

2014

# The March of Judicial Cosmopolitanism and the Legacy of Enemy Combatant Case Law

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**THE MARCH OF JUDICIAL COSMOPOLITANISM AND THE  
LEGACY OF ENEMY COMBATANT CASE LAW**

**MADALINA SONTROP**

A THESIS SUBMITTED TO  
THE FACULTY OF GRADUATES STUDIES  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF  
MASTER OF LAWS

GRADUATE PROGRAM IN LAW  
OSGOODE HALL LAW SCHOOL,  
YORK UNIVERSITY  
TORONTO, ONTARIO

AUGUST 2014

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## **ABSTRACT**

This thesis explores the concept of judicial cosmopolitanism and its prevalence in enemy combatant case law. The author draws upon the theoretical and philosophical underpinnings of cosmopolitanism and cosmopolitan law to describe judicial cosmopolitanism as form of legal discourse through which judges show a willingness to extend constitutional protections based on a contemporary, functional understanding of sovereign jurisdiction. The purpose of this work is to address the correlation between enemy combatant jurisprudence and the aforementioned understanding of judicial cosmopolitanism. It is argued that a march of judicial cosmopolitanism developed early in enemy combatant cases, and that it came to a standstill in more recent decisions.

## ACKNOWLEDGEMENTS

*I would like to thank my supervisor, professor Hengameh Saberi. It was an honour to learn from her and to work with her. Her mentorship guided me and encouraged me to explore my passion for this work. Words cannot express how much I appreciate the time she dedicated, and the support she provided. Thank you!*

*I would also like to thank the members of my thesis committee for their advice and contributions. Your comments and help are much appreciated.*

*It goes without saying that Osgoode Hall Law School is in the highest echelons of legal education. This would not be possible without the school's incredible community of academics and staff. For this reason, I wish to extend my gratitude to all members of Osgoode Graduate Program and the Nathanson Centre for having made this a memorable year.*

*Last, but most certainly not least, I would like to thank my family, my parents and my sister, for their unconditional love and constant encouragement throughout my educational pursuits. Thank you for being my motivation, my inspiration, my everything.*

Madalina Sontrop  
Osgoode Hall  
August 2014

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*“A cosmopolitan judge... might be one who wears English suits, speaks French or Swedish, and is not averse to citing international legal materials he or she picked up while summering in Salzburg with judges from other countries”*

-Noah Feldman

## **1. Introduction**

No event in recent history has had the impact of the 9/11 terrorist attacks. The consequences of these attacks have changed the lives of many individuals. They have highlighted a type of conflict that transcends borders, a conflict in which those responsible are no longer prisoners of war, but enemy combatants. Shortly following the attacks in New York, the United States retaliated with a declaration of war, and with the creation of a detention camp in Guantanamo Bay- a small bay in Cuba, where the US intended to detain terrorists. Yet, this was not a regular war – this was a “War on Terror”. Likewise, these were not regular detainees –they were enemy combatants detained in the course of the War on Terror; in other words, these were dangerous individuals. The detention camp at Guantanamo Bay opened in 2002, and 12 years later it remains the home of over 100 detainees. While political reasons (at the time) might have justified the use of such a detention facility, the legal implications were far from reasonable. Holding detainees from all-over the world, Guantanamo became known as a “legal black hole”.<sup>1</sup> It was the place where the United States could indefinitely detain enemy combatants, irrespective of their nationality or their legal entitlements. Furthermore, it was the place

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<sup>1</sup> John Steyn, “Guantanamo Bay: The Legal Black Hole” (2004) 53 International and Comparative Law Quarterly

where the US could detain without the right of due process, for, as far as the American government was concerned, Guantanamo was not part of its territorial border, and did not benefit from constitutional protections.

The legal repercussions of the War on Terror dominated American constitutional law from 2004 to 2010, puzzling both jurists and scholars. The courts were faced with an influx of cases challenging the legality of the detentions and the detainees' lack of due process. The resulting enemy combatant jurisprudence, headlined by *Boumediene v Bush*<sup>2</sup>, is mainly known for its extension of habeas corpus rights to alien enemies detained abroad, in Guantanamo Bay; it is also known for its discussion surrounding the separation of powers doctrine. In spite of these interpretations, the true legacy of enemy combatant jurisprudence does not lie in its approach to the separation of powers, or in its extension of habeas corpus. Rather, the lasting aspects of the case law lie in its contribution to the movement known as judicial cosmopolitanism. Through their use of functionalism, and in their understanding of jurisdiction and sovereignty, enemy combatant decisions have been construed as constituting a march of judicial cosmopolitanism.<sup>3</sup> Therefore, the objective of this project is to recognize this particular jurisprudence as judicial cosmopolitanism by examining the key notions that contributed to this phenomenon.

In order to address the contribution of enemy combatant cases to judicial cosmopolitanism, it is important to consider the main concepts: functionalism, judicial

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<sup>2</sup> *Boumediene v Bush; Al Odah v US* (2008) 553 US 723 [*Boumediene*]

<sup>3</sup> Eric A. Posner, "Boumediene and the Uncertain March of Judicial Cosmopolitanism" (2008) *Cato Supreme Court Review*.

cosmopolitanism, sovereign jurisdiction, and the meaning of the march of judicial cosmopolitanism. In this paper, judicial cosmopolitanism is described as a discourse through which: 1) judges apply constitutional provisions equally to citizens and noncitizens alike; and 2) the functional decisions of judges demonstrate a contemporary understanding of jurisdiction and sovereignty. For these purposes, jurisdiction and sovereignty are considered to be interrelated terms; with jurisdiction as the power to exercise authority over individuals, and sovereignty denoting the absolute power within a jurisdiction, these concepts are crucial to a finding of judicial cosmopolitanism. Still, judicial cosmopolitanism requires contemporary uses and understandings of these terms. Instead of relying on classical approaches to jurisdiction as defined by sovereign control and territoriality, judicial cosmopolitanism entails an application of jurisdiction as effective control, without the restricting aspects of territoriality. Furthermore, judicial cosmopolitanism can also arise when the courts adopt a functional approach.

Functionalism refers to a method of judicial analysis through which judges undertake a balancing exercise by considering contextual factors such as citizenship, the site of detention, and practical obstacles. Lastly, throughout this essay, I will refer to “the march”<sup>4</sup>, in the march of judicial cosmopolitanism as put forth by Eric Posner, as a movement<sup>5</sup> through which courts gradually adopt a judicial cosmopolitanism discourse by embracing the aforementioned conceptualizations. Therefore, it will be in light of an

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<sup>4</sup> Ibid.

<sup>5</sup> The movement refers to a *judicial movement*. A judicial movement, for purposes of this thesis, describes circumstances or situations through which judges have adopted a certain theoretical approach or understanding, such that when taken as a whole, their judgments (usually progressive/consecutive) represent a particular attitude (i.e.: judicial cosmopolitanism) toward the case law. The term “judicial movement” is typically used in reference with judges’ ability to construct and to interpret legislation (see Felix Frankfurter, “Some Reflections on the Reading of Statutes” (1947) 47 Colum. L. Rev. 527). Here, judicial movement will be used to represent a process through which judges have gradually adopted an interpretation, a discourse (in this case judicial cosmopolitanism) in relation to a specific body of cases.

analysis of jurisdiction and functionalism that I situate my description of judicial cosmopolitanism in enemy combatant jurisprudence.

The literature regarding judicial cosmopolitanism in enemy combatant case law offers insights into these descriptions, but lacks clear conceptualization of judicial cosmopolitanism and its underlying assumptions. Likewise, there is a lacuna in the literature as to whether the march to judicial cosmopolitanism is still ongoing, particularly following more recent, contrary jurisprudence. Hence, in addressing this body of cases from the perspective of judicial cosmopolitanism, the literature leaves certain aspects unanswered, and ripe for research. Taking into account these descriptions and the gaps in the works describing the phenomenon of judicial cosmopolitanism, I seek to address the following question:

In their functional analysis of enemy combatant jurisprudence in the War on Terror, have US courts commenced a march of judicial cosmopolitanism by adopting a notion of sovereign jurisdiction consistent with modern understandings of the concepts?

The answer, just like the question, will be twofold. First, I will address whether judicial cosmopolitanism adopts modern notions of sovereign jurisdiction; secondly, I will examine the link between courts' use of functional analysis and the prevalence of cosmopolitan tendencies in the case law. I argue that, even though the link between functional sovereignty and cosmopolitanism is weak, US courts have adopted a

contemporary understanding of sovereign jurisdiction that has enabled them to commence a strong march of judicial cosmopolitanism, a march which has, nonetheless come to a standstill in recent case law.

To address the questions posed by this project, I have divided the paper into three parts. Following the introduction, Part 2 provides a detailed overview of the literature regarding judicial cosmopolitanism and the relevant cases. The review itself consists of four sections: 1) judicial cosmopolitanism in relation to enemy combatant cases; 2) judicial cosmopolitanism as a legal theory; 3) underpinnings of judicial cosmopolitanism; and 4) further issues. The main objective of the literature is to identify the conversation and the debate around the phenomenon of judicial cosmopolitanism, as well as to address the different definitions and theoretical underpinnings of the concept. Thus, by discussing judicial cosmopolitanism both in relation to its role in the cases, and outside the case law, the literature review provides a thorough explanation of judicial cosmopolitanism. Part 2 also gives a concise definition of judicial cosmopolitanism and addresses other lacunae in the literature.

Part 3 provides the answer to the research question. First, Part 3 addresses the question of sovereign jurisdiction. In order to answer the question I first examine the modern conception of jurisdiction by citing and analyzing examples from the European Court of Human Rights and Canadian jurisprudence, to conclude that a modern understanding relies on effective control and not territorial sovereignty. Secondly, this part of the paper provides a discussion in regards to the notion of functional sovereignty, and the importance of the functional analysis to the establishment and to the finding of a

contemporary approach to sovereignty in the case law. I provide a general overview of functionalism, defining it as a methodology through which judges undertake the exercise of balancing relevant contextual factors. Having established a contemporary reading of sovereign jurisdiction, I turn to my initial question of whether the case law displays this modern description of jurisdiction. I address this by looking at cases pre-*Boumediene*, *Boumediene*, and the law following *Boumediene*. Following an examination of the relevant case law I proceed to examine the link between the use of functional analysis and the prevalence of judicial cosmopolitanism. I argue that functionalism serves a supporting role to judicial cosmopolitanism, and that in certain cases, particularly in *Boumediene*, it paves the way for cosmopolitanism. Nonetheless, following a close description of the case law, I conclude that the connection between functional sovereignty and judicial cosmopolitanism is weak, and that while functionalism does not impede a finding of judicial cosmopolitanism it does not automatically imply the existence of the phenomenon.

My final conclusion is that the march of judicial cosmopolitanism started prior to *Boumediene*, but that the movement's peak occurred with the decision in *Boumediene*. Therefore, it is without doubt that a movement has commenced; the question that remains is whether the movement still exists in the post-*Boumediene* case law. The answer is more complicated than it seems. On the face of it, the movement of judicial cosmopolitanism has come to standstill. However, because post-*Boumediene* case law did not overrule *Boumediene* (it could not have, since the cases examined are lower court cases) but merely applied it, then the march is still alive – although the reality is that

unless the issue goes before the Supreme Court again, judicial cosmopolitanism remains confined to earlier enemy combatant case law.

Taken as a whole, part 3 offers a detailed response to the present research question. It addresses the theme of judicial cosmopolitanism in light of contemporary approaches to functional jurisdiction and underpinning assumptions of judicial cosmopolitanism. Ultimately, the entire essay demonstrates that whilst the march to judicial cosmopolitanism was initiated as US courts adopted contemporary approaches to sovereign jurisdiction in light of functional methodologies, the movement has come to a standstill due to recent jurisprudence, without having been eradicated from judicial interpretation.

### 1.1 Methodology

This essay uses a mixture of doctrinal and theoretical methods of analysis. The doctrinal aspect represents the examination of the primary sources –i.e. the case law. I examine cases regarding enemy combatants. The cases range from 2004 to 2010, with the exception of an earlier case from the 1950s. The cases I discuss are *Eisentrager v Johnson*<sup>6</sup>, *Rasul v Bush*<sup>7</sup>, *Boumediene v Bush*<sup>8</sup>, and *Al-Maqaleh v Gates*<sup>9</sup>. All of these

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<sup>6</sup> *Johnson v Eisentrager*, (1950) 339 US 763. [*Eisentrager*]

<sup>7</sup> *Rasul v Bush*, (2004) 542 US 466.

<sup>8</sup> *Boumediene*, supra note 2.

<sup>9</sup> *Al Maqaleh v Gates I*, (DDC 2009) 604 F. Supp. 2d 205; *Al Maqaleh II*, (DC Cir 2010) 605 F.3d 84

cases concern enemy combatants and serve to identify whether the court's legacy lies in its discourse of judicial cosmopolitanism.

The cases listed above represent the core jurisprudence. However, I also rely on European Court of Human Rights, and Canadian cases in the task of providing contemporary understandings of jurisdiction and sovereignty. The ECtHR case are: *Loizidou v Turkey*<sup>10</sup>, *Bankovic and Others v Belgium*<sup>11</sup>, *Al-Saadoon and Mufdhi v the United Kingdom*<sup>12</sup>, and *Al-Skeini and Others v the United Kingdom*<sup>13</sup>. The examination of Canadian jurisprudence relies on *R v Hape*<sup>14</sup> and the 2008 and 2010 decisions in *Khadr v Canada*<sup>15</sup>. I chose these cases because they have similar factual and contextual scenarios; likewise, their judgments provide a good point of comparison with US decisions, while also proving to be a great tool in addressing the contemporary meaning of jurisdiction.

The theoretical analysis is developed particularly in the literature through a comprehensive discussion of secondary sources.

The methodological combination of doctrinal and theoretical approaches facilitates a thorough answer to my research question by adequately engaging with the conversation regarding the movement of judicial cosmopolitanism in enemy combatant jurisprudence.

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<sup>10</sup> *Loizidou v Turkey*, 1996-VI Eur Ct HR 2216 [*Loizidou*].

<sup>11</sup> *Bankovic and Others v Belgium*, 2001-XII Eur Ct HR 333 [*Bankovic*].

<sup>12</sup> *Al-Saadoon and Mufdhi v the United Kingdom* (2010), Application no. 61498/08. Retrieved from [http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-97575#{"itemid":\["001-97575"\]}](http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=001-97575#{)

<sup>13</sup> *Al-Skeini and Others v the United Kingdom* (2011) Application no. 55721/07. Retrieved from [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606#{"itemid":\["001-105606"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606#{)

<sup>14</sup> *R v Hape*, [2007] 2 SCR 292, 2007 SCC 26 [*Hape*]

<sup>15</sup> *Canada (Justice) v Khadr*, [2008] 2 SCR 125, 2008 SCC 28 and *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3. [*Khadr I* and *Khadr II*]

## ***2. Literature Review***

This chapter presents an overview of the literature regarding the role of judicial cosmopolitanism in cases involving alien detainees. The main objective is to present the different interpretations of judicial cosmopolitanism in order to achieve a concrete definition of the term. As such, it is divided into four parts: 1) judicial cosmopolitanism in enemy combatant cases; 2) judicial cosmopolitanism as a general theory; 3) the underpinnings of judicial cosmopolitanism and enemy combatant jurisprudence; and 4) other issues in the ongoing discussion.

In the first section I join the conversation among scholars whose work seeks to understand and interpret the decisions of US courts in enemy combatant cases as constituting a march of judicial cosmopolitanism. More specifically, my focus will be on the writings of individuals who address the majority decision of Justice Kennedy in *Boumediene v Bush* – a decision through which the Supreme Court conferred the constitutional right of habeas corpus to enemy aliens detained at Guantanamo. By discussing the works of Eric Posner, David Cole, Jean-Marc Piret, Gerald Neuman, and Jules Lobel, this session identifies the key definitions of judicial cosmopolitanism in light of enemy combatant case law. In the detailed analysis, it will become apparent that one of the main issues within the literature is that certain sources do not identify or provide a clear and concise definition of judicial cosmopolitanism. Nonetheless, I take this section as a starting point in the task of defining judicial cosmopolitanism in relation to enemy combatant case law.

The second section of the literature review looks at judicial cosmopolitanism as a general theory – in other words, it examines the origins of judicial cosmopolitanism, and addresses the typical understandings and definitions of this theory outside the context of enemy combatant jurisprudence. Since not all sources examined in section 1 provide a clear and concise definition of judicial cosmopolitanism, section 2 can be seen as complementary (and necessary) to the previous. The purpose of this section is to define the scope of judicial cosmopolitanism in a broader way, as it is used in other legal contexts. Although the works cited here outline a more general understanding of judicial cosmopolitanism, they are nevertheless crucial in my own formulation and application of the concept as a whole, and provide guidance in comprehending the theoretical foundations.

Section 3 returns to the main literature review. Following a detailed explanation of the background of judicial cosmopolitanism and its role as a legal theory (a brief detour), I return to my key authors. I continue to engage with the conversation among the scholars in section 1, as well as Noah Feldman, Gerald Neuman, Luke Nelson, and Sarah Cleveland, to show how key aspects of judicial cosmopolitanism (i.e.: sovereignty and functionalism) have been prevalent in classifying judicial decisions in enemy combatant cases as constituting an application of the theory of cosmopolitanism. Therefore, the purpose of this section will be to look at how the underpinnings of judicial cosmopolitanism (those that contributed to providing a philosophical context in Section 2) have impacted further uses of the concept. Since I have previously identified the roots and theoretical background of judicial cosmopolitanism, the goal here is to show how through a lenient reading of sovereignty, the Supreme Court justices have forwarded a

movement of judicial cosmopolitanism in cases regarding alien detainees in the War on Terror.

Lastly, Section 4 presents a discussion of further issues prevalent in the literature. This part of the review provides incentive for incorporating more recent case law to the initial discussion.

Hence, the purpose of the literature review is to identify not only what the main authors are saying, but also to understand their definition of judicial cosmopolitanism and how the foundations of this concept impact the extent to which the case law can constitute an application of judicial cosmopolitanism.

## 2.1 Judicial Cosmopolitanism in relation to Enemy Combatant Case Law

Section 1 describes the key understandings of judicial cosmopolitanism in relation to cases that arose out of the detentions in the War on Terror. It examines the works of Jules Lobel, Eric Posner, David Cole and Jean-Marc Piret. Each of these authors has provided a different definition and interpretation of judicial cosmopolitanism – identifying one of the main issues in the literature review. It is interesting to compare the writing of Lobel, whose emphasis is on debunking judicial cosmopolitanism, with the work of Posner whose definition of judicial cosmopolitanism takes on more substantial depth, and whose conceptual underpinnings relate to those of Jean-Marc Piret and Cole. Collectively, the works of these scholars paint a picture of judicial cosmopolitanism as a theory that seeks to embrace both citizens and non-citizens alike, with an overarching

goal of delivering equal justice. Likewise, when contrasted, the literature paints a fairly detailed picture of the different lenses through which judicial cosmopolitanism can be understood. This section, therefore, provides an overview of these nuanced explanations of judicial cosmopolitanism, by eventually demonstrating that further clarifications as to the theoretical assumptions of the concept are in order.

Jules Lobel's article<sup>16</sup> describes the key debates that arose out of *Boumediene v Bush*, debates which caused a rift not only within the court, but also among scholars. I use his paper as a gateway to explore different and competing interpretations to judicial cosmopolitanism, and as a starting point to the core literature review.

Lobel, although not a key proponent of judicial cosmopolitanism, brilliantly identifies the debates surrounding the significance of *Boumediene v Bush*, a case central to this study and to the discussion. The author contends that conservative commentators such as Jack Goldsmith and John Yoo, who claimed that “the ruling is judicial imperialism of the highest order”<sup>17</sup>, were not pleased with the decision and sided with Justice Scalia, who, in his dissent said that the result “will almost certainly cause more Americans to be killed”.<sup>18</sup> Meanwhile, progressive scholars such as David Cole “termed the decision groundbreaking”.<sup>19</sup> In his essay, Lobel cites three possible explanations for the *Boumediene* decision: 1) the assertiveness of the Supreme Court through the Judicial Supremacy Theory and Separation of Powers Doctrine; 2) increasing globalist constitutional perspective or Judicial Cosmopolitanism; and 3) Judicial Skepticism.

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<sup>16</sup> Jules Lobel, “The Supreme Court and Enemy Combatants” (2008) 54 Wayne L. Rev. 1131.

<sup>17</sup> *ibid* at 1132.

<sup>18</sup> *Boumediene*, *supra* note 2, Scalia J, dissenting at 2.

<sup>19</sup> Lobel, *supra* note 15, at 1133.

Accordingly, proponents of the judicial supremacy theory such as Justice Scalia and Professor Yoo view the decision as a “brazen power grab”<sup>20</sup>, while supporters of judicial cosmopolitanism such as Cole, Feldman, Neuman, and Posner envisage judges as having a constitutional obligation to protect “the rights not only of citizens within the United States but also of noncitizens outside its formal borders”.<sup>21</sup>

Lobel dismisses both the theory of judicial supremacy and that of judicial cosmopolitanism in favour of what he deems judicial skepticism. He states that the skepticism stems from the “Court’s recognition that the conflict with Al Qaeda is quite different in a number of crucial respects from the typical wars that America has engaged in and that the laws of war were designed to address”.<sup>22</sup> Lobel argues that the judges are sceptical that the ongoing war on terror can be described in conventional terms, especially since there is “confusion and difficulty of coming up with an acceptable definition of who may be detained as an enemy combatant”.<sup>23</sup> According to Lobel these circumstances and the nature of the conflict required the judicial protections that were asserted by the Court. Hence, the judicial assertiveness of Justice Kennedy and the majority opinion was nothing more than the “Court’s recognition that the so-called ‘war on terror’ does not fit comfortably within the traditional or even non-traditional warfare model, and that, therefore, the protections of [the] Constitution... are critical to adequately ensure ... constitutional liberty is not sacrificed in the name of security”.<sup>24</sup> Overall, Lobel’s article, whilst also providing another theoretical lens to understand the ruling in *Boumediene*, represents an introductory survey of the key contentious

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid* at 1139.

<sup>22</sup> *Ibid* at 1143.

<sup>23</sup> *Ibid* at 1147.

<sup>24</sup> *Ibid* at 1148.

statements regarding the case. It is very helpful in its mapping of the different debates which have arisen out of the *Boumediene* decision, and provides a great overview of the works which support these discussions. It does, however, fall short; it dismisses competing theories too quickly without an in-depth consideration, particularly in relation to judicial cosmopolitanism, and it provides a more introductory review of topic, rather than a substantive engagement with the matter. This is another problem found in the literature review. While other authors such as Posner and Piret engage in detailed analysis of judicial cosmopolitanism, it is important to note, early on, that further theoretical analysis of judicial cosmopolitanism will be beneficial. It is therefore important to rely on the work of other scholars to fill those gaps.

Eric Posner<sup>25</sup> is one of the key figures to describe enemy combatant jurisprudence using judicial cosmopolitanism. In his 2008 article *Boumediene and the Uncertain March of Judicial Cosmopolitanism*<sup>26</sup>, Posner sets out his theory of judicial cosmopolitanism as understood in enemy combatant cases. He argues that *Boumediene v Bush* is not to be seen as a separation of powers case, but rather, that Justice Kennedy's majority opinion is to be interpreted as a commitment to "protecting the interests of noncitizens overseas", a commitment which reflects "an emerging type of jurisprudence" which Posner refers to as "judicial cosmopolitanism".<sup>27</sup> According to Posner, judicial cosmopolitanism "is the view that judges have a constitutional obligation to protect the interests of noncitizens".<sup>28</sup>

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<sup>25</sup> See Alexis Galan and Dennis Patterson "The limits of normative Legal Pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*" (2013) 11(3) *ICON* 783. Posner is described as a "sovereigntist"- According to the authors, sovereigntists reject international law and attempt to diminish its influence on the US (787).

<sup>26</sup> Eric A. Posner, *supra* note 3.

<sup>27</sup> *Ibid* at 24.

<sup>28</sup> *Ibid* at 24-25.

First, he advances two readings of *Boumediene*: a narrow reading in which the case is merely an application of the precedent set by *Eisentrager*<sup>29</sup>; and a broader reading through which Justice Kennedy took the opportunity to “change the substance of the law”.<sup>30</sup> Professor Posner argues that Justice Kennedy undertook a broader reading of the previous case law and developed a functional test in *Boumediene*, and that the reason for doing so is because “Justice Kennedy is a cosmopolitan”.<sup>31</sup>

In deconstructing Posner’s work, the importance lies in his understanding of judicial cosmopolitanism. For Posner the term has different elements and can entail: 1) a global constitution- whereby governments obey an universal constitution that protects everyone, irrespective of nationality; 2) a cosmopolitan-American constitution- whereby “any rights in the US constitution that protect Americans also protect non citizens”;<sup>32</sup> and 3) residual constitutionalism- that the US constitution does not apply in countries with legitimate governments. Nevertheless, the principal idea that he employs for judicial cosmopolitanism is that the US constitution grants rights protections to “non-resident aliens”. In spite of their importance and their ties to a territorial constitution, citizenship and nationality do not matter when it comes to protecting human rights. This is a particularly important aspect of Posner’s definition because it is moulded to fit the circumstances surrounding the prisoners at Guantanamo; however, it is also a significant development in terms of understanding judicial cosmopolitanism in a broader sense than previously described in the literature.

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<sup>29</sup> *Eisentrager*, supra note 5.

<sup>30</sup> Posner, supra note 3, at 29.

<sup>31</sup> *Ibid*, at 32.

<sup>32</sup> *Ibid* at 34.

Posner's definition of judicial cosmopolitanism draws upon an understanding of the courts as guarding against "democratic failures". Democratic failures can occur when there are systematic exclusions of particular groups, or when there is improper use of power and weakening of democratic institutions. Essentially, in such situations, the role of the judiciary is heightened when there is a democratic failure and where the courts observe the need to protect the minority noncitizens who cannot vote and have no say in government policies. Posner also looks at some of the underlying theoretical perspectives behind the protection of enemy aliens such as the global welfarism (i.e.: are they second-class citizens?). Hence, judicial intervention in the case of non-resident aliens is justified because there is a democratic failure in relation to their status, for the elected government "has no incentive to give [their] interests any weight".<sup>33</sup> This is a very interesting explanation, especially since Posner is generally associated with the realist school of international relations, a school that relies "on the idea that states pursue unitary sets of interests (generally power and riches) and that international law is only instrumental".<sup>34</sup> It is clear from Posner's work that he considers the march of judicial cosmopolitanism as uncertain. However, irrespective of Posner's general association with realist thinking, in regards to enemy combatant jurisprudence he provides an explanation of how the disconnect between state interests and rights of detainees can result in a democratic failure, thereby requiring the involvement of courts as the sole mechanism through which to avoid legal black holes.

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<sup>33</sup> *Ibid* at 39.

<sup>34</sup> see Paul S. Berman, "Seeing Beyond the Limits of International Law" (2006) 84 Tex L Rev 1265.

It is here that Posner's underlying justification of judicial cosmopolitanism differs from the works of other scholars. Although he does not specifically use the term judicial cosmopolitanism, David Cole describes the need for a "universal jurisdiction"<sup>35</sup> for upholding fundamental human rights, and relies on "altered" perceptions and interplay between sovereignty and territoriality to justify the more assertive stance of the majority. Cole and Posner's overall understanding of the purpose of judicial cosmopolitanism appears to be similar, however they fundamentally differ in their conceptualizations of the phenomenon. Cole describes the primary assumptions of the court as being in line with modern developments in international law, a regime under which traditional notions of sovereignty – "that once left states... uncountable to domestic law for what they did to others outside their borders"<sup>36</sup> – have begun to erode and to give way to fundamental human rights protections. On the other hand, Posner looks at the internal pressures of democratic states. Under his thesis, while individuals may have altruistic inclinations, they need liberal democratic institutions through which to act; however, it is because of these liberal institutions in the first place (institutions which are to be held accountable to the interests of the voters and citizens) that states have a hard time acting in foreign places - for this would not be in the interest of those who enable these institutions to act in the first place. Therefore, when the government is unable to act, as it would not be protecting the interests of its voters, the institutions of the liberal democracy fail, and moreover, they fail to protect the interests of those outside the state boundaries. It is for this reason that courts have played a more aggressive and vocal role, and for this reason that Justice Kennedy undertook a judicial cosmopolitanism approach- to ensure that in

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<sup>35</sup> David Cole, "Rights Over Borders: Transnational Constitutionalism and Guantánamo Bay"(2008) *Cato Sup Ct Rev* 47-61

<sup>36</sup> *Ibid* at 52.

spite of failure of the state to act, the fundamental human rights of the enemy aliens would still be protected.

Thus far, Lobel, Posner, and Cole have all provided somewhat similar descriptions of judicial cosmopolitanism- with Posner's definition being the most substantial. At this point, it is worth noting that the key distinction between these scholars is found in their underlying formulation of the concept itself. The differences in the foundations of judicial cosmopolitanism are predominant in the literature, and whilst a contrast can be noted among the authors, further clarification is required (this will be done in Section 2).

Another definition of judicial cosmopolitanism is that proposed by Jean-Marc Piret<sup>37</sup>, based on a theory from a recognised constitutional scholar - Gerald Neuman. Piret employs Neuman's mutuality of obligations model as a form of judicial cosmopolitanism.

“The mutuality of obligations model is based on a limited government perspective and starts from.. [a] basic assumption: that aliens who are outside the United States and who are subjected to American laws when their actions abroad have effects on legitimate American interests, become automatically the beneficiaries of the constitutional protections correlative to the United States' exercise of power over them”<sup>38</sup>

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<sup>37</sup> Jean-Marc Piret “*Boumediene v Bush* and the Extraterritorial Reach of the U.S. Constitution- A Step Of Judicial Cosmopolitanism?” (2008) 4 Utrecht LRev 81.

<sup>38</sup> *Ibid* at 101.

Neuman's mutuality of obligations model is interpreted by Piret as a form of constitutional or judicial cosmopolitanism that obliges us "to grant even our enemies those minimum protection that any person is entitled to, simply because he is a human being".<sup>39</sup> Piret argues that in order to achieve this end, "the fundamental principles a nation embraces should be honoured, not only with regard to its own citizens, but to everyone who falls into the power of that nation".<sup>40</sup>

Conceptually, Piret's judicial cosmopolitanism can be compared with Posner's definition. Both scholars use the idea of limited government (or democratic failure in Posner's words) as the basis for which the courts had to apply such a theory to vindicate the rights of those detained by the American government in Guantanamo. Likewise, both theories have at their core the need for legitimate American interests to be impacted. However, they are not identical. In fact, it appears that Piret's understanding of Neuman's mutuality of obligations as judicial cosmopolitanism renders the theory much more complete and developed than the one Posner presents. What sets them apart is the idea of correlativity and implications of fundamental values. For Piret, it is only natural that detainees should be able to benefit from constitutional protections once the US exercises its power over them, whereas for Posner, the lack of legitimacy to exercise any power is what gives rise to judicial cosmopolitanism. In a sense, Posner's and Piret's theories can be seen as contradictory; however, Piret's assertions can also be construed as an extension to Posner's work. This represents another explanation for why it is important to establish a clear understanding of judicial cosmopolitanism.

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid* at 102.

Ultimately, Piret affirms that the *Boumediene* decision does not attain the ideals of judicial cosmopolitanism and those of the mutuality of obligations model. Even though the author considers the case to be a victory in its practical applications, he believes the Kennedy approach to be casuistic, and that “overruling *Boumediene* could be done without too much damage to the rule of stare decisis”.<sup>41</sup> Here, Piret’s view can be likened to that of Lobel’s judicial skepticism, an alternative lens through which the courts acted not because of a special duty toward all human beings, but because the circumstances of the conflict required an extension of judicial protections.

The works of Piret, Cole, Posner and Lobel show that there are a variety of modes to understand judicial cosmopolitanism in relation to cases like *Boumediene*. In addition to that, they also demonstrate the judicial cosmopolitanism is not the only theoretical lens through which to interpret decisions of the courts. Piret, Lobel, and even Posner offer quite a sceptical, pessimistic view toward the role and future of judicial cosmopolitanism. Of the three, only Posner considers the approach of Justice Kennedy to be cosmopolitan, while Lobel and Piret saw it more a coincidental occurrence, the direct result of a borderless conflict. On the other hand, Cole’s argument shows that judicial cosmopolitanism was indeed present in *Boumediene*’s majority judgement, and that it was certainly not the result of the court having no option, but rather the consequence of modern trend of judicial interpretation – a form of interpretation that seeks to transcend territorial boundaries and to uphold fundamental rights of all human beings.

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<sup>41</sup> *Ibid* at 103.

A discussion of judicial cosmopolitanism is not complete without addressing the debate between foreign and national law sources. Posner's analysis also looks at the connection between *Boumediene* and the foreign law debate – i.e. whether or not the US courts should be citing foreign decisions. He mentions that as a matter of tradition (in historical cases and the set of cases known as Insular Cases) noncitizens count less than Americans, and that *Boumediene* did not cite foreign law. His discussion is quite minimal in this sense. Cole, on the other hand provides a more meaningful insight into this matter. While he agrees that the court did not engage with international sources, it is likely that the justices were well aware of the contemporary developments in foreign law. Cole acknowledges that while the court's decision not to follow precedent and perhaps the encroachment on the political branches was indeed significant, the real substantial changes are to be found in the court's "modern day conceptions of sovereignty, territoriality, and rights".<sup>42</sup> He notes that the court's decision reflects the new ways to understand the traditional concept of sovereignty through the rejection of formalistic understandings of territoriality, all within the belief that the purpose of judicial review is the safeguard of human rights of all individuals, citizens and non-citizens alike.

The literature shows that there is a considerable difference of ideas when it comes to understanding judicial cosmopolitanism. Judicial cosmopolitanism can be a result of developments of international law, or it can have a much deeper connection to the ideals of equal justice for all human beings, irrespective of citizens. On the surface, all the different definitions presented here appear to be connected – they all stem from the idea that the courts and judges had to act, even more, that they had a duty to act in the manner

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<sup>42</sup> Cole, *supra* note 34, at 50.

in which they did. According to Posner – and Lobel – judicial cosmopolitanism furthers the view that judges must exercise their power under a constitutional obligation to protect the interests of noncitizens; the courts have to step up when there is a democratic failure at the core of the state. For Cole judicial cosmopolitanism is linked to the post WWII era of human rights protections and international legal regimes, in which fundamental territorial borders have begun to erode and to give way to further rights protections. Piret’s use of mutuality of obligations model seeks to adopt a form of judicial cosmopolitanism that has its root in the need to grant minimum protections to all human beings. Even though not all authors agree on whether there is a march of judicial cosmopolitanism – most having a doubtful tone toward it – their descriptions of cosmopolitanism are vital to the formulation of my own definition. In general, this section sought to introduce the literature by describing the views of distinct authors whose work links judicial cosmopolitanism to enemy combatant case law. However, as it was mentioned, it would also be very useful to engage with sources that discuss judicial cosmopolitanism as a theory of judicial interpretation, regardless of the context in which is it applied.

## 2.2 Judicial Cosmopolitanism as a Legal Theory – Defining Judicial Cosmopolitanism

In this section, I describe judicial cosmopolitanism as a theory of legal interpretation. This means that I look at judicial cosmopolitanism not only as a

movement, but also as a form through which judges interpret previous case law and important concepts such as sovereignty and functionalism. By relying on general sources of legal philosophy and scholarship, I address judicial cosmopolitanism for what it represents in the legal world, not solely to readers of extraterritorial case law. Section 1 showed that the meaning of judicial cosmopolitanism varies from one scholar to another. Thus, it becomes necessary to examine the basic theoretical structure and underpinnings of judicial cosmopolitanism. The purpose is to identify the underlying assumptions and concepts that have shaped judicial cosmopolitanism into what it represents today, in order to correctly arrive at a comprehensive definition of the concept. Although the sources discussed below do not form part of the main literature review, their role is complementary to the previous works, for offer further insight into how judicial cosmopolitanism is to be understood, and a basis for how judicial cosmopolitanism can be defined.

Judicial cosmopolitanism is a relatively modern phenomenon. It has arisen as a result of the proliferation of international law sources and decisions (particularly following WWII), and, importantly, it is to be distinguished from the wider philosophical concept of cosmopolitanism.<sup>43</sup> As such, it is not necessary to engage with the overall philosophical nature and meaning of cosmopolitanism; nevertheless, it is valuable to

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<sup>43</sup> See Richard A Posner, *How Judges Think* (Cambridge: Harvard University Press, 2008), at 354. Posner Sr. provides a brief overview of the philosophical concept of cosmopolitanism as one that embraces the “citizen of the world”, and which “teaches that our duties to other human beings do not stop at the border; that our common humanity transcends, or at least rightly competes with, loyalties to family, friends... Nowadays it is most often advanced as an argument in favour of generous foreign assistance by rich nations” (354). Although judicial cosmopolitanism has its roots in the philosophical idea of cosmopolitanism, Posner clearly identifies that the overarching thesis of cosmopolitanism has often been confused, but has nothing to do with judicial cosmopolitanism.

outline current understandings of the concept of cosmopolitanism, in order to better understand the movement of judicial cosmopolitanism.

Philosophically, the “nebulous core shared by all cosmopolitan views is the idea that all human beings, regardless of their political affiliation, are (or can and should be citizens of a single community”<sup>44</sup>, citizens of the world. Cosmopolitanism is not a new theory; it has been around since the time of ancient philosophers and saw its modern roots in the Enlightenment and 19<sup>th</sup> and 20<sup>th</sup> centuries. Generally, speaking “for contemporary political theorists, cosmopolitanism as citizenship of the world... implies a critique of ordinary theories of political obligation”.<sup>45</sup> Prominent cosmopolitan scholars David Held and Garrett Brown “describe cosmopolitanism since Immanuel Kant as both a moral and political project that addresses questions about how to implement cosmopolitan principles by reforming institutions and designing new ones”.<sup>46</sup> In terms of the political project of cosmopolitanism, Held seeks the development of a cosmopolitan democracy that “attempts to transcend the state as the primary form of governance”.<sup>47</sup> In Held’s account of cosmopolitanism, the classical interpretation of a state’s sovereignty and control over a delineated territory is no longer the focal point of importance; rather, “recent decades have seen a demonstrated capacity of states to develop and elaborate international institutions and [embed] themselves within global forms of governance”.<sup>48</sup>

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<sup>44</sup> Stanford Encyclopedia of Philosophy, *Cosmopolitanism* (2013), online: <http://plato.stanford.edu/entries/cosmopolitanism/>

<sup>45</sup> Noah Feldman, “Cosmopolitan law?” (2007) 116 Yale LJ 1022, at 1023.

<sup>46</sup> Alyssa R. Bernstein, “Political Cosmopolitanism” in Deen K Chatterjee, ed, *Encyclopedia of Global Justice* (Salt Lake City: Springer, 2011) 857 at 857.

<sup>47</sup> Steven Slaughter, “Reconsidering the State: Cosmopolitanism, Republicanism, and Global Governance” in Stan van Hooft and Wim Vandekerckhove, eds *Questioning Cosmopolitanism* (New York: Springer, 2010) at 190.

<sup>48</sup> *Ibid*

Held and Brown address five themes between the moral and the practical aspects of cosmopolitanism, namely: cultural cosmopolitanism; political cosmopolitanism; civic cosmopolitanism; global justice cosmopolitanism; and legal cosmopolitanism.<sup>49</sup>

Although each different kind of cosmopolitanism has its own principles and literature, I will mostly focus on legal cosmopolitanism.<sup>50</sup> Importantly, the literature has noted a distinction between ethical cosmopolitanism and legal (which has also been called institutional) cosmopolitanism.<sup>51</sup> Dower argues that at the individual level, legal cosmopolitanism focuses on global citizenship and society, international human rights law, and cosmopolitan democracy; at the state level, it places emphasis on new forms of global government, post-Westphalian order, cosmopolitan law, and world government.<sup>52</sup> In quoting Thomas Pogge, Thomas Campbell affirms that there are three elements that resonate in all cosmopolitan accounts. The first is individualism, meaning that the “ultimate units of concern are human beings or persons- rather than...cultural or religious communities, nations or states”.<sup>53</sup> The second and third are universality and generality; they reflect the idea that globally, “the ultimate unit of concern attaches to every human being equally”.<sup>54</sup> Thus, while the state and while sovereignty do remain legitimate units in certain accounts of cosmopolitanism, in legal cosmopolitanism, the focus is on human beings rather than national territories; the focus is not on states adopting universal jurisdiction, but rather on local legal systems “[refusing] to admit that [their] laws apply

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<sup>49</sup> *Ibid.*

<sup>50</sup> For a great overview of the most important cosmopolitan writers and their work, see Alyssa Bernstein.

<sup>51</sup> Nigel Dower, “Questioning the Questioning of Cosmopolitanism”, in Stan van Hooft and Wim Vandekerckhove, eds *Questioning Cosmopolitanism* (New York: Springer, 2010) at 3.

<sup>52</sup> *Ibid* at 4.

<sup>53</sup> Tom Campbell, “Questioning Cosmopolitan Justice”, in Stan van Hooft and Wim Vandekerckhove, eds *Questioning Cosmopolitanism* (New York: Springer, 2010) 121 at 124.

<sup>54</sup> *Ibid.*

at all to a given situation”.<sup>55</sup> The purpose of legal cosmopolitanism is to prevent the possibility of a legal vacuum and to avoid places that “would be treated as a law-free zone”, in favour of legal systems “expanding their jurisdictions to fill the apparent gap”.<sup>56</sup> Feldman calls this view a minimalist legal cosmopolitanism, and equates it to the US Supreme Court decisions in *Rasul v Bush* and *United States v Hamdan*, where the Court simply “did not want to accept the Government’s argument that Guantanamo is a place where no law applies” by stating that the US “exercised control” over the territory.<sup>57</sup>

One important aspect of legal cosmopolitanism is cosmopolitan law, which can be traced back to Kant. “Cosmopolitan law is concerned not with the interaction between states, but with the status of individuals in their dealings with states of which they are not citizens... it is concerned with the status of individuals as human beings, rather than as citizens of states”.<sup>58</sup> As such cosmopolitan law in Kant’s account represents a third category of public law, “a right to hospitality”.<sup>59</sup> Kleingeld’s description of Kant’s cosmopolitan law is very important in understanding how judicial cosmopolitanism is to be construed, in understanding the core philosophical principles behind the theory itself. Her summary to Kant’s writings can provide a very helpful review of how cosmopolitan law is to be interpreted. She states that cosmopolitan law is not part of international law, but that it is institutionally different based on the view that individuals and states are “citizens of a universal state of humankind... citizens of the earth...”.<sup>60</sup> Thus, the idea of cosmopolitan law is the right to hospitality, which does not necessarily mean that states

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<sup>55</sup> Feldman, *supra* note 44 at 1031.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid* at 1032.

<sup>58</sup> Pauline Kleingeld, “Kant’s Cosmopolitan Law: World Citizenship for a Global Order” (1998) 2 *Kantian Review*, at 72.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at 74.

have to treat all individuals as guests, but rather that states have to ensure to not deny a visit, and particularly to not deny it violently.<sup>61</sup> Based on Kant's justifications of cosmopolitan law, "those who own territory on which foreigners arrive due to forces beyond their control can then be required under cosmopolitan law to let foreigners use part of their property if this is necessary for their survival".<sup>62</sup> To tie this to the issue at hand in this essay, an analogy can be drawn here: under the cosmopolitan law, then, those who detain foreigners on their territory can be required to let foreigners use and have access to their legal system. In relation to the Guantanamo Bay detention cases, Feldman states:

"What makes this view [the Court's] cosmopolitan, despite its reliance on local laws, is its normative suggestion that as a citizen of the world, I should always be protected by the laws of the place in which I happen to be. This is not because I owe or am owed some political duty to the polis in that place. Nor it is because some agreement unites the world. It is because law ought to protect the citizen of the world everywhere in the world".<sup>63</sup>

Cosmopolitan law has at its very core the idea of citizen of the world. As such, the purpose is to ensure that irrespective of nationality, citizenship, and borders, law applies to individuals, wherever they are. Jurisdiction, therefore is only a "practical consequence of borders".<sup>64</sup>

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<sup>61</sup> *Ibid* at 75.

<sup>62</sup> *Ibid* at 81.

<sup>63</sup> Feldman, *supra* note 44, at 1032.

<sup>64</sup> *Ibid*.

Paul Berman<sup>65</sup> also provides a useful account of cosmopolitanism. According to Berman, “a cosmopolitan conception makes no attempt to deny the multirooted nature of individuals within a variety of communities, both territorial and non territorial”.<sup>66</sup> Cosmopolitanism “does not require a universalist belief in a single world community” by offering “a promising rubric for analysing law in a world of diverse normative voices...”<sup>67</sup> For Berman, a cosmopolitan framework “must always be understood as a middle ground between sovereigntist territorialism, on the one hand, and universalism, on the other”.<sup>68</sup> When applied to judicial interpretation, this cosmopolitan framework “asks courts to consider [a] variety of normative communities... and judges [to] see themselves as part of an interlocking network of domestic, transnational, and international norms”.<sup>69</sup> In Berman’s conception, cosmopolitanism is a theory that embraces and enables the hybridity of the various normative systems to survive. Cosmopolitanism, as such, provides the incentive for international adjudication and dialogue among different court systems, particularly in relation to choice of law dilemmas. Under the banner of cosmopolitanism, courts interact with each other and become international actors in solving transnational disputes. “Cosmopolitan pluralism thus offers courts an opportunity to craft choice-of-law rules that reflect the realities of a world where people from multiple community affiliations that are not necessarily linked to physical geography”.<sup>70</sup> Naturally, for Berman applying a cosmopolitan framework to judicial interpretation allows for greater international cooperation and compromises, something which can

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<sup>65</sup> Berman writes from the perspective of legal pluralism.

<sup>66</sup> Paul S. Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press 2012), at 147.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid* at 150.

<sup>69</sup> *Ibid* at 262.

<sup>70</sup> *Ibid* at 269.

become beneficial in maintain hybridity, whilst also resolving multi-state conflicts. In his book, Berman proceeds to provide examples of how a cosmopolitan approach has worked in practice<sup>71</sup>, ultimately arguing that “a cosmopolitan pluralist approach permits a more direct engagement with issues of jurisdictional overlap and a far more nuanced and explicit effort to negotiate among normative communities”.<sup>72</sup>

Berman looks at the transnational arena through the lens of legal pluralism. Instead of addressing the impact of formal law itself, he assesses the impact of international norms and the efficacy of the norms in their application. His theory allows him to identify two polar opposites, the sovereigntists (who use physical location as their base) and universalists (who advocate for harmonized, uniform rules). Claiming that neither provides an ideal solution of addressing multiplicity, Berman campaigns for a jurisgenerative approach that can address and sustain hybridity through the use of pluralist mechanisms that focus on procedural rules, institutional designs, and discursive practices.<sup>73</sup> Hence, for Berman a cosmopolitan approach to legal norms allows this hybridity to thrive, and provides a proverbial middle ground through which the two polar opposites can interact, and through which, on a practical level, judges can find a means to reconcile competing domestic/international legal norms and to accept the variety of cultural and normative communities:

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<sup>71</sup> See Berman, *supra* note 65, at 269-290 - where he uses examples such as *GlobalSantaFe Corp v Globalsantafe.com*; *Barcelona.com, Inc. v Excelentísimo Ayuntamiento de Barcelona*; *Bob Jones Univ. v Unites States*; and *Employment Div., Dept. of Human Resources of Oregon v Smith*.

<sup>72</sup> *Ibid* at 293.

<sup>73</sup> See Paul S Berman, “Jurisgenerative Constitutionalism: Plural Principles for Managing Global Legal Pluralism” (2013) *Indiana Journal of Global Legal Studies* 20(2), 665-695.

“A cosmopolitan approach allows us to think of community not as geographically determined territory circumscribed by fixed boundaries, but as “articulated moments in networks of social relations and understandings. This... permits us to conceptualize legal jurisdiction in terms of social interactions... not motionless demarcations frozen in time and space”<sup>74</sup>

Paul Berman’s account of cosmopolitanism is deeply rooted and inherently connected to the philosophical origins outlined above. Generally speaking, however, judicial cosmopolitanism mostly resonates with scholars who look at whether domestic courts, particularly those in the US, should, if at all, rely on foreign sources of law when rendering their decisions, along with the use and implications of comparative law on national court systems. Noah Feldman describes this perfectly: “A cosmopolitan judge... might be one who wears English suits, speaks French or Swedish, and is not averse to citing international legal materials he or she picked up while summering in Salzburg with judges from other countries”.<sup>75</sup> Judicial cosmopolitanism is, in a way, very much one of the products of globalization.<sup>76</sup>

According to John Murray, the impact of globalization “in the judicial domain has been referred to as the growing judicial cosmopolitanism resulting from the increased

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<sup>74</sup> Paul S. Berman, “The Globalization of Jurisdiction” (2002) 151 University of Penn L Rev at 321.

<sup>75</sup> Feldman, *supra* note 44, at 1021.

<sup>76</sup> Literature also describes the movement as “globalized judiciary” or “judicial globalization”, one that is part of an empirical phenomena – see Ken I. Kersch. “The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law” (2005), Wash U Global Studies Law Review, 4, 345, at 363. Kersch argues that because the globalized judiciary is rooted in world events and political transformations, the idea remains vulnerable to events that have the ability to trigger sole reliance on provincialism and originalism in US law. While judicial cosmopolitanism is linked to the globalized judiciary, the movement is different from judicial cosmopolitanism. In a way, judicial cosmopolitanism can perhaps be seen as a consequence of the globalized judiciary, a phenomenon which relies on deep cosmopolitan principles, rather than the mere interaction or dialogue among judges of different national/transnational courts.

tendency of supreme courts to examine foreign judicial decisions and doctrines”.<sup>77</sup> In the same approach, Richard Posner identifies judicial cosmopolitanism as a movement “that treats the entire world as if it were one judicial jurisdiction”.<sup>78</sup>

Logically, as much as globalization has been a catalyst for this movement, certain US judges have been particularly credited with being responsible for initiating the move of judicial cosmopolitanism. As early as 1989, former Chief Justice William H. Rehnquist recognized, that in light of the post WWII constitutional development, “it is time that the United States courts being looking to the decisions of other constitutional courts to aid in their own deliberative process”.<sup>79</sup> More than a decade ago, in a Keynote Address, Justice Sandra Day O’Connor<sup>80</sup> asserted that “although international law and the law of other nations are rarely binding upon... decisions in US courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts”.<sup>81</sup> She referred to this as “transjudicialism”. O’Connor advocates for more use of international law in the interpretation of US statutes, and even more so, in the interpretation of the US Constitution. In the same note, Justice Ruth Bader Ginsburg affirmed that America’s “‘island’ or ‘lone ranger’ mentality is beginning to change”.<sup>82</sup> Particularly in the realm of combatting international terrorism, Justice Ginsburg calls upon the courts to continue according “a decent Respect to the

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<sup>77</sup> Justice John Murray, “Judicial Cosmopolitanism” (2008) *Judicial Studies Institute Journal*, 1-17, at 4.

<sup>78</sup> Richard Posner, *supra* note 42, at 353. It should be noted, nevertheless, that Posner is not a cosmopolitan and argues against the theory of judicial cosmopolitanism.

<sup>79</sup> Justice Ruth B. Ginsburg, “A Decent Respect to the Opinions of [Human]kind’: The Value of Comparative Perspective in Constitutional Adjudication” (2005) 99 *Proceedings to the Annual Meeting (American Society of International Law ASIL)* 351-359.

<sup>80</sup> Even as early as 1997, O’Connor contended that the United States would benefit from the decisions of other legal systems. See O’Connor, “Broadening our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law” (1997) *Intl Judicial Observer*

<sup>81</sup> Sandra Day O’Connor, “Keynote Address” (2002) 96 *Proceedings to the Annual Meeting (American Society of International Law ASIL)*, 350.

<sup>82</sup> Ginsburg, *supra* note 78.

Opinion of [Human]kind as a matter of comity and in a spirit of humility”.<sup>83</sup> Ginsburg’s plea for humility is one that requires US judges, especially those on the Supreme Court to be open to the idea that other legal systems can fashion better solutions to legal problems, solution from which the US can greatly benefit. Lastly, but not least, Justice Kennedy (even prior to his majority decision in *Boumediene*) was considered by many to follow the developing trend of “transjudicialism” or judicial cosmopolitanism. In *Lawrence v Texas*<sup>84</sup>, Justice Kennedy “buttressed his majority opinion by citing the opinions of the European Court of Human Rights” to defend rights that “[had] been accepted as an integral part of human freedom in many other countries”.<sup>85</sup>

There are more examples and more details that can be added to the ensuing trend of judicial globalization in the United States. Nevertheless, it is not the purpose of this essay to showcase all instances of judicial cosmopolitanism in past decisions, nor to provide a historical account of how judicial cosmopolitanism came to be. Rather, the point of citing these uses is to show, to a certain degree, how the phenomenon of judicial cosmopolitanism has developed in the wider context (i.e. outside enemy combatant jurisprudence), and the meaning judges and scholars have subsequently attributed to it. Specifically, this literature demonstrates that judicial cosmopolitanism is inherently related to Berman’s reality of multiple, hybrid normative systems, and that it does consequently seek to provide a middle ground interpretation to show these systems should interact. It is, nevertheless, obvious that in this aspect, while many of justices and scholars cited acknowledge the human rights and equality underpinnings of judicial cosmopolitanism, theoretically it has mainly been attributed to the use of foreign law

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<sup>83</sup> *Ibid*

<sup>84</sup> *Lawrence v Texas*, (2003) 539 US 558.

<sup>85</sup> Murray, *supra* note 76, at 6.

sources in domestic contexts. Murray explains that judicial cosmopolitanism “is part of a grand dialogue, particularly on themes of constitutional protection of human rights, which takes place today between Supreme Court judges, both judicially and extra-judicially”.<sup>86</sup>

Judicial cosmopolitanism is indeed a theory of judicial interpretation, of judicial dialogue – a theory that arises particularly when domestic court judges use outside sources of law to base their decisions. In a sense, it is a theory of comparative law. Yet, how do we tie the philosophical origins and the movement it has become today to the overarching theme of enemy combatants?

To answer this question, it is helpful to return to the definitions presented in the first section of the literature review. Posner defines judicial cosmopolitanism as a mode of judicial interpretation through which judges “have a constitutional obligation to protect the interests of noncitizens”.<sup>87</sup> For Posner judicial cosmopolitanism is a means through which judges, in light of the democratic failure (described above) can ensure that the same constitutional rights and protections that Americans enjoy as applied equally to noncitizens. Jean-Marc Piret, on the other hand, describes judicial cosmopolitanism as something akin to Neuman’s global due process doctrine, and a reasonable consequence in light of the governmental intervention and power exercised over the enemy combatants detained in Guantanamo. Furthermore, in regards to using foreign law sources, Posner recognises that the judges did not cite outside law in their *Boumediene* decisions, but his

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<sup>86</sup> *Ibid* at 16

<sup>87</sup> Posner, *supra* note 3.

analysis was minimal. Cole, however, asserts that the underpinnings of the court's judicial cosmopolitanism<sup>88</sup> are evident in the altered perceptions of sovereignty and territoriality and the universal jurisdiction approach of the Supreme Court. At this stage, the various interpretations attributed to judicial cosmopolitanism as rather obvious, even though the majority of the debates surrounding judicial cosmopolitanism focus on whether, if at all, the theory should be practically adopted by the Supreme Court. I argue that, based on the sources cited in the main and the secondary literature review, a further concern arises: is judicial cosmopolitanism a theory that outlines a constitutional obligation to protect noncitizens (naturally based on the philosophical description of cosmopolitanism), a theory of global due process? Or is judicial cosmopolitanism solely a theory which refers to the implementation of foreign law sources in domestic decision-making? The response here is that judicial cosmopolitanism does not have to be one or the other; that judicial cosmopolitanism is a much more complex concept, and that an adequate approach would need to encompass the different nuances that this theory has to offer. In posing these questions, I am identifying that there have been (and exist) various interpretations of the movement, and that one must be wary of these interpretations before applying the concept to judicial decisions.

Therefore my understanding of judicial cosmopolitanism, that which will be adopted throughout the remainder of this paper, is one that seeks to harmoniously combine the two previously described contentions. As such, for my purposes, judicial cosmopolitanism will be understood as a theory of judicial interpretation based on legal

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<sup>88</sup> A reminder that Cole does not actually use the term judicial cosmopolitanism, and as such he does not define it. Nonetheless, the theoretical underpinnings he adopts have labeled his work as being in line with judicial cosmopolitanism (see Jules Lobel above).

cosmopolitan underpinnings; this means that a good conceptualization of judicial cosmopolitanism has to take into account both the philosophical and the modern influences. Hence, my definition of judicial cosmopolitanism will represent a discourse through which: 1) judges will equally apply (certain) constitutional provisions (i.e.: fundamental rights, due process) to citizens and noncitizens alike (irrespective of territorial borders); and through which 2) the decisions of judges will demonstrate an underlying contemporary understanding of important concepts such as jurisdiction (which in turn looks at sovereignty and territoriality) and functionalism - whether they choose foreign sources of law or not. In other words, that judges cite outside law is not a pivotal requirement of judicial cosmopolitanism, as they may choose to sidestep this practice, but to show it intrinsically through their modern and contemporary understanding of the aforementioned concepts (jurisdiction and functionalism).

To recap, it is not necessary, nor mandatory for judges to cite foreign sources of law in order for their decisions to constitute judicial cosmopolitanism. Rather, it is important that, judges demonstrate a non-insular understanding of constitutional provisions as to ensure an equal application of fundamental rights among both citizens and noncitizens. My approach to judicial cosmopolitanism, one which very much relies on extraterritoriality, has a particular emphasis on the assertion that this mode of judicial interpretation can arise even where judges do not rely on outside sources of law to explain their decision, so long as they adopt a cosmopolitan mind set – a mind set that enables them to disregard the restrictions imposed by their own local legal systems in favour of treating all human beings equally, irrespective of citizenship, so long as these individuals are within the control of that particular legal order. Likewise, my definition of

judicial cosmopolitanism acknowledges that judicial independence is integral to a theory of judicial interpretation, but that it is outside the purpose of this research to resort to a division of powers doctrinal explanation. In relation to enemy combatants jurisprudence, I will outline a view of judicial cosmopolitanism as developed through an inherently modern view of jurisdiction and an application of a functionalist approach.

In a nutshell, judicial cosmopolitanism is often defined as a product of globalization, and rightly so. It is a relatively modern way to define the practice of judges to use international or transnational sources of law. I argue, however, that judicial cosmopolitanism does not need to be restrained solely to whether or not judges have used foreign jurisprudence; judicial cosmopolitanism is intrinsically related to cosmopolitan prescriptions and conceptualizations, particularly the principle of equal worth and dignity. Hence, in a tradition similar to Posner and Piret's, while building upon the secondary literature described previously, judicial cosmopolitanism is a phenomenon that embraces the application and extension of a national constitution to noncitizens (i.e.: extraterritorial application of the constitution), while conceptually relying on modern and transnational understandings of key concepts such as jurisdiction, sovereignty and territoriality, as well as functionalism (sovereignty and functionalism are described in Part 3 of the paper).

## 2.3 Underpinning Values of Judicial Cosmopolitanism and Enemy Combatant

### Jurisprudence

Section 3 of the literature review focuses on the works of those scholars who might not have necessarily engaged directly with judicial cosmopolitanism, but whose essays nonetheless demonstrate a strong link between the underpinnings of judicial cosmopolitanism (i.e.: the modern conceptions of sovereignty and functionalism) and enemy combatant cases. In particular, this section examines works that rely on contemporary notions of territorialism and jurisdiction to describe the movement commenced by the US Supreme Court in *Boumediene*. These scholars do not specifically identify a trend of judicial cosmopolitanism; however, the fact that they discuss essential underpinnings of the concept in relation to relevant case law makes their work very relevant to this research, and helps built up some of the lacuna previously mentioned in Section 1.

As an aside, it is important to note that for this research enemy combatant cases are not about issues of judicial supremacy or the separation of powers. In this light, David Cole outlines the arguments of critics who have deemed the court as “illegitimately activist” or as having an “inflated notion of judicial supremacy”<sup>89</sup>, critics who argue there should be a certain amount of deference to the political branches in military matters. For Cole, this separation of power issues can be set aside in the protection of fundamental rights. Even if the critics despise the robust intervention of unelected courts, if the court itself had not engaged in this shift toward modern understanding of sovereignty, it would not have come to the conclusion to extend habeas corpus to detainees in Guantanamo,

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<sup>89</sup> Cole, *supra* note 34, at 49.

and would have allowed such places as Guantanamo to remain “law free zones”.<sup>90</sup> In Cole’s understanding, the courts and their progressive or evolutionary approach, play an important role in ensuring democratic respect for human rights, while also ushering US law into the 21<sup>st</sup> century.<sup>91</sup>

For David Cole, though *Boumediene* may not sit well with domestic precedent, the case fits with the transnational trend of courts acting aggressively to protect individual rights by restricting political actions on terrorism. His paper stresses that the significance of *Boumediene* does not lie in its reading of precedent, but rather in what it says about the present and future, because the court appears to utilize modern day conceptions of sovereignty, rights and judicial review, concepts that have been shaped by the human rights revolution of the last century. This is a very interesting observation. Cole is right in making this assertion because, although the USSC did not use any international law or transnational legal material in coming to its decision in *Boumediene*, these new conceptions/ evolving ideas of international law appear to underlie the court’s presumptions<sup>92</sup>. Basically, the *Boumediene* court followed or reflected global transformations in international law post WWII. Yet, what is missing from his paper is how the traditional concept of sovereignty developed, and why. He does not engage with or explain how it is that the concept changed, but merely states that it has. There is much substance missing from his argument in this matter, and while his work can be complemented by Sarah Cleveland’s insightful paper on the use of international law in US constitutional jurisprudence, the literature, in this regard, shows serious lacunae.

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<sup>90</sup> *Ibid* at 47.

<sup>91</sup> *Ibid* at 61.

<sup>92</sup> *Ibid* at 57.

Sarah Cleveland's "Embedded Constitutional law and the Constitution Abroad"<sup>93</sup> is an excellent article to pair with Cole's, and it complements it by providing an explanation of the current views of sovereignty. While Cole's work merely mentions that there is an underlying assumption made by the US courts, Cleveland goes on to explain exactly where that underlying assumption comes from. Her essay explores what she refers to as "embedded" international law in US constitutional interpretation. Her explanation, while not one of judicial cosmopolitanism, provides a theory of constitutional interpretation, which is very helpful in complementing the works discussed so far in this literature review. Her contribution is particularly important when it comes to the debate of whether or not US courts should be using sources of international law or any other laws in making their decisions. Naturally, judicial cosmopolitanists are in favour not only of using foreign law sources, but also of making it a standard and mainstream practice. Yet, Justice Kennedy in *Boumediene* steered clear of international sources of law. While this is not a blow to the cosmopolitan approach, Cleveland's understanding of the international between domestic US law and foreign sources of law is a clever way to ensure that judicial cosmopolitanism was the underpinning theory of the case.

Cleveland argues that in reality, many "portions of US constitutional doctrine have been influenced by international law over time".<sup>94</sup> According to Cleveland, certain principles have become embedded in the American constitutional legal consciousness – "they have become incorporated into the interpretation of a principle of the American

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<sup>93</sup> Sarah Cleveland "Embedded Constitutional Law and the Constitution Abroad" (2010) 110 Colum. L. Rev. 225

<sup>94</sup> *Ibid* at 226.

constitution”.<sup>95</sup> In the case of *Boumediene*, she states that the “Supreme Court... brought US extraterritoriality doctrine substantially in line with modern international law principles of jurisdiction and state responsibility”.<sup>96</sup> Cleveland first begins by setting forth the contemporary or modern rules of international jurisdiction. She looks at cases from the ICJ, the EU, international tribunals, and organizations to develop her theory of sovereignty in its contemporary use in international jurisdiction. She discredits the principle of strict territoriality (which limits the application of the constitution) in favour of the state’s exercise of effective control “over either a person or a territory” something which places the conduct of said states within its jurisdiction and which gives rise to responsibility for human rights violations.<sup>97</sup>

Her theory of embedded international law and norms has three approaches: the evolutionary, entrenchment, and substitution approaches. For Cleveland, *Boumediene* was ground breaking in that its doctrinal significance can be characterized as an evolutionary approach for citizens and an entrenchment approach for aliens.<sup>98</sup> Cases that are classified as evolution “recognize that both international and constitutional meaning evolve over time, and to the extent that courts have looked abroad, they have looked to the then-contemporary international rules”.<sup>99</sup> This is an important observation for *Boumediene*. If we take for granted that international legal norms have over time become embedded in municipal US constitutionalism, this would affirm the idea that inherently, or presumptively the majority decision based its ruling on modern ideas of sovereignty and territoriality, and broke away with the domestic legal tradition. This is very important to

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<sup>95</sup> *Ibid* at 226.

<sup>96</sup> *Ibid* at 230.

<sup>97</sup> *Ibid* at 248.

<sup>98</sup> *Ibid* at 230.

<sup>99</sup> *Ibid* at 245.

note, for it affirms David Cole's own understanding of "altered" sovereignty and territoriality (even though he falls short of explaining what that entails) and fuels that judicial cosmopolitanism movement.

While Cole does not define the phenomenon of the Supreme Court as judicial cosmopolitanism, his explanations and readings of the case have made other scholars group him with proponents of the theory.<sup>100</sup> For Cole, judicial cosmopolitanism arises based on the courts' revolutionary approach (which is in line with current international law practices) to human rights. On the other hand, for Posner, the reason why judicial cosmopolitanism is the proper theoretical lens through which to approach enemy combatant cases is that the demos is actually global, not national, and that "democratic failure occurs because the US government has no electoral incentives to take account of the interests of people living abroad".<sup>101</sup> Hence, courts should strike governmental decisions that unreasonably burden noncitizens abroad. However, Posner argues that this cosmopolitan approach is outside the mainstream approaches; since the Supreme Court maintains its power by staying close to the political centre, and there is no clear basis under which the courts should compel the government to incorporate foreign norms into constitutional law and to extend constitutional protections outside the nation's borders, the maintenance of such a broad theory of cosmopolitanism will prove to be difficult. Thus, the march to cosmopolitanism is uncertain, but for Posner, the lasting legacy of the decision in *Boumediene* will be not its separation of powers, but its contribution in the march of judicial cosmopolitanism, "the emerging view that the interests of non-resident

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<sup>100</sup> See Jules Lobel, *supra* note 15.

<sup>101</sup> Posner, *supra* note 3, at 43.

aliens deserve constitutional protection secured by judicial review”.<sup>102</sup> Posner is, after all, writing in line with the realist theory of international law, also described as “inward-looking” conservatives.<sup>103</sup>

Another companion to Cole’s research is Gerald Neuman - one of the most cited expert scholars on US extraterritorial law. In his earlier articles he identifies various theories or ways at examining extraterritorial law, so it came with no surprise that he would provide a discussion<sup>104</sup> of *Boumediene v Bush*.

He begins by situating the *Boumediene* decision within recent debates and developments in international law particularly in regards to the geographical reach of individual rights. He argues that there is no legal black hole at GTMO and that the decision protects the security of detainees, whom he considers “innocent victims” of the Bush administration. Part II focuses solely on the functional approach in *Boumediene* and dissects the case. Neuman highlights the importance of questions of extraterritoriality turning on practical concerns rather than formalism, which is the stance the USSC took in *Boumediene*.

Part III of the paper represents Neuman’s own reflections on the case. Here, in scrutinizing the functional approach, he argues that the functional approach suffers from lack of certainty; Neuman actually refers to the functional approach as global due process. However, in subsection entitled “some dogs that did not bark” Neuman observes

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<sup>102</sup> *Ibid* at 46.

<sup>103</sup> Noah Feldman, “When Judges Make foreign Policy” (2008), *New York Times*, online: [http://www.nytimes.com/2008/09/28/magazine/28law-t.html?\\_r=3&oref=slogin&ref=magazine&pagewanted=print&](http://www.nytimes.com/2008/09/28/magazine/28law-t.html?_r=3&oref=slogin&ref=magazine&pagewanted=print&)

<sup>104</sup> Gerald L. Neuman “The Extraterritorial Constitution After *Boumediene v Bush*” (2009) 82 Southern California L. Rev. 259.

that there was very limited use of international law in the majority opinion and engaged in virtually no comparative discussion. Neuman mentions that the briefs put before the court drew on various sources of international law, humanitarian law, Israeli law, Canadian law, political covenants, and UN human rights briefs. Even though the court examined the English jurisprudence on habeas corpus, this view is seen as rather originalist instead of comparative. It is indeed interesting that Neuman chose to focus on this lack of or silence in regard to other sources of law. Sarah Cleveland, in her essay on the *Embedded Constitution* uses this critique to further build her argument that the courts did in fact achieve a decision that is consistent with modern/evolutionary trends in international law. Neuman, however, states that the use of international law would have constrained the functional approach. He sees a benefit in the court basing the legitimacy of the decision on domestic precedent and constitutional values. Neuman is right in approaching the situation from this perspective. As he says “it would be as wrong to assume that none of the Justices know such basic facts about international human rights law as it would be unwise to assume that all of them do”.<sup>105</sup> This is a viable argument, but this still does not explain the court’s conception of sovereignty. The way the court interprets sovereignty, in a move away from classic territorial conceptions to a more “effective control” stance does not necessarily find its root in purely domestic cases. Perhaps Neuman is too quick to dismiss the importance or a lack of discussion of international law sources, although, understandably an argument can be made – why should, and to what extent, should outside sources determine the court’s understanding of sovereignty? Yet, I believe that sovereignty, being a concept that has long puzzled states

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<sup>105</sup> *Ibid* at 277, fn 101.

and international legal affairs, there is a case to be made that in fact the Justices were widely influenced by the current interpretations of the topic.

Though I may take the stance that the Justices began a march of judicial cosmopolitanism in their lenient reading of sovereignty, a reading that is only possible in light of current development in international law, one that is consistent with a functionalist approach, Neuman's focus on the legitimacy of domestic sources is helpful in understanding the underlying ideas of the judges. But, as mentioned, Neuman only dedicated a few pages of ink to this inquiry, given that his purpose is a more holistic understanding of the possible implications of the case.

#### 2.4 Additional Issues for Discussion

One of the main downfalls of the authors cited thus far is that their engagement with jurisprudence ends with the *Boumediene* decision in 2008 – it does not include the most recent decisions involving detainees in Bagram. Particularly in regards to Professor Posner's article, who referred to the phenomenon of judicial cosmopolitanism as an uncertain march, it would be helpful to gain insight into whether or not this march has survived post *Boumediene* developments. The case law regarding enemy combatants, and possibly, the march of judicial cosmopolitanism, have subsequently been influenced by the more recent decision in *Al Maqaleh*<sup>106</sup>. In line with the focus of my research being on

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<sup>106</sup> *Al Maqaleh v Gates*, (2010) 605 F. 3d 84

the court's understanding of sovereignty, the work of Luke Nelson<sup>107</sup> provides an important perspective into how the courts have gone on to interpret and apply their pivotal decision in *Boumediene*.

Nelson proposes that territorial sovereignty is no longer a controlling factor in the extraterritorial application of habeas corpus. In his essay, he looks at the background to the decision in *Boumediene* (namely historical cases) and then the aftermath of *Boumediene- Al Maqaleh v Bush*.

He argues that there is an evolving standard in the understanding of territorial sovereignty and how rights apply outside the borders of the US; chiefly, that territorial sovereignty does not determine how habeas corpus is applied to detainees due to the fluid, and practical factors of analysis created by the functional approach in *Boumediene*. Nelson looks at the definition of sovereignty in *Boumediene* and compares it with the approaches of the DC District Court and DC Circuit Court in the *Al Maqaleh* decisions (the former allowed for the extension of the writ to Bagram detainees, whereas the latter denied it). He believes that this particular contrast between the courts makes the issue of sovereignty and control by the US over outside territories such as Bagram a question ripe for Supreme Court consideration.

Even so, his analysis of the meaning of sovereignty is only superficial. He provides a mere "definition" – which is more an interpretation than anything else – of the courts in *Eisentrager* (a historical case) and how it changed in *Boumediene*. He does not describe the phenomenon beyond stating that there is an evolution in the definition, which is only a natural process, given that the government had provided a traditional

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<sup>107</sup> Luke R. Nelson "Territorial Sovereignty and the Evolving *Boumediene* Factors: *Al Maqaleh v Gates* and the Future of Detainee Habeas Corpus Rights" (2011) 9(2) University of New Hampshire L. Rev. 297.

definition of territorial sovereignty, which the court disagreed with. However he fails to explain how this evolution came about, and more importantly, why. On the other hand, Nelson thinks that the *Boumediene* factors outlined in the functional approach have been changing and will continue to do so. He further proposes additional factors to the list, without properly addressing the issue that expanding the test would create even further uncertainty in its application.

Nelson argues that sovereignty is no longer as important of a factor in determining detainee jurisprudence and extraterritorial application of the writ of habeas corpus. Yet, he contradicts himself, considering that earlier he emphasized how the discord between the lower courts' understanding of sovereignty makes the issue ripe for further Supreme Court consideration. His emphasis is on adding further factors to the functional test developed in *Boumediene*. However, instead of adding to the 3-part test, and causing further uncertainty, the focus should be on reconciling and attempting to piece together the puzzle of sovereignty. He does not do sufficient justice to the analysis that a concept like sovereignty requires. It is in this term that the paper mostly lacks substance. He dismisses territorial sovereignty as an issue that will not puzzle courts in the extraterritorial application of habeas, however this will turn out to be the centre of analysis.

Lastly, Nelson mentions that perhaps the US courts should adopt Justice Black's approach- that the right of habeas corpus should extend to all persons coming within the ambit of the United States' power. He only cites this a mere afterthought, however, by situating it in within the context of new kinds of warfare, and therefore fails to expand on this topic. The question of whether the writ should apply to all those within America's

influence can only be resolved by addressing the issue of power, which is inherent in the understanding of sovereignty. This statement by Justice Black raises the question of the court's march to judicial cosmopolitanism, an issue that I would like to address, one that Nelson hints to, but never engages with.

Overall, the literature examined shows that there are contradictory, but also concurrent understandings in regards to the extraterritorial importance of *Boumediene*. The scholars that have been cited tend to approach this case from a judicial cosmopolitanism perspective. For some judicial cosmopolitanism is rooted in the failure of the demos, while for others it finds its theoretical background in contemporary state sovereignty and territoriality norms. Nevertheless, while the literature provides a very strong overview of how concepts of sovereignty and functionalism interact with the overarching theory of judicial cosmopolitanism, many articles fall short of showing how these can be tied together coherently, and more importantly, in light of more recent developments in enemy combatant jurisprudence. My research seeks to complete the current discussion by looking at the ties between sovereignty and functionalism in order to weave together a better understanding of a theory of judicial cosmopolitanism as one that incorporates altered perceptions of sovereignty.

### ***3. The Research Question: Jurisdiction, Functional Sovereignty, and Judicial Cosmopolitanism***

Judicial cosmopolitanism can have a variety of definitions. It can refer to the practice of citing foreign law in national courts, or to the extension of constitutional protections outside political borders. The literature examined above outlined the debate regarding the use of judicial cosmopolitanism as method of judicial interpretation for enemy combatant cases, while also having examined the idea of judicial cosmopolitanism in a wider context. Certain scholars looked at the case law through a sceptical lens, while others came to terms with its reality – that there is more than mere reliance on precedent, more than mere liberalism on the part of the judges; that perhaps there is a phenomenon at work, one that has at its core specific, cosmopolitan underlying assumptions. As a theory, judicial cosmopolitanism is widely associated with the practice of judges to utilise outside sources of law when making domestic decisions. Judicial cosmopolitanism is based on the premise of a globalized judiciary, of a figurative dialogue and interaction between judges from different legal regimes. Likewise, judicial cosmopolitanism is distinguished from the broader philosophical concept of cosmopolitanism. Nonetheless, particular ideals and beliefs of cosmopolitanism appear to remain at the core of judicial cosmopolitanism in practice. As such my definition of judicial cosmopolitanism seeks to embrace these cosmopolitan underpinnings, while also adopting the consensus understanding of judicial cosmopolitanism as the practice to incorporate foreign law in domestic decisions. Therefore, judicial cosmopolitanism is to be understood as a theory of judicial interpretation that enables judges (whether they use foreign law sources

explicitly or implicitly) to apply certain constitutional provisions equally to citizens and noncitizens alike, based on an underlying modern/contemporary understanding of key concepts of jurisdiction (by looking at sovereignty and territoriality) and functionalism, to uphold the cosmopolitan ideal of the world citizen, and of equal treatment for citizens and non-citizens alike.

With this definition in mind, I can return to my initial research question: *In their functional analysis of enemy combatant detention jurisprudence in the War on Terror, have US courts commenced a march of judicial cosmopolitanism by adopting an understanding of sovereign jurisdiction consistent with its contemporary interpretations?*

In this section, I will strive to answer this question by addressing its components in turn; in a way, I will be dissecting and answering the question as a whole, by tending to its individual sub-questions first. Through my definition of judicial cosmopolitanism I have already identified that an explanation of jurisdiction and functionalism (as they are conceptually understood today) will be required in order to conclude whether the judges' own use of these concepts enables or triggers a cosmopolitan. Therefore, the next section will include: 1) an explanation of the modern conception of jurisdiction through the use of territorial sovereignty and how this was or was not identified in the case law regarding enemy combatants; 2) an explanation of functionalism and functional sovereignty, and how this was adopted in the relevant case law. Following these clarifications, it will be important to assess whether judicial cosmopolitanism is indeed the theory through which to address enemy combatant cases, and if so, the extent to which a march of judicial

cosmopolitanism has been initiated, or whether this interpretation will remain one that is restricted to its particular case scenario.

### 3.1 Jurisdiction & Judicial Cosmopolitanism

*What is the modern conception of jurisdiction?*

To be able to assess whether the decision of the US Courts in enemy combatant cases constitutes judicial cosmopolitanism, it is important to look at how the foreign judges have understood concepts of jurisdiction and sovereignty, especially in regards to the relation between these and fundamental human rights. However, before looking at the specific examples from the case law, this section will discuss the idea of jurisdiction and sovereignty as understood contemporarily. It is important to take into account how these terms have been employed outside the US domestic practices, because judicial cosmopolitanism is a concept that revolves around the perspective that judicial decisions and sources of law have been and are, implicitly or explicitly, influenced by global understandings of such terms.

Jurisdiction, “literally the power to ‘speak law’”<sup>108</sup> is a concept that can be interpreted in different ways. International law uses the term “jurisdiction” “to refer to the ability of a state to lawfully exercise its domestic authority over persons or property... by having a “jurisdiction to prescribe, jurisdiction to enforce, and jurisdiction to

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<sup>108</sup> Anthony Colangelo, “What is Extraterritorial Jurisdiction” (2014) SMU Dedman School of Law Legal Studies Research Paper No. 131, at 6.

adjudicate”.<sup>109</sup> Cleveland argues that 19<sup>th</sup> century view of jurisdiction in international law was dominated by the sovereign territoriality; that the legal jurisdiction of a nation was constrained by its geography. As such, a principle of strict territorial jurisdiction was prevalent in much of the case law (especially the *Insular Cases*) and dictated the decisions of the judges.<sup>110</sup> The result was that under territorial jurisdiction, “constitutional provisions would not apply abroad”.<sup>111</sup> Although for purposes of this paper it is not important to review all the cases dealing with the concept and application of territorial jurisdiction (as this would be outside the ambit of the research), it is important to mention, as Cleveland herself notes, that in relation to protecting aliens abroad, US approaches “remained tied to a territorial conception of jurisdiction that was anachronistic under international law”.<sup>112</sup> As such prior to *Boumediene*, the Court’s perceptions “remained tied to the antiquated conceptions of territorial jurisdiction”.<sup>113</sup>

However, modern approaches to the conception of jurisdiction, mainly as defined through transnational law, and human rights organizations, have adopted a view of jurisdiction as “effective control over either a person or a territory... giving rise to legal responsibility for human rights violations”.<sup>114</sup> This forms part of a wider concept of extraterritorial jurisdiction, one that is important in the development of this essay. Hence, the next part of this section will look at how two bodies of international law have relied on a definition/test of jurisdiction as control, rather than territory, in a cosmopolitan attempt to ensure protection of fundamental rights and freedoms outside national

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<sup>109</sup> Cleveland, *supra* note 92, at 231, 232.

<sup>110</sup> Although, it is important to note that Cleveland utilizes some examples through which US judges hinted to a relaxation of the principle of strict territoriality. See Cleveland, at 236- 237.

<sup>111</sup> *Ibid* at 240.

<sup>112</sup> *Ibid* at 244.

<sup>113</sup> *Ibid* at 247.

<sup>114</sup> *Ibid* at 248.

territories. I will, therefore, address the overall interpretation of jurisdiction as described by the European Court of Human Rights; I will also examine the test for jurisdiction according to Canadian jurisprudence.

#### *A. The European Court of Human Rights*

The ECtHR (European Court of Human Rights) has quite an extensive literature on extra-territorial jurisdiction, particularly in its interpretation of word “jurisdiction” under Article 1 of the European Convention on Human Rights. It is neither necessary nor possible to examine the whole jurisprudence here; hence, I will only examine certain cases that specifically deal with questions of jurisdiction in somewhat comparable circumstances.<sup>115</sup> In literature on extraterritorial jurisdiction, the judgments of the ECtHR are very valuable; I will also give them substantial weight, for the Court has been very particular in its decisions. Similarly, when taken as a whole, the most important cases show that there is a contention between classical and modern views of jurisprudence, with the more recent understandings following trends inspired by a globalized movement of human rights protections.

In *Loizidou v Turkey (1995)*<sup>116</sup>, a case that concerned access to property following continued occupation of northern parts of Cyprus by Turkey, the court held that “the

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<sup>115</sup> For a more in-depth discussion and survey of the case law see Cleveland’s article. Extraterritoriality is a broad topic in European human right law, particularly in relation to Article 1 of the European Convention of Human Rights. It would therefore be a grand task to provide a detailed analysis of the case law, as such only selective decisions are presented in this essay. For even further analysis see Marko Milanovic “From Compromise to Principle: Clarifying the Concept of Jurisdiction in Human Rights Treaties” (2008) 8(3) Human Rights Law Review.

<sup>116</sup> *Loizidou v Turkey* (1995), Application no. 15318/89, online: <http://www.hri.org/news/special/loizidou/judgmnt.html>

concept of jurisdiction... is not restricted to the national territory”.<sup>117</sup> Further, “the responsibility of a contracting party may also arise when as a consequence of military action-whether lawful or unlawful- it exercises *effective control* of an area outside its national territory”.<sup>118</sup> The view that jurisdiction under the Convention on Human Rights is not restricted to national territory, but that it is intrinsically tied to a degree of control (the test being that of “effective control”) was further upheld in *Issa and Others v Turkey*, *Cyprus v Turkey*, as well as *Pad and Others v Turkey*.

Perhaps one of the most relevant decisions of the European Court of Human Rights is *Bankovic and Others v Belgium*<sup>119</sup>. The Grand Chamber discussed the meaning of jurisdiction:

“While international law does not exclude a State’s exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant States.... The Court is of the view, therefore, that Article 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being *exceptional* and requiring special justification in the particular circumstances of each case”.<sup>120</sup>

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<sup>117</sup> *Ibid* at 23-24.

<sup>118</sup> *Ibid*

<sup>119</sup> *Bankovic and Others v Belgium and Others* 2001- XII 333; (2007) 44 EHRR SE5

<sup>120</sup> *Ibid* at 352.

As it can be seen from the quote, even the ECtHR acknowledges that a definition of jurisdiction is inherently tied to presumptions of territoriality. However, the Court also speaks of extra-territorial acts that constitute exercises of jurisdiction, particularly drawing upon his decision in *Loizidou* and *Cyprus v Turkey*. In relation to this, the Court recognizes the existence of arises when exceptional extra-territorial jurisdiction when a state:

“...through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”<sup>121</sup>

The Court’s test of jurisdiction is highly relevant in this matter. Instead of building on its previous case law, this judgment has been interpreted by some as creating a “presumption against extraterritorial jurisdiction under Article 1”.<sup>122</sup> It is not disputed that the idea of jurisdiction is closely linked with the territorial sovereignty of a state. This indeed shows a classical understanding of the concept of jurisdiction. Nonetheless, the ECtHR “shifted its interpretation under the Convention from focusing on the de facto control... to a test that was designed to determine the international legality of extraterritorial conduct under prescriptive jurisdiction”.<sup>123</sup> Cleveland argues that the court showed a retreat from its previous rulings in *Cyprus* and *Loizidou*, cases in which the ECtHR accepted a more relaxed definition of jurisdiction as being constrained or limited

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<sup>121</sup> *Ibid* at 355.

<sup>122</sup> Barbara Miltner, “Revisiting Extraterritoriality: the ECHR and its lessons” (2012) 33(4) Michigan Journal of International Law, at 735.

<sup>123</sup> Cleveland, *supra* note 92, at 264.

by territorial sovereignty, in favour of a more classical approach to the concept.

However, as Cleveland herself notes, the Court affirmed “that effective control of a territory through military occupation could give rise to obligations under the Convention...”<sup>124</sup>

The decision in *Bankovic* demonstrates that although the European Court of Human Rights had initially adopted a modern approach to jurisdiction, it still maintained narrow, classical views of territorial jurisdiction as the main assumption. The fact that the court acknowledges that in relation to extraterritoriality, jurisdiction is to be assessed in relation to effective control over a territory, nevertheless shows that jurisdiction is very much a concept inspired by contemporary definitions, even if in exceptional circumstances.

*Al-Saadoon and Mufdhi v the United Kingdom*<sup>125</sup> and *Al-Skeini and Others v the United Kingdom*<sup>126</sup> are also useful cases, especially in relation to their factual background. In *Al-Saadoon*, the applicants were initially detained by British forces in British operated detention facilities following the invasion and subsequent occupation of Iraq; they were then transferred into Iraqi custody, and they contended this based on the risks of being sentenced to death. Here, one of the questions for the Court was whether the British had jurisdiction over the detainees. The Court answered, that since the “British forces had physical custody and control of the applicants... [they] therefore fell within

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<sup>124</sup> *Ibid* at 266.

<sup>125</sup> *Al-Saadoon and Mufdhi v the United Kingdom*, (2010), Application no. 61498/08.

<sup>126</sup> *Al-Skeini and Others v the United Kingdom* (2011) Application no. 55721/07.

United Kingdom's jurisdiction".<sup>127</sup> The applicants, when detained by the British on their facilities were indeed under UK's jurisdiction, up until they were transferred to authorities in Iraq. Again, the ECtHR shows that jurisdiction does not rely solely on the territorial aspect of sovereignty, but that, especially in cases of exceptional extraterritorial circumstances, jurisdiction depends on control, rather than territorial demarcations. It is important to note that the British facilities here were not British soil; they were found on foreign territory, albeit in a zone of war and occupation, but nonetheless, this goes to show that in situations outside the natural borders of a nation, jurisdiction takes on the meaning of control, and not of geographical restraints.

Jurisdiction was also one of the preliminary questions in *Al-Skeini*, a case that concerned the deaths of the applicants' relatives at a time during which the UK was an occupying power in Iraq. The deceased were either killed by British soldiers, or died on British bases. In its discussion, the Court stated that "a state's jurisdictional competence under Article 1 is primarily territorial" and that "jurisdiction is presumed to be exercised normally throughout the state's territory".<sup>128</sup> Consequently, acts "outside [national] territories can constitute an exercise of jurisdiction within the meaning of Article 1 *only* in exceptional cases [emphasis added]".<sup>129</sup> Among the exceptional circumstances giving rise to extra-territorial jurisdiction, the Court identified: 1) "acts of diplomatic and consular agents present on foreign territory... when these agents exert authority and control over others"; 2) state exercise of "all or some public powers normally to be exercised by the [national] government"; and 3) "use of force by a state's agents

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<sup>127</sup> *Al-Saadoon*, supra note 124 at 57.

<sup>128</sup> *Al-Skeini*, supra note 125 at 131.

<sup>129</sup> *Ibid* at 134.

operating outside its territory”.<sup>130</sup> The most important exception, as pointed out by the Court is when a state exercises effective control of an area that is outside its territorial borders. This kind of control can be “exercised directly, through the contracting state’s own armed forces or through a subordinate local administration”.<sup>131</sup> Irrespective of how effective control is exercised, it gives rise to jurisdiction, which in turn requires that the state comply with the substantive rights set out by the ECHR. Most importantly, by establishing effective control as a question of fact<sup>132</sup>, the Court will look at the extent of military presence and the political influence over the region alongside other considerations. Another interesting remark by the Court, as a last point, is that although the ECHR is considered an *espace juridique*, which does not govern the actions of those states which are not parties to it, this does not necessarily mean that jurisdiction under Article 1 “can never exist outside the territory covered by the Council of Europe Member States”.<sup>133</sup>

The result following the Article 1 analysis was that the Court found a jurisdictional link between the UK and the deceased parties. This case shows that *Bankovic* did not necessarily create a rule against a presumption of jurisdiction. Rather, *Al-Skeini* demonstrates that “extraterritorial jurisdiction can now be established where a state exercises... effective authority”.<sup>134</sup> Miltner argues that in relation to evaluating extraterritorial jurisdiction, the European Court of Human Rights has an underpinning rationale of personal (rather than territorial) jurisdiction. As such this nexus between states and the persons over which the states exhibit a degree of control, becomes the

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<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid* at 122.

<sup>132</sup> *Ibid* at 139.

<sup>133</sup> *Ibid* at 142.

<sup>134</sup> Miltner, *supra* note 121, at 737.

necessary foundation for a finding of jurisdiction outside territorial borders. Thus, “*ratione personae* constitutes the pivotal component and the most compelling element in determining Article 1 jurisdiction extraterritorially”, making the “significance of a state’s nexus to territory ... a secondary consideration at best”.<sup>135</sup>

Case law from the European Court of Human Rights reflects a contemporary understanding of extraterritorial jurisdiction as effective control. The Court’s decisions and many scholarly interpretations show that judges (whilst still respecting the classical position of jurisdiction under international law) have started a movement that seeks to protect individuals and to affirm human rights protections, rather than protecting the territorial integrity of nation states. ECtHR judges have adopted a view of jurisdiction that is friendly to human beings, irrespective of their nationality, of their citizenship. They have affirmed jurisdiction in cases where nations acted in foreign territory, and in turn sought not to be bound by their actions. They have ensured that law applies to such actions “because law ought to protect the citizen of the world everywhere in the world”.<sup>136</sup> The jurisprudence of the European Court of Human Rights is greatly cited in extraterritorial literature as a modern approach to jurisdiction – one that is in line with international human rights protections and equal treatment for all persons. This is very much in line with legal cosmopolitan interpretations, and especially with a trend of judicial cosmopolitanism. The judgments discussed here outlined how the courts displayed judicial cosmopolitanism both by adopting an underlying cosmopolitan

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<sup>135</sup> *Ibid* at 745.

<sup>136</sup> Feldman, *supra* note 44, at 1032.

approach to the protection of individuals, and in their use and application of international and domestic case law.

### *B. Canadian Case Law*

The Supreme Court of Canada has also had to deal with jurisdiction in recent Charter jurisprudence, when addressing the reach of Charter protections outside Canadian territorial borders. However, the display of judicial cosmopolitanism in the Canadian case law is different from that which arose in the ECtHR.. In *R v Hape*<sup>137</sup>, the Supreme Court, relying on principles of international law (particularly the respect for the sovereignty of foreign states, and that all states are sovereign and equal) stated that the Charter does not apply to searches and seizures in other countries, as Canadian law cannot be enforced upon another state without its consent. For Lebel J, sovereignty is at the cornerstone of international law. In drawing upon customary international law principles of sovereignty and jurisdiction (being mainly related to territoriality), the majority held that, “as the supreme law of Canada, the Charter is subject to the same jurisdictional limits as the country’s other laws or rules. Simply put Canadian law, whether statutory or constitutional, cannot be enforced in another state’s territory without the other state’s consent”.<sup>138</sup> The approach adopted in *Hape* is in line with a narrow reading of customary international law; in a way in very much mirrors what the European Court of Human Right said, in *Bankovic*, in relation to the reality of jurisdiction in international law. However, Justice Bastarache, in his concurring decision adopts a “control” approach

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<sup>137</sup> *Hape*, supra note 13, Lebel J, at 69.

<sup>138</sup> *Ibid.*

more similar to that found in the Court of Human Rights. In this sense, he disagrees with the majority; he relies solely on the Charter (rather than principles of international law) to view it as a document that is flexible and “amenable to contextual interpretation” that should have applied in these circumstances.<sup>139</sup> His approach is close to a fundamental rights approach, “a conscience model, because it does not turn on the location of the search or the nationality of the suspect”.<sup>140</sup> Unfortunately, this was not the view adopted by the other Supreme Court justices, and it is only *obiter*.

This approach was upheld in the first *Khadr*<sup>141</sup> case, where the Court however stated that the Charter applied to Omar Khadr a Canadian citizen detained at Guantanamo, because the interviewing of Khadr by Canadian officials violated international human rights and domestic law. The Supreme Court of Canada relied on the US judgment in *Rasul v Bush*, particularly on Justice Kennedy’s opinion, to argue that:

“The violations of human rights identified by the United States Supreme Court are sufficient to permit us to conclude that the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law”<sup>142</sup>

Therefore, if Canada participates in a process that violates the country’s “binding obligations under international law, the Charter applies to the extent of that

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<sup>139</sup> Ibid, Bastarache J, at 125.

<sup>140</sup> C. Keitner, “Rights Beyond Borders” (2011) 36 Yale Journal of International Law, at 85.

<sup>141</sup> *Khadr I*, supra note 17.

<sup>142</sup> *Ibid*, at 24.

participation”.<sup>143</sup> Here, the Charter applied due to the participation and involvement of the CSIS interviewers, who were bound by the Charter’s protections. This case demonstrates that the Canadian Supreme Court accepted an extraterritorial application of the Charter; however, this needs to be qualified, for the Charter, in the Canadian context, can only apply where there has been action by Canadian authorities, and the action must have been in violation of fundamental human rights outlined by the Charter.

In 2010, the Canadian Supreme Court ruled in the second *Khadr*<sup>144</sup> case. This time, Khadr requested his repatriation from Guantanamo to Canada; the Prime Minister rejected his request. Khadr subsequently applied to Federal Court for judicial review. The Federal Court found that, given the circumstances of the case, and Canada’s previous violation of Khadr’s s. 7 Charter rights, the government was under a duty to protect his fundamental rights and to seek his repatriation.

In its judgment, the Supreme Court noted that it had previously dealt with the rule against the extraterritorial application of the Charter, having ruled in 2008 that the Charter did apply to the Canadian officials involved in Khadr’s interview – and, that this extraterritorial application of the Charter also governed the present case. Furthermore, the court also found that the government violated Khadr’s principles of fundamental justice by having interrogated in his youth without proper due process. Therefore, the main question for the court was whether Khadr’s request for repatriation was an appropriate judicial remedy. In answering this question, the Court found itself to “possess a narrow

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<sup>143</sup> Keitner, supra note 139, at 89.

<sup>144</sup> *Canada Prime Minister v Khadr* (2010) SCC 3, SCR 44.

power to review and intervene on matter of foreign affairs to ensure the constitutionality of executive action”.<sup>145</sup> However, it ruled in favour of government by leaving it with “a measure of discretion in deciding how best to respond”.<sup>146</sup>

Professor Hathaway states that, in spite of these recent cases, the Canadian Supreme Court has still “not yet squarely addressed when exactly international human rights treaty obligations apply beyond the country’s territorial borders”.<sup>147</sup> While this may be so, Canadian jurisprudence has shifted its focus from the rejection of the effective control test in *Hape*, to the exceptions recognised where there are “clear violations of international law and fundamental rights”.<sup>148</sup> Hathaway argues that this “suggests that Canada’s human rights obligations have some application beyond its borders – perhaps in line with some sort of effective control test”.<sup>149</sup>

Generally speaking Canadian courts have strictly maintained a classical view toward jurisdiction as linked to territorial sovereignty. Nonetheless, these examples show that Canadian judges are fully aware that there are contemporary circumstances in which a Constitutional document can be extended extraterritorially, particularly in instances when human rights need to be protected. Importantly, Canadian courts have relied heavily on international and foreign sources of law to come to their decisions, an account that definitely portrays a globalized definition of judicial cosmopolitanism. While the movement of judicial cosmopolitanism has certainly not been as strong as in European

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<sup>145</sup> *Ibid* at 38.

<sup>146</sup> *Ibid*.

<sup>147</sup> Oona A. Hathaway et al., “Human Rights Abroad: When do Human Rights Treaty Obligations Apply Extraterritorially?” (2011) 43 *Arz St LJ*, at 12.

<sup>148</sup> *Hape*, supra note 13, at 52.

<sup>149</sup> Hathaway, supra note 145, at 34.

case law, Canadian jurisprudence shows that the courts would be willing to extend the extraterritorial reach of the Charter, especially in situations in which fundamental rights have been violated. However, at the moment this is speculation – only the future can tell how the Supreme Court will react if it were to be presented with circumstances ripe for review. In this aspect, these cases show a situation in which judicial cosmopolitanism, and a march of judicial cosmopolitanism, have failed to crystallize. The concurring judgment of Justice Bastarache in *Hape* very much resembles Justice Kennedy’s concurrence in *Rasul v Bush* (which will be addressed shortly). The difference is that whilst Justice Kennedy’s concurrence became the majority in the subsequent case (*Boumediene*), Justice Bastarache’s discussion remained *obiter*. The Canadian Supreme Court has never capitalized on the adoption of an effective control test, beyond the acceptance that exceptional circumstances could trigger an expansion of Charter protections outside Canada’s borders. As such, these cases are not exemplary in demonstrating other instances of judicial cosmopolitanism – the reality is that they do not. The Canadian decisions, taken together do not show a judicial movement toward cosmopolitanism in the sense that ECtHR and American jurisprudence has. Nevertheless, they do show that the seeds for a possible, future march of judicial cosmopolitanism have been sown. Although the Supreme Court fell short of adopting an approach that embraces the theoretical underpinnings of judicial cosmopolitanism, its recognition that exceptional circumstances will require an effective control test demonstrates that this form of judicial discourse has indeed impacted judges in Canada as well. Likewise, although these cases do not reveal a march of judicial cosmopolitanism in (based on contemporary readings of

jurisdiction), they are helpful because they establish that judges can be influenced, and can adopt a judicial cosmopolitanism approach where the context permits it.

### 3.2 Sovereignty

Jurisdiction is the “power to exercise authority over persons, conduct and events”, and is an aspect of sovereignty – “although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty”<sup>150</sup>. It would be helpful, therefore to have a discussion on sovereignty. I do not intend to trace the development of sovereignty and its meaning in political theory. I merely want to address the view of sovereignty in comparative international law, and to do so in order to provide an understanding of a concept that comes up often in enemy combatant cases. Likewise I want to discuss the idea of functional sovereignty.

Sovereignty has been described as a “something of a mythical concept”.<sup>151</sup> In the classical Westphalian formulation, “sovereignty connoted unlimited and absolute power within a jurisdiction”.<sup>152</sup> It was a fact, something that “could not be contested... divided, shared, diminished, or limited. Classical sovereignty was legal; absolute; unitary, ... and necessarily indivisible”.<sup>153</sup> “The classical regime of sovereignty highlights the development of a world order in which states are nominally free and equal; enjoy

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<sup>150</sup> *Hape*, supra note 13, Lebel J at 41.

<sup>151</sup> Timothy Zick, “Are the States Sovereign” (2005) 82 Washington U Law Rev 229, at 230.

<sup>152</sup> *Ibid* at 231.

<sup>153</sup> *Ibid* at 240.

supreme authority over all subjects and objects within a given territory...”<sup>154</sup> Today, territorial sovereignty remains an established rule of customary international law, and very much a dominant factor in international relations and extraterritoriality. “While sovereignty is not absolute, the only limits on state sovereignty are those to which the state consents or that flow from customary or conventional international law”.<sup>155</sup>

However, in a liberal international regime, “principles of democracy, and human rights [are seen] as the proper basis of sovereignty”.<sup>156</sup> Further, sovereignty can be de jure (legal or recognized) and de facto (actual).<sup>157</sup> Thus, other actors may achieve effective control over a territory and be recognized as the de facto sovereigns. Sovereignty is therefore best understood as “an evolving spatial practice as states try to respond to changes and challenges in domestic and international economic, social and political life”.<sup>158</sup>

Practical considerations are similarly important when taking into account a conception of sovereignty. In this research, I adopt the concept of functional sovereignty.<sup>159</sup> Functional sovereignty denotes a contemporary understanding of sovereignty, as applied through a functional analysis. This means that a reading of sovereignty will depend on the court’s interpretation of functional factors and on a balancing of these considerations. To better understand functional sovereignty, I will first describe what I mean by functionalism.

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<sup>154</sup> David Held, “The Changing Structure of International Law: Sovereignty Transformed?” in David Held and Anthony McGrew (eds), *The Global Transformations Reader: An Introduction to the Global Debate* (Cambridge: Polity Press, 2003), at 162.

<sup>155</sup> *Hape*, supra note 13, Lebel J at 43.

<sup>156</sup> Held, supra note 153, at 164.

<sup>157</sup> Carl Dahlman, “Sovereignty” in Carolyn Gallaher et al. (eds) *Key Concepts in Political Geography* (London: SAGE, 2009), at 31.

<sup>158</sup> *Ibid.*

<sup>159</sup> I would like to thank Professor David Schneiderman for this idea.

Functionalism is a multi-faceted concept that can be found in a variety of disciplines from social sciences, to philosophy, to sociology. This focus is on the meaning of functionalism in law, and more particularly in constitutional, comparative, and international law. Hence, functionalism will be conceptualized by taking into account these different approaches.

Functionalism has been described as a “leading theory of constitutional interpretation, particularly in separation-of-powers scholarships”.<sup>160</sup> Within constitutional law functionalism advocates a more pragmatic approach that allows the branches to overlap and blend as long as the autonomy and integrity of one branch is not encroached upon by another branch”.<sup>161</sup> Functionalism can therefore be contrasted with formalism<sup>162</sup>, but also with other models of legal analysis.<sup>163</sup> Formalism “posits that each branch of government should exercise only the power it constitutionally is authorized to exercise; as a result, the inquiry is limited to the text, origin, and structure of the constitution”.<sup>164</sup> Functionalism, on the other hand “requires interpreters to engage in nuanced and textured interest-balancing; they must use contemporary social and political science to determine whether a particular act of Congress might unbalance the distribution of authority at the apex of government...”<sup>165</sup> The Supreme Court’s preferred methodology of constitutional

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<sup>160</sup> Ronald J Pestritto and Thomas G. West (eds.) *Modern America and the Legacy of the Founding* (Plymouth: Lexington Books, 2007), at 59.

<sup>161</sup> Simona Martinez McConnell, “The Unstated Tension in *Albuquerque Rape Crisis Centre v Blackmer: A Divergence between Formalism and Functionalism*” (2006) 36 *New Mexico L Rev*, at 661.

<sup>162</sup> Formalism looks “to the Constitution’s Test, structure, and historical materials to reveal the meaning of the text”. See Robert H. Knowles, “American Hegemony and the Foreign Affairs Constitution” (2009), *Arizona State Law Journal*, at 9.

<sup>163</sup> See Wilson R. Huhn, “Teaching Legal Analysis Using a Pluralistic Model of Law” (2001) *Gonzaga Law Review*, at 434-495, for other methods of legal analysis.

<sup>164</sup> Martinez McConnell, *supra* note 230, at 661.

<sup>165</sup> Pestritto and West, *supra* note 229, at 59.

interpretation has not always been functionalism; there are instances in which the court has relied on a formalistic/ originalist interpretation of the constitution. In *Boumediene* this was the case in Justice Scalia's dissent, whereas Justice Kennedy's majority decision undertook a functional approach.

Earlier in this essay, *Boumediene* was identified as a case that can be interpreted from a separation of powers analysis; in fact, most enemy combatant cases can be (and have been) interpreted as being crucial separation of powers cases. However, it was also noted that such a discussion would be beyond this thesis, particularly since the true legacy of the jurisprudence lies not with this matter, but with the initiation of the march of judicial cosmopolitanism. Therefore, it is important to note that whilst the meaning of functionalism within constitutional interpretation is helpful in providing an overall definition for the term, it is not to be taken as the definitive and sole means to understand the concept. Nonetheless, certain meanings of functionalism as a theory of constitutional interpretation can provide helpful guidance. With that in mind, functionalism has also been generally associated "with standards or balancing tests that seek to provide public actors with greater flexibility".<sup>166</sup> Likewise, functionalism can "...be understood as emphasizing pragmatic values like adaptability, efficacy, and justice in law"<sup>167</sup> by inquiring whether "a given law or procedure is efficient, convenient, and useful in facilitating the functions of government".<sup>168</sup> As a model of constitutional interpretation and construction, functionalism is primarily focused with creating a pragmatic, balanced approach to the separation of powers analysis.

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<sup>166</sup> William N Eskridge Jr, "Relationships between Formalism and Functionalism in Separation of Powers Cases" (1998) Harvard Journal of Law and Public Policy, at p. 21.

<sup>167</sup> *Ibid.*, at 22.

<sup>168</sup> R. Knowles, *supra* note 231, at 9.

Historically, functionalism has been seen as one of the “most influential approaches to the study of comparative law”.<sup>169</sup> “According to functionalism, comparative legal scholars should understand different countries’ laws as solutions to similar social problems”.<sup>170</sup> Ralf Michaels describes functionalism within comparative law:

“In short, ‘the functional method’ is a triple misnomer. First, there is not one (‘the’) functional method, but many. Second, not all allegedly functional methods are ‘functional’ at all. Third, some projects claiming adherence to it do not even follow any recognizable ‘method’. Does functionalist comparative law actually have any meaning? Functionalist comparatists agree on some important elements. First, functionalist comparative law is factual, it focuses not on rules but on their effects, not on doctrinal structures and arguments, but on events. As a consequence, its objects are often judicial decisions as responses to real life situations, and legal systems are compared by considering their various judicial responses to similar situations. Second, functionalist comparative law combines its factual approach with the theory that its objects must be understood in the light of their functional relation to society. Law and society are thus thought to be separable but related. Consequently, and third, function itself serves as *tertium comparationis*. Institutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfil similar functions in different legal systems. A fourth element, not shared by all variants of functional method, is that functionality

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<sup>169</sup> C. A. Whytock, “Legal Origins, Functionalism, and the Future of Comparative Law” (2010), Brigham Young University Law Review, at 1879.

<sup>170</sup> *Ibid.*

can serve as an evaluative criterion. Functionalist comparative law then becomes a ‘better-law comparison’—the better of several laws is that which fulfils its function better than the others.”<sup>171</sup>

Therefore, a functional approach to comparative law embraces different solutions to an issue. In a sense, much like in constitutional law interpretation, functionalism provides a balancing approach. Yet, unlike its role in constitutional interpretation, functionalism in comparative law looks not to balance interests in the maintenance of separation of powers, but rather to balance solutions in the interest of attaining a more favourable outcome. In comparative law the role of functionalism is to examine and compare laws based on the functions and the roles they serve in society.<sup>172</sup>

What about the role of functionalism in international law? A study of the development of functional analysis of international law is a separate research project in itself.<sup>173</sup> Nonetheless, in order to compare with the other varieties of functionalism, it will be helpful to provide a brief account as to the goals of functional methodology in international law. The language of functionalism in international law was first adopted by “anti-formalists international lawyers in the United States, such as Hudson, Jessup... as well as Morgenthau”.<sup>174</sup> Particularly in terms of jurisdiction, international law functionalists “prefer to avoid dependency on traditional doctrine... and instead to examine in context claims to authoritative control over areas, resources, activities,

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<sup>171</sup> Ralf Michaels, “The Functional Method of Comparative Law” in Mathias Reimann, and Reinhard Zimmermann (eds.) *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2006), at 342.

<sup>172</sup> *Ibid.*

<sup>173</sup> For a very detailed summary and relationship between functionalism and international see Douglas M. Johnston, “Functionalism in the Theory of International Law” (1988) 26 *Can YB Intl L* 3

<sup>174</sup> Douglas M. Johnston, “Functionalism in the Theory of International Law” (1988) 26 *Can YB Intl L* 3, at 22.

technology, information and persons”.<sup>175</sup> More importantly, functionalists see no “necessity to establish a uniform outer boundary for territorial [spaces]”.<sup>176</sup> This is a very interesting contention. Given that functionalism analysis in international law is intrinsically linked to functionalism in international relations and political science<sup>177</sup>, an international law theory of functionalism places emphasis on the common needs of states and non-state actors (particularly when taking into account the erosion of state sovereignty). Thus, functionalism moves away from rigid realist assumptions of international relations to embrace a framework of analysis that relies heavily on non-state actors and common interests of human beings.

Thus far, functionalism has proven to be a very flexible and diverse concept. Whilst I have not provided a comprehensive account, important aspects can be drawn from the role of functionalism in constitutional interpretation, comparative, and international law. All three accounts focus on functionalism as a tool of analysis that seeks to balance interests. In the case of constitutional law, it balances interests between the different branches; in the case of comparative law it balances different laws; and, in the case of international law, functionalism balances the interests of both state and non-state actors, in favour of moving away from rigid constructions of jurisdiction and sovereignty. In adopting a sole definition of functionalism and functional analysis, I wish to take account of the nuances of functionalism from the three definitions previously presented. Hence, for purposes of this essay, functionalism will be understood as a method of judicial analysis that focuses on the factual background of the case, with the

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<sup>175</sup> *Ibid.*, at 35.

<sup>176</sup> *Ibid.*, at 36.

<sup>177</sup> Hans J. Morgenthau, “Positivism, Functionalism, and International Law” (1940) 34(2) *The American Journal of International Law* 260.

purpose of addressing the effects of the contextual factors on the overall decision. With this in mind, a functional approach in addressing the march of judicial cosmopolitanism will also be a balancing test. The functional approach will, therefore, produce an account that balances different contextual factors in order to address the extraterritorial application of constitutional protections in light of modern conceptions of jurisdiction and sovereignty. Since the underpinnings of judicial cosmopolitanism rely on a modern approach to territoriality, a functional analysis must be one that can balance different considerations in light of giving way to such an understanding of jurisdiction.

Functionalism was described as being a supportive tool in relation to the court's discourse of judicial cosmopolitanism. As such, in order for functionalism to provide that supportive role, it needs to be a method of analysis that not only puts in balance the relevant contextual factors, but that also allows and embraces a cosmopolitan approach to jurisdiction. Below, I will address how (and if) the courts adopted a functional, and more importantly, whether this functional approach paved the way for judicial cosmopolitanism.

Before turning to the case law, and with the above understanding of functionalism, the notion of functional sovereignty therefore presumes that a contemporary understanding of sovereignty can be undertaken through a balancing of contextual factors. Thus, in their legal analysis, the courts will engage with the idea of sovereignty based on the functional test (which will be discussed in *Boumediene*).

Functional sovereignty is a tool through which the court adopts a balancing approach (weighing contextual factors) in deciding whether jurisdiction can be asserted through effective control, or through a territorial understanding of the term. Thus, functional

sovereignty matters in establishing whether the court adopts a contemporary reading of the concept. As well, this implies that there might be a link between a functional analysis of sovereignty, and judicial cosmopolitanism (which ultimately relies on a modern perception of the concept). To address this matter I will explore the following questions:

Is there a connection between the use of functionalism and the march of judicial cosmopolitanism? Does the use of functional analysis help forward the movement of judicial cosmopolitanism?

In *Boumediene* Justice Kennedy's functional methodology enabled the majority of the court to extend habeas corpus rights to noncitizen detainees at Guantanamo; that use of functionalism directly impacted the discourse and aided to the adoption of judicial cosmopolitanism. When looking at *Boumediene* alone, there appears to be a strong link between functionalism and judicial cosmopolitanism. However, a further case, *Al Maqaleh*, particularly the Circuit Court decision, shows an apparent disconnect between the two concepts. In *Al Maqaleh* the use of functionalism does little to further the movement of judicial cosmopolitanism, as the court refuses to extend the writ of habeas corpus to detainees in Bagram. Therefore, it is also important to address the correlation between the use of functionalism (functional sovereignty) and the instances of judicial cosmopolitanism.

Functionalism, and the Supreme Court's functional analysis of sovereignty represent an aiding tool in demonstrating the commencement of the court's march of judicial cosmopolitanism. The role of functionalism is a supporting role; consequently, its

purpose is to provide support for upholding the overall interpretation of the court in line with the ideals of cosmopolitanism. In the case studies, I will argue that, initially, the use of functionalism in *Boumediene* furthered judicial cosmopolitanism; yet, the subsequent decision in *Al Maqaleh* demonstrates that there is only a weak connection between functional analysis and judicial cosmopolitanism, and that while the functional test itself plays a secondary role, the concept of functional sovereignty is an important tool in the courts' interpretation.

### *Summary*

The purpose of this passage was to show that jurisdiction (and sovereignty) are concepts, which in spite of their classical definition and use in international law, have contemporary understandings that are in line with fundamental protections of human rights. The case law from the ECtHR shows that jurisdiction is a multi-faceted concept that can arise without sovereign territoriality (particularly not *de jure*), granted that there is a finding of effective control over the persons or the territory involved. This approach has been adopted due to an increasing number of transnational conflicts (most of them as a result of terrorism), whereby the parties involved in the conflict need to be held accountable for their acts, even though these were produced outside their territorial boundaries. In relation to my thesis, this modern approach is very much in line with cosmopolitan law principles, and illustrates a judiciary that is not afraid to embrace and apply such ideas in the quest to uphold fundamental rights and freedoms. By embracing

such a trend, the judiciary shows a protection-oriented application of constitutional protections, which could be the direct result of severances in the associations and links between territory, jurisdiction, and sovereignty; however this may well be the subject of another project. In this section, I meant to show that there are indeed contemporary uses of jurisdiction and functional sovereignty, and that these uses have been reflected in courts around the world (to a certain extent). Further in this essay, I will show how a contemporary understanding of such concepts also underpins the decision of the US courts in relation to enemy combatants.

### 3.3 Functional Sovereignty and Jurisdiction in pre-*Boumediene* cases: A Status Quo?

Enemy combatant case law prior to *Boumediene* arose out of the 9/11 attacks and the subsequently waged “War on Terror”. Yet, cases such as *Rasul v Bush*, *Hamdi v Rumsfeld*<sup>178</sup>, and *Hamdan v Rumsfeld*<sup>179</sup> were not the first time the US Supreme Court encountered the question of whether habeas corpus should apply to noncitizen enemy combatants. For the purposes of this paper, this section will examine *Johnson v Eisentrager* and *Rasul v Bush*, as they are useful in creating a historical development of how the concept of sovereignty was initially understood by the Court, and in addressing whether judicial cosmopolitanism is a phenomenon that was evident before *Boumediene* through the use of sovereignty and functional analysis.

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<sup>178</sup>*Hamdi v Rumsfeld*, (2004) 542 US 507.

<sup>179</sup>*Hamdan v Rumsfeld*, (2006) 548 US 557.

The first case in which the USSC resolved ideas of sovereignty and jurisdiction based on the application of habeas corpus to noncitizens detained abroad is *Johnson v Eisentrager*. In 1950, the Court “addressed whether habeas corpus jurisdiction extended to enemy aliens who had been convicted of violating the laws of war”.<sup>180</sup> The enemy aliens in this instance were WWII prisoners of war detained at Landsberg Prison, an US-administered prison in Germany, which at the time was under Allied occupation. In the 6-3 decision, Justice Jackson wrote the opinion of the Court, not extending the constitutional protection to the enemy aliens in question:

“...these prisoners at no relevant time were within any territory over which the United States is sovereign, and the senses of their offence, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States”.<sup>181</sup>

On the dissenting end, Justice Black argued:

“If this opinion thus means, and it apparently does, that these petitioners are deprived of the privilege of habeas corpus solely because they were convicted and imprisoned overseas, the Court is adopting a broad and dangerous principle”.<sup>182</sup>

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<sup>180</sup> *Boumediene*, supra note 2, Justice Kennedy at 32

<sup>181</sup> *Eisentrager*, supra note 5, Justice Jackson, writing for the court

<sup>182</sup> *Ibid*, Justice Black, dissenting at 795.

“Habeas corpus, as an instrument to protect against illegal imprisonment, is written into the Constitution. Its use by courts cannot in my judgment be constitutionally abridged by Executive or by Congress. I would hold that our court can exercise it whenever any United States *official* illegally imprisons *any* person in *any* land we *govern*.”<sup>183</sup> [emphasis added]

The Court’s approach in *Eisentrager* was well in line with general territorially dominated interpretations of jurisdiction. According to Justice Jackson, the prisoners of war were given sufficient judicial review by the military tribunals, and additionally, and more importantly, the reality was that the court’s decision rested on the fact that the enemies were captured and imprisoned outside America’s territory. Meanwhile, the dissenting justices concurred that territorial boundaries were not as relevant; what truly mattered was whether an American official imprisoned any person in a land governed by the US. Justice Black does not define the term “govern”. However, given the fact that he is on the dissenting end of the an opinion which denied the extension of habeas corpus to an US-administered prison, it is safe to assume that so long as the United States has an administrative, perhaps executive interest and control over the land, the writ would extend in that matter.

Following *Eisentrager*, it was clear that habeas corpus did not expand outside the sovereign territory of the United States. Enemy combatant jurisprudence proliferated following the terrorist attacks in New York. The first case in the series of Guantanamo Bay detainee cases was *Rasul v Bush*. In this case, the term “enemy combatant” was used

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<sup>183</sup> *Ibid* at 796.

to describe the status of the detainees, in order to disallow them access to trial. Justice Stevens delivered the opinion of the court, while Justice Kennedy wrote a concurring opinion, with Justice Scalia dissenting. The main question on appeal to the Supreme Court was whether US courts “lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba”.<sup>184</sup> The petitions for habeas corpus were dismissed by the District Court for lack of jurisdiction; however, the Supreme Court granted certiorari and reversed the judgement, holding that US courts have jurisdiction to consider such challenges (challenges to the legality of the detention at Guantanamo Bay) under 28 U.S.C. §2241. The statute “authorizes district courts... to entertain habeas applications by persons claiming to be held in custody in violation of the laws of the United States”.<sup>185</sup> It affirms that jurisdiction “extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty”.<sup>186</sup> This greatly resonates with the view put forth by Justice Hugo Black in his dissent in *Eisentrager*. In the majority opinion, the Court distinguished the case from *Eisentrager* based on the facts that the detainees were “not nationals of countries at war with the United States...” and that “for more than two years they have been imprisoned in a territory over which the United States exercises exclusive jurisdiction and control”.<sup>187</sup>

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<sup>184</sup> Opinion of the Court

<sup>185</sup> *Rasul*, supra note 6, syllabus [LII].

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

Justice Stevens wrote the following:

“Applications of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called “exempt jurisdictions,” where ordinary writs did not run, and all other dominions under the sovereign’s control. As Lord Mansfield wrote in 1759, even if a territory was “no part of the realm,” there was “no doubt” as to the court’s power to issue writs of habeas corpus if the territory was “under the subjection of the Crown.”<sup>188</sup>

The court’s approach in *Rasul* shows the first instance of judicial cosmopolitanism in enemy combatant case law. It is indeed true that the decision did not rely on outside or foreign sources, but their understanding of jurisdictional control clearly shows that the underlying conception of sovereignty is not solely restricted to territorial delineations. The opinion of the majority mainly turned on the applicable statutory provision under U.S.C. §2241, which granted the District Court jurisdiction to hear the petitioners’ claims of habeas corpus. Thus, the decision in *Rasul* depended on the interpretation of a statute that provided the basis of jurisdiction for the District Court to hear habeas petitions.

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<sup>188</sup> *Ibid*, Justice Stevens at 14.

Furthermore, Justice Kennedy argued that:

“Guantanamo Bay is in *every* practical respect a *United States territory*, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains “ultimate sovereignty” over it... At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the *unchallenged* and *indefinite control* that the United States has long exercised over Guantanamo Bay.”<sup>189</sup> [emphasis added]

It is important to note, however, that while Kennedy agreed habeas corpus should be extended to detainees at Guantanamo, he did so without discrediting the *Eisentrager* framework. In his opinion, the decision to grant the petition followed and was a faithful application of *Eisentrager*, but an application based on a new set of facts. This was a problem for Justice Scalia, who dissented, explicitly stating that the Court must “either agree that the... decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager*”.<sup>190</sup> Nevertheless, procedural questions aside, *Rasul*, as the first case to tackle enemy combatants detained in Guantanamo, was a positive victory for the detainees. It represented a historic decision, with the majority of the court holding in a 6-3 decision that American courts possessed the necessary jurisdiction to consider due process petitions from alien detainees.

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<sup>189</sup> *Ibid*, Justice Kennedy, concurring at 3.

<sup>190</sup> *Ibid*, Justice Scalia, dissenting at 6.

In its modern, rather than classical use of sovereign territoriality and jurisdiction, this case represents a statement of the Court's cosmopolitan tendencies. Justice Kennedy, particularly was keen to establish Guantanamo as part of the US, based on America's plenary exercise of control (a control that is not only unchallenged, but also indefinite) of the former Cuban territory. As early as 2004, Justice Kennedy and Justice Stevens supported an understanding of jurisdiction as not merely constrained to territorial borders. *Rasul* was the first case to extend habeas corpus protections to non-citizen detainees held at Guantanamo Bay. It upheld the statutory jurisdiction of the federal courts to deliberate the detention of enemy aliens.

Taken as a whole, these two cases show that the Court's understanding of sovereignty, and subsequently, its jurisdiction has followed trends developed by international law. Naturally, critics may argue that two cases do not. The courts did not rely on any foreign sources of law (*Eisentrager* being an exception due to its reliance on the Geneva Convention in a time of war) and *Rasul* was explained as merely flowing from precedent (albeit, a mistaken understanding of precedent). Yet, *Eisentrager* was decided in 1950, in a period in which international law was thriving, and in which states were regaining their sovereign powers following a world war. *Rasul* on the other hand, was decided shortly after the fight against terrorism was declared, and most importantly, in an ambit of conflict unlike that which dominated the 20<sup>th</sup> century.

The context of these cases is significant and demonstrates that they outline opposite approaches, especially on the basis that many of the international and transnational legal regimes and judgments described above were developed after the

decision in *Eisentrager*; hence, the Court in 1950s would not have been influenced by other sources of law because few truly existed. Naturally, there is something important about the role of international law in enemy combatant jurisprudence, even though the Supreme Court has preferred not to rely on outside sources of law. The point here is that *Eisentrager* is indeed a useful case to be taken into account when addressing enemy combatant issues; however its historical context and facts are different, and for this reason, the enemy combatant jurisprudence that developed in an age of globalization should be distinguished and understood not only as a result of domestic precedent.

*Rasul* is a significant case to this paper, and to the discussion of judicial cosmopolitanism in *Boumediene*. For the first time, the Supreme Court held that the petitioners were entitled to constitutional, fundamental rights. The Court specifically rejected the application of the *Eisentrager* framework to Guantanamo detainees, due to major contextual differences. In finding that the US government holds plenary jurisdiction over Guantanamo, the Court relied on the language of the Lease Agreement (denoting the terms in regards to the lease of Guantanamo to the US government) and on the interpretation of the federal court statute 28 U.S.C. §2241. Likewise, the decision relied on the status of the petitioners. Unlike the prisoners in *Eisentrager*, who were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms, the Guantanamo detainees [were] being held indefinitely, and without benefit of any legal proceeding to determine their status”.<sup>191</sup> In quoting the Lease Agreement, the Court described Guantanamo as within the territorial jurisdiction of the

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<sup>191</sup> Amy Baher, “*Rasul v Bush and the Intra-Territorial Constitution*” (2007) 62 NYU Annual Survey of American Law 369, 395.

American government, “because the United States exercised complete jurisdiction and control over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses”.<sup>192</sup> Thus, for the Supreme Court, Guantanamo was not outside the American territorial borders, and it was not outside the reach of the Constitution. In the majority’s reliance on the interpretation of the Lease Agreement, the extension of habeas corpus protections to detainees at Guantanamo did not showcase an exercise of extraterritoriality; rather, the federal habeas statute (read in conjunction with the Lease Agreement) applied because Guantanamo was very much part of the US territory due to the government’s control of the base. *Rasul* therefore represents an important instance of judicial cosmopolitanism, found in the Court’s application of the *Eisentrager* factors, and in a functional understanding of sovereignty. In this sense, *Rasul* very much paved way for the subsequent decision in *Boumediene* – it provided precedent that habeas corpus applied, and even more, that habeas corpus extended to the detainees at Guantanamo based on an effective control reading of jurisdiction. *Rasul* enabled the Supreme Court in *Boumediene* to further extend its understanding and application of sovereign jurisdiction in a way that is compatible with contemporary approaches. The case represents the inception of the judicial cosmopolitanism movement in relation to alien detainees. *Boumediene* further builds on *Rasul*, and solidifies the march of judicial cosmopolitanism by adopting theoretical underpinnings of the concept.

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<sup>192</sup> *Ibid*, 397.

*The Functional Approach pre-Boumediene*

Gerald Neuman refers to the Court's decision in *Boumediene* as a "functional approach to the extraterritorial application of constitutional rights".<sup>193</sup> According to Neuman, "the Court rejects formalistic reliance on single factors, such as nationality or location... and essentially maintains that functionalism has long been its standard methodology for deciding such questions".<sup>194</sup> Justice Kennedy in *Boumediene*, discusses the Supreme Court's previous approach to functionalism:

"...Even if we assume the *Eisentrager* Court considered the United States' lack of formal legal sovereignty over Landsberg Prison as the decisive factor in that case, its holding is not inconsistent with a functional approach to questions of extraterritoriality. The formal legal status of a given territory affects, at least to some extent, the political branches' control over that territory. *De jure* sovereignty is a factor that bears upon which constitutional guarantees apply there.

Third, if the Government's reading of *Eisentrager* were correct, the opinion would have marked not only a change in, but a complete repudiation of, the Insular Cases' (and later *Reid*'s) functional approach to questions of extraterritoriality. We cannot accept the Government's view. Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in

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<sup>193</sup> Neuman, *supra* note 103, at 261.

<sup>194</sup> *Ibid.*

determining the geographic reach of the Constitution or of habeas corpus. Were that the case, there would be considerable tension between *Eisentrager*, on the one hand, and the Insular Case and *Reid*, on the other. Our cases need not be read to conflict in this manner. A constricted reading of *Eisentrager* overlooks what we see as a common thread uniting the Insular Cases, *Eisentrager*, and *Reid*: the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism”.<sup>195</sup>

As Jean-Marc Piret also notes, Kennedy holds that “non-formalistic reading of *Eisentrager* is possible which is more in line with the functional approach of extraterritoriality...”<sup>196</sup> However, Piret is of the opinion that Kennedy’s attempt to read functionalism into the *Eisentrager* decision is quite unconvincing because “that case established beyond any doubt that alien enemy combatants held outside the sovereign territory of the US had no constitutional right to habeas corpus...”<sup>197</sup> Although Piret makes a valid contention, *Eisentrager* can be read as a display of functional analysis. The *Eisentrager* court relied on a balancing a variety of factors such as the place of detention, and the citizenship of the detainees. The fact that Justice Jackson’s judgment ruled against the extension of habeas corpus privileges does not mean that the court’s decision is not representative of a functional approach. In relation to enemy combatants, *Eisentrager* is the only pre-*Boumediene* case that can offer an insight into whether the functional analysis was previously applied. Justice Kennedy argues that it was applied; I

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<sup>195</sup> *Boumediene*, supra note 2, at 34.

<sup>196</sup> Piret, supra note 36, at 88.

<sup>197</sup> *Ibid.*

agree. However, the functional analysis in *Eisentrager* was highly influenced by the court's conservative stance toward jurisdiction and sovereignty. As such when it comes to analyzing the link between a functional approach and the march of judicial cosmopolitanism *Eisentrager* does not paint a most favourable picture. In the discussion on jurisdiction and the reading of sovereignty in *Eisentrager*, it was argued that the Court's approach was well in line with the general understandings of territoriality – it was clear that the movement of judicial cosmopolitanism did not commence there. Irrespective of whether the Court used a functional approach, due to the narrow reading of territoriality, *Eisentrager* is not an encouraging example of judicial cosmopolitanism. Regardless, the fact that a functional analysis can be deduced from the Court's use of factors to determine the result prompts a promising turn in more recent jurisprudence.

*Rasul* was the first case in which a functional sovereignty approach gave rise to judicial cosmopolitanism. The Court in *Rasul* adopted the contextual factors test from *Eisentrager*. In doing so, it arrived at a different result, a result that enabled majority to extend habeas corpus protections in Guantanamo – a place that is technically outside the territorial delineations of the United States. By examining the listed factors, the Court found that not only were the petitioners being held without cause, but that they were on a completely opposite spectrum from those detained in *Eisentrager* – they were, in other words differently situated from those petitioners in *Eisentrager*. The functional analysis approach in *Rasul* adopted a reading of sovereignty based on contemporary approaches. The Court found that the US had jurisdiction over Guantanamo by weighing the different elements of that particular case. *Rasul* clearly provides a positive starting point in the march of judicial cosmopolitanism. The judges accepted a functional notion of

sovereignty, and inherently asserted an underlying theory of judicial cosmopolitanism. As such, *Rasul* is both a milestone and a stepping-stone. It represents a milestone in enemy combatant case law due to its extension of habeas corpus outside formal US territory. It is a stepping-stone because it provided the background against which further cases could rely on a reading of functional sovereignty to adopt a discourse of judicial cosmopolitanism. The subsequent case of *Boumediene v Bush* is an excellent example of the impact *Rasul* had on the judges' modes of analysis, and on how the functional sovereignty test became a very important piece to judicial cosmopolitanism.

### 3.4 *Boumediene v Bush*

*Boumediene* is arguably the most important case concerning designated alien enemy combatants detained at Guantanamo Bay. The case has come to be considered a landmark decision in regards to enemy combatant jurisprudence, and represents the first time that the US Supreme Court agreed to extend the writ of habeas corpus not only outside its territorial borders, but also to a noncitizen. Here, the issue facing the court was whether the detainees had “the constitutional privilege of habeas corpus, a privilege not to be withdrawn except conformance with the Suspension Clause”.<sup>198</sup> The decision of the court was split 5-4, with Justice Kennedy writing for the majority. In this section, I will focus mostly on Kennedy's use and understanding of sovereignty, in order to be able to tie his opinion back with modern and contemporary theories of jurisdiction. The second

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<sup>198</sup> *Boumediene*, supra note 2, Justice Kennedy, at 1 [LII].

part of Kennedy's decision, namely functionalism, will be addressed in the section on functionalism.

*Sovereignty: de jure or de facto?*

The most important aspects of Kennedy's decision are found in section III and IV of his opinion, namely the parts that deal with the physical location of the detainees. Justice Kennedy states that the "government contends that non-citizens designated as enemy combatants and detained in a territory located outside our Nation's borders have no constitutional rights and no privilege of habeas corpus".<sup>199</sup> Of particular importance is the Government's position- that "Guantanamo Bay is not formally part of the United States".<sup>200</sup> The Government based its argument on the available precedent (*Johnson v Eisentrager*, where the Supreme Court did not extend the constitutional protection of habeas corpus to enemy German nationals) and on the common law of habeas corpus as it existed when the Constitution was framed (that it was not available or applicable outside the sovereign territory of the Crown). For the Government, the argument was simple: 1) Guantanamo was not a sovereign territory of the US; and 2) precedent showed that habeas corpus had not been previously extended to noncitizens detained abroad. Meanwhile, attorneys for the petitioners, such as Tom Wilner argued: "anyone... who violates the Endangered Species Act by harming an iguana at Guantanamo, can be fined and prosecuted... Yet the government argues that US law does not apply to protect the

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<sup>199</sup> *Ibid* at 8.

<sup>200</sup> *Ibid*, at 22-23.

human prisoners there... pretty absurd”.<sup>201</sup> In other words, the US had recognized, even more, asserted its presence in Guantanamo, but continued to deny the extension of its own constitutional protections, in the interest of keeping Guantanamo a “legal loophole”<sup>202</sup>, particularly by framing the issue as a political question.

To understand the contentions between the petitioners and the government, Kennedy provides an account of the history of the writ by relying on its origins in English law, and its application in relation to the framing of the constitution, as well as subsequent case law.<sup>203</sup> Nevertheless, Kennedy acknowledges that the “modern-day relations between the United States and Guantanamo... differ in important respects from the 18<sup>th</sup>-century relations between England and the kingdoms of Scotland and Hanover”.<sup>204</sup> According to Justice Kennedy, the US government pointed out that there was no case law demonstrating the granting of habeas corpus to enemies detained abroad, while the petitioners responded by saying that “there is no evidence that a court refused to do for lack of jurisdiction”.<sup>205</sup> On this matter, Justice Kennedy emphasised the “*unique* status of Guantanamo Bay and the particular dangers of terrorism in the modern age”<sup>206</sup>, declining to rely heavily on historical common law, or lack thereof. Taken as a whole, Kennedy’s survey of the law of habeas corpus showed the interdependent relationship between a finding of habeas and the existence of sovereignty.

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<sup>201</sup> Suzanne Ito, “At Guantanamo, Iguanas Have Rights. Detainees Not so Much” (2008) ACLU, online: <https://www.aclu.org/blog/national-security/guantanamo-iguanas-have-rights-detainees-not-so-much>

<sup>202</sup> Steyn, *supra* note 1.

<sup>203</sup> This has been seen by some scholars as an originalist approach to legal interpretation; however, Justice Kennedy distances himself from the historical examples he provides and merely relies on them as a tool to emphasize the importance of the writ of the habeas corpus

<sup>204</sup> *Boumediene*, at 21.

<sup>205</sup> *Ibid*, at 22.

<sup>206</sup> This was not the first time Kennedy recognized the “unique” status of Guantanamo. See the quote from *Rasul v Bush* above.

It was clear that the government's account of territoriality firmly adhered to antiquated concepts of sovereignty and jurisdiction, particularly since under the terms of the lease between Cuba and the US, "Cuba retains ultimate sovereignty over the territory while the United States exercises complete jurisdiction and control".<sup>207</sup> With this in mind, Justice Kennedy does not question the position that Cuba and not the US maintains sovereignty in the "legal and technical sense of the term"; however, he does inquire into the "objective degree of control" asserted by the US over Guantanamo.<sup>208</sup> What does Kennedy mean by the legal definition of sovereignty? The following passage answers this question:

"When we have stated that sovereignty is a political question, we have referred not to sovereignty in the general, colloquial sense, meaning the exercise of dominion or power, ... but sovereignty in the narrow, legal sense of the term, meaning a claim of right ... (noting that sovereignty "implies a state's lawful control over its territory generally to the exclusion of other states, authority to govern in that territory, and authority to apply law there")..."

"Accordingly, for purposes of our analysis, we accept the Government's position that Cuba, and not the United States, retains *de jure* sovereignty over Guantanamo Bay.

As we did in *Rasul*, however, we take notice of the obvious and uncontested fact that

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<sup>207</sup> *Ibid* at 23.

<sup>208</sup> *Ibid* at 23-24.

the United States, by virtue of its complete *jurisdiction and control* over the base, maintains *de facto* sovereignty over this territory...”<sup>209</sup>

This is an important passage in Justice Kennedy’s decision to extend to habeas corpus to the detainees at Guantanamo. Not only does Kennedy show that he dismissed the Government’s territorially linked understanding of jurisdictional limits, but that his definition of sovereignty relies on more than just domestic conceptions of the term. This view is much in line with his concurring opinion in *Rasul*, except that here, it represents the decision of the majority.

Writing on this matter, Anthony Colangelo identifies “three types of sovereignty at play in *Boumediene*: (i) de jure sovereignty; (ii) practical sovereignty; and (iii) de facto sovereignty”.<sup>210</sup> According to Colangelo, de jure, formal sovereignty is a political question, and one which can easily be put aside because the Court already decided that “the writ’s availability does not turn on it”.<sup>211</sup> In this light, practical sovereignty is to be understood as “practical control over a territory”, with de facto sovereignty referring to “both practical control and jurisdiction over a territory, such that the de facto sovereign’s laws and legal system govern the territory”.<sup>212</sup> For Colangelo, the Court’s decision rests on an interpretation of de facto sovereignty as a middle ground between de jure and practical sovereignty, to mean both control and jurisdiction. However, “the Court may have stepped around a de jure sovereignty political question problem, but in doing so it

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<sup>209</sup> *Ibid.*, at 24-25.

<sup>210</sup> Anthony Colangelo, *supra* note 107, at 625.

<sup>211</sup> *Ibid.*, at 626.

<sup>212</sup> *Ibid.*

stepped right into a de facto sovereignty political question problem”<sup>213</sup>. The author goes on to use US case law to show that the question of de facto sovereignty is indeed a political question which would mean it would not be open for the Court to apply and define the concept without political considerations, since it was a question of legislative jurisdiction, and not only adjudicative jurisdiction based on the degree of control. He states that the “Court did not... employ [the] practical sovereignty concept in *Boumediene* to determine as a matter of judicial inquiry US sovereignty over Guantanamo”, but that “the Court took notice of a political agreement contained in the lease establishing de facto sovereignty that includes not only control but also jurisdiction as a benchmark”.<sup>214</sup> Colangelo’s footnote in regards to this point says that it is either what he asserted, or “that the Court overrule without any citation or discussion whatsoever the line of cases stretching back into the nineteenth century providing emphatically that de facto sovereignty is a political question”.<sup>215</sup>

In a sense, Colangelo is right to point out that the Court’s understanding of de facto sovereignty does indeed seem to rely on America’s complete “jurisdiction and control” of Guantanamo (see Justice Kennedy’s quote above). However, instead of criticizing the use of de facto sovereignty based on a separation of powers analysis, it would be more useful to interpret the Court’s de facto sovereignty as an approach that is in line with the contemporary uses of jurisdiction and sovereignty (described above), an approach that supports the idea of judicial cosmopolitanism.

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<sup>213</sup> *Ibid.*

<sup>214</sup> *Ibid.*, at 662.

<sup>215</sup> *Ibid.*

As it was described in the discussion on jurisdiction, de jure sovereignty entails a legal claim to sovereignty, whereas the de facto sovereign is not necessarily a legal sovereign, but it is the sovereign which has the force and capability to make its will prevail, and to enforce its laws. This ultimately means that the United States is the lawmaker and law enforcer at Guantanamo Bay (especially with the temporal characteristics of the lease lasting more than a century<sup>216</sup>, and Guantanamo Bay not being a “transient possession”<sup>217</sup>). It is evident here that the Supreme Court did not follow a strictly territorial approach of sovereignty and jurisdiction. Justice Kennedy “rejected the US government’s argument that the Constitution’s geographic scope vis-à-vis aliens is limited to the formal sovereign territory- that the Constitution stops where de jure sovereignty ends”.<sup>218</sup> Kennedy adopted a functional approach that enabled the majority “to inquire into the objective degree of control” that the US asserts over Guantanamo.<sup>219</sup> For Kennedy however, his approach was much in line with the approach developed in *Eisentrager*, which, in his opinion allowed for a reading of sovereignty in terms of jurisdiction as control. In this aspect, “sovereignty referred to the objective degree of control the United States asserted over the facility, or plenary control, or practical sovereignty, rather than “de jure” sovereignty”.<sup>220</sup>

Justice Kennedy’s approach to jurisdiction clearly denotes one that is in line with a contemporary test of jurisdiction as “control”, particularly when viewed under the

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<sup>216</sup> *Boumediene*, supra note 2, Kennedy affirms that the US maintained complete and uninterrupted control over Guantanamo for over 100 years, at 35.

<sup>217</sup> *Ibid*, at 25.

<sup>218</sup> Cleveland, supra note 92, at 270.

<sup>219</sup> *Ibid*, at 271.

<sup>220</sup> *Ibid*, at 272.

practical realities of de facto sovereignty. This does show an approach that is consistent with the underpinnings of judicial cosmopolitanism. Interestingly, the Court chose to rely solely on domestic decisions (partly the reason why Justice Kennedy wanted to show that *Boumediene* is in line, and can be reconciled with *Eisentrager*). Various briefs for Amici Curiae<sup>221</sup> in favour of the petitioners were submitted to the Court for consideration.

The Amicus Curiae Brief of 383 UK and European Parliamentarians, whose submission was aimed at providing “an international perspective on the wider context within which this Court’s decision will be viewed”<sup>222</sup> is of particular importance. The Amici argued that the US, which was bound by the international treaties that it signed, and customary international law, could not deny the extension of habeas corpus to detainees at Guantanamo. They rely on the International Covenant on Civil and Political Rights (ICCPR) art. 2 (1) to show that the United States is responsible to secure ICCPR protections “though domestic law as applicable to all individuals within its territory and subject to its jurisdiction”.<sup>223</sup> Following the Supreme Court’s decision in *Rasul*, that the US exercises “complete jurisdiction and control”, the Amici argue that Guantanamo detainees are entitled to habeas corpus. Further, the Amici use the Torture Convention, and customary international law to demonstrate that the US has a responsibility to protect fundamental rights, stating that “it is crucial” for the US to abide by its legal commitments; a failure to do so would “undermine the political and moral authority of the US and damage the rule of law”.<sup>224</sup> Moreover, the UK and European parliamentarians

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<sup>221</sup> A total of 25 briefs were submitted on behalf of the petitioners. These can be fully accessed at <https://cjrjustice.org/amicus-briefs>

<sup>222</sup> Amicus Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioners, online: [http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/PDFs/Boumediene\\_383\\_UKEurParliamentariansamicus.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/Boumediene_383_UKEurParliamentariansamicus.pdf) at 3.

<sup>223</sup> *Ibid.*, at 8.

<sup>224</sup> *Ibid.*, at 12.

adopt a view that jurisdiction can be affirmed and exercise by the state outside its territory by citing the International Court of Justice's decision in the *Wall Advisory Opinion*. Similarly, they cite *Coard v United States*<sup>225</sup> to demonstrate that the fundamental protections "attach not due to the territorial locus of state conduct but by virtue of the fact that the state exercises authority and control over individuals claiming the protection".<sup>226</sup> Here, it can be seen that the contemporary understanding of jurisdiction is one which relies on control, on there being a certain authority exhibited by the state over the individuals in question. Therefore, "jurisdiction 'may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state- usually through the acts of the latter's agents abroad".<sup>227</sup> The Amici argue that the US "unquestionably" asserts control over Guantanamo Bay, and that because of its obligations in international human right norms, the US is required to extend fundamental protections and rights, not based on geography, but based on the fact that the respective individuals are within its control and within its authority.

On a similar note, the Brief of Amicus Curiae of the United Nations High Commissioners for Human Rights relied on a variety of international law instruments, particularly on the ICCPR to argue that under article 9(4) of the said Covenant, the detainees are entitled to have access to judicial review and to contest the lawfulness of their detention. And important part of their argument also relies on the finding of jurisdiction (the brief cites ICCPR article 2(1) in relation to jurisdiction). Here, as in the brief of UK and EU parliamentarians, it is argued that the US has to extend its treaty

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<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*, at 14.

<sup>227</sup> *Ibid.*, at 15.

obligations “to any person subject to its jurisdiction, regardless of their location”.<sup>228</sup> This brief also cited the *Wall Advisory Opinion* to affirm that “while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory”.<sup>229</sup> The view of jurisdiction presented in this brief, like that mentioned above, resembles the contemporary description and understanding of jurisdiction discussed in the above section on jurisdiction.

It is not necessary to discuss all the briefs of Amicus Curiae, especially to avoid repetition. The majority of the briefs that rely on a definition of jurisdiction as control, employ virtually the same sources and arguments- that Guantanamo is a territory under complete US jurisdiction and control.<sup>230</sup> The importance of the use of jurisdiction in these briefs is to show that “habeas jurisdiction has always turned on de facto control, [and] not on formalistic notions of sovereignty”.<sup>231</sup>

Prior to making its decision in *Boumediene*, the Court had access to all the briefs of Amicus Curiae, and when looking at the judgment itself, much of the relevant arguments on jurisdiction and its contemporary uses is outlined in Justice Kennedy’s opinion (cited above). As mentioned, Justice Kennedy does not rely on foreign sources of law to make his decision (and especially not on those cited in the briefs supporting jurisdiction as effective control). “The fact that the court did not cite international law,

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<sup>228</sup> Brief of Amicus Curiae United Nations High Commissioner for Human Rights in Support of Petitioners, online: <http://www.scotusblog.com/movabletype/archives/dpny-22548269-v1-UNHCHR%20Amicus%20Brief%20Boumediene%20v.%20Bush%20FINAL.PDF> , at 9.

<sup>229</sup> *Ibid*, at 12.

<sup>230</sup> See Brief of Professors of Constitutional Law and Federal Jurisdiction as Amici Curiae in Support of Petitioners, online: [http://www.scotusblog.com/movabletype/archives/probono\\_Brief\\_Professors\\_Constitutional.pdf](http://www.scotusblog.com/movabletype/archives/probono_Brief_Professors_Constitutional.pdf)

<sup>231</sup> Brief of Salim Hamdan as Amicus Curiae, online: [http://www.wilmerhale.com/uploadedFiles/WilmerHale\\_Shared\\_Content/Files/PDFs/Boumediene\\_Hamdanamicus.pdf](http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/PDFs/Boumediene_Hamdanamicus.pdf) at 13.

however, does not preclude the doctrine from being informed by international law or from evolving with international law in the future”.<sup>232</sup> Perhaps this is what has been termed as a “silent dialogue” between the Court and other sources of international law in the development of “parallel rules for the same underlying principles”.<sup>233</sup> Hence, the approach adopted by the Court in Justice Kennedy’s opinion is not only in line with contemporary views of jurisdiction and de facto sovereignty, but also with the movement of a globalized judiciary. Although Justice Kennedy did not specifically adopt foreign decisions (except in his historical explanation of habeas corpus throughout English law), it is hard not to imagine that he engaged in a silent dialogue with international sources. He clearly had the materials before him (various Amicus Briefs, arguments of the petitioners); yet, the choice of adopting a domestic approach does not mean that Justice Kennedy turned a blind eye to other interpretations.

It is useful to return to my research question: *In their functional analysis of enemy combatant detention jurisprudence in the War on Terror, have US courts commenced a march of judicial cosmopolitanism by adopting an understanding of sovereign jurisdiction consistent with its contemporary interpretations?* As I stated earlier, I am answering this question by tackling its individual sub-questions. The first of these was to look at the contemporary interpretation of jurisdiction. It was established that jurisdiction, in classic international and domestic law interpretations remains very much tied to a conception of territorial sovereignty delineated by state boundaries. Nonetheless, the case law of the European Court of Human Rights and those of the Canadian Supreme Court,

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<sup>232</sup> Cleveland, *supra* note 92, at 274.

<sup>233</sup> *Ibid.*, at 275. The term silent dialogue comes from Judith Resnik and Rosalind Dixon.

alongside the Amici Briefs, show that jurisdiction, especially in an extraterritorial ambit, is not restrained by geography – that it is found in a test of effective control, particularly over persons, even if they happen to be on a completely foreign territory. This approach to jurisdiction, an approach that is modern, an approach that has at its underlying principles a notion of protecting individuals, and protecting their fundamental rights – irrespective of their citizenship and nationality. This notion is in line with the legal cosmopolitan movement and its focus on human beings, rather than on national territories. A quote from Noah Feldman is worth repeating: the purpose of legal cosmopolitanism is to prevent the possibility of a legal vacuum and to avoid places that “would be treated as a law-free zone”, in favour of legal systems “expanding their jurisdictions to fill the apparent gap”.<sup>234</sup> Therefore, contemporary approaches to jurisdiction very much parallel the project of legal cosmopolitanism, and inherently, underlying principles of judicial cosmopolitanism. I defined judicial cosmopolitanism as a theory of judicial interpretation that enables judges to extend constitutional protections to noncitizens irrespective of territorial borders through a contemporary understanding of jurisdiction and functionalism. I argued that judicial cosmopolitanism is more than the process of a globalized judiciary applying international concepts and norms (explicitly) in a domestic context. In my view, judicial cosmopolitanism is not solely the practice of the globalized judiciary; it can include that (although this is not necessary), but more importantly, judicial cosmopolitanism denotes a practice by judges to adopt legal principles in with an underlying cosmopolitan view (something that can arise even in a “silent dialogue”). In line with these contentions, the first part of the research question can hence be answered: the Court in *Boumediene* adopted a cosmopolitan, a

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<sup>234</sup> Feldman, supra note 44, at 1031.

contemporary approach to jurisdiction, one that is representative of a judicial cosmopolitan movement. This movement was probably first noted in *Rasul v Bush*, and under Justice Kennedy's majority opinion, judicial cosmopolitanism is certainly a great way to describe the phenomenon. Thus far in enemy combatant jurisdiction, judicial cosmopolitanism is an appropriate umbrella to describe the decision of the US Supreme Court, irrespective of their non-engagement with outside sources, for in this essay, judicial cosmopolitanism is not merely the use of international law; it is a theory that denotes underpinning cosmopolitan understandings of jurisdiction, something that is prevalent in Justice Kennedy's opinion in *Boumediene*.

Eric Posner argues that the decision in *Boumediene* shows a clear commitment to the protection of noncitizens, that "Justice Kennedy is a cosmopolitan".<sup>235</sup> However, it is more than just the mere fact that Kennedy is a cosmopolitan. The decision of the court shows inherent cosmopolitan leanings, and as such it is quite simplistic to merely declare that Justice Kennedy is a cosmopolitan (a view which Posner criticizes as being unsustainable). Justice Kennedy's opinion in *Boumediene* fits well with practices of liberal democracies following expansion of legalization of rights; it is consistent with a "worldwide trend"<sup>236</sup> whereby courts have become pivotal organs in ensuring and upholding liberties, especially for minorities. The most profound implications of the decision in *Boumediene* indeed "lie in what it reflects about altered conceptions of sovereignty, territoriality, and rights in the globalized world".<sup>237</sup> Nonetheless, there is a

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<sup>235</sup> Posner, supra note 3, at 32.

<sup>236</sup> David Cole, "Putting Boumediene in a Global Perspective" (2008) *Huffington Post*, online: [http://www.huffingtonpost.com/david-cole/putting-boumediene-in-glo\\_b\\_107453.html](http://www.huffingtonpost.com/david-cole/putting-boumediene-in-glo_b_107453.html)

<sup>237</sup> Cole, supra note 34, at 47.

strong correlation between Kennedy’s majority opinion and judicial cosmopolitanism in *Boumediene*. As stated earlier, Kennedy’s previous involvement in *Rasul* showed his engagement with the underpinnings of the theory and with the idea of functional sovereignty. When *Boumediene* provided Justice Kennedy with the perfect opportunity to adopt judicial cosmopolitanism into the Supreme Court’s discourse he embraced the theory and showcased its strength through a contemporary reading of jurisdiction, and through the adoption of a clearly outlined functional test.

#### *Boumediene and the Functional Approach*

Sarah Cleveland affirms that *Boumediene* “... substantially reoriented the US extraterritoriality doctrine of a functional, control-based test”.<sup>238</sup> The control part of the test was already discussed – it refers to a finding of jurisdiction based on the effective control of the person (or territory) and it is in line with modern/contemporary approaches to international law. The functional aspect of the test was developed in earlier case law, though not enemy combatant cases. Justice Kennedy adopted a functional analysis not only to determine various factors, but also as a balancing test between such factors in relation to their effect on the parties to the case (the petitioners in particular). Above, I stated that functionalism, in relation to enemy combatants, refers to a balancing exercise; a balancing exercise that takes into account contextual and factual factors with a view of adopting a contemporary approach to understandings of sovereignty and jurisdiction.

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<sup>238</sup> Cleveland, *supra* note 92, at 270.

In the Court’s opinion, Justice Kennedy makes it clear that in his reading and interpretation of sovereignty and jurisdiction, he does not adopt formalism as a legal analysis, but rather focuses on “objective factors and practical concerns”<sup>239</sup> – in other words, functional sovereignty.

Kennedy summarises the functional approach in *Eisentrager* as relying on:

“(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner’s entitlement to the writ”.<sup>240</sup>

When applied, this test shows a balancing exercise, whereby the various factors are weighed against each other to discover whether or not habeas corpus can extend outside US borders based on whether or not these factors lead to a finding of effective control jurisdiction.

The factors that will decide the result of the balancing exercise are citizenship, place of detention, and practical obstacles. Therefore, the majority adopted “an objective and practical three-factor balancing test to determine the extraterritorial reach of [habeas corpus]”.<sup>241</sup> After undertaking the functional analysis, Justice Kennedy found that the practical obstacles of awarding the writ of habeas corpus to the detainees at Guantanamo were dispositive, as there was no indication that it “would cause friction with the host

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<sup>239</sup> *Boumediene*, supra note 2, at 34.

<sup>240</sup> *Ibid.*, at 37.

<sup>241</sup> Nelson, supra note 106, at 305.

government...”<sup>242</sup> However, as Kennedy notes, “if the detention facilities were located in an active theatre of war, arguments that issuing the writ would be ‘impracticable or anomalous’ would have more weight”<sup>243</sup>. The *Boumediene* Court did what no other US Court had done before – it extended a constitutional protection on the basis of a functional analysis that heavily relied on the contextual particularities of the case itself.

Judicial cosmopolitanism, much like legal cosmopolitanism, or general approaches to philosophical cosmopolitanism, is the conception of the world citizen – of all human beings being equal, and deserving the same equal treatment irrespective of their citizenship – that all persons belong to the community. In *Boumediene* Justice Kennedy shows a strong commitment to ensuring that citizenship does not impair the detainees’ access to justice, particularly since it represents the very first time that noncitizens on foreign soil are awarded judicial review. Taken as a whole, the three functional factors in *Boumediene* show not only how the Court balanced interests of detainees in favour of wider ideals of justice, but also how it did so in light of modern contentions of jurisdiction, by not relying on strict understandings of territoriality. *Boumediene* is a good representation of how the functional approach can be applied by a court in order to uphold a discourse of cosmopolitanism. Likewise, the case shows that functionalism in enemy combatant jurisprudence depends on a balancing exercise through which judges have weighed the certain factors that define the case. Overall, having already established that the majority decision in *Boumediene* constitutes a march of judicial cosmopolitanism, and having held that Justice Kennedy indeed employed a

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<sup>242</sup> *Boumediene*, supra note 2, at 41

<sup>243</sup> *Ibid.*

favourable balancing exercise (one which took into account contextual factors and modern views of jurisdiction), there is no doubt that a functional sovereignty analysis may be conducive as a supportive mechanism to the Court's judicial cosmopolitanism.

### 3.5 Post *Boumediene*: *Al-Maqaleh v Gates*

*Boumediene* is the most recent Supreme Court judgment in relation to the habeas corpus of enemy combatants detained at Guantanamo— even Posner, who criticizes the march of judicial cosmopolitanism, recognizes that the case will likely be remembered “as one more step in the march of judicial cosmopolitanism”.<sup>244</sup> Though the case can be credited with initiating a strong movement of judicial cosmopolitanism (asserting it more than *Rasul v Bush*), a question ensues: where is the movement post-*Boumediene*? Unfortunately, most of the literature I engage with is silent on this topic – the literature that exists does not look at the case law from the perspective of judicial cosmopolitanism, or it only refers to the *Boumediene* decision, as it was the most recent at the time. This issue was also discussed earlier, in Section 4 of the literature review.

In addressing the movement post-*Boumediene*, I continue to answer my research question – did the US courts adopt a functional meaning of sovereignty and jurisdiction in accordance with contemporary understandings? Since it has already become evident that *Boumediene* constitutes a strong example of judicial cosmopolitanism, I will now try to address whether the trend of judicial cosmopolitanism (particularly in relation to the

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<sup>244</sup> Posner, *supra* note 3, at 46.

jurisdiction aspect) was a one-off decision, or whether it has been put into application by lower courts.

I will look at another important decision in enemy combatant jurisprudence, namely *Al-Maqaleh v Gates*. *Al-Maqaleh* is not a Supreme Court decision; it was first decided by the District Court in DC, and subsequently by the Court of Appeals the DC Circuit. The concern in this case was not whether habeas corpus applied to detainees in Guantanamo (for that had already been established) but rather, whether habeas corpus applied to detainees in Bagram Air Force Base in Afghanistan, where the petitioners were confined by the US military. I will in turn look at the District Court and the Circuit Court decisions.

#### *District Court*

At the District Court level (DC), Judge John Bates noted that the issues were closely related to those in *Boumediene*, even though the circumstances were a bit different. Judge Bates applies the *Boumediene* factors (which will be discussed in the following section), for he “concludes that these petitioners are virtually identical to the detainees in *Boumediene* – they are non-citizens who were... apprehended in foreign lands far from the United States and brought to yet another country for detention”.<sup>245</sup> Very importantly, Judge Bates affirms “although the site of detention at Bagram is not identical to that at Guantanamo Bay, the “objective degree of control” asserted by the

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<sup>245</sup> *Al Maqaleh I*, supra note 8, Judge Bates at 209.

United States there is not appreciably different than at Guantanamo”.<sup>246</sup> Thus, in addressing the question of jurisdiction, the judge looked at the degree of control asserted by the US over the Bagram facility. In this particular situation, a Status of Forces Agreement (SOFA) governed the US presence in Afghanistan. According to the judge, under the SOFA, “the United States appears to have near-total operational control at Bagram” and US personnel is allowed to enter and leave the country without a passport.<sup>247</sup> Yet, there are differences between the US presence at Bagram and the US control at Guantanamo, which is “in every practical sense... not abroad”.<sup>248</sup> Judge Bates notes that there is a difference in the amount/level of jurisdiction asserted by the US in Bagram and Guantanamo:

“...it is clear that U.S. jurisdiction at Bagram is not quite as plenary as at Guantanamo. Although the Bagram lease is silent with regard to jurisdiction, the SOFA addresses it. Under the SOFA, the United States has criminal jurisdiction over U.S. personnel. Criminal jurisdiction over Afghan workers or over allied personnel is beyond U.S. authority. The SOFA further provides that the United States and Afghanistan waive civil claims against one another, but it does not provide the United States with jurisdiction over civil claims brought by individuals. To be sure, these provisions grant the United States some limited jurisdiction at Bagram—but there are no limits on U.S. jurisdiction at Guantanamo. There is, then, lesser U.S. "jurisdiction" at Bagram than at Guantanamo.

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<sup>246</sup> *Ibid.*, at 209.

<sup>247</sup> *Ibid.*, at 222.

<sup>248</sup> *Ibid.*

But the differences in control and jurisdiction set forth above do not significantly reduce the "objective degree of control" the United States has at Bagram. The existence of a SOFA and the presence of non-U.S. personnel does not affect the actual control the United States exercises at the Bagram detention facility, which is practically absolute. "[T]he United States would not detain enemy combatants on any long-term basis at a facility that it did not control." Nor do the differences in jurisdiction drastically undercut the objective degree of control at Bagram. "Jurisdiction," like "sovereignty," is merely a label, and *Boumediene* rejected the argument that a label like "sovereignty" is determinative in assessing the reach of the Suspension Clause. Perhaps the difference in jurisdiction precludes the United States from operating at Bagram, as it does at Guantanamo, entirely free from the scrutiny of the host country. As a practical matter, however, when assessing day-to-day activities at Bagram, the lack of complete "jurisdiction" does not appreciably undermine the conclusion that the United States exercises a very high "objective degree of control."

... Thus, although U.S. control over Bagram is not quite as absolute as over Guantanamo, the United States exercises a significantly greater "objective degree of control" over Bagram than it did over Landsberg in post-World War II Germany."<sup>249</sup>

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<sup>249</sup> *Ibid.*, at 223-224.

Judge Bates' analysis of jurisdiction as effective control creates a spectrum on which to place the different situations. Guantanamo and Lansberg (the prisoner in *Eisentrager*) are the opposite ends of the spectrum, with the former exhibiting almost complete jurisdiction and the latter no jurisdiction, whilst Bagram finds itself somewhere in the middle. The Judge is correct in distinguishing between Bagram and Guantanamo; the two differ not only in their "lease" agreements, as it were, but also in their temporal qualities – the US presence at Guantanamo having been a century long, compared with a decade long presence in Afghanistan. Additionally, the Court also took into account the future intentions of the US at Bagram, which asserted a presence only "until the current military operations are concluded and Afghan sovereignty is fully restored"<sup>250</sup>, whereas in relation to Guantanamo, the US "has evidenced an intent to stay indefinitely".<sup>251</sup> Overall, while the Court "cannot conclude that Bagram, like Guantanamo is 'not abroad'", "Bagram lies much closer to Guantanamo than Landsberg"<sup>252</sup>, and "it is still fair to say that the United States has a high objective degree of control at Bagram".<sup>253</sup>

The remainder of Judge Bates' analysis in regards to the functional approach will be discussed in further below, however, for now it is important to mention that he found the petitioners to belong to the *Boumediene* category and in an application of the functional factors, he held that the petitioners were entitled to seek habeas review in the Court. For purposes of this section, Judge Bates' discourse on jurisdiction is very important. He maintains a standard of jurisdiction very much in line with the decision in

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<sup>250</sup> *Ibid*, at 225.

<sup>251</sup> *Ibid*, at 224.

<sup>252</sup> *Ibid*, at 225.

<sup>253</sup> *Ibid*, at 226.

*Boumediene*, and more importantly, parallel with the main contemporary approach to functional jurisdiction. In the passages quoted above, the Judge recognizes that jurisdiction in relation to enemy aliens detained abroad is not limited by territorial boundaries, as long as the petitioners show an degree of effective control (the test here seems to be based on facts, much like the ECtHR held in its cases). As the case stood at the District Court level, the march of judicial cosmopolitanism (particularly in relation to a cosmopolitan understanding of jurisdiction) continued and was very much alive.

*Court of Appeals, DC Circuit*

At the DC Circuit level, this changed – the Circuit Court held that the District Court did not have jurisdiction to hear the habeas corpus petitions, and reversed the order in order to dismiss the petitions. The Court began its analysis by discussing the legal history –i.e.: cases such as *Eisentrager*, *Rasul*, and *Boumediene*, among others, noting that *Eisentrager* is still not overruled.<sup>254</sup> The Court stated that in *Boumediene*, the plurality opinion rested on the decision that de jure sovereignty was not the touchstone of habeas corpus, and that the US maintained de facto sovereignty and completed jurisdiction and control over Guantanamo. In relation to the question of jurisdiction in *Al-Maqaleh*, the CC rejected “the [Government’s] proposition that *Boumediene* adopted a bright-line test with the effect of substituting de facto for the de jure in the... interpretation of *Eisentrager*”.<sup>255</sup> The Court held that the surrounding circumstances in

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<sup>254</sup> *Al Maqaleh II*, supra note 8, the Court at 93.

<sup>255</sup> *Ibid*, at 95.

relation to the locations of Guantanamo and Bagram “are hardly the same”.<sup>256</sup> The Court here relied heavily on the decision in *Eisentrager* to assert that the writ of habeas corpus does not extend to Bagram, for the US had neither de facto nor de jure sovereignty, and because Bagram is “within the territory of another de jure sovereign”.<sup>257</sup> While most of the decision at the Circuit Court level relied on the functional factors, especially the nature of the sites of detention (the factors will be discussed below under functionalism), the court refuses to extend US de facto sovereignty over Bagram. The Court states that the site of detention is not the determinative, but is firm in its view that Afghanistan remains the sovereign of the area, and that the US presence there is merely based on a mutual and cooperative agreement. Therefore, the dismissal of the case was due to lack of jurisdiction particularly as “the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in Executive detention in the Bagram detention facility in the Afghan theatre of war”.<sup>258</sup>

The DC Circuit Court shows a return to an *Eisentrager* mentality toward sovereignty. Luke Nelson argues that “territorial sovereignty is no longer the driving habeas determination that the *Eisentrager* majority once envisioned”.<sup>259</sup> He argues that following *Boumediene*, “no longer will US borders determine the reach of the Suspension Clause; rather, the determination will be made on a case-by-case basis after considering the degree of US government control asserted over a particular facility or location”.<sup>260</sup> This to Nelson, “considering today’s globalization and the level of US presence in

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<sup>256</sup> *Ibid*, at 97.

<sup>257</sup> *Ibid*, at 98.

<sup>258</sup> *Ibid*, at 99.

<sup>259</sup> Luke Nelson, *supra* note 106, at 311.

<sup>260</sup> *Ibid*, at 313.

international conflicts, this change from de jure to de facto sovereignty was appropriate”.<sup>261</sup> However, this welcomed change and broad understanding of sovereignty as not longer restricted by territory caused confusion between the two decisions in *Al Maqaleh*. On one hand, the District Court applied the test of effective control, whereas, on the opposite end, the DC Circuit Court ruled “the site of detention weighed strongly against extending the Suspension Clause to Bagram because... the United States failed to exert as much control over Bagram as it did over Guantanamo Bay”.<sup>262</sup> This shows that both courts did in fact apply the test of objective degree of control, but with completely different results. Such a contention, Nelson notes, makes the issue ripe for Supreme Court review.

What about judicial cosmopolitanism? Here, as mentioned before, is where the literature needs to be updated. What remains of the march of judicial cosmopolitanism following the DC Circuit Court decision in *Al Maqaleh*? It is evident that in the District Court the movement of judicial cosmopolitanism commenced in *Rasul*, shaped by the *Boumediene* decision, remained alive and kicking. To a certain extent, even the DC Circuit Court accepted the test of jurisdiction as relying on effective control, rather than territorial sovereignty – although the extent is curtailed by the Court’s firm distinction between the sites of detention, and ultimately the failure of the case in relation to the functional factors. Thus, judicial cosmopolitanism seems to have been dimmed; it has been set aside in favour of functional considerations (which will be analysed in the next section), but it has not been entirely erased from the memory of the court.

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<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*, at 314.

*Al Maqaleh and the Functional Approach*

Did the courts in *Al Maqaleh* adopt the functional approach to sovereignty? Did this constitute a finding of judicial cosmopolitanism – did the link between functional sovereignty and the cosmopolitan approach remain strong? At the DC District Court Level, the court held that habeas corpus applies to detainees at Bagram. In doing so, they also adopted a functional approach; however, instead of relying on Justice Kennedy’s three factors, the court further divided them into six different aspects to take into account:

“1) the citizenship of the detainee; 2) the status of the detainee; 3) the adequacy of the process through which the status determination was made; 4) the nature of the site of apprehension; 5) the nature of the site of detention; and 6) the practical obstacles inherent in resolving the petitioner’s entitlement to the writ”.<sup>263</sup>

The examination of the district court relied on dividing the factors into two categories: those factors which deserve to be awarded lesser weight, and those factors which serve as “primary drivers”. The primary drivers were the practical obstacles, the nature of the detention site, and the adequacy of process.<sup>264</sup> Following an analysis of the less important factors, the DC District Court found that while the detainees were similarly situated to those at Guantanamo Bay, the fact that they were apprehended at Bagram meant that they were outside the sovereign borders of the US. The Court then applied the primary drivers to find that the American government exercised a “near-total operational

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<sup>263</sup> *Al Maqaleh I*, supra note 8, at 215.

<sup>264</sup> *Ibid*, at 218.

control”<sup>265</sup> over Bagram, in spite of this degree of control being slightly lesser than the control exercised over Guantanamo.

Like in *Boumediene*, the functional test once again turned on the court’s understanding of jurisdiction. In this case, the Court noted that the location was in a theatre of war, however it stood by its decision to consider US involvement there as “near-total US control”<sup>266</sup> of the facilities. The functional approach in DC Circuit Court *Al Maqaleh* decision was a clear application of the test set forth by Justice Kennedy in *Boumediene*; the results were also similar. At the District Court level, *Al Maqaleh* shows that the movement of judicial cosmopolitanism continued to thrive even following *Boumediene*, and that the main reason for such success was the Court’s decision to adopt a balancing test exercise conducive to a functional methodology.

Unfortunately, the DC Circuit Court decision in the *Al Maqaleh* appeal brought about an abrupt stop to the movement of judicial cosmopolitanism as supported by functionalist analysis.

In the appeal, the Circuit Court decided to adopt the three-factor *Boumediene* test over the six-factor District Court analysis. Thus, the court looked at the citizenship, the nature of the site of detention, and the practical obstacles. In the court’s decision, Chief Judge Sentelle found the Bagram detainees to be in a similar situation at the Guantanamo detainees, also having been deprived of adequate due process. However, once he

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<sup>265</sup> *Ibid.*, at 222.

<sup>266</sup> *Ibid.*, at 228.

commenced analysing the detention side and the practical obstacles, his decision differed entirely from that of that District Court and that of the Supreme Court. The geographic location of Bagram weighed heavily in favour of the United States in the decision not to extend the writ due to a lack of functional sovereignty:

“At various points, the petitioners seem to be arguing that the fact of United States control of Bagram under the lease of the military base is sufficient to trigger the extraterritorial application of the Suspension Clause, or at least satisfy the second factor of the three set forth in *Boumediene*. Again, we reject this extreme understanding. Such an interpretation would seem to create the potential for the extraterritorial extension of the Suspension Clause to noncitizens held in any United States military facility in the world, and perhaps to an undeterminable number of other United States-leased facilities as well.”<sup>267</sup>

In their analysis of the third factor, the Court was even more convinced of its decision not to extend the writ:

“We hold that the third factor, that is "the practical obstacles inherent in resolving the prisoner's entitlement to the writ," particularly when considered along with the second factor, weighs overwhelmingly in favor of the position of the United States. It is undisputed that Bagram, indeed the entire nation of Afghanistan, remains a theater of war.

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<sup>267</sup> *Al Maqaleh II*, supra note 8, at 95.

The United States asserts, and petitioners cannot credibly dispute, that all of the attributes of a facility exposed to the vagaries of war are present in Bagram. The Supreme Court expressly stated in *Boumediene* that at Guantanamo, "[w]hile obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base. Were that not the case, *or if the detention facility were located in an active theater of war*, arguments that issuing the writ would be 'impractical or anomalous' would have more weight.

...

We therefore conclude that under both *Eisentrager* and *Boumediene*, the writ does not extend to the Bagram confinement in an active theater of war in a territory under neither the *de facto* nor *de jure* sovereignty of the United States and within the territory of another *de jure* sovereign."<sup>268</sup>

Although the Circuit Court followed the functional analysis in *Boumediene*, this case well exemplifies the flaws of this methodology, particularly since this time around it resulted in a different solution. According to Luke Nelson, Justice Kennedy's statement in *Boumediene* – that "at least" three factors were important to an analysis regarding the extraterritorial reach of habeas corpus – "indicated that *Boumediene*'s multi-factor test is not exclusive or foreclosed from modification".<sup>269</sup> *Al Maqaleh* (both decisions) shows that the functional test has flaws, that due to lack of guidance, lower courts have the

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<sup>268</sup> Ibid, at 97-98.

<sup>269</sup> Nelson, supra 106, at 317-318.

opportunity to manipulate or to interpret the test to their own preference. The District Court added to and categorized the factors. While the result was positively in line with the decision in *Boumediene*, the fact that courts have an unrestricted opportunity to adopt a balancing test represents a problem. The functional test needs to be curtailed and adequately defined in order to avoid such contrasting differences. It might be argued that the composition of the court also matters when taking into account and applying contextual factors – even though this is outside the scope of my research, it can present an opportunity to further inquiry. Nevertheless, the reality is that the functional test in the *Al Maqaleh* appeal failed to provide the necessary pathway for judicial cosmopolitanism to thrive. Not only did the movement of judicial cosmopolitanism suffer from the court’s apparent return to a territorial-based interpretation of jurisdiction, judicial cosmopolitanism was also affected by an adverse result following the application of a functionalist balancing test. That is not to say that the march to judicial cosmopolitanism was stopped in its tracks. Rather this case shows that due to an uncurtailed discretion to reframe and interpret the functional sovereignty test, the march to judicial cosmopolitanism was indeed abruptly paused.

There is a link between the use of functionalism and judicial cosmopolitanism in enemy combatant case law. In *Boumediene* an application of the functional test not only initiated a strong cosmopolitan oriented discourse, but also aided in the adoption of contemporary readings of jurisdiction and sovereignty. This was the case in the District Court’s judgment in *Al Maqaleh*. However, that Court’s use of additional factors (in spite of providing a result similar to *Boumediene*) showed that the functional test was not a

clean-cut as initially intended. The Circuit Court appeal further proved the flaws of functionalism, and demonstrated that functionalism cannot always provide a base for the flourishing of judicial cosmopolitanism. It therefore became clear that functionalism could not always play the supportive role to judicial cosmopolitanism. Earlier, I defined functional analysis as a balancing exercise of contextual factors with the purpose of providing a supportive role in the march of judicial cosmopolitanism. The *Al Maqaleh* Circuit Court decision showed that there is no established presumption that judicial cosmopolitanism and functionalism do not go hand in hand. Although I never presumed that functional analysis of sovereignty would automatically result in judicial cosmopolitanism, I did not deny it either. Nonetheless, in relation to this aspect of my research question (i.e.: whether it is through a functional methodology that the courts adopted a march of judicial cosmopolitanism) the answer is uncertain. While in *Boumediene* the functional test seemed to be tied to Justice Kennedy's decision, subsequent case law showed that the link might be only superficial. Therefore, as a final point, the use of functionalism in an interpretation of jurisdiction does not imply a finding of judicial cosmopolitanism, for in enemy combatant cases, functional analysis remains largely unguided and allows the opportunity for a wide display of judicial discretion, which can or cannot result in judicial cosmopolitanism. Even if in *Boumediene* functionalism paved the way for judicial cosmopolitanism, *Eisentrager* and *Al Maqaleh* show that the link between the two concepts remains weak and that functionalism only plays a small role in supporting a movement of judicial cosmopolitanism.

### 3.6 Final Thoughts on the Research Question: Functional Sovereignty and Judicial Cosmopolitanism

From the onset, this section sought to address solely the use of jurisdiction and sovereignty in US enemy combatant jurisprudence, in order to address whether the courts' use of these concepts appears to be in line with contemporary understandings that ultimately underpin a theory of judicial cosmopolitanism. The review of the case law shows that there has indeed been a transition from a strict territorial sovereignty approach to jurisdiction in *Eisentrager*; this transition explicitly came in the Supreme Court's judgment in *Rasul* and was elaborated upon by Justice Kennedy's majority opinion in *Boumediene*. It was demonstrated that the US courts adopted a view of jurisdiction as effective control, an approach in line with modern case law (from the European Court of Human Rights, and Canadian cases) and international legal instruments. While the use of jurisdiction as effective control was not the result of the court's use of foreign sources of law, it was nonetheless concluded that (in *Boumediene*) the Court engaged in a silent dialogue with contemporary interpretations, especially after having addressed the Amici Briefs presented in support of the petitioners. With the court having adopted this view of jurisdiction, a post-Westphalian view underpinning a theory of legal cosmopolitanism, it was argued that the Court in *Boumediene* (and even as early as *Rasul*) commenced a phenomenon of judicial cosmopolitanism. However, and disappointingly so, the march of judicial cosmopolitanism seems to have come to a standstill in *Al Maqaleh*, after the DC Circuit adopted a view much more consistent with *Eisentrager*. As a final conclusion on this section, judicial cosmopolitanism is indeed the proper way to address the Court's

interpretation of the jurisdiction; however the movement of judicial cosmopolitanism has encountered an obstacle, one that only a further assertion of the Supreme Court along the lines of *Boumediene* can address. Therefore, to answer the first limb of my research question: US courts, in spite of their reluctance to rely and to cite foreign sources of law that denote a contemporary approach to sovereignty have indeed adopted one, initiating, but also abruptly pausing a movement of judicial cosmopolitanism.

#### ***4. Conclusion***

The legal implications of the War on Terror developed as a result of habeas corpus applications from the detainees at Guantanamo – detainees whose due process rights had been denied for years. The US Supreme Court found itself dealing with a series of cases that sought to extend domestic constitutional provisions and rights outside of America’s territorial borders. In the pivotal case of *Boumediene v Bush*, the Court decided to extend rights of due process to those detained in the offshore camp at Guantanamo. While this decision has been the subject of much debate and contention, it has also paved way for scholars to interpret the case as constituting a march of judicial cosmopolitanism.

I have argued that, in relation to enemy alien cases, judicial cosmopolitanism is a concept that encompasses the philosophical and theoretical assumptions of cosmopolitanism, along with the general tendencies judicial cosmopolitanism in the field of comparative and extraterritorial law. Judicial cosmopolitanism was therefore defined as a legal discourse through which judges grant constitutional protections to citizens and noncitizens alike, whilst relying on modern conceptions of sovereign jurisdiction through functional analysis. It was also argued that a contemporary understanding of jurisdiction sought to do away with ideas of sovereign territoriality in favour of an effective control test. In these respects, I found that judicial cosmopolitanism was present in a few cases, and that the march to judicial cosmopolitanism had bloomed in *Boumediene*. Nonetheless, the march of judicial cosmopolitanism came to a standstill in the 2010 Circuit Court decision in *Al-Maqaleh v Gates*, a decision which although applied the

*Boumediene* functional analysis, arrived at the conclusion that habeas corpus should not be extended to detainees at the Bagram detention facilities.

Additionally, I also examined the relationship between adopting a functional sovereignty approach and the prevalence of judicial cosmopolitanism. In *Boumediene* it appeared that the link between functionalism and judicial cosmopolitanism was very strong – that functionalism served supporting role in the finding of judicial cosmopolitanism. Yet, after further doctrinal analysis, it was deduced that the court’s use of functionalism did not substantially impact whether the march of cosmopolitanism existed.

Presently, the march of judicial cosmopolitanism is at a standstill. Its roots can be traced to pre-*Boumediene* cases, however it was not until 2008 that the Supreme Court adopted this approach in its majority decision. At the time, judicial cosmopolitanism seemed like a strong movement. Yet, only two years later, lower courts achieved different results, abruptly pausing the march. I use the term paused because the Supreme Court decision has not been overruled, and because there is always a possibility of a similar case arising in the future. At the moment, judicial cosmopolitanism remains a dormant movement in enemy combatant jurisprudence. Nonetheless, as long as US courts continue to adopt an understanding of sovereign jurisdiction as effective control, the march of judicial cosmopolitanism can once again become a dominant method of judicial interpretation.

I started this project by stating that the true legacy of enemy combatant jurisprudence does not lie in its extension of habeas corpus to Guantanamo detainees or in its approach to the separation of powers doctrine. Rather, the true legacy of this case

law lies in its adoption of cosmopolitan underpinnings and in its establishment of a march toward judicial cosmopolitanism. Perhaps it is too early to speak about the legacy of a body of cases that merely started in 2004, only 10 years ago; perhaps we have not yet seen the full implications of the decision in *Boumediene* or its subsequent application in *Al Maqaleh*. After all, these are relevant concerns in the present political landscape. Guantanamo remains open and the War on Terror is far from over. I do not think that it is premature to view the legacy of the enemy combatant jurisprudence, *Boumediene* in particular, as a movement of judicial cosmopolitanism. The examination of the case law as judicial cosmopolitanism shows that there is an increasing inclination within US courts to move away from the prevalent insular thinking that has dominated earlier cases. The role that judicial cosmopolitanism will play in determining how future courts will react to the use of foreign law sources, and to the extension of constitutional protections in other areas of law (immigration, for example) will be an interesting development to follow and can provide a substantial base for future research. Thus, although the march to judicial cosmopolitanism was identified as a movement in relation to enemy combatant cases, the reality is that such a trend might also be recognized in other legal decisions. Although these are beyond the scope of this research, this project can be used as example of how judicial cosmopolitanism has become an important theory, and not just in enemy combatant jurisprudence. However, this would have to be the focus of another conversation. Meanwhile, the march of judicial cosmopolitanism in the War on Terror has proven to be a very significant notion in legal discourse, one that may be dormant, but one that is sure to be remembered as the legacy of enemy combatant case law.

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