Complementarity as a Legal Principle and as Criteria for Admissibility

Jann K. Kleffner

in Complementarity in the Rome Statute and National Criminal Jurisdictions

Published in print: 2008 Published Online: May 2009
Item type: chapter

This chapter addresses the substantive provisions: the Preamble and Article 1, which introduce complementarity as a general principle, and Articles 17 and 20 (3), which translate that principle into criteria for the admissibility of cases before the ICC, including the key notions of ‘unwillingness’ and ‘inability’. These criteria bear the potential of responding to many of the obstacles that hamper effective domestic suppression of core crimes. Conversely, the criteria provide yardsticks for what States have to do in order to retain jurisdiction. However, the detailed nature of the definitions of ‘unwillingness' and ‘inability’ result in some gaps vis-à-vis some situations and considerable overlap in others. With a view to overcome these difficulties in defining the criteria for admissibility, it is suggested that consideration should be given to replace the notions of ‘unwillingness’ and ‘inability’ with the criterion of ‘effectiveness’ of domestic proceedings.

Exceptions to the Freedom Exclusively Applicable to Third Country Contexts

Steffen Hindelang

in The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law

Published in print: 2009 Published Online: September 2009
Item type: chapter

This chapter addresses the exceptions that apply exclusively to third country direct investment, i.e., Article 57 (1) EC, Article 59 EC, and
Article 60 EC. Article 57 (1) EC contains a grandfathering clause for restrictive national and Community laws with respect to the categories of direct investment, including real estate, establishment, the provision of financial services, and admission of securities to capital markets. Concerning Article 57 (2) — empowering the Community to adopt measures involving the categories of capital movement mentioned above — this book limits itself to a broad brush depiction of the provision. Article 59 EC allows the Community to take temporary safeguard measures with regard to third countries in case of economic crisis. Article 60 EC provides the EC, and on an interim basis also the Member States, in the framework of the Common Foreign and Security Policy (CFSP), with a tool to adopt economic sanctions against one or more third countries in the area of free movement of capital. The discussion of the above-mentioned exceptions centres upon their effects on the standard of liberalisation of foreign direct investment achieved by virtue of Article 56 (1) EC.

Which Level of Protection?—The Scope of the Prohibition of Restriction: Equal Treatment and Market Access

Steffen Hindelang

in The Free Movement of Capital and Foreign Direct Investment: The Scope of Protection in EU Law

Published in print: 2009 Published Online: 2009
September 2009 Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780199572656.003.0005
Item type: chapter

This chapter maps the scope of the ‘prohibition of restriction’ enshrined in Article 56 (1) EC — falling into two tests, the non-hindrance and the non-discrimination tests — in both intra-Community and third-country contexts. First, the operation of the non-hindrance and non-discrimination tests in an intra-Community context is analyzed. With respect to the ‘non-hindrance’ test this chapter in particular addresses the issue of whether and to what extent the doctrinal concepts developed by the Court in the context of other freedoms can be translated into the ambit of free movement of capital. Turning to the ‘non-discrimination test’, although Article 56 (1) EC does not explicitly mention the ‘prohibition of discrimination’, this omission is not to be understood as saying that within the ambit of free movement of capital, discriminatory conduct would not in principle be prohibited. In the second part of the discussion, the chapter assesses whether the construction set forth for an intra-Community context needs to be revised when it comes to third country capital movement. The discussion largely evolves around two points. First, the persuasiveness of teleological
considerations based on the argument that free capital movement in a third-country context allegedly serves the Treaty aims to a lesser extent than it does in an intra-Community context is critically reviewed. Secondly, within the context of the non-discrimination test, the question of ‘comparability’ in principle of domestic/intra-Community and third country direct investment is examined.

The Extent to which Peacekeeping and other Multi-national Forces have a General ‘Responsibility to Protect’ under International Humanitarian Law

Siobhán Wills

in Protecting Civilians: The Obligations of Peacekeepers

This chapter examines the extent to which international humanitarian law (IHL) may be applicable to peacekeeping forces, and the extent to which this encompasses positive obligations that would require troops to protect the local population from serious abuses of certain of their human rights. Common to the four Geneva Conventions, Article 1 is the most significant provision of IHL that could be construed as obliging troops to take action to prevent serious abuses of human rights being committed by third parties. Article 1 provides that the High Contracting Parties undertake to ‘respect and ensure respect’ for the provisions of the Conventions ‘in all circumstances’. It is now largely accepted that Article 1 of the Geneva Conventions carries third party obligations for State parties at a general level; but it is not clear what this implies for States that contribute to peacekeeping operations or for the peacekeepers themselves.

RECENT CASE LAW ON THE PROTECTION OF PROPERTY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Luzius Wildhaber and Isabelle Wildhaber

in International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer
The guarantee of the protection of property, contained in Article 1 of Additional Protocol No. 1, has become — after Article 6 ECHR — the second most frequently invoked guarantee of the Convention. This chapter first begins by presenting the jurisprudence describing the Convention notion of protection of property generally. It then discusses illustrative case law concerning the concept of ‘legitimate expectations’, social security claims, and the way some well-known recent judgments approach the interpretation of Article 1 of Protocol No. 1. It selects four categories of very recent cases and discusses them. The discussion demonstrates that the Strasbourg Court has encountered exaggerated formalism, chicanery, tricks, or plainly arbitrary acts by State authorities.

Reconstructing and Reinforcing Islamism
Joseph Chinyong Liow
in Piety and Politics: Islamism in Contemporary Malaysia
Published in print: 2009 Published Online: May 2009
Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780195377088.003.0004
Item type: chapter

This chapter explores attempts to “reframe” Islamism in the 1990s by both PAS and UMNO by investigating the contours of the ongoing debate between PAS and UMNO, and within PAS itself, over the nature and expression of Islam as an organizing principle for society and politics in pluralist Malaysia. It also examines how Malaysia’s non-Muslim community has responded to this renovation and negotiation exercise that Malaysia’s main Islamist parties have been engaged in.

Limitations on Manifestations of Religion or Belief
Carolyn Evans
in Freedom of Religion under the European Convention on Human Rights
Published in print: 2001 Published Online: March 2012
Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780199243648.003.0007
Item type: chapter

This chapter examines State implementation of Article 9(2) to balance out competing interests between individual freedom to manifest a religion or belief and the legitimate interests of the State in ensuring that such manifestations are restricted from unduly interfering in public health and order, morality, and the rights and freedoms of others. The Court and Commission give wide leeway for State activity in justifying whether restrictions on the manifestation of religion or belief are
necessary. Although the Court and Commission are tasked to secure State action on manifesting religion or belief, not many cases are passed on to Article 9(2) because they paid little attention to issues concerning Article 9(1), either bypassing the article with little explanation for breach or completely ignoring the issues. Limited scope is given to Article 9(1).

**Competition Law**

Julian Nowag

in *Environmental Integration in Competition and Free-Movement Laws*

Published in print: 2016 Published Online: January 2017

Publisher: Oxford University Press


This chapter shows that on competition law the second form of environmental integration can take place either under Article 101(1) TFEU’s European rule of reason and Article 101(3) TFEU, or under the objective justification and efficiency defence in the examination of Article 102 TFEU. The chapter first explores Article 101(1) and 101(3) TFEU and then Article 102 TFEU. It particularly focuses on the extent to which environmental protection can be balanced against restrictions of competition under the different tests because such balancing is contentious. Finally, the chapter conceptualizes the relationship between the different forms of balancing in Article 101(1) and 101(3) TFEU, the objective justification and the efficiency defence under Article 102 TFEU, and their interaction with Article 106(2) TFEU.

**The Right to Manifest a Religion or Belief**

Carolyn Evans

in *Freedom of Religion under the European Convention on Human Rights*

Published in print: 2001 Published Online: March 2012

Publisher: Oxford University Press


This chapter concentrates on the application of the right to manifest freedom of religion or belief — an essential protection for freedom of religion or belief stipulated in Article 9(1) under the Convention. It describes the difficulty of demonstration of the right caused by restrictions, not only from State interference, relatively narrow definition of terms, and numerous possible interpretations of the manifestation, but also from Court and Commission management. The approach of the Court and Commission to manifestation of religious rights offers limited
scope and protection, especially to minorities and individual believers, since their performance is supported by insufficient reference to what is necessary to religion or belief, and since their approach is analogous to the tradition of Christian beliefs, a dominantly recognized religion.

State Aid Law
Julian Nowag

in Environmental Integration in Competition and Free-Movement Laws

Published in print: 2016 Published Online: January 2017
Publisher: Oxford University Press DOI: 10.1093/acprof:oso/9780198753803.003.0017
Item type: chapter

This chapter examines the second form of environmental integration in the context of the exceptions and exemptions under Article 107(3) TFEU and the potential rule of reason under Article 107(1) TFEU. This chapter shows how this form of integration is only possible under Article 10(3) TFEU and how the Commission prefers to exempt aid under Article 107(3)(c) TFEU. The chapter, finally, highlights the sophisticated proportionality test under Article 107(3) TFEU which can provide a model for other areas where balancing is needed. It therefore only suggests some modest improvements to the test based on the experiences in free-movement law.

State Aid Law
Julian Nowag

in Environmental Integration in Competition and Free-Movement Laws

Published in print: 2016 Published Online: January 2017
Publisher: Oxford University Press DOI: 10.1093/acprof:oso/9780198753803.003.0006
Item type: chapter

This chapter shows that the first form of integration is possible under Article 107 TFEU although only to a very limited extent, specifically under Article 107(1) and 107(2) TFEU. Article 107(1) is first scrutinized and the defining elements of State aid are examined. The chapter shows the limited scope for integration in the market investor principle and the Altmark test. It develops an alternative reading of the selectivity and effect on competition criterion based on the polluter pays principle and the consistency test. The chapter also shows that for a narrow group of cases Article 107(2) TFEU can be used to achieve the first form of environmental integration.
The place of international law in dispute settlement by the United Nations (UN) Security Council is a topic which has already occasioned debate. Many lawyers contend that law plays a minimal role in the work of the Council. The Security Council may be a political body, but its role is defined by the UN Charter, which is a legal instrument, a treaty between nations. Further, Article 1 of the Charter declares a major purpose of the UN to be the resolution of disputes ‘in conformity with the principles of justice and international law’. What does it mean for a political body to act within a legal framework, and to have to provide solutions to disputes that are in conformity with the law? When we speak of law in the Security Council, we are really speaking of two things: law as it is invoked by the claimants to a dispute, and law as it is employed by the organ itself, when passing its decision.

Freedom of Religion under the European Convention on Human Rights
Carolyn Evans

Freedom of religion and belief is one of the central rights set out in international human rights treaties and yet it has also been one of the most controversial. While it is generally agreed that religious freedom is a fundamental right, there is little consensus about its content or scope. This book provides a detailed analysis of the law of freedom of religion or belief as developed under the European Convention on Human Rights. It takes a critical view of the restrictive manner in which the European Court and Commission of Human Rights have interpreted the Convention provisions relating to freedom of religion or belief and the high level of deference that they have given to State interests. The first part of the book sets the context, historical and theoretical, in which the interpretation of religious freedom in the Convention takes place. The second looks at the meaning of the Article 9(1) provisions for the
protection of freedom of religion and belief, and the third part explores the limitations that a State may place on that freedom. Some of the issues raised include the role of religious education in State schools, permissible limitations on proselytism, the rights of conscientious objectors, and the scope of religious freedom for prisoners.

Access to the Refugee Convention for Stateless Persons
Michelle Foster and Hélène Lambert

in International Refugee Law and the Protection of Stateless Persons

Chapter 4 discusses preliminary issues relating to access to refugee status for stateless persons. It begins by considering the fundamental question of whether stateless persons should be protected per se under the 1951 Refugee Convention or whether they must meet the same criteria as those with a nationality, namely well-founded fear of being persecuted on a Convention ground. The chapter further provides guidance on establishing lack of nationality in the refugee status determination context and considers questions such as the determination of the country of reference, voluntary renunciation, and the imposition of nationality without consent, concluding with an examination of the meaning and interpretation of ‘country of former habitual residence’.

The Scope of Regulatory Autonomy of WTO Members under Article III:4 of the GATT
Frieder Roessler

in International Economic Law and Governance: Essays in Honour of Mitsuo Matsushita

The WTO Appellate Body has ruled that products are ‘like products’ within the meaning of Article III:4 of the GATT if they directly compete in the market and that an imported product is accorded ‘less favourable treatment’ within the meaning of that provision if it is accorded less favourable competitive opportunities. Regulations that distinguish between different types of products and accord one of them less favourable treatment are typically adopted precisely because the market
does not make the distinction that the regulator considers necessary. Many, if not most, internal regulations are thus likely to be inconsistent with Article III:4. The ten policy goals listed in Article XX of the GATT do not comprise many regulatory objectives, such as harmonizing standards, reducing transaction costs for consumers, or preventing deceptive practices. The Appellate Body’s market-oriented approach to Article III:4 therefore renders many legitimate regulations inconsistent with the GATT.

**Competition Law**

Julian Nowag

in Environmental Integration in Competition and Free-Movement Laws

Published in print: 2016 Published Online: January 2017
Item type: chapter

In the context of competition law the second form of preventative integration, balancing to prevent environmental degradation, might be seen as possible under Article 101(1) TFEU’s rule of reason, or under Articles 101(3) and 102 TFEU. However, this chapter discusses how the second form of preventative integration cannot and should not take place within the current framework competition law.

**State Aid Law**

Julian Nowag

in Environmental Integration in Competition and Free-Movement Laws

Published in print: 2016 Published Online: January 2017
Item type: chapter

This chapter shows that preventative integration occurs neither within the current framework of Article 107(1) TFEU nor in the context of Article 107(2) and (3) TFEU. It is shown that the polluter-pays principle is not used for preventative integration but only for supportive integration. Thus Article 107(3)(b) can only offer the second form of integration.
This chapter illustrates that each national of a Member State shall be a Citizen of the Union (Articles 9 TEU and 20(1) TFEU). Citizenship of a modern European State comes with a range of well-recognized rights and duties. All States have different detailed frameworks, but the idea of the individual citizen’s intimate connection with, and expected allegiance to, his or her State is missing at the EU level. Articles 9 TEU and 20(1) TFEU also provide that Union citizenship ‘shall be additional to and not replace national citizenship’. It is but a supplement; though on a more positive note, EU citizenship strengthens State citizenship with a set of entitlements and protection that extend beyond that which can be provided at the national level. The chapter aims to provide an understanding of the scope of protection granted by EU law, as well as its relationship with national law.

Application of the EU CFR by National Courts in Purely Domestic Cases

András Jakab

in The Enforcement of EU Law and Values: Ensuring Member States' Compliance

This chapter argues that the most promising way to conceptualize the values of European constitutionalism in a judicially enforceable manner is through a creative reinterpretation of Article 51(1) EU CFR. It asserts that in order to create a fully fledged value community which benefits all its citizens equally, the CFR should become fully applicable in every case in its own right—even in purely domestic cases in domestic courts and even in the absence of a systemic failure of fundamental rights protection at the domestic level. This would mean that judicial review would be introduced across Europe via the supremacy of EU law. This judicial review would be decentralized in the sense that local courts could exercise it, but its unified application would be ensured by the
preliminary procedure. The EU could thus become a ‘community of fundamental rights’ with nobody left behind.

State Aid Law
Julian Nowag

in Environmental Integration in Competition and Free-Movement Laws

Published in print: 2016 Published Online: January 2017
Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780198753803.003.0023
Item type: chapter

This chapter shows that preventative integration could take place in State aid law and in particular in the context of Article 107(3) TFEU which allows the Commission to exempt certain forms of aid. Various options for integration under Article 107(3) are discussed, with relevant case law. In contrast, under Article 107(1) TFEU could only offer the second form of integration, balancing, if a rule of reason approach were taken, which is not possible.