

In the News / Actualité

The European Commission's *Amicus Curiae* Brief in the *Alvarez-Machain* Case

CEDRIC RYNGAERT*

On 30 March 2004, the U.S. Supreme Court began to hear arguments in the case of *Sosa v. Alvarez-Machain*. The case concerns a claim under the Alien Tort Claims Act (ATCA), on behalf of Mr. Alvarez-Machain, who was abducted on Mexican territory on behalf of the U.S. Drug Enforcement Agency. The ATCA is a U.S. act granting a civil cause of action to victims of serious violations of the law of nations or a treaty, regardless of the place where such violations occurred.¹ In international law terms, the ATCA confers universal tort jurisdiction on U.S. courts for violations of international treaties and customary international law. In the *Alvarez-Machain* case, a large number of *amicus curiae* briefs were filed, one of them on behalf of the European Union by the European Commission.²

The European Union asserts that it has an interest of *amicus curiae* whenever the United States adopts or applies extraterritorial legislation that affects areas of the EU's competence. Clearly, an international organization cannot possibly assert an interest as *amicus curiae* over a subject matter which its constitutional treaty has not given it competence to address. Nor can such interest arise if the constitutional treaty – even where subject matter competence exists – does not provide for legal instruments through which that competence may be exercised. The action of the European Union and its organs is therefore guided by the principle of conferred

* Ph.D. Research Fellow, Institute for International Law, University of Leuven (Belgium).

¹ 28 U.S.C. Section 1350: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

² Brief of *Amicus Curiae* of the European Commission in support of neither party, in the Supreme Court of the United States, *Sosa v. Alvarez-Machain*, 23 January 2004, available at <www.nosafehaven.org/_legal/atca_oth_EurComSupportingSosa.pdf>. Although the *amicus curiae* brief itself refers to “the Community”, the term “Union” will be used, as the brief also addresses non-Community provisions, such as Articles 6 and 11 of the EU Treaty.

powers, which implies that any action of the European Union is dependent upon a specific legal basis.³

An *amicus curiae* brief is a prime example of a “non-standard act”, *i.e.*, an act that is not defined in the European treaties.⁴ This does not mean that the Union cannot have recourse to such an act – which is by necessity a “soft law” act – as no act by the Union can be legally binding unless it is provided for in the European treaties.⁵ The Union’s legal order recognizes non-standard acts, provided indeed that they are not intended to have legal effects on individuals.⁶ In the case of an *amicus curiae* brief, one could argue that, ultimately, such a brief is intended to affect the position of individuals in some manner. The *Alvarez-Machain* brief, for instance, denounces the application of the Alien Tort Claims Act to conduct undertaken outside the United States by European nationals or legal entities. In so doing, the Commission hopes to safeguard the rights of European legal subjects under public international law.⁷ Yet, the *amicus curiae* brief, although it is intended to vindicate rights of European subjects, cannot be construed to have direct legal

³ See K. Lenaerts & P. Van Nuffel, R. Bray (ed.), *Constitutional Law of the European Union*, London, Sweet & Maxwell, 1999, 88-98.

⁴ Article 249 of the EC Treaty defines the legal instruments available to the institutions as regulations, directives, decision, recommendations and opinions. See for the non-Community pillar: Articles 12-15 and 34 of the EU Treaty.

⁵ See for overview: K. Wellens & G.M. Borchardt, “Soft Law in European Community Law”, (1989) *European Law Review* 267-321. It should be noted that also some standard acts, such as recommendations and opinions are not binding.

⁶ The ECJ has consistently held that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects. See Case 22/70 *Commission v. Council* [1971] ECR 263, paragraph 42, Case C-325/91 *France v. Commission* [1993] ECR I-3283, paragraph 9, and Case C-57/95 *France v. Commission* [1997] ECR I-1627, paragraph 7. See also K. Lenaerts & P. Van Nuffel, R. Bray (ed.), *supra* note 3, at 586-587; K. Wellens & G.M. Borchardt, at 321.

⁷ This brief therefore differs from the European Union’s *Atkins amicus curiae* brief with respect to the death penalty for mentally retarded persons, which was filed with the U.S. Supreme Court in 2002. This brief was not meant to affect the position of European individuals. The fact that the addressees were non-European citizens does not, however, subject this *amicus curiae* brief to a different legal regime insofar as ECJ review competence is concerned. The *amicus curiae* brief in the *Atkins* case (*Atkins v. Virginia*, 536 U.S. 304 (2002)) is available at <www.eurunion.org/legislat/DeathPenalty/SpainWmsBrief.doc>.

effects inside the Union, as any possible effects of the final decision are not brought about by the Union, but by the U.S. Supreme Court. This implies that the European Court of Justice has no nullification competence under Article 230, para. 1 of the EC Treaty, or under Article 35 (6) of the EU Treaty. The ECJ only has competence over soft law acts that are – regardless of their form – intended to be binding on individuals while not having been issued pursuant to the procedures provided for in the European treaties.

The subject matter competence upon which the Commission bases its *amicus curiae* brief poses further problems. The brief states that, under the treaty framework, the European Community and its Member States are entitled to express views and legislate on issues of extraterritorial jurisdiction in relation to their respective competencies. The Community applied this aspect of the principle of “*in foro interno, in foro externo*” to counter the extraterritorial effects of the U.S. Helms-Burton and D’Amato-Kennedy Acts (1996), as well as the Soviet Pipeline Regulations (1982).⁸ Yet, these effects, which hampered trade between the Community and third countries, were of a typical economic nature and were easily captured by treaty provisions.⁹ It is much harder to identify a pertinent treaty provision as applying to the effects of universal jurisdiction.

Consistent with most non-standard acts, the preamble of the *amicus curiae* brief does not explain its legal basis in terms of subject matter competence. However, in asserting its interest of *amicus curiae*, the European Union does refer to treaty provisions which, in its opinion, confer powers on it to submit a brief to the U.S. Supreme Court regarding universal jurisdiction. The *amicus curiae* brief refers to, *inter alia*, Article 177(2) of the EC Treaty, a provision dealing with development cooperation, and Article 181a(1) of the same treaty, dealing with economic, financial and technical cooperation with third countries.¹⁰ While the Union might hint

⁸ Council Regulation (EC) No. 2271/96, *O.J.* (L 309) 1 (22 Nov. 1996); *European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R.*, reprinted in 21 I.L.M. 891 (1982).

⁹ For the 1996 Acts, Council Regulation No. 2271/96 identifies as legal bases Articles 73c (now Article 57 – free movement of capital between Member States and third countries) and 113 (now Article 133 – common commercial policy) and 235 (now Article 308 – action necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, for which the EC Treaty has not provided the necessary powers).

¹⁰ Both provisions read: “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.”

at the adverse effects which the exercise of unilateral jurisdiction might have on international cooperation, it is far-fetched to say that universal jurisdiction in civil matters produces direct, substantial and reasonably foreseeable effects on all sorts of non-political cooperation. The above-mentioned provisions only provide a legal basis for the Union to engage in certain international cooperation, but not to address behavior which may remotely or hypothetically influence such international cooperation.

The brief also cites Article 6 of the EU Treaty (1992). According to Article 6(1), the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and on the rule of law. Article 6(2) requires the Union to respect fundamental rights. Article 6 can, however, hardly serve as a legal basis for *external* Community action, as it addresses only the Union's *internal* rule-of-law foundations. Article 6 is not even a legal basis at all, certainly not for Union action aimed at countering extraterritorial effects of foreign legislation,¹¹ as it does not confer any competence on the Union. Article 6 merely anchors the rule of law in the EU Treaty in order to provide protection *vis-à-vis* EU institutions and Member States.¹²

Article 11 of the EU Treaty – the last provision invoked by the brief – provides that the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be, *inter alia*, to promote international cooperation and to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. Clearly, this article reflects a commitment to the rule of law, also outside an EU context. Thus, the Union can take positions on issues of international law, as in the case at hand. Yet Article 11 provides that the *Council*, and not the Commission, shall ensure compliance with these principles. Issues of foreign relations may indeed be too sensitive to be left entirely to institutions in which the Member States as such are not represented. The European Union's *amicus curiae* brief in the *Atkins* case was, for instance, not filed by the Commission, but by the Council.¹³

¹¹ The reference to other legal bases in previous EC positions on extraterritorial jurisdiction is testimony to this. See footnote 7.

¹² See K. Lenaerts & P. Van Nuffel, R. Bray (ed.), *supra* note 3, at 539-547.

¹³ The draft agenda of the Public International Law Working Group of the Council (3 September 2003) reveals that the Council itself took the lead in the *amicus curiae* briefs concerning the death penalty in the U.S. See <register.consilium.eu.int/pdf/en/03/tx03/tx03715.en03.pdf>. See also the provisional agenda of the Working Group on Human Rights of the Council (4 February 2004), available at <register.consilium.eu.int/pdf/en/04/cm00/cm00394.en04.pdf>.

In the *Alvarez-Machain* case, nothing indicates that the Council in any way initiated the filing of the *amicus curiae* brief. On the contrary, although the Council's legal department advised, on constitutional grounds, against the Commission's filing of the brief, the Commission decided to pursue its action without a Council mandate.¹⁴

The Commission, in its wish to speed up cooperation in matters of international law (which are still largely the domain of the Member States) pushes the limits of the powers conferred on it by the European treaties, and even on the Community and the Union at large, quite far. The fact that an *amicus curiae* brief merely expresses a view of the Commission and does not directly affect individuals, let alone bind them, might, however, counsel against an outright condemnation of the Commission's action. Furthermore, objections based on the lack of democratic legitimacy of the brief could be neutralized by the argument that the individual Member States remained free to file separate *amicus curiae* briefs. Only the United Kingdom did this.¹⁵

Turning now to the content of the brief, it should be noted that the brief does not discuss the facts of the case or support either party. It merely addresses the abstract substantive standards and the jurisdictional reach of universal tort jurisdiction.

Somewhat disappointingly, in the discussion of the substantive standards imposed by the ATCA, the brief does not contain any new position. Citing ample ATCA case law, it is limited merely to re-affirming the recent evolution of the reference that these standards make to international law. More interesting is the jurisdictional part of the brief. There, the Commission requests the Court to pay heed to the local remedies rule and the complementary nature of universal jurisdiction. Against this background, States should only exercise jurisdiction pursuant to the traditional bases of jurisdiction. Beyond the factual circumstances of the case, the Commission obviously wants to prevent the ATCA from applying to European (multinational) companies whose conduct contravenes international standards. In the Commission's view, those companies should not be subject to the jurisdiction of U.S. courts in the first place, but rather to the jurisdiction of the courts of the State in which their conduct occurred (territoriality principle), or of

¹⁴ The Council only expressed its arguments orally. Transcript of email conversation with Council official on file with the author.

¹⁵ The brief filed by the United Kingdom, Australia and Switzerland is available at <www.sdshh.com/Alvarez/Sosa%20Brief%20Final.pdf>.

the courts of the (European) State in which the company is incorporated (personality principle). Only when the States of incorporation are unwilling or unable to provide effective remedies could U.S. courts claim jurisdiction.

The Commission's view certainly corresponds to the on-going re-appraisal of international and national jurisdiction over the most serious crimes under international law. The emerging jurisdictional framework takes into account the interests of States that have a stronger link with the case, without granting impunity or wasting resources. Despite its shaky constitutional basis, the Commission's *amicus curiae* brief is a noteworthy contribution to a more efficient and legitimate system of international law enforcement at both the national and the international level.¹⁶

¹⁶ For a proposal and discussion that an equivalent of the Alien Tort Claims act be adopted by the European Union: see C. Kessedjian, "Les actions civiles pour violations des droits de l'homme – Aspects de droit international privé", conference au Comité français de droit international privé, novembre 2003, à paraître.