the criminal justice system in the Nordic countries has been marked by more lenient sanctions than the rest of Europe. The Nordic countries should, therefore, be a paradise for criminal organizations. However, organized crime has not traditionally been a big problem in the Nordic countries. Although the effective function of the police, prosecutors and the whole criminal justice system affecting the definitiveness of a criminal sanction may have a role here, it still seems to be false to assume that offenders would actively seek safe havens inside the Union. For these briefly elaborated reasons, it is not at all certain that there is a compelling reason to fight cross-border crime by taking action at the EU level. At least there should be some evidence on the cross-border nature of criminality in question and reasons in favour of EU action in that particular situation.

Another category justifying EU action in the approximation of substantive criminal law, apart from the cross-border nature of the crime, is the special need to combat a form of criminality or a particular offence on a common basis. The special need may relate to the heinous character of some particularly serious crime.[54] This category of "Euro crimes" is actually more easily justified than cross-border crimes. It is quite conceivable that some crimes are so grave that European-wide grounds for criminalization are needed. This could be justified by a comparison with international criminal law. International criminal law has traditionally operated—alongside *jus cogens* crimes—through criminal law conventions. It is possible that there is some extra dimension in these crimes that justifies international action and this extra dimension is or should be related to the particularly serious character of the crime in question—whether terrorism, human trafficking, or organized crime.[55] Similarly, it could be assumed that there could be a European-wide special need to prevent a particular kind of criminality that is directly related to the character of these offences.[56] Another question of course is which crimes actually merit the classification of "particularly serious offence".

Article 83(1) TFEU contains an exhaustive list[57] of crimes that may be subject to approximation of substantive criminal law. The list of these so-called Euro

[54] Generally, *John Stanton-Ife*, Horrific Crime, in RA Duff et al. (eds.), The Boundaries of the Criminal Law (Oxford University Press 2010), pp. 138—162.

[55] On the nature of certain crimes in international criminal law, see *Gerhard Werle*, Völkerstrafrecht (Mohr Siebeck 2003), pp. 69—71.

[56] A very brief argument of this kind is provided in COM(2011) 573 final, at p. 5.

[57] This is a considerable improvement introduced by the Treaty of Lisbon. The previous "crime lists" were not exhaustive and thus the legal basis was not precise enough—nor with regard to the principle of subsidiarity either, although the requirement for unanimity eased concerns.

crimes includes particular categories such as terrorism, trafficking in human beings 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. The Commission has recently stated that these crimes "merit, by definition, an EU approach due to their particularly serious nature and their cross-border dimension".[58] This is true, but is the list of Euro crimes accurate enough with regard to the principle of subsidiarity? It must be remembered that the article only lists imprecise categories of criminality, not specifically and precisely defined offences. Is it, therefore, justified to assume that all offences under these categories merit an EU approach by definition? Illicit drug trafficking, for instance, covers a wide range of offences and it is not certain that all offences under this category are particularly serious or have a cross-border dimension. Organized crime is a very broad category under which a spectrum of various offences could be gathered, some of which may have a cross-border dimension and others not. Due to this, the principle of subsidiarity still has a role with relation to the Euro crimes listed in Article 83(1) TFEU. The requirements of the federal dimension of ultima ratio are not fulfilled unless subsidiarity is understood to have a crucial role within these categories of offences. In order to fulfil these requirements, the EU must limit its action to those offences under the category listed in Article 83(1) TFEU that genuinely have a cross-border dimension or that are genuinely so serious that there is a special need to prevent them by common action.

The ancillary competence prescribed in Article 83(2) TFEU is perhaps not such a tricky one relative to the federal dimension of subsidiarity as the competence in general. First of all, it needs to be noted that the scope of the ancillary competence is not precise. The competence is defined with reference to the essential nature of approximation of criminal law in ensuring the effective implementation of a particular Union policy. The substantive scope of the competence is, however, entirely open while the article only mentions "Union policy", which basically could mean all Union policies. The Commission has, therefore, listed areas in its recent communication on EU criminal policy that could define the substantive scope of the competence. These areas are the financial sector, the fight against fraud, protection of the euro against counterfeiting, road transport, data protection, customs rules, environmental protection, fisheries policy, and internal market policies.[59] If approximation of criminal law is realized in these areas, the federal dimension of ultima ratio that has its form in the principle of subsidiarity demands that the requirements of the principle be fulfilled similarly to cases of particularly serious crime. One needs to consider whether each offence under the category of, e. g. internal market policies, fulfils the requirements of the principle. One needs to ask whether and how adopting

[58] COM(2011) 573 final, at p. 5.
[59] COM(2011) 573 final, pp. 10—11.

common criminal law action of the EU more effectively prevents the offence in question.

V. Ultima ratio in European criminal law: Proportionality

Like the principle of subsidiarity, the principle of proportionality is a general principle of EU law related to the exercise of powers by the EU.[60] The legal basis of the principle of proportionality is currently found in Article 5(4) TEU, which declares that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties". The principle of proportionality in EU law has traditionally been seen to contain three subprinciples:

1) Whether the means adopted is appropriate to achieving the objectives legitimately pursued (suitability test);

2) Whether the means adopted is necessary in order to achieve the objectives legitimately pursued (necessity test); and

3) The means adopted should not impose an excessive burden on the individual (proportionality sensu stricto).[61]

These dimensions of the principle of proportionality resemble the ultima ratio principle. When proportionality is examined a little more thoroughly, even more similarities may be found. If the starting point of this article is to identify the ultima ratio principle in EU law, the principle of proportionality offers a unique chance to develop the ultima ratio in EU law. Whereas subsidiarity offered a view—the federal dimension—on ultima ratio that is not apparent at the national level, the principle of proportionality could be directly connected to the ultima ratio principle.

The suitability test requires the means adopted to be appropriate to achieve the objectives legitimately pursued. It thus refers to the relationship between the conceivable means and the objective(s) pursued.[62] The necessity test, in turn, is considered to contain considerations on whether the means chosen is necessary in achieving the goal pursued.[63] Related to the necessity test, the CJEU has in a number of cases also imposed requirements on the means that could be chosen in pursuing the objectives. The CJEU has stated that "when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[64] In

[60] On the history of the principle in the EU see, e. g., *Nicholas Emiliou*, The Principle of Proportionality in European Law: A Comparative Study (Kluwer Law International 1996), pp. 134—139.

[61] *Grainne de Búrca*, The Principle of Proportionality and its Application in EC Law, 13 Yearbook of European Law (1993), at p. 106 (105—150). The background of the tripartite structure is German administrative law in which similar tests have been adopted. See, e. g., *Francis G. Jacobs*, Recent Developments in the Principle of Proportionality in European Community Law, in: Evelyn Ellis (ed.), The Principle of Proportionality in the Laws of Europe (Hart Publishing 1999) at p. 1 (1—22).

[62] *Tor-Inge Harbo*, The Function of the Proportionality Principle in EU Law, 16 European Law Journal (2010), at p. 165 (158—185).

[63] *Harbo*, supra note 61, at p. 165 and *Emiliou*, supra note 59, at p. 134.

[64] C-331/88, *Fedesa*, [1990] ECR I-4023, para 13. See also C-296/93 and C-307/93 *Commission v. Ireland and France*, [1996] ECR I-00795, para 30 and C-254/94, C-255/94 and C-269/94 *Fattoria*, [1996] ECR I-04235, para 40.

addition, the *sensu stricto* proportionality test leaves room for overall considerations on the excessive nature of the means adopted from the viewpoint of the individual. The means chosen must not impose an excessive burden on the individual. For example, in the classic *Internationale Handelsgesellschaft* case the CJEU considered the means chosen (a system of deposits in import and export undertakings) to be appropriate and necessary[65] but there still was a need to examine whether the means constituted a burden that was a violation of fundamental rights.[66] The *sensu stricto* test has provoked criticism since it could be assumed to undermine the rationality of the principle of proportionality, especially because with reference to the sensu stricto test the case may be decided in principle regardless of suitability and necessity tests.[67] The criticism of the sensu stricto test may, however, be somewhat excessive. The purpose of this test is to guarantee the overall assessment of the means chosen and to ensure that the viewpoint of the individual under the potential burden is taken into account. This is especially important with regard to genuine understanding of the fundamental rights system and its ability to impose restraints on legislation.

The principle of proportionality seems to be nicely linked to the ultima ratio principle. It is debatable whether the classic formulation of the ultima ratio principle is to survive in the context of EU criminal law when EU law already has a developed doctrine on the principle of proportionality that may have numerous convergences with the ultima ratio principle. While there are numerous traces of the ultima ratio principle in the official documents relating to the development of EU criminal law and while the principle of proportionality is a strong general principle of EU law that has its legal basis in the TEU, it might be tempting to try to formulate the principle of proportionality in a way especially designed to restrict the EU criminal law.

First of all, however, the suitability test may entail some problems in this regard. The suitability test requires, as already stated above, that the means chosen be appropriate to achieving the objective of the proposed measure. Here we may face the problem that there is no unanimous view on the objectives of criminal justice policy within the EU. The view formulated in the recent Commission communication on EU criminal policy is, unfortunately, not very sophisticated and reasoned. It contains somewhat disjointed notions on the potential added value of EU criminal law action with reference to cross-border crime, the EU's more effective fight against crime, and the ability of the EU to foster the confidence of the citizens by means of EU criminal law.[68] Perhaps we might consider that the EU's criminal justice policy is primarily labelled by the "fight against crime" approach. This view is very different from the view adopted in some Member States.[69]

[65] C-11/70, *Internationale Handelsgesellschaft*, para 12.

[66] C-11/70, *Internationale Handelsgesellschaft*, para 14.—As commonly known, the CJEU did not consider that the system of licences guaranteed by a system of deposits constituted a violation of fundamental rights (para 20).

[67] *Harbo*, supra note 61, at p. 165.

[68] COM(2011) 573 final, at p. 5.

[69] While the EU has emphasized the "fight against crime" approach in criminal justice policy, the Finnish objectives are more nuanced, formulating the objectives as follows: (1) To regulate/minimize the sum total of the social costs (including human suffering) caused by crime and by society's response to crime, and (2) To distribute these

While the EU action in criminal law of course presupposes that the EU objectives are adopted as a basis, this disparity in criminal justice policy objectives inevitably affects the suitability test. When the objectives or at least the understanding of the true function of the objectives varies, there can hardly be a unanimous view of the appropriateness of the means. Thus the suitability test and the necessity test—while the necessity of the means is also linked to the objectives pursued—presuppose a thorough determination of the objectives of the EU criminal justice policy.

In any case, the principle of proportionality is highly relevant to the ultima ratio principle. The principle of proportionality advocates the least onerous means where a choice is to be made among various options. When this is related to the view adopted by AG Mazák in the ship-source pollution case, where he stated that criminal law is exceptional among the branches of law since it entails the use of the most intrusive and coercive means of the legal system, criminal punishments,[70] it seems evident that the principle of proportionality contains almost identical components with the substance of the ultima ratio principle. The Commission also takes a similar view in its communication on EU criminal policy which states that criminal law is a "sensitive" policy field and criminal law comprises "intrusive rules".[71] In this light, it may be correct to assume that the principle of proportionality already contains the view on criminal law as a last resort and it would be possible to state that there is a legal principle of ultima ratio within EU (criminal) law. The general principle of proportionality is thus connected to the outer dimension of ultima ratio, which puts criminal law in proportion with another legislative means. This is extremely relevant with regard to EU criminal law. The ancillary competence in Article 83(2) TFEU, for instance, is so imprecisely formulated that there is an overwhelming need for limiting principles. While the principle of subsidiarity, the federal dimension of ultima ratio, perhaps offers no adequate limiting criteria in this regard as illustrated above, the principle of proportionality should do this. The principle of proportionality forces the EU legislator to consider whether there are less restrictive means that could be used instead of the approximation of criminal law.

The inner dimension of ultima ratio is also apparent in EU criminal law. The EU Charter contains an article on the principle of legality (Article 49). It is remarkable that the article contains a clause on the proportionality of the penalty to the criminal offence. Article 49(3) of the Charter states that "The severity of penalties must not

social costs fairly among the parties involved, i. e., offenders, crime victims, tax payers, etc. On the Finnish objectives, see *Patrik Törnudd*, In Defense of General Prevention, in Facts, Values and Visions: Essays in Criminology and Crime Policy (Helsinki 1996), at p. 15 (11—22).

[70] Opinion of AG Mazák, 28. 6. 2007, in C-440/05, *Commission v. Council*, para 67: "In many respects, criminal law stands out from other areas of law. Availing itself of the most severe and most dissuasive tool of social control—punishments—it delineates the outer limits of acceptable behaviour and in that way protects the values held dearest by the community at large. As an expression essentially of the common will, criminal penalties reflect particular social disapproval and are in that respect of a qualitatively different nature as compared with other punishments such as administrative sanctions."

[71] COM(2011) 573 final, at p. 3 and 4.

be disproportionate to the criminal offence." This is clearly a notion of the inner dimension of ultima ratio. Article 49(3) refers to the classical dimension of the proportionality principle operating within the criminal justice system—mostly in terms of sentencing. In sentencing, proportionality has been seen to embody the notion of just that is intrinsic to retributivist punishment theories, whereas punishment theories oriented toward prevention have been assumed to suffer from excessive instrumentalism.[72]

Proportionate sentencing is thus linked to the often repeated and elaborated notion of "just deserts". Proportionate sentences, in other words, are an expression of justness. The aim of proportionate criminal sanctions is that they should reflect the degree of wrongfulness or reprehensibility of the criminal act committed.[73] This aim, of course, relates to sentencing, to court action. Proportionality, however, also has its important space in terms of legislation where one important dimension is the proportionate relation between the act criminalized and the type and level of criminal penalty provided for that act.[74] For these reasons, it seems clear that Article 49(3) of the Charter actually contains a clause of importance and with a unique character, since no other article on the principle of legality in international human rights conventions contains such a clause on the proportionality of criminal sanctions.

The inner dimension of proportionality in EU criminal law found its expression in 2002, when the Council adopted conclusions on the approximation of criminal penalties. In the conclusions, explicit minimum levels on maximum penalties (penalty scales for maximum penalties) were adopted.[75] The intention was to obtain coherence within EU criminal law—or more specifically within the former III pillar instruments relating to approximation of substantive criminal law—by introducing penalty scales that were intended to be used in future EU instruments relating to the approximation of substantive criminal law. These 2002 Council conclusions are also mentioned in the Council conclusions on the model criminal law provisions adopted in 2009.[76] Of course, commitment to proportionality with regard to criminal sanctions is also apparent in the often repeated phrase "effective, proportionate and dissuasive" related to (criminal) sanctions in EU law. In addition, the Commission directly relates the proportionality of sentences to the ultima ratio principle in its recent communication on EU criminal policy.[77]

When the proportionality of criminal sentences, which illustrates the inner dimension of ultima ratio, as elaborated in section III in fine, is related to the view

[72] *Andrew Ashworth/Andrew von Hirsch*, Proportionate Sentencing: Exploring the Principles (Oxford University Press 2005) at p. 4.

[73] *Ibid*.

[74] It must be noted that the type and level of criminal sanction is also relevant from the perspective of subsidiarity. See the Opinion of AG Mazák in C-440/05, *Commission v. Council*, paras 104—108 and C-440/05, *Commission v. Council*, [2007] ECR I-9097, para 70.

[75] Council Document 9141/02 DROIPEN 33.

[76] Council Document 16542/2/09 REV 2, at p. 6 and 9.

[77] COM(2011) 573 final, at p. 7.

of the special character of criminal law, which is also shared by the Union, it may be assumed that the principle of proportionality in EU criminal law could also contain the inner dimension of ultima ratio that requires the EU legislator to be cautious in demanding the approximation of criminal sanctions. The aim should thus be that the total severity of criminal sanctions should be kept as lenient as possible. The practice of EU criminal law, however, shows that this has not been the case.

VI. Conclusion

The discussion above illustrates that the ultima ratio principle has its place within EU criminal law. First, it must be noted that the principle has been recognised in EU documents and in the practice of the CJEU. The ultima ratio principle at the EU level, however, differs slightly from the traditional understanding. The first EU dimension of the principle is the federal dimension, which is linked to the principle of subsidiarity. The federal dimension of ultima ratio operates to secure a legitimate legislative space for the Member States. The ultima ratio principle is also— and perhaps more convincingly—connected to the principle of proportionality. This principle shares similarities with the traditional form of the ultima ratio principle. While the EU principle of proportionality advocates the least onerous means, it could be directly connected to the ultima ratio principle. It could also be argued that the proportionality applying to the ultima ratio principle within EU criminal law contains both outer and inner dimensions that strive toward coherence within EU law and EU criminal law. This article suggests that there is, at the very least, a great need for research that elaborates the possible limiting principles for EU criminal law more thoroughly. Since the importance of such principles has been recently recognised by the Commission,[78] the need for such research is obvious.

Finally, one aspect that would of course have deserved much more thorough attention needs to be mentioned. While the title of this article relates to European criminal law, the scope needs to be broadened to cover other important European institutions than the EU alone. The case law of the ECtHR is also relevant with regard to the ultima ratio principle. It needs to be kept in mind that the ECtHR has interpreted the concept of "criminal charge" in Article 6 of the Convention autonomously in its case law. If the ultima ratio principle had been given an active role nationally and if, for example, a legislative solution for administrative sanctions were chosen instead of criminal law, taking the case law of ECtHR into account, the question might still basically be about the use of criminal law within the meaning of criminal charge, criminal offence and criminal sanction.[79] Taking this brief notion into account, the ultima ratio principle may in some situations restrict

[78] COM(2011) 573 final.
[79] See, e. g., *Öztürk v. Germany*, 21. 2. 1984, A73.

the national scope of criminal law but the European (criminal) law changes the course. The procedural safeguards guaranteed in Article 6 of the Convention affect the role of ultima ratio at the European level. Where national considerations have favoured alternative "non-criminal" means, the European procedural safeguards may still convert the solution adopted to be considered "criminal"—in the sense of the criminal charge mentioned in Article 6.