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

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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

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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

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4 Article 249 of the EC Treaty defines the legal instruments available to the institutions as regulations, directives, decision, recommendations and opinions. See for 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.


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/SpanWmsBrief.doc>.