

The Place of International Law in Recent Supreme Court Decisions

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ABSTRACT

What place does the United States Supreme Court confer to international law? This is an old question and certainly not an original one. However, it arises each time the Court has to deal with topics that have international frameworks. Moreover, the answers to this question are often controversial and raise numerous doctrinal debates. The purposes of this paper are then both to focus this debate and to try to contribute to it, particularly in light of the most recent Supreme Court decisions.

In 2004, the Supreme Court delivered five decisions in which questions dealing with international law were examined: *Republic of Austria v. Altmann*, *Rumsfeld, v. Padilla*, *Rasul v. Bush*, *Hamdi v. Rumsfeld* and *Sosa v. Alvarez-Machain*. The international law matters that were specifically examined were: (1) the reach of the *Alien Tort Claims Act*; (2) the retroactivity of the *Foreign Sovereign Immunities Act*; (3) the jurisdiction of U.S. courts to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated in territories over which the United States exercises plenary and exclusive jurisdiction, but not ‘ultimate sovereignty’—*i.e.* over Guantánamo Bay detainees, and (4) the right for a detainee to challenge his classification as an enemy combatant and then to receive notice of the factual basis for his classification. Nevertheless, while the Court answered—or refrained from doing so—these different questions, it was coping with larger questions: the incorporation of international law in the U.S. domestic order and, then, with the question of defining the relationship between international law and domestic law.

In this regard, the idea that arose during the previous terms of the Supreme Court, that international law was acquiring a real position in its decisions, might be considered in light of the 2004 term. In fact, the balance of the last decisions of the Supreme Court is mitigated. But precisely because it is mixed, the possibility occurs to point out when and why international law is invoked as a serious argument to support Supreme Court’s decisions.

In this paper, I will first analyze how recent Supreme Court decisions influence the old question of the relations between international law and domestic law in order to then offer a systematization of the place conferred to international law by the Supreme Court of the new century. In order to reach such a systematization, questions like the dualist approach of the Supreme Court, the presumption of self-executing treaties, the rule of interpretation (the *Charming Betsy* canon) or the exception of defense of a national interest will be revisited. Indeed, the decisions examined explicitly or implicitly raise those questions. After this analysis, I will point out the following argument: international law considerations are being progressively taken into account by the Supreme Court regarding matters of jurisdiction. However, when international law invokes deals with substantial law, its role is weaker, not just because it is not incorporated as a part of the *supreme law of the land* but also owing to the reluctance to appeal to international law standards in the exercise of the Supreme Court’s interpretive function.

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