

THE EUROPEAN COMMISSION'S *AMICUS CURIAE* BRIEF IN THE ALVAREZ-MACHAIN CASE

On March 30, 2004, the U.S. Supreme Court started to hear arguments in the case of *Sosa v. Alvarez-Machain*. One of the arguments centered on the application of the Alien Tort Claims Act (ATCA) to the victim of an abduction of Mr Alvarez-Machain in 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 these violations occurred. In international law terms, the ATCA confers universal torts jurisdiction on U.S. courts for violations of customary international law and treaties. In the *Alvarez-Machain* case, a large number of *amicus curiae* briefs were filed, one of them on behalf of the European Commission. In what follows, I will at length discuss the problematic constitutional mandate of the Commission to file it. Afterwards, I will briefly turn to the actual content of the brief.

The European Commission asserts that it has an interest of *amicus curiae* whenever the United States adopts or applies extraterritorial legislation that affects the areas of competence of the European Union.¹ Clearly, an international organization cannot possibly assert an interest of *amicus curiae* if the constitutional treaty of that organization does not bestow subject matter competence upon it. Nor can there be an interest if the constitutional treaty, even in case of subject matter competence, does not provide for legal instruments to exercise that competence. The action of the European Union and its organs is therefore guided by the principle of conferred powers, which implies that any action of the European Commission depends on a specific legal basis.²

The use of non-standard acts,³ such as *amicus curiae* briefs, by the Community is not regulated by the European treaties. This does not mean that the Community cannot have recourse to such “soft law” acts.⁴ The Community legal order indeed recognizes them, provided however that they are not intended to have legal effects on individuals.⁵ Taking the case of an *amicus curiae* brief, one could argue that, eventually, an *amicus curiae* brief is intended to somehow affect the position of individuals. The *Alvarez-Machain* brief, for instance, denounces the application of the Alien Tort Claims Act to conduct undertaken outside the U.S. by European nationals or legal entities. In doing so, the

¹ 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.

² See K. LENAERTS & P. VAN NUFFEL, R. BRAY (ed.), *Constitutional Law of the European Union*, London, Sweet & Maxwell, 1999, 88-98.

³ A non-standard act is an act that is not defined in the treaties. 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.

⁴ See for an overview: K. WELLENS & G.M. BORCHARDT, “Soft Law in European Community Law”, *European Law Review*, 1989, 267-321.

⁵ The European Court of Justice 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.), *op. cit.*, at 586-587; K. WELLENS & G.M. BORCHARDT, *loc. cit.*, at 321.

Commission hopes to safeguard the rights of European legal subjects under public international law.⁶ If the Supreme Court takes the brief into account, the latter's position may be influenced. Yet the modification of their position is not directly brought about by the Community as such, but merely via a judicial act of the U.S. Supreme Court, the likelihood of which can of course not be anticipated. The *amicus curiae* brief, even if intended to vindicate rights of European subjects, cannot therefore be construed to have direct legal effects in the Community. This implies that the European Court of Justice has no nullification competence under Article 230, al. 1 of the EC Treaty or Article 35 (6) of the EU Treaty. The Court of Justice has only competence over soft law acts that are, in spite of their form, meant to be binding on individuals.

The subject matter competence upon which the Commission bases its *amicus curiae* brief, poses more problems. The *amicus curiae* brief puts forward that, under the treaty framework, the European Community and its Member States are both entitled to express views and to 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 American Helms-Burton and D’Amato-Kennedy Acts (1996), as well as the Soviet Pipeline Regulations (1982).⁷ Yet these effects, hampering trade between the Community and third countries, were of a typical economic nature, which could easily be caught by treaty provisions.⁸ For the effects of universal jurisdiction, it is much harder to identify a pertinent treaty provision. As is the case with most non-standard acts, the preamble of the *amicus curiae* brief does not mention its legal basis in terms of subject matter competence. However, in asserting its interest of *amicus curiae*, the European Commission duly refers to treaty provisions allegedly conferring powers on it to submit a brief to the Supreme Court with respect to universal jurisdiction.

The *amicus curiae* brief refers, amongst others, to Article 177(2) of the EC Treaty, a provision dealing with development cooperation, and Article 181a(1) of the same treaty, a provision dealing with economic, financial and technical cooperation with third

⁶ 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. To be true, the fact that the addressees were non-European citizens does not subject this *amicus curiae* brief to another legal regime in terms of European Court of Justice review competence (see *infra*). The *amicus curiae* brief in the *Atkins* case (*Atkins v. Virginia*, 536 U.S. 304 (2002)) is available at <http://www.eurunion.org/legislat/DeathPenalty/SpainWmsBrief.doc>.

⁷ Council Regulation (EC) No. 2271/96, *O.J.* (L 309) 1 (Nov. 22, 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).

⁸ 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).

countries.⁹ One could wonder what these provisions have to do with the issue of universal jurisdiction.

The brief also features Article 6 of the EU Treaty (1992). According to Article 6(1) of the EU Treaty, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Article 6(2) of the EU Treaty enjoins the Union to respect fundamental rights. Article 6 of the EU Treaty can, however, hardly serve as a legal basis for external Community action as it only addresses the internal rule of law foundations of the Union. Article 6 of the EU Treaty is even no legal basis at all, certainly not for Union action aimed at countering extraterritorial effects of foreign legislation,¹⁰ since it does not confer any competence on the Union. Article 6 of the EU Treaty merely anchors the rule of law in the EU Treaty in order to provide protection *vis-à-vis* Union institutions and Member States.¹¹ The reference to the rule of law enshrined in this article probably only serves to illustrate the interest of *amicus curiae*.

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,¹² also outside an EU context. Thus, the Union can also take positions on issues of international law, as in the case at hand. Yet Article 11 of the EU Treaty provides that the *Council*, and not the Commission, shall ensure that these principles are complied with. Issues of foreign relations may indeed be too sensitive to be entirely left to institutions in which the Member States are not represented as such. The European Union's *amicus curiae* brief in the *Atkins* case for instance, was not filed by the Commission, but by the Council, presenting itself as 'the European Union'.¹³ In the *Alvarez-Machain* case, nothing indicates that the Council has 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 *amicus curiae* brief, the Commission decided to pursue its action without a Council mandate.

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

⁹ 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."

¹⁰ The reference to other legal bases in previous EC positions on extraterritorial jurisdiction is testimony to this. See footnote 7.

¹¹ See K. LENAERTS & P. VAN NUFFEL, R. BRAY (ed.), *op. cit.*, 539-547.

¹² The *amicus curiae* brief confusingly refers to the EC Treaty in this context.

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 <http://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 <http://register.consilium.eu.int/pdf/en/04/cm00/cm00394.en04.pdf>.

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 by 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 might be neutralized by the argument that the individual Member States remained free to file a separate *amicus curiae* brief. Only the United Kingdom did this.¹⁴

Having dealt with the preliminary question of the Commission's competence to file the *amicus curiae* brief in the *Alvarez-Machain* case, I will now briefly turn to the content of the brief. This brief does not consider the facts of the case and supports neither party. It merely addresses the abstract substantive standards and the jurisdictional reach of universal torts jurisdiction.

Somewhat disappointingly, when discussing the substantive standards imposed by the ATCA, the brief does not contain any new position. Citing ample ATCA case law, it merely limits itself to re-affirming the evolution that the reference to international law of these standards has undergone. 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. Along the lines of the complementarity principle as enshrined in the Statute for the International Criminal Court, 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, these companies should not be subject to the jurisdiction of U.S. courts in the first place, but to the jurisdiction of the courts of the State in which their conduct concerned occurred (territoriality principle), or of the courts of the (European) State in which the company is incorporated (personality principle). Only when these States are unwilling or unable to provide effective remedies, U.S. courts could claim jurisdiction.

If not settled international law, the Commission's view certainly corresponds to the ongoing re-appraisal of international and national jurisdiction over the most serious crimes against international law. The emerging jurisdictional framework takes the interests of States that have a stronger link with the case into account, without conferring impunity, and prevents the waste of resources. In spite of 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.

¹⁴ The brief filed by the United Kingdom, Australia and Switzerland is available at <http://www.sdshh.com/Alvarez/Sosa%20Brief%20Final.pdf>