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The competence of the European Union to conclude international human rights treaties

1. HISTORICAL DEVELOPMENT

Historically framing the evolution of this issue, it is worth recalling the initial silence on human rights in the original founding Treaties. It had to wait for the Spinelli Reform Bill of 1984, which proposed that the European Communities "should" accede to the European Social Charter and the United Nations Covenants on Human Rights of 1966.

An important milestone was the Opinion of the European Court of Justice of 28 March 1996, in which the Court affirmed that the European Community had no competence to accede to the European Convention on Human Rights. As a belated reaction, the Treaty of Lisbon of 13 December 2007 affirmed the obligation of the European Union to accede to the European Convention on Human Rights (Art. 6.2 TEU). Furthermore, the European Parliament Resolution of 19 May 2010 insisted that, in addition to acceding to the European Convention on Human Rights, the European Union should also accede to both the



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Co-funded by
the European Union

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revised European Social Charter and the Council of Europe's Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

2. THE EUROPEAN UNION'S CAPACITY TO CONCLUDE INTERNATIONAL HUMAN RIGHTS TREATIES

With regard to the European Union's capacity to conclude international human rights treaties, it should be stressed at the outset that, according to Article 3(2) of the Treaty on European Union, the European Union has exclusive competence for the conclusion of an international treaty if it is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence; or in so far as its conclusion may affect common rules or alters their scope.

In a slightly more developed form, Article 216 of the Treaty on the Functioning of the European Union states that the Union may conclude international agreements in four cases: (1) where the founding treaties so provide; (2) where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties; or (3) is provided for in a legally binding Union act; or (4) is likely to affect common rules or alter their scope.

3. EXPLICIT COMPETENCES OF THE EUROPEAN UNION

On the explicit competences of the European Union, i.e. on the express provision in the founding treaties for cases in which the Union may conclude international treaties on human rights, the following five ideas should be mentioned.

First of all, it should be noted that Article 6(2) of the Treaty on European Union contains an *ad hoc* provision, stating the obligation of the Union to accede to the European Convention on Human Rights. It should be recalled that, on 5 April 2017, the forty-seven Member States of the Council of Europe and the European Union adopted the Draft Agreement on the Accession of the Union to the European Convention on Human Rights. However, Opinion 2/13 of the Court of Justice of the European Union of 18 December 2014 concluded that the Draft Accession Agreement was contrary to the founding Treaties. Hence, negotiations on a new Draft Accession Agreement have recommenced.

Secondly, we can note that, among the general objectives of the Union, the Treaty on European Union mentions the following three: (1) to promote respect for human rights (Art. 3.1 TEU); (2) to combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child (Art. 3.3 TEU); and (3) in its relations with the rest

of the world, the Union shall promote and protect human rights. It shall also respect and develop international law (Art. 3.5 TEU).

Thirdly, among the provisions of the Treaty on the Functioning of the European Union of general or cross-cutting application, there are also the following three: (1) to eliminate inequalities, and promote equality, between men and women (Art. 8); (2) to promote a high level of employment, the guarantee of adequate social protection, to fight against social exclusion, and a high level of education, training and protection of human health (Art. 9); and (3) to combat all discrimination (Arts. 10 and 19). In this regard, it is worth mentioning the Council Decision of 26 November 2009 on the conclusion of the UN Convention on the Rights of Persons with Disabilities.

The fourth idea to highlight is that, among the specific objectives of the Union's external action, the Treaty on European Union mentions the following two: (1) to advance in the wider world: the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. (Art. 21.1 TEU); and (2) in its international relations, the Union shall consolidate and support human rights and the principles of international law (Art. 21.2 TEU).

Finally, fifth, it should be noted that there are provisions scattered throughout the Treaty on the Functioning of the European Union that contain express references to various international human rights treaties. I cite two provisions by way of example: (1) Article 78 states that asylum policy “must be” in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and “other relevant treaties”; and (2) Article 151 states that social policy must “have in mind” fundamental social rights such as those set up in the European Social Charter signed at Turin on 18 October 1961.

4. IMPLICIT COMPETENCES

With regard to the Union's implied competences (i.e. where the exercise of these competences is necessary to achieve the Union's objectives, in the context of one of its policies) to conclude international human rights treaties, two general ideas are worth noting.

Firstly, according to the *AETR* Judgment of 31 March 1971 (paras. 17-19): in matters in which the Union has explicit competence *ad intra*, it will also have implicit competence *ad extra*. This would allow the Union to conclude, *inter alia*, international treaties on equality between men and women, non-discrimination, social policy and employment, or asylum and refuge.

Secondly, the non-foreseeable jurisdiction clause provided for in Article 352 of the Treaty on the Functioning of the European Union allows the implicit competences to be made explicit. An example of this is the 2008 Council Decision on the Agreement between the Economic Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe.

5. EXPRESS PROVISION IN A BINDING EU LEGAL ACT

As regards the possibility of the Union enjoying competence to conclude international human rights treaties resulting from an express provision in a binding legal act, it is clear that this refers to an express provision in a regulation, directive, or decision.

So far, this possibility has never been realised in practice. The closest it has come is the Council Regulation of 29 April 1999, which stated in its Preamble that the external action of the European Community "shall be guided by the general principles" contained in the Universal Declaration of Human Rights, the International Covenants of 1966, the Genocide Convention, "as well as other rules of international treaty or customary law".

It should also be recalled that, if the provision is included in a legislative act of the European Union, then the Union has exclusive competence to

conclude the relevant international treaty (Art. 3(2) TFEU).

6. WHERE IT IS LIKELY TO AFFECT COMMON RULES OR ALTER THEIR SCOPE

Finally, it should be underlined that the European Union will also have competence to conclude international human rights treaties when the international treaty may affect common standards or alter their scope.

The origin of this provision is to be found in the jurisprudential rule of the useful effect. It should be recalled that, in its *Kramer* Judgment of 14 July 1976, the Court of Justice stated that, where competence for the attainment of an objective has been conferred on the European Economic Community internally, the Community may conclude international treaties (in the absence of explicit competence) in order to attain the objectives of internal competence.

This possibility could be applied in areas such as police and judicial co-operation in criminal matters, development co-operation, migration policy, restrictive measures, etc.

