

# PROSECUTING ISIS

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*The Islamic State of Iraq and Syria (“ISIS”) is a militant organization that has committed crimes against humanity, war crimes, and crimes against foreign citizens in its pursuit of creating a caliphate. This article asserts that ISIS has committed criminal acts and proposes the proper way to prosecute the heinous crimes that the ISIS has committed against the Iraqi and Syrian peoples and the foreign civilians in ISIS’s territory. The first step in prosecuting ISIS for its crimes is to identify the nature of the organization. The second step is to identify the crimes that ISIS has committed and the appropriate venues for prosecuting said crimes.*

*Part I provides a brief synopsis of the relevant international law. Part II establishes the identity of ISIS, describes its crimes, and analyses its claim to statehood. Part III explores the possibility of prosecuting ISIS’s international crimes before the International Criminal Court, ad hoc international tribunals, or the domestic courts of Iraq and Syria. Part III proposes that the United Nations establish an international tribunal with Iraqi and Syrian representatives to prosecute ISIS’s international crimes—specifically crimes against the law of war and crimes against humanity.*

*Part IV argues that prosecutions based on the passive personality principle should take priority over territorial or active personality jurisdiction because the offenders harmed their victims because of the victims’ nationality and used the victims as hostages to compel their home countries. The United States’ and other countries’ interest in protecting its citizens abroad and prosecuting offenses against their citizens targeted because of their nationality supersedes the interests of Iraq or Syria in preserving order within their borders through territorial jurisdiction, especially considering the questionable status of Iraq’s or Syria’s abilities to effectively exercise jurisdiction or prosecute over ISIS’s offenses against foreigners. The passive personality principle should also take primacy over any interest another State has in exercising active nationality jurisdiction over its citizens’ offenses abroad. While it is novel to exercise passive personality in preference to both territorial and national jurisdiction, such an application is appropriate when the offenders victimize the victims because of their nationality, which would cause the passive personality State’s interest in prosecuting the offenses supersedes the interest of the territorial or active nationality State.*

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## Table of Contents

Introduction.....	3
I. International Law .....	5
A. The Roots of International Law.....	5
B. Sources of International Law .....	6
C. The Westphalian Evolution of International Law & International Criminal Law .....	7
II. What is ISIS? .....	9
A. A Brief History of ISIS.....	9
B. The So-Called “Islamic State”.....	10
C. ISIS’S Actions .....	12
1. ISIS’S Actions against Women and Children.....	12
2. ISIS’S Actions against Minorities.....	13
3. ISIS’s Actions against Iraqi Soldiers .....	14
4. Categorizing ISIS’S Actions.....	14
III. Prosecuting ISIS’s Violations of International Law in an International Forum.....	16
A. Iraqi and Syrian Domestic Tribunals.....	16
B. The Permanent International Criminal Court.....	18
C. An International Tribunal .....	19
1. A Brief History of United Nations’ International Criminal Tribunals.....	19
2. The Argument for an International Criminal Tribunal to Prosecute ISIS’s International Crimes .....	21
IV. Prosecuting Offenses Against United States Citizens Under the Passive Personality Principle.....	22
A. The United States Has a Right to Prosecute ISIS for Offenses against American Citizens .....	23
1. The Passive Personality Principle .....	23
2. The Constitutional Ability to Prosecute Offenses under the Passive Personality Principle.....	25
3. The United States’ Growing Acceptance of the Passive Personality Principle: <i>Yunis</i> and <i>Rezaq</i> .....	26
B. Passive Personality Jurisdiction as a Primary Basis of Jurisdiction .....	28
1. Passive Personality Jurisdiction and Territorial Jurisdiction .....	28
2. Passive Personality Jurisdiction and Nationality Jurisdiction .....	30
C. How Prosecuting ISIS’s Crimes against Foreigners Coexists with Prosecuting ISIS’s International Crimes .....	31
Conclusion .....	32

## INTRODUCTION

“The world is broken, but it will be healed in the end, and good will prevail.” Paula Kassig<sup>1</sup>

For almost two years, in the lands controlled by the Islamic State of Iraq and Syria (“ISIS”), agents of ISIS have brutally murdered Christians and other religious minorities who refused to convert to ISIS’s beliefs.<sup>2</sup> ISIS has brutally raped and trafficked hundreds of Iraqi and Syrian women and children and has targeted Iraqi and Syrian minorities because of the victims’ religious affiliations or ethnic backgrounds.<sup>3</sup> Iraqi and Syrian armed forces have struggled to defend their territory and citizenry from ISIS’s domination and aggressive advances, but the Iraqi and Syrian soldiers have been unable to defend themselves from ISIS’s atrocities.<sup>4</sup> Since September 2014, the United States and other nations have launched airstrikes against ISIS strongholds and hideouts in attempts to defeat the brutal regime that now calls itself the Islamic State (“IS”).<sup>5</sup>

Not all of those who resist ISIS have fought its violence with traditional weapons. Scores of journalists and humanitarian aid workers have risked their lives and freedom to fight ISIS by sharing the truth about ISIS’s terrible campaigns and helping the victims of ISIS’s brutality. These warriors of truth and compassion have come from many nations, and some have indeed paid the ultimate price.

James Foley and Steven Sotloff, American journalists, traveled to Syria to document and publicize the plight of the Syrian people.<sup>6</sup> Peter Kassig returned to Syria as a humanitarian aid worker after serving in United States armed forces in Iraq.<sup>7</sup> These men and many others witnessed the brutalities that the tyrannical and oppressive regime visited on the people of the region.<sup>8</sup> These men fought with words and support rather than weapons, and these men fought to make the truth known and ease the suffering of an oppressed people. ISIS captured these men, held them hostage against United States’ intervention in the region, and ultimately executed them. ISIS broadcast these murders to the world over the Internet in attempts to terrorize the world,

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<sup>1</sup> *ISIS Beheading Leaves Fate Uncertain for Last Two Hostages*, NBCNEWS.COM (Nov. 17, 2014), <http://www.nbcnews.com/storyline/isis-terror/isis-beheading-leaves-fate-uncertain-last-two-hostages-n250256>

<sup>2</sup> Bobby Ghosh, *ISIS: A Short History*, THEATLANTIC.COM (Aug. 14, 2014), <http://www.theatlantic.com/international/archive/2014/08/isis-a-short-history/376030/>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *ISIS Beheading Leaves Fate Uncertain for Last Two Hostages*.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

specifically the United States of America. James Foley, Steven Sotloff, and Peter Kassig join the hallowed number of men and women who have died attempting to help the people of Iraq and Syria rise out of the grip of tyranny and terror, and they join the tens of thousands that ISIS has victimized in its brutal pursuit of domination and oppression.<sup>9</sup>

In all likelihood, some type of military action will account for the ones responsible for the murders and ISIS's other atrocious acts. If the ones responsible survive and some nation takes the leaders into custody, a question arises about the proper way or ways to prosecute the crimes that ISIS has committed. ISIS has committed crimes against international law and against the citizens of other nations.<sup>10</sup> The "international crimes" that ISIS has committed are distinct from the crimes that ISIS has committed against foreign citizens, and this article addresses the proper and distinct way to prosecute the two types of offenses.

This article argues that ISIS's crimes against the Iraqi and Syrian peoples are war crimes and crimes against humanity, and the international community should prosecute ISIS for its crimes against international law. This article also argues that the crimes against foreign citizens are distinct from the international crimes and that the home country of ISIS's victims has a right to prosecute the offenders that is superior to the rights of other countries.

Specifically, this article argues that the United States has the authority to prosecute those accused of murdering, kidnapping, and otherwise harming United States citizens based on the passive personality principle, which is a theory of extraterritorial jurisdiction that grants jurisdiction over the offender based on the victim's nationality. Also, in cases where the offender chooses his victim based on the victim's nationality, the passive personality principle should take primacy over other bases of jurisdiction that traditionally notions take precedence.

Part I discusses the history of ISIS from its birth as an offshoot of al-Qaeda<sup>11</sup>, details its crimes, and analyses its claim to statehood. Part II analyzes ISIS's crimes as international crimes, discusses the possible venues for prosecuting them, and proposes that the United Nations establish an international tribunal with Iraqi and Syrian representatives to prosecute ISIS's international crimes—specifically crimes against the law of war and crimes against humanity. Part III argues that, under the passive personality principle, the United States has the authority to prosecute ISIS leaders and others for their complicity in crimes against American citizens. Part III also argues that the exercise of passive personality jurisdiction should prime territorial jurisdiction and active nationality jurisdiction when the offenders' motive for

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<sup>9</sup> *ISIS: A Short History*.

<sup>10</sup> *Id.*

<sup>11</sup> *What is Islamic State?*, *BBCNews.com*, <http://www.bbc.com/news/world-middle-east-29052144> (last updated on June 15, 2015).

harming the victims is the victim's nationality.

## I. INTERNATIONAL LAW

Before exploring the possible methods of prosecuting international crimes and weighing the merits of the various methods, it is necessary to lay a foundation for understanding the origins, evolution, and applicability of international law. Black's Law Dictionary defines international law as "[t]he legal system governing the relationships between countries; more modernly, the law of international relations, embracing not only countries but also such participants as international organizations and individuals."<sup>12</sup>

### A. *The Roots of International Law*

Many scholars credit the Peace of Westphalia initiated by the Treaties of Osnabrück and Münster in 1648 with the creation of international law as it exists today.<sup>13</sup> While the Peace of Westphalia was a momentous occasion in the evolution of international law, it was not its genesis.<sup>14</sup> For as long as there have been nations to interact with each other, there has been international law.<sup>15</sup> Scholars can trace the roots of international law back at least as far as the ancient Roman, Grecian, Egyptian, Hittite, Persian, and Babylonian civilizations. These ancient foundations of international law included legal methods for

the creation and enforcement of treaties and contracts, the development of permanent channels of diplomatic exchange, and the protection and granting of extraterritorial privileges to ambassadors ... the presence of foreigners [within a nation's] territories, including such sophisticated processes as rules for the extradition of criminals – an area of law still giving rise to significant complexity as between international and municipal law.<sup>16</sup>

While the existence of legal procedures for governing the interactions of nations in times of peace are ancient, scholars can also trace the origins of the law of war, which is now commonly considered a subset of international law, to other ancient sources including the Code of Hammurabi, which contained

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<sup>12</sup> Black's Law Dictionary (10th ed. 2014).

<sup>13</sup> Gideon Boas, PUBLIC INTERNATIONAL LAW 8 (2012).

<sup>14</sup> *Id.* at 3, 8.

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.*

provisions for preventing oppression, releasing prisoners, and enforcing sanctions.<sup>17</sup> Cyrus the Great of Persia laid the foundation for the humane treatment of enemy combatants and conquered peoples after the Persians conquered Babylon in the sixth century B.C.<sup>18</sup> These early manifestations of nations “regulating the conduct of hostilities and the fundamental rights of human beings” appear consistently throughout the evolution of international law.<sup>19</sup>

### B. *Sources of International Law*

Generally, it is accepted that the sources of international law are laid out in Article 38 of the Statute of the International Court of Justice, the judicial organ of the United Nations, states that

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>20</sup>

While no hierarchy is expressly laid out, the sources in the first three subsections are generally interpreted as primary authority and the sources in the fourth subsection are generally interpreted as secondary authority.<sup>21</sup>

International conventions generally govern armed conflicts, and the four Geneva Conventions and their Protocols are the most pervasive and relevant conventions that govern armed conflict.<sup>22</sup> Despite the practically

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<sup>17</sup> *Id.* at 6.

<sup>18</sup> *Id.* at 6-7.

<sup>19</sup> *Id.* at 7.

<sup>20</sup> Statute of the International Court of Justice, Art. 38(1).

<sup>21</sup> Boas at 46.

<sup>22</sup> Boas at 33-34. The four Geneva Conventions are: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31; the Geneva Convention for the Amelioration of the Condition of the Wounded,

universal application of the Geneva Conventions, customary international law continues to govern the protection of civilians including making a distinction between combatants and noncombatants, requiring combatants to care for prisoners of war, and prohibiting “torture, medical experimentation and neglect endangering health.”<sup>23</sup>

Treaties memorialize the majority of international agreements from wide-reaching conventions to relatively simple trade agreements.<sup>24</sup> Given their prevalence and versatility, treaties are one of the most common sources of international law, and their creation, application, and interpretation cast penumbras for many applications of international law.<sup>25</sup>

In addition to applying customary international law to armed conflicts, such customs that govern interpreting treaties among others are also binding sources of international law.<sup>26</sup> Proponents of a particular position can use other sources, such as various domestic judicial opinions and scholarly writings, as persuasive authority to support the argument that a particular custom actually exists.<sup>27</sup> However, despite the existence of sources of international law, each State’s participation and acquiescence to international law is consensual.<sup>28</sup> Each State may disregard international law at the peril of economic sanctions or war, but each State is bound by international law only so far as it consents to be bound. This is perhaps the strongest remnant of Westphalian sovereignty, and it comes to play a large role in prosecuting international crimes because such prosecutions regularly involve either the consensual cooperation of a State or the violation of its sovereignty.

### *C. The Westphalian Evolution of International Law & International Criminal Law*

The Treaties of Osnabrück and Münster ended the bloody Thirty Years War in 1648 and redefined the borders of Europe and established the principle of sovereignty in international law and lead “to the rise of the nation state as the key actor in international law and politics.”<sup>29</sup> As sovereignty

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Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85; the Geneva Convention relative to the Treatment of Prisoners of War, 75 UNTS 135; and the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287. *Id.* at 33-34, note 168. The three Protocols are: the Protocol relating to the Protection of Victims of International Armed Conflict, 1125 UNTS 3; the Protocol relating to the Protection of Victims of Non-International Armed Conflict, 1125 UNTS 609; and the Protocol relating to the Adoption of an Additional Distinctive Emblem, not yet in force. *Id.* at 34, note 169.

<sup>23</sup> Boas at 33-34.

<sup>24</sup> *Id.* at 46-48.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 46.

<sup>27</sup> *Id.* at 47.

<sup>28</sup> *Id.* at 49.

<sup>29</sup> *Id.* at 8-9.

became more important, the distinction between international law and domestic law became clearer.<sup>30</sup> While international law governs the interactions between and among States, each State's sovereignty allowed its domestic law to govern its internal affairs.<sup>31</sup>

While the importance of sovereignty in relation to international law has continued, the twentieth century saw the dawn of international criminal liability for individuals.<sup>32</sup> Generally, national sovereignty trumps international prosecutions, but there are instances where the international prosecution can take precedence.<sup>33</sup> There were trials in Germany of German individuals who "violated the laws and customs of war" after World War I, but the first large-scale international prosecution of individuals for crimes occurred after World War II when Nazi officials were tried by an international tribunal at Nuremberg.<sup>34</sup>

On August 8, 1945, the United States, Great Britain, France, and the Union of Soviet Socialist Republics established the International Military Tribunal ("IMT") that prosecuted the "major war criminals of the European Axis" at Nuremberg.<sup>35</sup> The Allies established the Nuremberg IMT by signing the London Charter, which outlined the powers and responsibilities of the Tribunal.<sup>36</sup> This document would be "extremely influential" on the establishment of the International Criminal Court ("ICC"), the International Criminal Tribunal for Rwanda ("ICTR"), the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), and other international criminal tribunals.<sup>37</sup> The Nuremberg IMT, in addition to prosecuting offenses against the laws of war, considered, for the first time, crimes against humanity and established much of the legal definition for what constitutes crimes against humanity.<sup>38</sup> Perhaps most importantly, the charter for the Nuremberg IMT allowed prosecutions for crimes against humanity to go forward even if the actions giving rise to the crimes against humanity were not illegal in the territory in which the actions occurred.<sup>39</sup>

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<sup>30</sup> *Id.* at 9.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 36-37.

<sup>33</sup> *Infra* \_\_\_\_.

<sup>34</sup> *Id.* at 37.

<sup>35</sup> Ilias Bantekas and Susan Nash, INTERNATIONAL CRIMINAL LAW 472 (3rd ed. 2007); see also London Charter, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. 472.

<sup>36</sup> *Id.* at 498.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 502-03. *Infra* \_\_\_\_.

<sup>39</sup> *Id.* at 506. This is especially relevant given that a government that is committing crimes against humanity can easily make the actions "legal", which is exactly what has happened in the territories controlled by ISIS. See also Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, NYTIMES.COM (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of->



While the world agreed that the Nazis' actions were atrocious, reprehensible, and vile beyond description, the Nuremberg IMT was not without its faults.<sup>40</sup> Many have questioned the adequacy of the defendants' access to legal counsel as well as the procedural and evidentiary rules established for the Nuremberg IMT.<sup>41</sup> However, while there many have been inadequacies with the Nuremberg IMT, those inadequacies can be addressed and avoided should another IMT need to be established. Surely, if a tribunal is established to prosecute the heinous actions of the Islamic State, the experiences of the Nuremberg IMT, as well as the ICTR and ICTY, will inform and direct such a tribunal's creation.

## II. WHAT IS ISIS?

There is evil in this world, and we all have come face to face with it once again. Ugly, savage, inexplicable, nihilistic, and valueless evil. ISIL is the face of that evil, a threat to people who want to live in peace, and an ugly insult to the peaceful religion they violate every day with their barbarity.

John Kerry, Secretary of State, August 20,  
2014<sup>42</sup>

### A. *A Brief History of ISIS*

The Islamic State, more commonly known as ISIS, is a militant, jihadist group operating in northern Iraq and northwestern Syria<sup>43</sup>. The group originated as an offshoot of the terrorist organization al-Qaeda.<sup>44</sup> Abu Musab al-Zarqawi, a Jordanian, created Jama'at al-Tawhid w'al-Jihad in 2003, which became al-Qaeda in Iraq ("AQI") in 2004 after Zarqawi joined his organization with that of Osama bin Laden.<sup>45</sup> In the spring of 2006, Zarqawi, styling himself as an "emir" or "insurgent commander," began enforcing harsh sharia law on Sunni Muslims in Iraq.<sup>46</sup> Zarqawi and his followers executed those who objected.<sup>47</sup> After Zarqawi's death from a United States airstrike in June of 2006, the U.S. military and local Sunni forces further weakened AQI, which was renamed the Islamic State in Iraq ("ISI").<sup>48</sup>

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rape.html?\_r=1

<sup>40</sup> Bantekas at 505-06.

<sup>41</sup> *Id.*

<sup>42</sup> John Kerry, *Murder of James Foley*, STATE.GOV (Aug. 20, 2014),

<http://www.state.gov/secretary/remarks/2014/08/230772.htm>

<sup>43</sup> *What is Islamic State?*

<sup>44</sup> *Id.*

<sup>45</sup> *ISIS: A Short History*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

In 2010, Abu Bakr al-Baghdadi, an Iraqi, took control of ISI.<sup>49</sup> Whereas a Jordanian had lead AQI and many foreigners formed the bulk of its ranks, ISI consisted mainly of Iraqi Sunni Muslims, many of whom had served in the military under Saddam Hussein.<sup>50</sup> ISI continued to attack government and civilian targets in Iraq with suicide bombers and the like, and Baghdadi expanded ISI's operations into Syria.<sup>51</sup> ISI imposed harsh Sharia law on the territory that it held in Syria, and Baghdadi renamed the group the Islamic State in Iraq and Syria.<sup>52</sup> After capturing the Iraqi city of Mosul, Baghdadi, who was acting as the emir, declared himself the "caliph" or "holy leader"<sup>53</sup> of the Islamic State, which he expected to stretch from the Mediterranean to the Persian Gulf<sup>54</sup> and command the loyalty of the world's Muslim population.<sup>55</sup>

ISIS controls between 15,000 and 90,000 square miles of former Iraqi and Syrian territory, and approximately eight million people live under total or partial ISIS control.<sup>56</sup> ISIS continues to enforce a harsh interpretation of Sharia law, and it has proved especially harsh on the ethnic and religious minorities in ISIS controlled territory.<sup>57</sup> ISIS controls its territory with approximately 31,000 fighters, of which 12,000 are from eighty-one countries other than Iraq or Syria.<sup>58</sup>

### B. The So-Called "Islamic State"

"ISIS has no nationality. Its nationality is terror, savagery, and hatred."  
Shaykh Muhammad al-Yaqoubi, Syrian Sunni cleric<sup>59</sup>

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<sup>49</sup> *What is Islamic State?*. See also Rowan Scarborough, *Islamic State Leader al-Baghdadi Formerly a U.S. Captive*, WASHINGTONTIMES.COM (July 13, 2014), <http://www.washingtontimes.com/news/2014/jul/13/islamic-state-leader-abu-bakr-al-baghdadi-formerly/?page=all>.

<sup>50</sup> *What is Islamic State?*.

<sup>51</sup> *ISIS: A Short History*.

<sup>52</sup> *Id.*

<sup>53</sup> *ISIS' Leader Just Declared Himself Caliph*, SLATE.COM (July 13, 2014), [http://www.slate.com/articles/news\\_and\\_politics/war\\_stories/2014/07/iraq\\_isis\\_leader\\_abu\\_bakr\\_al\\_baghdadi\\_names\\_himself\\_caliph.html](http://www.slate.com/articles/news_and_politics/war_stories/2014/07/iraq_isis_leader_abu_bakr_al_baghdadi_names_himself_caliph.html).

<sup>54</sup> *ISIS: A Short History*.

<sup>55</sup> *ISIS' Leader Just Declared Himself Caliph*.

<sup>56</sup> *What is Islamic State?*.

<sup>57</sup> Bobby Ghosh, *The Iraqi Minorities in ISIS's Crosshairs*, Slate.com (Aug. 7, 2014), <http://www.theatlantic.com/international/archive/2014/08/the-iraqi-minorities-in-isis-crosshairs/375745>.

<sup>58</sup> *What is Islamic State?*. At least 2,500 of the foreign fighters come from Western States.  
*Id.*

<sup>59</sup> Ritesh K Srivastava, *Noted Syrian cleric condemns Kassig's beheading, says ISIS chief is "going to hell"*, ZEENEWS.INDIA.COM (Nov. 18, 2014), [http://zeenews.india.com/news/world/noted-syrian-cleric-condemns-kassigs-beheading-says-isis-chief-is-going-to-hell\\_1500738.html](http://zeenews.india.com/news/world/noted-syrian-cleric-condemns-kassigs-beheading-says-isis-chief-is-going-to-hell_1500738.html).

While ISIS holds itself out as a State and Abu Bakr al-Baghdadi claims to be the caliph of a caliphate that should command international personhood, the reality is that ISIS falls far short of truly possessing legitimate Statehood. In order to understand the ability of the United States to prosecute ISIS'S offenses based on passive personality jurisdiction, it is important to know whether ISIS is a State and can exercise territorial jurisdiction.

Arguably, neither Iraq nor Syria retains territorial sovereignty in the areas controlled by ISIS since neither State can exercise peaceful and effective control over the territories and populations that ISIS controls. Likewise, ISIS cannot exercise peaceful and effective control because ISIS only maintains dominion over its population and territory by force. Since Iraq and Syria both lack peaceful and effective control of the territory that ISIS controls, it is unlikely that either can or would attempt to exert territorial jurisdiction over the offenses against aliens that occur in ISIS's territory.<sup>60</sup> As discussed below, this is relevant because if no State can exercise territorial jurisdiction over an offense, then no State exercising passive personality jurisdiction can offend another State's territorial sovereignty.

International law recognizes that there are four prerequisite qualities of statehood: territory, population, government, and recognition. The presence of territory, population, and government are questions of fact.<sup>61</sup> A prospective State shows territory by examining the physical territory that the prospective state claims.<sup>62</sup> The population that a State claims is the population that resides in the territory.<sup>63</sup> If there is a segment of the population that organizes the affairs of the rest of the population and deals with the governments of other states, then a government exists as well.<sup>64</sup>

A prospective State gains recognition if a significant number of States, or a significantly powerful State, recognizes that the government of the prospective State has "effective control" over the population and territory that it claims.<sup>65</sup>

A State's citizens are not its property, and, in the eyes of the world, a State does not gain effective control over its citizens by force of arms.<sup>66</sup> A

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<sup>60</sup> Since there is a question about whether Iraq or Syria can effectively exert territorial jurisdiction over ISIS's crimes against foreigners, then that bolsters the argument that a State whose citizens have been harmed, like the United States or the United Kingdom, could exercise passive personality jurisdiction over the offenders without offending Iraqi's or Syria's territorial sovereignty. If neither country can properly exercise territorial jurisdiction over the offense, then neither country should object to the United States or Great Britain exercising passive personality jurisdiction.

<sup>61</sup> BRIERLY'S LAW OF NATIONS, 149-57, (Andrew Clapham ed., 7th ed. 2012).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*. States acquire territory in four ways: creation, occupation, cession, and prescription. *Id.* ISIS took possession of its territory by prescription, which means that it used force of arms to take the territory from Iraq and Syria. *ISIS: A Short History*.

<sup>64</sup> BRIERLY'S at 149-57.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

population legitimizes a successive government if it assents to the new government, even if there was a period of violence associated with the regime change.<sup>67</sup> If the population and the government coexist peacefully, then the government exercises “effective control” over the population.<sup>68</sup> If a government cannot exercise “peaceful possession and effective” control, then the international community will not recognize the prospective State as a State.<sup>69</sup>

If Iraq, Syria, and ISIS all cannot exercise “peaceful and effective control” over the ISIS’s territory, then none of the three have a valid argument that the United States exercising passive personality jurisdiction over offenses against American citizens in that territory violates their territorial sovereignty.<sup>70</sup> As discussed below, this is relevant because if no State can exercise territorial jurisdiction over an offense, then no State exercising passive personality jurisdiction can offend another State’s territorial sovereignty.

### C. ISIS’S Actions

ISIS continues on a violent campaign through Northern Iraq and committing unspeakable acts in the name of their twisted version of religion.<sup>71</sup> Many media sources have called ISIS’S actions “war crimes” and “crimes against humanity.”<sup>72</sup> While ISIS’s actions are heinous, the crimes must meet the internationally accepted definitions of “war crimes” and “crimes against humanity” before the United Nations or the International Criminal Court will prosecute the offenders.

#### 1. ISIS’S Actions against Women and Children

ISIS has “systematically ignored” the prohibition against the “use and

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 149-157

<sup>70</sup> Since there is a question about whether Iraq or Syria can effectively exert territorial jurisdiction over ISIS’s crimes against foreigners, then that bolsters the argument that a State whose citizens have been harmed, like the United States or the United Kingdom, could exercise passive personality jurisdiction over the offenders without offending Iraqi’s or Syria’s territorial sovereignty. If neither country can properly exercise territorial jurisdiction over the offense, then neither country should object to the United States or Great Britain, the nations whose citizens ISIS has executed, exercising passive personality jurisdiction. *ISIS Beheading Leaves Fate Uncertain for Last Two Hostages.*

<sup>71</sup> *ISIS: A Brief History.*

<sup>72</sup> Gordon Brown, *The International Criminal Court Must Take on ISIS Crimes Against Children*, HuffingtonPost.com (last updated Oct. 5, 2014), [http://www.huffingtonpost.com/gordon-brown/the-international-criminal-court-must-take-on-isis-crimes-against-children\\_b\\_5936560.html](http://www.huffingtonpost.com/gordon-brown/the-international-criminal-court-must-take-on-isis-crimes-against-children_b_5936560.html).

abuse of children in armed conflict.”<sup>73</sup> The UN Assistance Mission for Iraq and the Office of the UN High Commissioner for Human Rights released a report on ISIS’S actions against civilians, specifically actions against women and children from July 6, 2014, to September 10, 2014.<sup>74</sup> In addition to detailing ISIS’S actions, the report calls for the International Criminal Court to launch an investigation into ISIS’S crimes.<sup>75</sup>

The report describes how ISIS has pressed children as young as twelve and thirteen years old into service donating blood to treat wounded ISIS soldiers, patrolling ISIS controlled towns, and manning ISIS checkpoints.<sup>76</sup> ISIS has also used children as shields in skirmishes with Iraqi and other resistance forces.<sup>77</sup>

In Mosul City, ISIS murdered the parents of sixty-five Turkmen and Yazidi children while the children watched, sexually assaulted several of the older children, and left the children in an orphanage before returning to force them to pose with ISIS flags for photographic “trophies of war.”<sup>78</sup> The children range in age from five months to seventeen years old.<sup>79</sup> In early August 2014 ISIS transported 150 unmarried, Yazidi and Christian women and girls from Nineva to Syria to be sold into sexual slavery or gave them as gifts to ISIS soldiers there.<sup>80</sup> ISIS has abducted more minority women and children from other areas under ISIS’S control and transported them, sexually abused them, and sold them into slavery.<sup>81</sup> ISIS continues abducting more women and children daily.<sup>82</sup>

## 2. ISIS’S Actions against Minorities

Since ISIS began operating in Iraq as AQI, they have consistently targeted civilians as well as military personnel in their attacks.<sup>83</sup> The majority of ISIS’s fighters are members of the Sunni Muslim sect.<sup>84</sup> Under al-Baghdadi’s leadership, the group continued to target Shi’ites, which are a majority in Iraq as a whole but are a minority in ISIS dominated northern Iraq.<sup>85</sup> While ISIS

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *The International Criminal Court Must Take on ISIS Crimes Against Children.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *ISIS: A Short History.*

<sup>84</sup> Bobby Ghosh, *A Short Political History of the Barbaric Terrorists*

*Who Call Themselves the Islamic State*, QZ.COM (Aug. 13, 2014), <http://qz.com/248787/a-short-political-history-of-the-barbaric-terrorists-who-call-themselves-the-islamic-state/>.

<sup>85</sup> Bobby Ghosh, *The Communities Most Endangered by the Rise of ISIL*, QZ.COM (Aug. 6, 2014), <http://qz.com/245569/genocide-watch-the-communities-most-endangered-by-the->

focused on targeting Shi'ites in the past, in the summer of 2014 it began targeting other ethnic minorities including Christians, Yazidis, Shabak, Shi'ite Turkmen, and other Sunni Muslims who disagree with ISIS's religious philosophy and actions.<sup>86</sup> On August 2, 2014, ISIS overran the town of Sinjar, home to a large number of Yazidis.<sup>87</sup> After the fall of Mosul in June of 2014, ISIS began its march toward conquering Sinjar, executed any Yazidi men who did not immediately convert to ISIS's version of Islam, and took Yazidi women as "jihadi brides."<sup>88</sup> More than forty thousand Yazidi's fled into the Sinjar mountains and neighboring Kurdistan to escape ISIS's advance, and the world-wide leader of the Yazidi faith, Prince Tahseen Said begged the leaders of the world for help in the Yazidi's plight.<sup>89</sup>

### 3. ISIS's Actions against Iraqi Soldiers

Since its inception, ISIS targeted military and civilians, but the group continued its systematic violence against all citizens in Iraq and Syria throughout 2014.<sup>90</sup> On June 12, 2014, ISIS executed 1,700 "Shi'a members" of Iraq's armed forces, captured other Iraqi soldiers from a military base, and executed 175 Iraqi Air Force recruits on June 22, 2014.<sup>91</sup> In photographs reminiscent of Nazis herding Jewish citizens onto cattle cars, viewers see ISIS agents loading groups of Iraqi soldiers dressed in civilian clothing onto trucks, forcing them into trenches, and executing them as they knelt in the dirt.<sup>92</sup> The Iraqi government recovered some of the bodies of the executed Air Force recruits floating in the Tigris River downstream from Tikrit.<sup>93</sup> The Iraqi government believed ISIS buried the other recruits in a mass grave.<sup>94</sup>

### 4. Categorizing ISIS'S Actions

There are arguments to be made that ISIS'S actions could generate criminal

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rise-of-isis/. Shi'ites also control the Iraqi central government and have a history of ethnic conflict with the Sunnis. *Id.*

<sup>86</sup> *Id.* ISIS and its leader al-Baghdadi "hate[] pretty much everyone who doesn't agree with his particular, perverted interpretation of Islam." *Id.*

<sup>87</sup> George Packer, *A Friend Flees the Horror of ISIS*, NEWYORKER.COM (August 6, 2015), <http://www.newyorker.com/news/daily-comment/friend-flees-horror-isis>.

<sup>88</sup> *Id.* ISIS considers the Yazidis to be "devil worshipers" and seems to take particular pleasure in persecuting the Yazidis. *Id.*

<sup>89</sup> *Leader of Iraq's Yazidis Issues Distress Call, Appeals for Help Against ISIS*, AINA.ORG (Aug. 4, 2014), <http://www.aina.org/news/20140804041237.htm>

<sup>90</sup> *Id.*

<sup>91</sup> *Iraq: ISIS Execution Site Located*, HRW.ORG (June 26, 2014), <http://www.hrw.org/news/2014/06/26/iraq-isis-execution-site-located>

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

liability for all of the offenses under Article Five, but the prosecutions should focus on war crimes and crimes against humanity.<sup>95</sup>

A "crime against humanity" under the Rome Statute means any of several enumerated acts knowingly committed as part of a widespread or systematic attack directed against any civilian population.<sup>96</sup> As described above, ISIS has been systematically murdering, exterminating, enslaving, forcibly transporting, raping, committing other sexually violent acts, persecuting groups based on their religion and ethnicity, and is committing "inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."<sup>97</sup>

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<sup>95</sup> Article Six of the Rome Statute defines "genocide" as actions taken with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Rome Statute. Such actions include killing members of the group, causing serious physical or mental harm to members of the group, and forcibly transferring children of the targeted group to another group, which are all things that ISIS has done on a relatively small scale compared to the Holocaust and Rwandan genocide. While ISIS' actions against the minority populations in the territory it controls are heinous, it is unlikely that those actions rise to the strict interpretation of genocide that international tribunals typically require. Judicial bodies vilify the crime of genocide to such a degree because it is analogous to wiping out a species from the world. Beth Van Schaack and Ronald C. Slye, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT*, 2d ed. (2012).

Regarding ISIS's offenses against Iraqis and Syrians, the nationality and racial bases for genocide are unlikely to be present, and the ethnicity basis is tenuous because the "ethnic groups" are so similar to each other. The strongest argument for the presence of an ethnic basis is that the different religious beliefs and cultures amount to distinct ethnicities in the areas controlled by ISIS, however, religious affiliation is an independent basis for genocide. *Id.* ISIS is targeting minorities that are of different religious groups, but ISIS's actions so far, while terrible, have not reached the levels typically needed to establish the crime of genocide. *See ISIS: A Brief History*.

If ISIS continues to grow and expand its power and capabilities, ISIS's actions may eventually rise to the level of genocide, but let us hope that the international community neutralizes ISIS before its reign of terror reaches that genocidal proportion.

Regarding aggression, the ICC cannot prosecute for the crime of aggression until a further amendment to the Rome Statute defines the crime and sets forth standards for its prosecution. Rome Statute of the International Criminal Court, art. 69(3) (1998) (hereinafter Rome Statute).

<sup>96</sup> Rome Statute, art. VII. Crimes enumerated in Article Seven include

(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

<sup>97</sup> *Id.*

A “war crime” is any of several “grave breaches” of the Geneva Conventions of 1949, “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law,” and similar offenses when the conflict is not of an international nature.<sup>98</sup>

### III. PROSECUTING ISIS’S VIOLATIONS OF INTERNATIONAL LAW IN AN INTERNATIONAL FORUM

There are three ways to prosecute ISIS’s international crimes: (1) in the domestic courts of Iraq and Syria, (2) before the International Criminal Court, or (3) before an *ad hoc* tribunal. It is important to understand the different types of judicial bodies that can hear international crimes to determine which body is most appropriate to hear the cases arising from ISIS’s offenses.

#### A. Iraqi and Syrian Domestic Tribunals

Domestic courts are the “backbone of a global criminal justice system”.<sup>99</sup> Some countries allow their courts to hear international crimes as violations of international law, but other countries only allow their courts to hear such cases if the international law is also part of the country’s domestic law.<sup>100</sup> If a domestic court is hearing an international criminal law case, then it draws on treaties, customary international law, secondary sources, and other general principles of law to decide the applicable law.<sup>101</sup>

The cases before the Iraqi High Tribunal (“IHT”) are perhaps the most famous, or infamous, cases where a domestic court tried defendants for violations of international law. Human rights groups argued that Saddam Hussein and other Ba’athist leaders, accused of committing genocide, war crimes, and crimes against humanity among other charges, should be tried before an international or mixed tribunal rather than the “U.S. sponsored, Iraqi-led” domestic proceedings.<sup>102</sup> Critics argue that the Iraqi courts were too “deeply compromised” after decades of Ba’athist rule and could not handle the complexity of the criminal proceedings, that it would take an inordinate amount of time to train the judiciary to handle the cases, and that the domestic judges would be too prejudiced against the defendants to give them a fair

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<sup>98</sup> Rome Statute, art. 8(2). Article 8(2) contains an enumerated, but not exhaustive, list of what acts constitutes war crimes.

<sup>99</sup> Antonio Cassese, *INTERNATIONAL CRIMINAL LAW* 25 (2nd ed. 2013).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 26.

<sup>102</sup> U.S. *Plans for Iraq Tribunals “A Mistake”*, HRW.ORG (Apr. 7, 2003), <http://www.hrw.org/news/2003/04/06/us-plans-iraq-tribunals-mistake>.



trial.<sup>103</sup>

The critics' skepticism was "fully warranted."<sup>104</sup> Although the IHT incorporated elements of the ITCY, ITCR, and ICC, the trials were still procedurally and substantively insufficient to protect the defendants' rights to due process.<sup>105</sup>

A trial is only as fair as the substantive and procedural law that it applies; if either or both violate due process, a defendant's trial will be unfair no matter how decorously it is conducted. Indeed, in the context of a tribunal like the IHT, which is intended to hear multiple cases over a period of many years, the underlying substantive and procedural law is arguably more important than the fairness of any individual trial. Although trial conduct in general can be improved by appointing better judges, substantive and procedural reform requires legislative action, a slow and unpredictable process in the best of circumstances and one that may be nearly impossible in a political environment as troubled as Iraq's.<sup>106</sup>

The IHT also had issues with the retroactivity of the charges against Saddam Hussein and the other Ba'athist defendants.<sup>107</sup> The IHT's charter granted it subject matter jurisdiction over war crimes and crimes against humanity that occurred between 1968 and Hussein's fall from power in the early 2000s.<sup>108</sup> This broad jurisdictional grant was an issue because some of the war crimes and crimes against humanity prosecutors charged Hussein and the Ba'athist leaders with were only illegal under international or Iraqi law after the mid-1990s.<sup>109</sup>

The retroactivity issues of the IHT will not haunt any domestic proceedings against ISIS in Iraq, but there are several problems associated with prosecuting ISIS'S crimes against humanity and war crimes in the domestic courts of Iraq and Syria.

The first problem is that ISIS agents committed the crimes in the territories of both Iraq and Syria, and it is questionable whether either country

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<sup>103</sup> *Id.*

<sup>104</sup> Heller, Kevin Jon, *A Poisoned Chalice: The Substantive and Procedural Defects of the Iraqi High Tribunal*, 39 CASE W. RES. J. INT'L L. 261 (2007).

<sup>105</sup> *Id.* See also International Covenant on Civil and Political Rights, art. 14(1), adopted Dec. 19, 1966, 999 U.N.T.S.171, 6 I.L.M. 368 (entered into force Mar. 23, 1976).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Under Heller's approach, the IHT could only prosecute two categories of crimes against humanity: "(1) those that were committed at any time during an armed conflict and (2) those that were committed during peacetime after 1995" and two types of war crimes: "(1) those that were committed at any time during an international armed conflict; and (2) those that were committed in an internal armed conflict after 1994." *Id.* at 267.

can properly exercise territorial jurisdiction over the crimes.<sup>110</sup> Assuming that the two countries came to some agreement about which country would prosecute the crimes, the objections to either country initiating domestic proceedings echo the criticisms of the IHT from 2003. Neither the Iraqi nor the Syrian court systems can handle cases of this complexity or volume, and the “religious and ethnic composition” of the courts would threaten the integrity of any domestic panel or panels.<sup>111</sup>

As the IHT trials showed, the Iraqi courts are not capable of conducting international criminal trials in accordance with international due process requirements, and there would likely be deep political overtones associated with any domestic proceedings.<sup>112</sup>

Despite the misgivings that many might have about the capabilities of the Iraqi and Syrian justice systems, no one can deny that ISIS has committed crimes against the citizens of those two countries and the Iraqi and Syrian governments have a duty to protect their citizens and prosecute those who harm them.

For that reason, if the Security Council creates an *ad hoc* tribunal or the case goes before the ICC, then the Security Council or the ICC should appoint judges from Iraq and Syria to sit on the panels that hear the cases. This would alleviate many concerns about the corruption and inefficiencies of the domestic courts. Including Iraqi and Syrian jurists in the prosecutions would give legitimacy to the proceedings and would help to instill a sense of trust in the international legal system.

### B. *The Permanent International Criminal Court*

Article Five of the Rome Statute gives the ICC jurisdiction to try individuals charged with committing genocide<sup>113</sup>, crimes against humanity<sup>114</sup>, war crimes<sup>115</sup>, and the crime of aggression.<sup>116</sup> The ICC may exercise jurisdiction over Article Five crimes in three situations: (1) if a State Party refers a situation to the Prosecutor accordance with Article Fourteen of the Rome Statute, (2)

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<sup>110</sup> *Supra* notes 90-94.

<sup>111</sup> *U.S. Plans for Iraq Tribunals “A Mistake”*

<sup>112</sup> Heller at 267. Assuming that any court, international or domestic, does hear the cases arising out of ISIS’s offenses, the case load will surely number from the many hundreds to the multiple thousands unless the prosecutions focus on ISIS leaders above a certain rank in the organization. For the ISIS offenders who did not participate to an advanced degree in the planning or commission of international crimes, a restorative justice program similar to the ones established in Rwanda after the Rwanda genocide or South Africa after apartheid would serve as an adequate forum for “prosecuting” ISIS agents with lower levels of culpability.

<sup>113</sup> See also Rome Statute, art. 6.

<sup>114</sup> See also Rome Statute, art. 7.

<sup>115</sup> See also Rome Statute, art. 8.

<sup>116</sup> Rome Statute, art. 5(2). The ICC can only exercise jurisdiction over the crime of aggression after the crime is more thoroughly defined. *Id.*

the Security Council of the United Nations refers a situation to the Prosecutor in accordance with Chapter VII of the Charter of the United Nations, (3) or the Prosecutor initiates an investigation in accordance with Article Fifteen of the Rome Statute.<sup>117</sup>

Article Fourteen allows a State Party to refer a situation to the Prosecutor for investigation if the State Party believes that one or more of the Article Five offenses has occurred.<sup>118</sup> If the Prosecutor investigates the State's or States' allegations and determines that one or more individuals should be charged and prosecuted, then the proceedings before the ICC can begin.<sup>119</sup>

If the Prosecutor wishes to initiate an investigation *proprio motu* pursuant to Article Fifteen, then he or she may collect information from "States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."<sup>120</sup> After collecting said information, if the Prosecutor concludes that there is a "reasonable basis to proceed with an investigation" he or she seeks the approval of the Pre-Trial Chamber to initiate an investigation.<sup>121</sup>

If the Pre-Trial Chamber finds that there is a "reasonable basis to proceed with an investigation," then it authorizes the Prosecutor to commence the investigation.<sup>122</sup> Following the commencement of the proceedings, the ICC can exercise jurisdiction over "natural persons" who commit any of the Article Five crimes.<sup>123</sup>

### C. *An International Tribunal*

#### 1. A Brief History of United Nations' International Criminal Tribunals

The Security Council of the United Nations can establish an *ad hoc* tribunal to prosecute "grave breaches" of the Geneva Convention of 1949.<sup>124</sup> The Security Council has created two such tribunals, one to prosecute international

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<sup>117</sup> Rome Statute, art. 13.

<sup>118</sup> Rome Statute, art. 14.

<sup>119</sup> Rome Statute, art. 15.

<sup>120</sup> *Id.* The Prosecutor may decide that the information that he or she is presented or has gathered "does not constitute a reasonable basis for an investigation," but this does not prejudice the Prosecutor from reconsidering his or her decision if new evidence is presented. *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* Subsequent proceedings before the ICC are not bound by the Pre-Trial Chambers' determination that the offenses fall within the ICC's jurisdiction. *Id.* If the Pre-Trial Chamber finds that there is not a "reasonable basis to initiate the investigation," the Prosecutor may present the case again if he or she produces new evidence to support the request. *Id.*

<sup>123</sup> Rome Statute, art. 25(1); *see also* Rome Statute, art. 25(3) for what constitutes committing one of the crimes enumerated in Article 5.

<sup>124</sup> Geneva Convention of 1949.

criminal violations during the 1994 civil war in Rwanda<sup>125</sup> and the international criminal violations that occurred during the struggles in the former Yugoslavia in the early 1990s.<sup>126</sup> The Security Council can establish such tribunals pursuant to Chapter VII of the United Nations Charter<sup>127</sup>, and the Security Council should establish such a tribunal to prosecute the international crimes that ISIS has committed.

The Security Council created the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) to prosecute individuals who accused of “grave breaches” of the Geneva Convention of 1949, war crimes, genocide, and crimes against humanity.<sup>128</sup>

The Statutes of the Yugoslavian and Rwandan Tribunals both incorporate Article II of the Convention on the Prevention and Punishment of the Crime of Genocide, but the two Statutes possess slightly different, but not mutually exclusive, definitions of crimes against humanity.<sup>129</sup> Article 5 of the ICTY Statute and Article 3 of the ICTR Statute empowered the each tribunal respectively to “prosecute persons responsible for the [] crimes” murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecutions on political, racial, and religious grounds; or other inhumane acts.<sup>130</sup>

Where the Statutes differ is the scope of the tribunals’ abilities to prosecute since the ICTY’s language limited prosecutions to the acts that were “committed in armed conflict, whether international or internal in character, and directed against any civilian population.”<sup>131</sup> The ICTR, however, could prosecute the crimes as crimes against humanity if they were “committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,” which allowed the tribunal to exercise authority over actions committed outside of periods of armed conflicts.<sup>132</sup>

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<sup>125</sup>Shraga, Daphna and Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, Symposium: Towards an International Criminal Court, 7 EUR. J. INT’L L. 501 (1996).

<sup>126</sup>Murphy, S.D., *Progress And Jurisprudence of the International Criminal Tribunal For The Former Yugoslavia*, 93 AM. J. INT’L L. 57 (1999).

<sup>127</sup> United Nations Charter, ch. VII.

<sup>128</sup> Statute of the International Tribunal for the Former Yugoslavia, art. 7, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (hereinafter ICTY Statute); Statute of the International Criminal Tribunal for Rwanda, art. 6, S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (hereinafter ICTR Statute).

<sup>129</sup> ICTY Statute, art. 4; ICTR Statute, art. 2. Shraga at 508. *See also* Genocide Convention, Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>130</sup> ICTY Statute, art. 5. ICTR Statute, art. 3. Shraga at 508.

<sup>131</sup> ICTY Statute, art. 5. Shraga at 508.

<sup>132</sup> ICTR Statute, art. 3. Shraga at 508. The broader application of crimes against humanity in the ICTR Statute makes it especially helpful as a potential model for a similar Statute to

Dugko Tadic, the first defendant tried by the Yugoslavian Tribunal, challenged the Security Council's ability to create such an international tribunal.<sup>133</sup> The trial court found that the ICTY did not have the power to review the Security Council's decision to create the tribunal and that the question was nonjusticiable because it was a political issue.<sup>134</sup> The appellate chamber disagreed with the trial chamber and found that a tribunal had the power to determine its competence to hear a case as part of its "incidental or inherent jurisdiction." The appellate chamber also found that Tadic's challenge was justiciable, and ruled that the Security Council could create an international criminal tribunal under Chapter VII of the United Nations Charter even though the power to do so is not expressly stated.<sup>135</sup> The appellate chamber's decision in *Tadic* helped pave the way for the creation and implementation of the Rwandan Tribunal.<sup>136</sup>

## 2. The Argument for an International Criminal Tribunal to Prosecute ISIS's International Crimes

The situation with ISIS satisfies the requirements for the Security Council to act under Chapter VII, and the Security Council should establish an International Criminal Tribunal for Iraq and Syria to prosecute ISIS's crimes against humanity and war crimes.<sup>137</sup> Iraq and Syria, as members of the United Nations, would be required to cooperate and abide by the decisions of the international tribunal.<sup>138</sup>

The Statutes of the ICTY and the ICTR defined crimes against humanity and war crimes consistently with the definitions in the Rome Statute<sup>139</sup>, and the Security Council should define the international crimes the same way in a statute that establishes a tribunal to prosecute the leaders of ISIS. An international tribunal would also have the flexibility to compel the production

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address the widespread crimes being committed by ISIS on just such grounds.

<sup>133</sup> Murphy at 60-66.

<sup>134</sup> Anne-Marie Slaughter, *Tougher than Terror*, PROSPECT.ORG (Jan. 9, 2002), <http://prospect.org/article/tougher-terror>.

<sup>135</sup> Murphy at 60-66.

<sup>136</sup> Shraga at 508-9.

<sup>137</sup> UN Charter, ch. VII.

<sup>138</sup> *Id.* While Security Council could undercut the ICC by establishing, if the ICC's mission truly includes "that the most serious crimes of concern to the international community as a whole must not go unpunished," then the mission can be accomplished even if the ICC is not the tribunal that prosecutes the offenses. Rome Statute, Preamble. Neither Iraq nor Syria is a party to the Rome Statute, and that could be an issue if the countries do not agree to the ICC prosecuting ISIS's leaders. If the Security Council or the ICC Prosecutor initiates an indictment against Abu Bakr al-Baghdadi and other ISIS leadership, Iraq and Syria could cooperate with the investigation and trial by surrendering the defendants to the custody of the ICC, but the brief history of the ICC is shrouded by the ineffectiveness of its prosecutions.

<sup>139</sup> ICTY Statute, arts. 4-5; ICTR Statute, arts. 2-3; Rome Statute, arts. 7-8.

of the defendants from any member country in which they may be found. To alleviate some of the difficulty of trying such a potentially large number of defendants, the Security Council could draft the statute to allow the international tribunal to prosecute ISIS leaders and commanders, right up to the so-called caliph himself, and allow domestic courts to try the rank and file ISIS members.

For the international crimes against humanity and war crimes, the Security Council should create an international tribunal in the style of the ICTY and the ICTR to prosecute ISIS's international crimes. Assuming that an international forum is preferable to the Iraqi and Syrian domestic courts, it would be more effective to establish a tribunal similar to the ICTY or ICTR to hear the cases rather than bringing the cases before the ICC.

#### IV. PROSECUTING OFFENSES AGAINST UNITED STATES CITIZENS UNDER THE PASSIVE PERSONALITY PRINCIPLE

Barbarity, sadly, isn't new to our world. Neither is evil. We've taken the fight to it before, and we're taking the fight to it today. When terrorists anywhere around the world have murdered our citizens, the United States held them accountable, no matter how long it took. And those who have murdered James Foley and Steven Sotloff in Syria should know that the United States will hold them accountable too, no matter how long it takes.

John Kerry, Secretary of State, September 3, 2014<sup>140</sup>

Having discussed the various ways in which ISIS's conduct is internationally criminal and the ways in which ISIS could be prosecuted for those international offenses, this article turns to the issue of prosecuting ISIS'S offenses against American citizens.

As noted above, there are five recognized bases of jurisdiction: territorial, active nationality, protective, universal, and passive personality.<sup>141</sup> The most well-grounded bases are the territorial and active nationality bases, and the passive personality principle is perhaps the least favored of the five.<sup>142</sup> However, this article argues that when an offender chooses his victim because of the victim's nationality, passive personality jurisdiction should be the most favored bases.

The State in which the crime occurs has an interest in enforcing the

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<sup>140</sup> John Kerry, *Steven Sotloff*, State.gov (Sept. 9, 2014), <http://www.state.gov/secretary/remarks/2014/09/231242.htm>.

<sup>141</sup> Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L LAW. 435 (Supp. 1935).

<sup>142</sup> Zagaris, Bruce and Jay Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L L.J. 303, 310 (1985).

laws of its State and protecting its territorial integrity.<sup>143</sup> States that could exercise active nationality jurisdiction have an interest in “detering nationals from engaging in conduct that damages that state's reputation and foreign relations.”<sup>144</sup> States that can exercise passive personality jurisdiction have a “legitimate interest” in protecting their citizens abroad.<sup>145</sup>

*A. The United States Has a Right to Prosecute ISIS for Offenses against American Citizens*

1. The Passive Personality Principle

Passive personality jurisdiction is based on a State’s “need to protect nationals living or residing abroad.”<sup>146</sup> “Under the passive personal principle, a state may punish non-nationals for crimes committed against its nationals outside of its territory, at least where the state has a particularly strong interest in the crime.”<sup>147</sup> Controversies and difficulties arise over States exercising passive personality jurisdiction because typically when one State attempts to exercise passive personality jurisdiction, other States consider it a violation of the territorial sovereignty of the country in which the offense occurred.<sup>148</sup> States typically expect passive personality jurisdiction to yield to exercises of national jurisdiction if the offending party is not a national of the country that could exert territorial jurisdiction.<sup>149</sup>

In the past several decades, however, the passive personality principle has received more support from the international community.<sup>150</sup> The passive personality principle asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national. The principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and, or to assassination of a state's diplomatic representatives or other officials.

The international community tends to acquiesce to the exercise of passive personality jurisdiction in cases that involve hostage taking and

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<sup>143</sup> BRIERLY’S at 149-57.

<sup>144</sup> Watson, Geoffrey R., *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT’L L. 41, 68 (1992).

<sup>145</sup> United States v. Yunis (Yunis I), 859 F.2d 953 (D.C.Cir.1988).

<sup>146</sup> Cassese at 282-84. The author continued and added “a substantial mistrust in the exercise of jurisdiction by the foreign territorial State” as a second reason why a State would want to exercise passive personality jurisdiction. *Id.*

<sup>147</sup> United States v. Yunis (Yunis II), 924 F.2d 1086, 1091 (D.C. Cir. 1991).

<sup>148</sup> McCarthy, John G., *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 FORDHAM INT’L L.J. 298 (1989-1990).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

terrorism or “other organized attacks on a state's nationals by reason of their nationality”.<sup>151</sup> Most of the agreement among nations arises over the severity of hostage taking and terrorism.<sup>152</sup>

“Terrorism” can be defined as “acts of planned violence outside the context of war that are directed against individuals or property and that are designed to achieve results by creating fear, or that are committed to achieve violent results as ends themselves.”<sup>153</sup>

McCarthy proposed limiting the application of passive personality jurisdiction to acts of terrorism, and his proposal has three goals: “to ensure extradition in cases involving international terrorism directed at individuals because of their nationality, ensure fairness in the application of the passive personality principle, and would assist states in better protecting their nationals abroad.”<sup>154</sup> These are noble goals, and States should uniformly exercise passive personality jurisdiction if other States are to recognize it as a legitimate basis for extraterritorial jurisdiction. McCarthy, like other authors, approaches exercising passive personality jurisdiction as an extraordinary jurisdictional basis for extraordinary crimes. There is considerable disagreement among and within States about the exact nature of crimes, including terrorism, and many States endorse many different ways of exercising passive personality jurisdiction.<sup>155</sup> This article proposes that if a State can show that an offender

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<sup>151</sup> *Id.* See also Restatement (Third) of Foreign Relations Law § 402, Comment (g) (1987).

<sup>152</sup> *Id.*

<sup>153</sup> McCarthy, 13 FORDHAM INT’L L.J. 298. This definition lines up well with the definition set forth in 18 U.S.C. § 2331. 18 U.S.C. § 2331 reads:

As used in this chapter--(1) the term “international terrorism” means activities that--(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;(B) appear to be intended--(i) to intimidate or coerce a civilian population;(ii) to influence the policy of a government by intimidation or coercion; or(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum[.]

18 U.S.C.A. § 2331. McCarthy would limit the exercise of passive personality jurisdiction to acts of terrorism. He argues that this limitation would reconcile the prosecuting nation’s passive personality jurisdiction with the sovereignty of the country with territorial jurisdiction because the prosecuting nation’s interest in protecting its citizens from terrorism “outweighs” the interest the other country might have in prosecuting the case. McCarthy at 322.

<sup>154</sup> McCarthy at 323.

<sup>155</sup> McCarthy at 321-22, notes 161-162. A major thrust of McCarthy’s article is that there should be a uniform approach to applying passive personality jurisdiction throughout the international community. McCarthy observes that States that have codified the passive personality principle fall into seven categories. Countries in the first category cover all crimes, the second cover specifically enumerated crimes, the third cover crimes with “a certain minimum degree of punishment”, the fourth require “executive consent” before prosecution, the fifth only prosecute when “the accused is found in the territory of the country seeking to



harmed a victim because of the victim's nationality that the exercise of passive personality jurisdiction should be an ordinary basis for prosecuting the offender rather than an "extraordinary" measure taken when territorial jurisdiction and active nationality jurisdiction prosecutions are not undertaken.

## 2. The Constitutional Ability to Prosecute Offenses under the Passive Personality Principle

The most relevant statutes that give the United States subject matter jurisdiction to prosecute ISIS for offenses against United States citizens abroad are 18 U.S.C. § 2331, the Omnibus Diplomatic Security and Antiterrorism Act of 1986<sup>156</sup>, and 18 U.S.C. § 1203, known as the "Hostage Taking Act."<sup>157</sup>

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exercise jurisdiction", the sixth only prosecute if the country with territorial jurisdiction refuses to prosecute the offense, and the seventh requires dual criminality before they will prosecute. McCarty at 313-314, notes 93-100.

The United States falls into the second category, because the United States Code sections that codify the passive personality principle specify the crimes over which the United States can exercise passive personality jurisdiction. An officer of the Attorney General's office, an executive branch of the United States government, must "certify" that the prosecution involves one of the enumerated crimes, so the United States method is also similar to the States that require "executive consent" before exercising passive personality jurisdiction. McCarthy, pages 315-316, notes 108-112, 123.

There is also considerable tension regarding the extradition of criminals to the United States. Given the disparities between the United States penal system and the majority of the rest of the world, it is unsurprising that States are "uncomfortable" extraditing offenders to the United States.

<sup>156</sup> Hereinafter "Antiterrorism Act". 18 U.S.C.A. § 2331 defines

(1) the term "international terrorism" means activities that--

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended--

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

<sup>157</sup> 18 U.S.C.A. § 1203 specifically provides that,

(a) Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

The Hostage Taking Act covers the actions taken by ISIS agents against James Foley, Steven Sotloff, and Peter Kassig because the men were American citizens and were seized, detained, threatened with death, and ultimately killed after their captors attempted to compel the United States government. 18 U.S.C. § 1203(b)(1)(A) empowers the United States to exercise passive personality jurisdiction over hostage-takers. This legislation is in line with the United States obligations and abilities under the 1979 International Convention for the Taking of Hostages (“Hostage Taking Convention”).<sup>158</sup> As described below the United States Federal Courts have recognized that Congress has the power to use the passive personality principle is a valid exercise of United States’ jurisdiction over crimes against Americans abroad.

### 3. The United States’ Growing Acceptance of the Passive Personality Principle: *Yunis* and *Rezaq*

The Court of Appeals for the D.C. Circuit vindicated the exercise of passive personality jurisdiction over those who take Americans hostage in *United States v. Yunis* and again in *United States v. Rezaq*.<sup>159</sup> A Federal District Court in the District of Columbia ruled that it did have subject matter jurisdiction over Yunis, a Lebanese terrorist who hijacked a plane in Beirut that had two American citizens on it.<sup>160</sup> The trial court found that the Hostage Taking Act gave the court jurisdiction over Yunis based on the nationality of the two American passengers on the hijacked plane.<sup>161</sup> Yunis argued that the international community did not accept the passive personality principle and that Congress did not have the authority to empower the government to exercise passive personality jurisdiction.<sup>162</sup>

The trial court rejected Yunis’s arguments, and the appellate court affirmed

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(b)(1) It is not an offense under this section if the conduct required for the offense occurred outside the United States unless—

(A) the offender or the person seized or detained is a national of the United States;

(B) the offender is found in the United States; or

(C) the governmental organization sought to be compelled is the Government of the United States.

18 U.S.C.A. § 1203. *See also* McCarthy at 229.

<sup>158</sup> Article 5 of the Hostage Taking Convention reads, “Each State party shall take such measures as may be necessary to establish its jurisdiction over any of the offenses set forth in [A]rticle 1 which are committed: ... (d) With respect to a hostage who is a national of that State, if that State considers it appropriate.” 34 U.N. GAOR Supp. (No. 39) at 23, UN. Doc. A/34/39 (1979), reprinted in 18 I.L.M. 1456 (1979).

<sup>159</sup> *Yunis II*, 924 F.2d at 1086; *United States v. Rezaq*, 134 F.3d 1121, 1133 (D.C. Cir. 1998).

<sup>160</sup> *Yunis II*, 924 F.2d at 1086.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

the trial court's decision and reiterated its reasoning.<sup>163</sup> The trial court relied on the international acceptance of the Hostage Taking Convention<sup>164</sup> to justify the passive personality principle under international law. The trial court ruled that the Constitution<sup>165</sup> did give Congress the ability to "punish crimes committed overseas" if it clearly states its intent to do so.<sup>166</sup>

Yunis also argued that applying the passive personality principle was improper because he did not seize the Americans because of their nationality.<sup>167</sup> Yunis's argument did not persuade the appellate court, and the court's reasoning suggests that an offender does not have to intend to seize an American because of his nationality to be accountable under the statute.<sup>168</sup>

In the *Rezaq* case, the Court of Appeals for the District of Columbia Circuit found that the terrorists' actions "clearly [fell] within ..., the so-called "passive personality principle." In 1985, Omar Mohammed Ali Rezaq hijacked an Air Egypt flight traveling from Athens to Malta.<sup>169</sup> After gaining control of the plane, Rezaq released the Egyptian and Filipino passengers and kept the Israelis and Americans on board as hostages.<sup>170</sup> When his demands were not met, Rezaq began shooting the Israelis and Americans, killing, among others, American Scarlett Rogenkamp.<sup>171</sup> The Court of Appeals found that the passive personality principle properly granted the United States jurisdiction over Rezaq as a matter of United States and international law.<sup>172</sup> The Court of Appeals even goes as far as to say that Rezaq victimized Rogenkamp because of her American citizenship.<sup>173</sup>

The *Yunis* decision shows, as a matter of United States law and international law in a United States' court, that passive personality jurisdiction is appropriate in situations where terrorists take hostages irrespective of their

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<sup>163</sup> *Id.*

<sup>164</sup> That allowed signatory States to exercise passive personality jurisdiction over offenders who take their citizens hostage. *Id.*

<sup>165</sup> "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations". U.S. Const. art. I, § 8, cl. 10.

<sup>166</sup> *Id.* Congress plainly stated that the act applied when "the offender or the person seized or detained is a national of the United States". 18 U.S.C. § 1203(b)(1)(A). *See also* United States v. Bowman, 260 U.S. 94 (1922) ("If punishment ... is extended to include those [acts] committed outside of the strict territorial jurisdiction, it is natural for Congress to say so in the statute and failure to do so will negate the purpose of Congress in this regard."); *See also* United States v. King, 552 F.2d 833, 850 (9th Cir. 1976) ("[t]here is no constitutional bar to the extraterritorial application of penal laws.").

<sup>167</sup> Yunis, 924 F.2d at 1096-97.

<sup>168</sup> *Id.*

<sup>169</sup> Rezaq, 134 F.3d at 1131-33.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* "Scarlett Rogenkamp was a United States citizen, and there was abundant evidence that she was chosen as a victim because of her nationality. This suffices to support jurisdiction on the passive personality theory" *Id.* at 1133.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

nationality.<sup>174</sup> The *Rezaq* decision establishes that passive personality jurisdiction is much more appropriate when the hostage's nationality is the very reason the terrorists chose that particular hostage.<sup>175</sup> This further supports why exercising passive personality jurisdiction is appropriate over the hostage taking and subsequent murders of the James Foley, Steven Sotloff, and Peter Kassig. ISIS kidnapped these men and their other hostages because of the hostages' nationalities and ISIS intended to use the hostages as leverage to bend their home countries to ISIS's will.<sup>176</sup>

If these men had not been Americans, then ISIS might not have harmed them at all, let alone subject them to months of captivity, privation, torture, and brutal deaths.<sup>177</sup> Instead, ISIS attempted to use their American hostages to compel the United States government to cease its military actions against ISIS.<sup>178</sup> ISIS's actions regarding the capture and murder of the Americans reveal that ISIS was motivated to act against these men because of their citizenship. The United States can clearly show that there is at least probably cause to support that ISIS targeted its victims because of their citizenship, and as such, the nation of their citizenship should have priority in prosecuting the offenders.

That someone should prosecute ISIS for its atrocious and heinous acts is not controversial. What is controversial is the assertion that the passive personality principle should prime the territorial and active nationality bases of jurisdiction.

#### B. *Passive Personality Jurisdiction as a Primary Basis of Jurisdiction*

"So just as your missiles continue to strike our people, our knife will continue to strike the necks of your people."

“Jihadi John”<sup>179</sup>

#### 1. Passive Personality Jurisdiction and Territorial Jurisdiction

States have an interest in exercising territorial jurisdiction over offenses

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<sup>174</sup> Yunis, 924 F.2d at 1091, 1096-97.

<sup>175</sup> *Rezaq*, 134 F.3d at 1133.

<sup>176</sup> *ISIS Beheading Leaves Fate Uncertain for Last Two Hostages*.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> “Jihadi John” is the name given to the executioner of James Foley and Steven Sotloff. The executioner speaks with an accent that analysts believe to be British. This remark was included in Steven Sotloff's execution video, and it expresses that ISIS will continue executing prisoners as long as the United States and other countries continue launching air strikes against ISIS. Mariam Karouny, *U.S. hostage Peter Kassig is killed by Islamic State*, REUTERS.COM (Nov. 16, 2014), <http://www.reuters.com/article/2014/11/16/us-mideast-crisis-beheading-idUSKCN0J008W20141116>.

that happen within the State's borders.<sup>180</sup> ISIS murdered James Foley in the desert south of Raqqa, Syria.<sup>181</sup> Analysts believe that ISIS murdered Steven Sotloff in that area around Raqqa as well.<sup>182</sup> ISIS beheaded and buried Peter Kassig near the Syrian town of Dabeq, which is close to the Turkish border.<sup>183</sup> While ISIS operates in Syria, the organization's leaders, including al-Baghdadi, continue to operate primarily out of ISIS's territory in Iraq.<sup>184</sup> It is very likely that the orders to execute the hostages in Syria came from Iraq. This complicates the exercise of territorial jurisdiction because two States could potentially exercise territorial jurisdiction over the murders: Iraq where the ISIS leaders gave the orders and Syria where the executioners carried out the orders.

As discussed in Part II, there is an argument that neither Iraq nor Syria can properly exercise territorial jurisdiction over ISIS's actions because ISIS controls such large portions of territory in the two countries.<sup>185</sup> Even assuming that Iraq or Syria could exercise territorial jurisdiction over ISIS for its crimes, it is unlikely that either government<sup>186</sup> would be interested in prosecuting ISIS for crimes against foreign nationals.

While the domestic courts of Iraq and Syria are interested in prosecuting offenses within their borders, since the terrorists chose to seize and murder Foley, Sotloff, and Kassig because of their nationality, the United States has a greater interest in prosecuting their murderers than either Iraq or Syria. The passive personality principle serves two purposes: (1) to protect citizens living or traveling abroad and (2) to provide an opportunity to prosecute an offense when there is "substantial mistrust in the exercise of jurisdiction by the foreign territorial State."<sup>187</sup> There is good reason for there to be a "substantial mistrust" about the Iraqi or Syrian governments exercising jurisdiction over the murders of American hostages, and if the United States prosecutes the offenses against Foley, Sotloff, and Kassig, then that would also satisfy the first rationale by deterring future offenders from targeting Americans because of their nationality.

If some of the ISIS members responsible for the crimes against United States citizens are not Iraqi or Syrian citizens, then the United States has an even stronger claim. While the State of the offenders nationality does have an

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<sup>180</sup> BRIERLY'S at 149-57.

<sup>181</sup> Eliot Higgins, *The Hills of Raqqa – Geolocating the James Foley Video*, Bellingcat.com (Aug. 23, 2014), <https://www.bellingcat.com/resources/case-studies/2014/08/23/the-hills-of-raqqa-geolocating-the-james-foley-video/>.

<sup>182</sup> *Id.*

<sup>183</sup> "U.S. hostage Peter Kassig is killed by Islamic State"

<sup>184</sup> *Id.*

<sup>185</sup> This is to say nothing of the unrest in Syria following more than three years of bloody civil war and unrest.

<sup>186</sup> Or whoever comes to power in Syria.

<sup>187</sup> Cassese at 282.

interest in regulating its citizens abroad, that interest pales in the presence of the United States' interest in prosecuting the offenders.

## 2. Passive Personality Jurisdiction and Nationality Jurisdiction

The main purpose of nationality jurisdiction is that it is a method of maintaining international relations with other States.<sup>188</sup> It does so by punishing nationals who might “escape” prosecution in another State, which serves as a deterrent against other nationals committing crimes abroad.<sup>189</sup> While States should owe a duty to other States to regulate their citizens abroad, States owe a higher duty to their own citizens to protect them. The passive personality principle does not mean that citizens will be free from harm while abroad, but it can serve as a deterrent because possible offenders should have to consider that their actions could be tried by a government, like the United States, which enforces much stricter criminal penalties than other States. In this way, other countries who might disapprove of the harsher punishments available under the United States penal code, the United States criminal justice system could promote the peace in other countries because potential offenders would have to question whether their intended victim could subject them to the United States' jurisdiction and harsher penalties.

Active nationality jurisdiction primarily exists to provide an alternative form of jurisdiction to prosecute an offender abroad if the territorial State cannot or will not prosecute the offense.<sup>190</sup> The major interest that States have for enforcing active nationality jurisdiction is to preserve the relationship that the national State has with the territorial State.<sup>191</sup> Unless the actions of the national threaten the security of the territorial State, this interest pales in comparison to interest that the victim's State owes to its citizens to protect them.

“Jihadi John” speaks with a British accent, but no intelligence agency can confirm that he is a citizen of the United Kingdom. If “John” is a citizen of the United Kingdom or another State, then a conflict exists between the passive personality jurisdiction of the United States and the active nationality jurisdiction of the other State. This is true whenever a national of one State harms a national of a second State in the territory of a third State.

While the world questions “Jihadi John's” nationality, French authorities identified Peter Kassig's murderer as Maxime Hauchard, one of more than

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<sup>188</sup> Watson at 68.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 44.

<sup>191</sup> *Id.* at 68.

1,600 French nationals fighting with ISIS in Iraq and Syria.<sup>192</sup> Since Hauchard is a French national, if the United States attempts to prosecute Hauchard as Kassig's murderer, there is a conflict between the United States exercising passive personality jurisdiction and France exercising active nationality jurisdiction. Under the active nationality principle, France has a recognized interest in prosecuting Hauchard for his criminal actions abroad, and the international community traditionally supports an exercise of active nationality jurisdiction in preference to an exercise of passive personality jurisdiction.<sup>193</sup> France's interest in prosecuting Hauchard is aimed at deterring other French nationals from participating in hostage-taking and murder abroad, but France has no interest in protecting the citizens of other States.<sup>194</sup> Peter Kassig had no tangible connections to France, and France likewise had no interest in his safety, well-being, or prosecuting an offense against him. The United States had such an interest because Kassig was a United States citizen.

*C. How Prosecuting ISIS's Crimes against Foreigners Coexists with Prosecuting ISIS's International Crimes*

If the United Nations establishes an international tribunal to prosecute ISIS's international crimes, then no double jeopardy issue arises with prosecuting ISIS's crimes against foreign citizens. The United States, or another passive personality State, would prosecute the offenses against its citizens rather than the international crimes or the crimes against the Iraqi and Syrian peoples, which an international tribunal, with Iraqi and Syrian representation as discussed above, would prosecute.

The kidnappings and murder of foreigners in ISIS territory should not be included in the proceedings before the proposed international tribunal because the crimes against the individual citizens of foreign States, while heinous, are not international crimes.<sup>195</sup> Crimes against humanity, as discussed above, must be, among other things, "widespread and systemic."<sup>196</sup> While ISIS does have a history of targeting, kidnapping, and executing civilian journalists and aid workers from a number of countries<sup>197</sup>, this practice is not "widespread and

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<sup>192</sup> *France Names Maxime Hauchard as an Executioner in Peter Kassig Video*, NBCNEWS.COM (Nov. 17, 2014), <http://www.nbcnews.com/storyline/isis-terror/france-names-maxime-hauchard-executioner-peter-kassig-video-n250186>.

<sup>193</sup> Watson at 68.

<sup>194</sup> France also has an interest in prosecuting Hauchard in France because it would allow them to deny any United States' extradition request.

<sup>195</sup> Rome Statute, art. 9. *See also* Cassese at 25.

<sup>196</sup> Rome Statute, art. 9.

<sup>197</sup> ISIS has allegedly kidnapped citizens of Denmark and Japan in addition to the more well-known abductions of citizens of the United States and the United Kingdom. It is possible that ISIS has abducted more civilian journalists and aid workers from other countries as well,

systemic” enough to qualify as a crime against humanity.

#### CONCLUSION

In conclusion, ISIS is a militant organization that has committed crimes against humanity, war crimes, and crimes against United States and other foreign citizens. The international community, specifically the United Nations Security Council should establish an international tribunal that incorporates Iraqi and Syrian jurists to prosecute ISIS leaders for the war crimes and crimes against humanity that ISIS has committed throughout its campaigns in Iraq and Syria. Establishing an international tribunal would address concerns that Iraqi and Syrian domestic courts would be too inefficient, corrupt, or biased to conduct trials consistent with international ideals of due process and would allow the proceedings to have the gravitas of proceedings before recognized international judicial bodies.

Regarding the crimes against United States citizens, the United States should have the authority to prosecute Abu Bakr al-Baghdadi and the other ISIS leaders and members responsible for the kidnappings and murders of James Foley, Steven Sotloff, and Peter Kassig. Because Foley, Sotloff, and Kassig were targeted because of their American citizenship, the passive personality principle should give the United States’ prosecution precedence over prosecutions based on territoriality or active nationality jurisdiction.

Passive personality jurisdiction should take priority over territorial or active personality jurisdiction because the United States’ interest in protecting its citizens abroad and prosecuting offenses against American citizens targeted because of their nationality supersedes the interests of Iraq or Syria in preserving order within their borders through territorial jurisdiction, especially considering the questionable status of Iraq’s or Syria’s abilities to effectively exercise jurisdiction or prosecute over ISIS’s offenses against foreigners. The passive personality principle should also take primacy over any interest another State has in exercising active nationality jurisdiction over its citizens’ offenses abroad. While it is novel to exercise passive personality in preference to both territorial and national jurisdiction, such an application is appropriate when the offenders victimize the victims because of their nationality, which would cause the passive personality State’s interest in prosecuting the offenses supersedes the interest of the territorial or active nationality State.

Assuming that the United States can obtain personal jurisdiction over ISIS’s leaders and those others complicit in the kidnappings and murders of

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but sometimes countries, companies, and families do not publicize abductions because they believe that it will help to protect the victims. This is partially why uncertainty exists about the number of foreign civilians that ISIS has captured. *How many more Western captives is ISIS holding?*, CNN.COM (Sept. 15, 2014), <http://www.cnn.com/2014/09/15/world/meast/isis-western-captives/>.



James Foley, Steven Sotloff, and Peter Kassig, then the United States should have the authority to prosecute the offenders as what they are: criminals.