

Expulsion or Imprisonment? Criminal Law Sanctions for Breaching an Entry Ban in the Light of *Crimmigration Law*

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1 Introduction

This article focuses on the Return Directive¹ and the entry ban, foreseen in Article 3(6) and Article 11 thereof. The question is whether the Member States² have the power to classify a breach of an entry ban as an offense and to lay down criminal law sanctions in national legislation such as financial sanctions or imprisonment, as well as to impose these sanctions. We note that the problem may not only relate to criminal law sanc-

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¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O. J. 2008, L 348/98.

² The Member States are: all EU Member States (except the United Kingdom and Ireland) and Iceland, Norway, Switzerland and Liechtenstein.

tions, but also to other (preliminary) measures entailing a deprivation of liberty, such as pre-trial detention. As we will analyse the case law of the Court of Justice of the European Union, in this article we will focus on criminal law sanctions.

The use of substantive criminal law as a response to illegal migration is growing. At EU-level, this trend is materialised by both the EU legislator and the Member States individually. Vavoula pointed out that EU involvement takes place in a two-fold manner:

1. directly, through harmonization of national legislations, and;
2. indirectly, through the case law of the Court of Justice of the European Union (CJEU).³

EU legislation regarding human smuggling is an example of the *direct* involvement of the EU in criminalizing illegal migration. Human smuggling is regulated by Directive 2002/90/EC⁴ which sets out the definitions for the crimes. This directive is accompanied by Framework Decision 2002/946/JHA⁵ criminalizing the conducts described in the directive and setting out sanctions.⁶

The case law of the CJEU regarding criminal law sanctions for breaching an entry ban is an example of the *indirect* involvement of the EU in criminalizing illegal migration. Entry bans are foreseen in the Return Directive. This directive aims at establishing common standards and procedures to be applied in Member States for returning illegally staying third-country nationals (Article 1). We note that in most international fora terms like ‘undocumented’ or ‘irregular’ migrants are preferred to describe a person who has no right to stay in a country. However, the Council and the European Commission adopted the terms ‘illegal’ third-country national and ‘illegal’ stay in the Return Directive. For that reason, in this article we will use the term ‘illegal’. As defined in Article 3(6) of the Return Directive, an entry ban is an ‘*administrative or judicial decision or act prohibiting entry into and stay on the territory of the Member States for a specified period, accompanying a return decision*’. This European dimension of an entry ban, expressed, *inter alia*, in Recital (14) of the Preamble to the Return Directive, is one of the added European key values of this directive. The conditions for issuing an entry ban are mentioned in Article 11 of the Return Directive. Regarding criminal law sanctions, this directive does not in itself preclude national legislation from classifying a breach of an entry ban by an illegally

³ Vavoula, ‘The interplay between EU immigration law and national criminal law: the case of the Return Directive’ in Mitsilegas *et al*, *Research Handbook on EU Criminal Law* (Edward Elgar Publishing 2016) p. 294.

⁴ Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence, Official Journal L 328/17.

⁵ Framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, Official Journal L 328/1.

⁶ See Vavoula 2016 p. 294.

staying third-country national as an offense and laying down criminal law sanctions. However, in its settled case law the CJEU places strict limitations on Member States' power to impose criminal law sanctions. In this article, we will discuss the possibilities and limitations. First, in paragraph 2 we will set out the context of *crimmigration law*. Thereafter, in paragraph 3 we will analyse the following six judgments:

1. the judgment in *El Dridi*;⁷
2. the judgment in *Achughbabian*;⁸
3. the judgment in *Sagor*;⁹
4. the judgment in *Filev and Osmani*;¹⁰
5. the judgment in *Celaj*,¹¹ and;
6. the judgment in *Affum*.¹²

Even though all of these judgments are not specifically related to entry bans, they are relevant as to define the Member States' power to classify a breach of an entry ban as an offense and to lay down criminal law sanctions in national legislation, and their power to impose these sanctions. In paragraph 4 we will bring together our findings.

2 The Concept of *Crimmigration Law*

2.1 *The Merger of Criminal Law and Immigration Law in the US*

As Stumpf noted in 2006, the merger of criminal law and immigration law has drawn the attention of immigration and criminal law scholars.¹³ These scholars have been doc-

⁷ CJEU (First Chamber) 28 April 2011, C-61/11 PPU, *El Dridi*, ECLI:EU:C:2011:269, <<http://curia.europa.eu>>

⁸ CJEU (Grand Chamber) 6 December 2011, C-329/11, *Achughbabian*, ECLI:EU:C:2011:807, <<http://curia.europa.eu>>

⁹ CJEU (First Chamber) 6 December 2012, C-430/11, *Md Sagor*, ECLI:EU:C:2012:777, <<http://curia.europa.eu>>

¹⁰ CJEU (Fourth Chamber) 19 September 2013, C-297/12, *Filev and Osmani*, ECLI:EU:C:2013:569, <<http://curia.europa.eu>>

¹¹ CJEU (Fourth Chamber) 1 October 2015, C-290/14, *Celaj*, ECLI:EU:C:2015:640, <<http://curia.europa.eu>>

¹² CJEU (Grand Chamber) 7 June 2016, C-47/15, *Affum*, ECLI:EU:C:2016:408, <<http://curia.europa.eu>>

¹³ See Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, *American University Law Review* vol. 56, no. 2 (2006) pp. 367-419, at 376 and 378.

umenting and analysing this merger in the US as well as in Europe, Canada, and Australia.¹⁴ Over time, immigration law has evolved from a primarily administrative civil process to the present day system that is intertwined with criminal law. For example, many criminal offences, including misdemeanors, now result in mandatory deportation. Stumpf pointed out that scholars have labeled this ‘*the criminalization of immigration law*’.¹⁵ She also explained that crimmigration control impacts perceptions of noncitizens and approaches to migration through the membership theory. The answer may lie in the core function that both immigration law and criminal law play in society. Both systems act as gatekeepers of ‘membership’ in society, determining whether an individual should be included in or excluded from society. The outcomes of the two systems differ. A decision to exclude in criminal law results in segregation within society through incarceration, while exclusion in immigration law results in separation from society through expulsion from the national territory.¹⁶

At the same time, Stumpf signaled that immigration violations previously handled as civil matters are increasingly addressed as criminal offences. Not only has there been an increase in the number and types of crimes that resulted in deportation, but actions by immigrants that were previously civil violations have crossed the boundary to become criminal offences, or have come to carry harsher criminal penalties with heightened enforcement levels. The national focus on terrorism has also had the effect of connecting criminal and immigration law.¹⁷ After the events of September 11, anti-terrorism efforts employed both immigration control and criminal law to reduce terrorist threats.¹⁸ The connection of the two areas of law entails an increased emphasis on crimes that only noncitizens can commit, such as unlawful entry or re-entry. Although many of these acts have long constituted crimes, the US government traditionally enforced them solely through deportation rather than prefacing deportation with a criminal prosecution and sentence. In contrast to the expansion of crime-based deportability grounds, this trend

¹⁴ Cf. Mitsilegas, Monar, and Rees, ‘The securitisation of organised crime and illegal immigration’ in Mitsilegas, Monar, and Rees, *The European Union and internal security: guardian of the people*, (Palgrave Macmillan 2003) pp. 42-61; Aas, Crimmigrant Bodies and Bona Fide Travelers: Surveillance, Citizenship and Global Governance, *Theoretical Criminology* (2011) pp. 331-346; Welch, The Sonics of Crimmigration in Australia: Wall of Noise and Quiet Manoeuvring, *British Journal of Criminology* (2012) pp. 112-131; specifically for the Netherlands, Van der Woude, Van der Leun, and Nijland, Crimmigration in the Netherlands, *Law & Social Inquiry* vol. 39, Issue 3 (2014) pp. 560-579.

¹⁵ See Stumpf 2006 pp. 376 and 378.

¹⁶ *Ibid*, pp. 396-402.

¹⁷ *Ibid*, p. 378.

¹⁸ *Ibid*, p. 385.

of criminalizing unauthorized movement across the border targets a different group of noncitizens, *i.e.* unlawfully present migrants and those who associate with them.¹⁹

Within the past decade, the intersection of crime and immigration has acquired a label: *crimmigration*. It is not surprising that the merger of criminal law and immigration law has become known as *crimmigration law*. Stumpf argued that the structure of crimmigration fosters the expansion of power. It is a wellspring for the regulation of crime, migration, security, and ethnicity. The array of targets it regulates attracts both government actors and private entities: not just national and supranational immigration enforcement, but local police officers seeking to regulate local populations and private prison companies seeking the stability of profits from a reliable migratory stream and government contracts. Whether or not crimmigration has a category of law into itself, it continues to be an active, flexible, and fertile field for innovations in legislation at local, national, and transnational levels and for new approaches to policing made possible by the expansion of discretion that the slippage between criminal law and immigration law fosters. In this respect, Stumpf concluded that crimmigration had become a leviathan, but one with chameleon-like properties, shifting across time and space to manifest a variety of bordered spaces and through different actors.²⁰

The merger of criminal law and immigration law in the US did not occur coincidentally or accidentally. Rather, it was a logical progression of deliberate choices.²¹ In the 1980s, and accelerating through the 1990s, the thin wall between both areas of law collapsed. The so-called ‘*war on drugs*’ in the US inspired legislation that created a category of grounds for deportation based on a variety of crimes regardless of when they were committed, and made many long-term resident noncitizens vulnerable to deportation. According to Stumpf, this classification for aggravated felonies underwent a complete transformation over the next decade, from a handful of crimes to a lengthy list of offenses that ranged from the serious to the very minor, ultimately including misdemeanors and petty thefts. It also increased the grounds for drug-related deportation and expanded the amorphous category of crimes involving moral turpitude.²²

At the same time, Stumpf noted that the US took a major step towards making crime-based deportation grounds unassailable. Congress stripped away almost all of the avenues for relief from deportation based on the criminal grounds. In place of a judicial or agency decision about whether an individual’s circumstances and connections to the US weighed against deportation, these laws walled off relief for most noncitizens with crim-

¹⁹ See Stumpf, ‘Crimmigration: encountering the leviathan’, in: S. Pickering and J. Ham (eds.), *The Routledge Handbook on Crime and International Migration* (Routledge 2015), pp. 15-16.

²⁰ See Stumpf 2006 pp. 244-245.

²¹ See Hernández, Creating Crimmigration, *Brigham Young University Law Review* (2013) pp. 1457-1515, at 1513.

²² See Stumpf 2015 *op.cit.*, p. 239.

inal convictions. For noncitizens, a criminal conviction suddenly acquired a major new consequence (*i.e.* deportation) that reached beyond the criminal sentence and operated largely outside of the traditional structure of the criminal justice system.²³

Are the developments of crimmigration and crimmigration law at a point of concern? As Stumpf already pointed out in 2006, the use of exclusion or deportation to punish criminal offences and to prevent recidivism may be efficient. However, she added that it circumvents criminal constitutional protections and fails to account for serious costs to noncitizens, family members, employers, and the community.²⁴ When noncitizens are classified as criminals, the individual's stake becomes secondary to the perceived need to protect the community. Similarly, when criminals become aliens, the sovereign state becomes indispensable to police the nation against this internal enemy. In combating an internal invasion of criminal outsiders, containing them through collateral sanctions such as registration and removal from public participation, appears critical.²⁵

2.2 *Crimmigration Law in the EU*

In his report of 2010, the Commissioner for Human Rights, Mr Hammarberg, described the measures of EU and the Member States which relate to criminalization of migration. He concluded that there is a steady advance of the discourse of 'illegality' in migration law and policy. As regards human rights, all EU measures, at least in their preambles, express that they comply with the EU's fundamental rights obligations. Explicit references are made to the duties of the Member States under the European Convention on Human Rights (ECHR) and, in asylum related measures, to the UN Refugee Convention. However, the recognition of these commitments does not appear to influence, in practice, the approach towards criminalization.²⁶

In 2012 Mitsilegas characterised the role of EU law reining in Member States' choices to criminalise unauthorised migration as a protective function of EU law. Principles of EU law, including the protection of fundamental rights and the principle of proportionality, place limits on immigration enforcement and national efforts to criminalise migration. The CJEU confirmed the limits that EU law places upon national criminal law and found a way to apply the protective provisions of EU law to third-country nationals.

²³ See Stumpf, *Doing time: crimmigration law and the perils of haste*, *University of California, Los Angeles, Law Review* vol. 58, no. 6 (2011) pp. 1705-1748, at 1718. See also Stumpf 2015 p. 239.

²⁴ See Stumpf 2006 p. 396.

²⁵ See Stumpf 2006 p. 419.

²⁶ See Hammarberg, *Criminalisation of Migration in Europe: Human Rights Implications*, Issue Paper, 4 February 2010 (Council of Europe Commissioner for Human Rights), <<https://wcd.coe.int/>>

The approach of the CJEU signifies, according to Mitsilegas, a direct challenge to the employment of symbolic criminal law by Member States. In addition the CJEU makes it increasingly hard for Member States to evade the control of both EU institutions and law when they make criminalization choices in the field.²⁷

In 2013 Parkin concluded that there is little evidence that immigrants are responsible for a disproportionate share of crime in the EU. First, the evidence presented in literature indicates that criminalization trends bear little relation to certain empirical developments that one might expect, such as fluctuations in crime rates or immigration rates. Second, the criminalization of migration is a process driven by multiple actors, including politicians, press, security officials and agencies, who are motivated by diverse yet overlapping interests and agendas. Third, the increasingly blurred boundaries between criminal law and migration management operate under a two-way process. First, criminal law is increasingly intersecting with immigration law and is being invoked to regulate migration matters. At the same time, administrative regimes are, with increasing prevalence, imposing sanctions akin to punishment, but denying the protections of criminal process. Fourth, there is a striking absence of social science research examining the consequences of criminalization for the individuals targeted by these laws, policies and practices. Fifth, a recurring theme throughout literature is the ‘symbolic’ nature of criminalizing policies – geared primarily towards communicating a message towards the public rather than achieving stated policy goals. Finally, the criminalization of migration must be treated with a certain degree of sensitivity. Criminality is here less associated with an ‘act’ but rather treated as the condition of a person, *i.e.* illegality is not an action but a facet of a migrants’ very being. Moreover, as several scholars have argued, given the complex nature of regulations governing migration status in European countries, the law itself often creates the status of illegality.²⁸

In 2014, Van der Woude, Van der Leun, and Nijland, researching crimmigration in the Netherlands, described the process of crimmigration as a process transcending the purely legal realm. They argued that legislative changes do not evolve in a vacuum and cannot be studied isolated from the social and political context in which they take place. Part of studying crimmigration is, in their opinion, analysing how issues relating to crime and immigration are perceived and framed in the social and political context. Studying these processes can shed light on rationales underlying the legal dimension of crimmigration in specific contexts.²⁹ One year later, in 2015, Mitsilegas described crimmigration

²⁷ See Mitsilegas, *The Changing Landscape of the Criminalisation of Migration in Europe: The Protective Function of European Union Law in Social Control and Justice: Crimmigration in the Age of Fear* (Eleven International Publishing 2012) pp. 87-113.

²⁸ See Parkin, *The Criminalisation of Migration in Europe, A State-of-the-Art of the Academic Literature and Research, CEPS Paper in Liberty and Security in Europe* No. 61 (2013) pp. 1-25.

²⁹ See Van der Woude, Van der Leun, and Nijland 2014 p. 561.

in the EU as the threefold process whereby migration management takes place via the adoption of substantive criminal law, via recourse to traditional criminal law enforcement mechanisms including surveillance and detention, as well as via the development of mechanisms for prevention and preemption.³⁰ In 2016, Koulish argued that the term ‘crimmigration’ also serves as an organizing tool for critical immigration scholarship about immigration structures, processes, interactions, and norms given rise to the criminalization of immigrants and immigration.³¹

According to Mitsilegas, Monar, and Rees, the crimmigration law in the EU developed along two interconnected levels. First, at the level of the EU and the Schengen Area.³² As regards the latter, we note that there are no internal border controls, and that individuals may travel without passport checks among participating countries. In effect, Schengen participants share a common external border where immigration checks for individuals entering or leaving are carried out. The Schengen Area is founded upon the Schengen Agreement of 1985. This agreement was incorporated into EU law in 1999. The Schengen Borders Code comprises a detailed set of rules governing both external and internal border controls in the Schengen Area, including common rules on visas, asylum requests, and border checks.³³

The second level along which crimmigration law developed in the EU, is the level of the individual Member States. Through the Schengen Agreement and its related covenants, most of the European countries have agreed to a unified migration policy that deliberalises international travel within the Schengen Area while establishing restrictions on migration from third-country nationals. The loosening of interior border controls in the Schengen Area described above coincided with heightened perceptions that connected unlawful immigration and organised crime, and linked them both with internal security. Mitsilegas, Monar, and Rees pointed out that concerns arose that unlawful migration from outside the EU might undermine economic stability because of labor competition, have negative social impacts due to employment in twilight industries with inadequate wages and workplace rights, or overburden the welfare structures of Member States.³⁴

³⁰ See Mitsilegas, *The criminalisation of migration in Europe: challenges for human rights and the rule of law* (Springer International Publishing 2015) p. 128.

³¹ See Koulish, Sovereign Bias, Crimmigration and Risk in *Immigration Detention, Risk and Human Rights. Studies on Immigration and Crime*, eds. Guia, Koulish and Mitsilegas (Springer International Publishing 2016) pp. 2-3.

³² See Mitsilegas, Monar, and Rees 2003 p. 53. See also Stumpf 2015 p. 240.

³³ Cf. Archick, *The European Union: Questions and Answers*, Congressional Research Service (2016) p. 9.

³⁴ See Mitsilegas, Monar, and Rees 2003 p. 53. See also Stumpf 2015 p. 240.

Finally, in 2016 Pahladsingh described the phenomenon of double crimmigration. In some countries of nationality (for example Cameroon)³⁵ there is for the illegal third-country national, who is expelled by EU Member States, a risk of criminalization in the form of criminal sanctions such as fines and detention. This is the situation when these countries of nationality criminalise emigration. Forced to return immediately to their country of departure or nationality, these ‘inadmissibles’ never fully become immigrants. These failed migrants become at least suspect citizens and risk a form of double crimmigration in their countries of departure or nationality as they risk to be penalised twice: firstly by their involuntary return and secondly by the instigation of criminal proceedings against them in the country of nationality. Double crimmigration should become a topic in EU return policy and security policy in which the EU should also formulate solutions.³⁶

3 The Return Directive and the Entry Ban: Criminal Law Sanctions

3.1 *The Autonomous Nature of National Criminal Law*

In its judgments in *Achughbabian* and *Sagor*, the CJEU pointed out that the Return Directive is not designed to harmonise in their entirety the rules of Member States on the stay of foreign nationals. Therefore, it does not preclude national legislation from classifying an illegal stay by a third-country national as an offence and laying down criminal law sanctions, including a term of imprisonment.³⁷ Neither does the CJEU preclude a third-country national from being placed in detention with a view to determining whether or not his stay is lawful.³⁸ Regarding entry bans, the CJEU referred in *Celaj* to its judgment in *Achughbabian* and *Sagor*. The CJEU stated, by analogy, that the Return Directive does not preclude, in principle, the law of a Member State from classifying the unlawful re-entry of a third-country national in breach of an entry ban as an offence and laying down criminal law sanctions to deter and penalise such an infringement.³⁹

In our opinion it follows from these judgments that the classification of breaching an entry ban as an offence and the laying down of criminal law sanctions in national legislation are, in principle, matters of the Member States. This shows the autonomous nature of national criminal law. However, according to the CJEU under the Return Directive

³⁵ Alpes, Airport Casualties: Non-Admission and Return Risks at Times of Internalized/ Externalized Border Controls, *Soc. Sci.* 2015 pp. 742-575, at 746-749.

³⁶ Pahladsingh 2016 pp. 14-18.

³⁷ *Achughbabian* (para. 32); *Sagor* (para. 32).

³⁸ *Achughbabian* (para. 29).

³⁹ *Celaj* (para. 32).

there are strict limitations for imposing criminal law sanctions by the Member States. These limitations relativise the autonomous nature of national criminal law. In paragraph 3.2 we will first describe the return procedure. Thereafter, in paragraph 3.3 we will give a more detailed analysis of the case law of the CJEU.

3.2 *An Overview of the Return Procedure in the Return Directive*

In its judgment in *El Dridi*, the CJEU summarised the return procedure set out in the Return Directive. Article 6(1) thereof provides, first of all, principally, for an obligation for Member States to issue a return decision against any third-country national staying illegally on their territory. As part of that initial stage of the return procedure, priority is to be given, except where otherwise provided for, to voluntary compliance with the obligation resulting from that return decision, with Article 7(1) of the Return Directive providing that the decision must provide for an appropriate period for voluntary departure of between seven and thirty days. It follows from Article 7(3) and (4) of the Return Directive that it is only under particular circumstances, such as where there is a risk of absconding, that Member States may, first, require the addressee of a return decision to report regularly to the authorities, deposit an adequate financial guarantee, submit documents or stay at a certain place or, second, grant a period shorter than seven days for voluntary departure or even refrain from granting such a period. The CJEU noted that in the latter situation, but also where the obligation to return has not been complied with within the period for voluntary departure, Article 8(1) and (4) of the Return Directive provides that, in order to ensure effective return procedures, the Member State which has issued a return decision against an illegally staying third-country national carries out the removal by taking all necessary measures including, where appropriate, coercive measures, in a proportionate manner and with due respect for, *inter alia*, fundamental rights. It is only where, in the light of an assessment of each specific situation, the enforcement of the return decision, in the form of removal, risks being compromised by the conduct of the third-country national concerned that Member States may deprive that person of his liberty and detain him.⁴⁰

In *El Dridi*, the CJEU concluded from the foregoing that the Return Directive provides for the order of the various stages in the procedure for returning illegally staying third-country nationals, corresponding to a gradation of the measures to be taken into order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty (*i.e.* granting a period for his voluntary departure), to measures which restrict that liberty the most (*i.e.* detention in a special-

⁴⁰ *El Dridi* (paras. 35-39).

ised facility). Throughout those stages, the principle of proportionality must be observed. With regard to the possible deprivation of liberty, the CJEU pointed out that this measure is strictly regulated by Articles 15 and 16 of the Return Directive. In particular, any detention pending removal is to be as short a period as possible and its length should not exceed that required for the purpose pursued.⁴¹

3.3 *Limitations for imposing criminal law sanctions*

In its settled case law (*El Dridi*, *Achughbabian*, *Sagor*, *Celaj*, *Filev and Osmani* and *Affum*) the CJEU more or less explicitly emphasized that Member States may not apply rules, even criminal law rules, which are liable to jeopardise the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness. Regarding, more specifically, the Return Directive, in *El Dridi* the CJEU pointed out that Member States may not, in order to remedy the failure of coercive measures adopted in order to carry out forced removal pursuant to Article 8(4) of that directive, provide for a custodial sentence on the sole ground that a third-country national continues to stay illegally on the territory of a Member State after an order to leave the national territory was notified to him and the period granted in that order has expired. Such a penalty risks jeopardizing the attainment of the objective pursued by the Return Directive.⁴² In particular, the CJEU pointed out that national legislation, such as that at issue in the Italian case of *El Dridi*, is liable to frustrate the application of the measures referred to in Article 8(1) of the Return Directive and delay the enforcement of the return decision.⁴³

In *Achughbabian*, the CJEU recalled its judgment in *El Dridi*. The CJEU pointed out that the expressions ‘measures’ and ‘coercive measures’ contained in the Return Directive refer to any intervention which leads, in an effective and proportionate manner, to the removal of the person concerned. Detention of the person concerned, for a maximum duration of eighteen months, is permitted only for the purposes of preparing and permitting the removal. According to the CJEU, the imposition and implementation of a sentence of imprisonment during the course of the return procedure does not contribute to the realisation of the removal which that procedure pursues. On the contrary, such imprisonment is liable to delay the return and thereby undermines the effectiveness of the Return Directive. Therefore it does not constitute a ‘measure’ or ‘coercive measure’ within the meaning of the Return Directive.⁴⁴

⁴¹ *El Dridi* (paras. 41-43).

⁴² See Raffaelli, The returns directive in the light of the *El Dridi* judgment, *Perspectives on Federalism* Vol. 3 (2011) pp. 32-45.

⁴³ *El Dridi* (paras. 45-47, 52, 55-59).

⁴⁴ *Achughbabian* (para. 37).

In *Achughbabian*, the CJEU also clarified the scope of the application of Article 2(2) (b) of the Return Directive. This provision allows Member States not to apply the Return Directive to third-country nationals who are subject to return as a criminal law sanction or as a consequence of a criminal law sanction according to national law, or who are the subject of extradition procedures. According to the CJEU, however, this provision clearly cannot be interpreted as allowing Member States not to apply the Return Directive to third-country nationals who have committed only the offence of illegal stay, since such an interpretation would deprive the Return Directive of its purpose and binding effect. Thus, in *Achughbabian* the CJEU clarified that criminal law sanctions may only be adopted once the return procedure is exhausted, if the adoption of coercive measures do not enable the removal of the immigrant to take place, and only so far as there is no justified ground for non-return. Finally, the imposition of such sanctions is subject to full compliance with fundamental rights, and in particular with the rights recognised by the ECHR.⁴⁵

In *Sagor*, the CJEU upheld its judgments in *El Dridi* and *Achughbabian* pursuant to the fact that the Return Directive would be undermined if, after establishing that a third-country national is staying illegally, the Member State in question were to preface the adoption or implementation of the return decision with a criminal prosecution which could lead to a term of imprisonment during the course of the return procedure, a step which would risk delaying the removal.⁴⁶ Next, in *Sagor* the CJEU observed that the return measures are not delayed or impeded by a criminal prosecution such as that brought against Mr Sagor, since the national legislation in question allows the return to be achieved regardless of the criminal prosecution, even without that prosecution having come to an end. Nor is the imposition of a fine liable to impede the implementation of the return procedure.⁴⁷ Also, the possibility given to the criminal court of replacing the fine with an expulsion order accompanied by an entry ban, as regards Italy, in situations where it is possible immediately to effect the return of the individual concerned, is not contrary to the Return Directive. Indeed, the Return Directive allows Member States – on the basis of an individual examination of the situation of the individual concerned – to impose expulsion without granting a period for voluntary departure where there is a risk that the individual may abscond in order to avoid the return procedure.⁴⁸ Lastly, in *Sagor* the CJEU observed that Member States are required, under their duty of loyalty and the requirements of effectiveness referred to in the Return Directive, to carry out the removal

⁴⁵ *Achughbabian* (paras. 41, 46, 48-49). See also on this Raffaelli, 'Case note: the Achughbabian case. Impact of the return directive on national criminal legislation, (*New York University School of Law* 2011) pp.1-11, at 8.

⁴⁶ *Sagor* (para. 33).

⁴⁷ *Sagor* (paras. 36-37).

⁴⁸ *Sagor* (para. 41).

as soon as possible. Where a fine is replaced by a home detention order, the CJEU found that that order, imposed in the course of the return procedure, does not help to achieve the physical transportation of an illegally staying third-country national out of the Member State concerned. On the contrary, the home detention order may delay and thus impede measures such as deportation and forced return by air, which can be used to achieve removal. In this respect, the CJEU pointed out that such a risk of undermining the return procedure is present in particular where the applicable legislation does not provide that the enforcement of a home detention order imposed on an illegally staying third-country national must come to an end as soon as it is possible to effect that person's removal.⁴⁹

In *Filev and Osmani*, the CJEU ruled that Article 11(2) of the Return Directive must be interpreted as precluding a breach of an entry ban in the territory of a Member State, which was handed down more than five years before the date either of the re-entry into that territory of the third-country national concerned or of the entry into force of the national legislation implementing that directive, from giving rise to a criminal law sanction, unless that national constitutes a serious threat to public order, public security or national security.⁵⁰ This precludes a continuation of the effects of entry bans of unlimited length made before the date on which the Return Directive became applicable, beyond the maximum length of entry bans laid down by that provision, except where those entry bans were made against third-country nationals constituting a serious threat to public order, public security or national security.⁵¹

According to the CJEU in *Filev and Osmani*, the Return Directive must be interpreted as precluding Member States from providing that an expulsion or removal order which predates by five years or more the period between the date on which that directive should have been implemented and the date on which it was implemented, may subsequently be used as a basis for criminal proceedings, where that order was based on a criminal law sanction within the meaning of Article 2(2)(b) of that directive and where Member States exercised the discretion provided for under that provision.⁵² The consequence of the use by Member States of the discretion provided for in Article 2(2)(b), at the latest upon expiry of the period for implementing that directive, is that third-country nationals referred to therein will not at any time fall within the scope of that directive. In contrast, in so far as a Member State has not yet made use of that discretion after expiry of the said time period for implementation, in particular because of the fact that it has not yet implemented the Return Directive in national law, it may not avail itself of the right to restrict the scope

⁴⁹ *Sagor* (paras. 44-45).

⁵⁰ *Filev and Osmani* (para. 44).

⁵¹ *Filev and Osmani* (paras. 44-45).

⁵² *Filev and Osmani* (paras. 50-52).

of the persons covered by that directive pursuant to Article 2(2)(b) thereof with regard to those persons who were already able to avail themselves of the effects of that directive.⁵³

In *Celaj*, the CJEU stated that the criminal proceedings at issue involved the situation of an illegally staying third-country national to whom the common standards and procedures established by the Return Directive were applied in order to put an end to his first illegal stay in the territory of a Member State and who then re-entered the territory of that State in breach of an entry ban. This brought the CJEU to the conclusion that the circumstances of the case of *Celaj* are clearly distinct from those in the cases that led to the judgments in *El Dridi* and *Achughbabian* in which illegally staying nationals of the third countries concerned were subject to a first return procedure in the Member State in question.⁵⁴ In addition, the CJEU recalled that it already held in its judgment in *Achughbabian* that the Return Directive does not preclude criminal law sanctions being imposed on third-country nationals to whom the return procedure established by that directive has been applied and who are illegally staying in the territory of a Member State without there being any justified ground for non-return. This, following national rules of criminal procedure. There is thus, according to the CJEU, all the more reason to consider that the Return Directive does not exclude the possibility for Member States to lay down criminal law sanctions against illegally staying third-country nationals for whom the application of the procedure established by that directive resulted in them being returned and who then re-enter the territory of a Member State in breach of an entry ban (see also paragraph 3.1 above). However, the imposition of a criminal law sanction is only admissible on the condition that the entry ban issued against the third-country national concerned complies with Article 11 of the Return Directive.⁵⁵ The imposition of such a criminal law sanction is moreover subject to full observance both of fundamental rights, particularly those guaranteed by the ECHR and, as the case may be, of the UN Refugee Convention, in particular Article 31(1) thereof.⁵⁶ When third-country nationals re-enter the territory of a Member State in breach of an entry ban, Majcher points out that Member States may use other available methods to punish the breach, such as an extension of an existing ban. More generally, criminalization of breaches of (administrative) immigration law risks creating a conflation between (non-punitive) immigration law and criminal law, which

⁵³ *Filev and Osmani* (para. 53).

⁵⁴ The 'distinction' argument had been advanced by the European Commission and intervening governments during the proceedings. They stressed that the circumstances in re-entry cases are distinct because penal sanctions could be imposed to dissuade migrants from breaching re-entry bans (Opinion AG Szpunar of 28 April 2015, C-290/14, *Celaj*, ECLI:EU:C:2015:640, para. 46). See for more critics on the distinction argument Majcher, 'The CJEU's Ruling in *Celaj*: Criminal penalties, entry bans and the Returns Directive' (<http://eulawanalysis.blogspot.nl/2015/10/the-cjeus-ruling-in-celaj-criminal.html>).

⁵⁵ *Celaj* (paras. 27-31).

⁵⁶ *Celaj* (para. 32).

may lead to negative consequences for migrants and an undue overburden to the criminal justice system. According to Majcher, the ruling in *Celaj* seems to compromise the effectiveness of the Return Directive in order to accord discretion to Member States that apply their domestic criminal provisions to deter and punish migrants for breaching an entry ban.⁵⁷

According to the CJEU in *Affum*, a preliminary point to note is that the main proceedings relate to the situation of a third-country national who illegally entered the territory of a Member State forming part of the Schengen Area by crossing a common border of that State and another Member State also forming part of that area, and who was then intercepted when she was preparing to go to the territory of a third Member State, which does not form part of that area.⁵⁸ It should be noted that, as regards the scope of the Return Directive, Article 2(1) provides that the Return Directive applies to third-country nationals staying illegally on the territory of a Member State. The concept of ‘illegal stay’ is defined in Article 3(2) of this directive as ‘the presence on the territory of a Member State, of a third-country national who does not fulfil, or no longer fulfils the conditions of entry as set out in Article 5 of the Schengen Borders Code or other conditions for entry, stay or residence in that Member State.’⁵⁹ Since a third-country national travelling on a bus across the territory of a Member State in breach of the conditions for entry, stay or residence is clearly present on its territory, the CJEU concluded that he is staying there illegally, within the meaning of Article 3(2) of the Return Directive, and falls within that directive’s scope, in accordance with Article 2 thereof.⁶⁰ Consequently, such nationals must be subject to the return procedure laid down by the Return Directive for the purpose of their removal, as long as their stay has not, as the case may be, been regularised.

The CJEU also stated in *Affum* that the Return Directive does not preclude an illegally staying national of a non-EU country from being imprisoned when the return procedure has been applied and the national re-enters the territory of the Member State in breach of an entry ban (see also the judgment in *Celaj* above).⁶¹ Nor does the Return Directive preclude nationals of a non-EU country from being placed in administrative detention with a view to determining whether or not their stay is legal.⁶² Finally, it must be made clear that the Return Directive does not prevent Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return

⁵⁷ See Majcher, ‘The CJEU’s Ruling in *Celaj*: Criminal penalties, entry bans and the Returns Directive’ (<http://eulawanalysis.blogspot.nl/2015/10/the-cjeu-ruling-in-celaj-criminal.html>).

⁵⁸ *Affum* (para. 44).

⁵⁹ *Affum* (para. 47).

⁶⁰ *Affum* (para. 48).

⁶¹ *Affum* (para. 64).

⁶² *Affum* (para. 53).

procedure has not yet been completed.⁶³ Furthermore, in *Affum* the CJEU pointed out that the exceptions provided for by the Return Directive⁶⁴ do not permit Member States to exclude nationals such as Ms Affum from its scope on the ground that they have illegally crossed an internal border of the Schengen Area (in this case, the Franco-Belgian border) or have been arrested when trying to leave that area (the United Kingdom does not form part of the Schengen Area).⁶⁵ Moreover, the fact that Ms Affum was the subject of a procedure for readmission into the Member State from which she came (Belgium) does not render the Return Directive inapplicable to her case. Readmission simply has the effect of transferring the obligation to apply the return procedure to the Member State responsible for taking the national back (in this case, Belgium). To imprison an illegally staying national of a non-EU country would delay the triggering of the return procedure and that national's actual removal and would thereby undermine the Return Directive's effectiveness.⁶⁶ In *Affum* the CJEU concluded that, for the same reasons as those set out in its decision in *Achughbabian*, Member States cannot permit nationals of non-EU countries in respect of whom the return procedure established by the Return Directive has not yet been completed to be imprisoned merely on account of illegal entry, resulting in an illegal stay, as such imprisonment is liable to thwart the application of that procedure and delay return, and thereby to undermine the Return Directive's effectiveness. This does not, however, prevent Member States from being able to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed. This judgment will have effect on Member States where imprisonment on the account of illegal staying is possible. Such domestic legislation have to be changed in the way that an individual assessment has to be made by the domestic authorities regarding the situation of the illegal staying third-country national and the possibility of imprisonment.⁶⁷

⁶³ *Affum* (para. 65).

⁶⁴ Under the Return Directive, Member States may decide not to apply the directive to nationals of non-EU countries who are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State.

⁶⁵ *Affum* (para. 78).

⁶⁶ *Affum* (para. 88).

⁶⁷ See Picon, *Criminalising Hope. Human Rights Implications of the Criminalization of Irregular Immigration in EU Member States and the EU*, (European Inter-University Centre for Human Rights and Democratisation 2010) pp.6-96, at p. 28: ' (...) the 23 countries do provide for criminal penalties for TCN [third-country nationals, JW/AP] who have illegally entered or who are illegally staying in their territory, in a broad sense.'

4 Conclusions

We conclude that there is an overlap between immigration law and criminal law in the area of the Return Directive and the entry ban foreseen thereof. It follows that the entry ban falls within the scope of crimmigration law. The findings of the evaluation of the European Commission in 2014, as well as a study conducted by FRA show that there are laws in place criminalizing illegal entry and/or stay, in different forms, in the majority of Member States.⁶⁸ We point out that the Return Directive does not in itself preclude national legislation from classifying a breach of an entry ban as an offence and laying down criminal law sanctions such as financial sanctions and imprisonment.⁶⁹ Criminal law matters remain, in principle, a Member State competence, with each Member State free to adopt criminal law sanctions in order to deter third-country nationals from remaining illegally on their territory.⁷⁰ However, we recall that Member States may not impose criminal law sanctions which are liable to undermine the application of the common standards and procedures established by the Return Directive and thus to deprive it of its effectiveness (the principle of proportionality in EU law).

The relation between immigration law and criminal law, and in particular the compatibility of national penal measures imposed as a punishment for breaching an entry ban is developed in the case law of the CJEU. In the cases touching upon this issue, the CJEU assessed whether the Return Directive allows Member States to penalise non-compliance with a return order or an illegal stay itself with imprisonment (*El Dridi*, *Achughbabian* and *Affum* respectively) or home detention (*Sagor*) as a criminal law penalty. The CJEU clearly concluded that Member States may not impose criminal law sanctions liable to jeopardise the attainment of the objectives pursued by the Return Directive and thus to deprive it of its effectiveness (the principle of proportionality in EU law). This means that criminal law sanctions may not be imposed if it hampers or delays the return of illegally staying third-country nationals. By extension, in *Celaj* the CJEU ruled that the Return Directive does not exclude the possibility for Member States to lay down criminal law sanctions against illegally staying third-country nationals for whom the application of the procedure established by that directive resulted in them being returned and who then re-entered the territory of a Member State in breach of an entry ban. However, the CJEU added that the imposition of a criminal law sanction is admissible only on the conditions that the entry ban complies with Article 11 of the Return Directive and that the imposi-

⁶⁸ EC 28 March 2014, EU return Policy, COM(2014) 199 final, p. 24.

⁶⁹ EC 1 October 2015, Common 'Return Handbook' to be used by Member States' competent authorities when carrying out return related tasks, C(2015) 6250 final, p. 62.

⁷⁰ See Garcia, 'Criminal sanctions and the Return Directive: the CJEU's ruling in *Celaj* clarifies an incestuous relationship' <via <http://eumigrationlawblog.eu>>.

tion is subject to full observance of both fundamental rights and, as the case may be, of the UN Refugee Convention.⁷¹

In *Affum*, the CJEU formulated three situations in which Member States are allowed to impose a criminal law sanction against illegally staying third-country nationals when breaching an entry ban:

1. when the third-country national has previously been subject to a return procedure and continues to stay illegally on the territory of the Member State with no justified ground (see also *Achughbabian*);
2. when a return procedure has been applied against a third-country national and the national re-enters the territory of the Member State in breach of an entry ban (see also *Celaj*);
3. Member States are allowed to impose a sentence of imprisonment to punish the commission of offences other than those stemming from the mere fact of illegal entry, including in situations where the return procedure has not yet been completed (*Affum*).

There is a significant role for the CJEU in practice as regards references from national courts concerning the Return Directive. This directive attracted more references to the CJEU than most EU immigration or asylum measures.⁷² While the case law of the CJEU on the whole has interpreted the Return Directive more liberally than its wording might suggest, it has focused more on the objective of efficient expulsion, rather than on illegal migrants' human rights. The reason for this focus is that it is the task of the national authority and finally of the national court to make the proportionality test with full observance of fundamental rights. As a directive leaves space for the Member States this can lead to certain differences between the Member States regarding criminal sanctions when illegally staying third-country nationals breach an entry ban. We note that these differences can be seen through the amount of a fine or through the duration of imprisonment.

The CJEU confirmed the limits that EU law places upon national criminal law and found a way to apply the protective provisions of EU law to third-country nationals. It makes it increasingly hard for Member States to evade the control of EU institutions and law when they make criminalization choices in the field. We note that in a broad sense it is positive that the Member States are not allowed to provide for criminal sanctions for third-country nationals just because they illegally entered or are staying illegally in their

⁷¹ EC 28 March 2014, EU return Policy, COM(2014) 199 final, p. 24: 'The above-mentioned rulings have resulted in a wide range of changes to national legislation in the countries examined and several Member States have recently changed their legislation as a consequence of this jurisprudence.'

⁷² See Peers, 'The EU's Returns Directive: Does it improve or worsen the lives of irregular migrants?' <<http://eulawanalysis.blogspot.nl/2014/03/the-eus-returns-directive-does-it.html>>.

territory (see *Affum*).⁷³ In this example the illegal migrants as such are not criminalised. However, only under strict and limited conditions Member States are allowed to impose criminal law sanctions. This is also in line with the Preamble to the Return Directive. This Preamble gives a number of fundamental principles which underpin the legislation as a whole and which therefore should be taken into account in the implementation of its provisions. For example, Recital (6) of the Preamble and Article 11 of the Return Directive assert that entry bans should be issued on a case-by-case basis and based on objective criteria, implying that consideration should go beyond the mere fact of an illegal stay. As regards human rights, the Return Directive and the case law of the CJEU express that they comply with the EU's fundamental rights obligations (Recital (24) of the Preamble and *Celaj*). Explicit references are made to Member States' duties under the ECHR and, in asylum related measures, to the UN Refugee Convention (Recital (23) of the Preamble).

However, the recognition of these commitments does not appear to influence, in practice, the approach towards criminalization. In this respect, we point at the Evaluation on the application of the Return Directive, commissioned by the European Commission and the European Migration Network's study on Good Practices in the return and reintegration of irregular migrants. These reports show that the legislation of almost 40 percent of the Member States provides for an automatic application of entry bans on all return decisions. This automatic application is, in our opinion, a major point of concern. Recitals (6) and (14) of the Preamble and Article 11(2) of the Return Directive stipulate that an entry ban shall be based on objective criteria and that the length of an entry ban shall be determined with due regard to all relevant circumstances of the individual case (see also *Filev and Osmani*). Member States which impose criminal law sanctions for breaching an entry ban issued against an illegally staying third-country national should respect the case law of the CJEU. In that perspective we advise that the European Commission should take action if a Member State fails to comply with these provisions of the Return Directive, especially because of the weak position of the illegally staying third-country national in society and the fact that fundamental rights, *inter alia*, the right of freedom (Article 6 Charter of Fundamental Rights of the EU), are at stake.⁷⁴ Furthermore we point out that there is an important role for the national courts to apply the case law of the CJEU in these criminal cases and to protect the rights of illegally staying third-country nationals. The centrality of the principle of proportionality in EU law taken together with the fact that the EU legal system is capable of influencing domestic legal systems in

⁷³ See also EC 28 March 2014, EU return Policy, COM(2014) 199 final, p. 27.

⁷⁴ EC 28 March 2014, EU return Policy, COM(2014) 199 final, p. 24: 'The Commission is following the situation closely and has already launched EU Pilot procedures against certain Member States.'

an unmediated manner, the role of litigation should not be underestimated.⁷⁵ In national procedures questions will arise about the proportionality of the specific criminal law sanction breaching an entry ban such as the duration of the imprisonment or the amount of the fine.

The use of the instrument of the entry ban and the imposition of criminal law sanctions for breaching an entry ban may be efficient regarding the return of illegally staying third-country nationals. However, we advise Member States to take into account other aspects such as the serious costs to noncitizens, family members, employers, and the community. Finally we suggest that Member States evaluate the effectiveness of the imposition of criminal law sanctions as an extra measure for the return of illegally staying third-country nationals. In this respect, we pose the following question: Does the imposition of criminal law sanctions for breaching an entry ban lead to more expulsions or does it in fact hamper the return of illegally staying third-country nationals?⁷⁶

The developments in our article show that the issues of crimmigration are very topical and that the main stakeholders in this area (the Member States, the EU institutions and the CJEU) should pay due considerations to core the fundamental rights of illegally staying third-country nationals.⁷⁷

⁷⁵ See the comparison with detention: Cornelisse, *The Constitutionalisation of Immigration Detention: Between EU Law and the European Convention on Human Rights*, *Global Detention project*, Working Paper No. 15, October 2016, pp.1-14, at 13.

⁷⁶ See Pahladsingh and Waasdorp 2016 p. 82.

⁷⁷ See Pahladsingh 2016 p. 267.