

PROSECUTING THE ISLAMIC STATE IN INDIA: REVISITING THE APPLICATION OF THE PASSIVE PERSONALITY PRINCIPLE

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ABSTRACT

Ranging from the destruction of cultural sites to barbaric murders, the crimes committed by the Islamic State of Iraq and Syria are unparalleled, so much so that such atrocities are no longer restricted to the territories of Iraq and Syria, but have in turn inspired attacks to be committed from within the territories of a multitude of states. India is no exception, and even though no special provisions have been adopted to quell this ever-increasing reign of terror, the existing laws along with the provisions pertaining to the active-personality principle would not only thwart domestic attacks, but would also ensure that Indians committing crimes upon territories of Iraq and Syria, and subsequently fleeing such lands to avoid prosecution, don't go unpunished. However, unlike countries such as the United States which have gone to great lengths to provide protection to their citizens abroad, India is yet to adopt provisions relating to passive-personality principle, even though such provisions are need-of-the-hour in protecting Indians overseas. In order to remedy India's regressive approach, this paper will attempt to argue in favour of India mimicking the efforts of US by establishing jurisdiction over crimes of terrorism and hostage-taking against Indians which are not committed in India. This would not only offer protection to Indians abroad, but would also result in the ancillary satisfaction of India's international law obligations. A legal framework including the application of active and passive-personality principles would have the cumulative effect of not only deterring crimes committed against Indians abroad, but would also prevent domestic IS inspired attacks.

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I. INTRODUCTION

The heinous crimes committed by the Islamic State of Iraq and Syria¹ are well-documented and the failures to obviate them even more so. These crimes encompass a wide-array of violations of fundamental human rights and attacks carried out by the members of the IS are often barbaric with different methods being adopted by such agents to instil and perpetuate fear.² Crimes carried out by IS are no longer limited to the territories of Iraq and Syria but have inspired splinter groups to carry out attacks in 29 other countries culminating in this carnage to attain a global character.³ Within the period from 2002 to 2016,⁴ these attacks have resulted in over 2,000 deaths⁵ bringing the toll to 33,000 deaths attributable to the IS and their ancillary groups, with no sight of an impending end of the same.

It is imperative that countries independently adopt a robust and stringent mechanism in order to protect their citizens from the growing threat of the IS. States must not bank upon the formation of any special court in relation to the crimes committed by the IS in Syria and Iraq, or for the domestic courts in Iraq and Syria to step in and prosecute these agents once the arms are finally laid down and the dust is settled. Instead provisions must be incorporated, the application of which would permit them to protect their citizens from crimes regardless of where they are present. The safety of a state's citizens can be developed through reliance on the passive personality principle. Provisions relating to such passive personality principle have been incorporated within various domestic laws, with the United States' Hostage Taking Act, 1984,⁶ being a premier example of the application of the same. This legislation is effective in guaranteeing the safety of such citizens in foreign lands, as it grants the US the power to exercise jurisdiction over the crime of committed on US citizens, regardless of where the crime is committed, i.e. within the US territory or outside.

¹ Hereinafter 'IS.'

² Human Rights Watch, *World Report 2015* 27 (1st ed. 2015).

³ Ewelina Ochab and Kelsey Zorzi, *Effects of Terrorism on Enjoyment of Human Rights: ISIS/Daesh and Boko Haram*, OHCHR (Sep. 23, 2016) <http://www.ohchr.org/Documents/Issues/RuleOfLaw/NegativeEffectsTerrorism/ADF.pdf>.

⁴ Julia Glum, *How Many People Has ISIS Killed? Terrorist Attacks Linked to Islamic State Have Caused 33,000 Deaths*, IB Times (Oct. 8, 2016) <http://www.ibtimes.com/how-many-people-has-isis-killed-terrorist-attacks-linked-islamic-state-have-caused-2399779> ; Patterns of Islamic State - Related Terrorism, 2002 – 2015, START Background Report (Aug., 2016, http://www.start.umd.edu/pubs/START_IslamicStateTerrorismPatterns_BackgroundReport_Aug2016.pdf.

⁵ Tim Lister, *ISIS goes global: 143 attacks in 29 countries have killed 2,043*, CNN (Jan. 16, 2017) <http://edition.cnn.com/2015/12/17/world/mapping-isis-attacks-around-the-world/>.

⁶ The Hostage-taking Act, 18 U.S.C.A. § 1203 (1984).

Protection can be extended to nationals of a particular country by applying the passive personality principle, i.e. extending the jurisdiction over offences which are committed against a State's nationals, by a foreign national.⁷ This principle is based upon the nationality of the victims and is completely independent of where the crime was committed (territorial jurisdiction),⁸ and the nationality of the offender (active personality jurisdiction).⁹ By virtue of the application of this principle, India can extend its jurisdiction over crimes committed against Indian nationals in Syria and Iraq, similar to the US courts' powers contained within the Omnibus Diplomatic Security and Antiterrorism Act of 1986¹⁰ and the Hostage Taking Act, 1984 for the limited crimes of taking hostages and international terrorism committed against US citizens by foreign authors abroad.¹¹

States can therefore theoretically (jurisdiction would be extended if such provisions are incorporated within their domestic framework such as the US Hostage Taking Act) extend their own jurisdiction to crimes committed upon their own nationals based upon the passive personality principle and deter their own citizens from committing crimes elsewhere outside the territory of their own state in furtherance of the active personality jurisdiction, as can be evinced from the Maher H. prosecution¹² in the Netherlands.

Though, the passive personality principle has made enormous strides over the past 30 years by gaining recognition within the international law sphere and also the domestic laws of various European countries, it is merely at an embryonic stage of development in India at this current juncture. Apart from explicit provisions recognizing the active personality principle,¹³ the legislature has not adopted any measures to create inroads for the implementation of the passive personality principle.

Various international instruments such as Convention against the Taking of Hostages, 1979,¹⁴ Convention for the Suppression of Terrorist Bombings, 1997¹⁵ and the Convention

⁷ Edwin D. Dickinson, Introductory Comment to Jurisdiction With Respect to Crime, 29 Am. J. of Int'l L. 474 (1935).

⁸ K.D. Gaur, Textbook on The Indian Penal Code 55 (4th ed. 2009).

⁹ *Id.* at 57.

¹⁰ S. 1202, The Omnibus Diplomatic Security and Antiterrorism Act 18 U.S.C.A. § 2331 (1986).

¹¹ Ss. (b), The Hostage-taking Act, 18 U.S.C.A. § 1203 (1984).

¹² Prosecution of Maher H., Case No. 09/767116 – 14 (District Court of The Hague, 1/6/2016).

¹³ The Indian Penal Code, 1860 §§3, 4.

¹⁴ Convention against the Taking of Hostages, 1979, 1316 U.N.T.S. 205 (1979), art. 5(1)(d) [Hereinafter 'Hostage Taking Convention.'].]

¹⁵ International Convention for the Suppression of Terrorist Bombings, 1998 2149 U.N.T.S. 284 (1998), art. 6 [Hereinafter Terrorist Bombing Convention.].]

against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984,¹⁶ enable the signatories to incorporate the passive personality principle regarding certain crimes in pursuance to their international obligations. These instruments provide member-states with the discretion to codify and subsequently assume the passive personality jurisdiction for crimes each respective convention seeks to proscribe. Apart from these conventions, other instruments do permit countries to adopt a passive personality jurisdiction for certain crimes,¹⁷ however, the crimes committed by the IS against foreigners in Iraq and Syria fall squarely within the purview of the crimes proscribed by the aforementioned conventions, by reason of which emphasis would be laid upon the pertinent provisions of these conventions in the following chapters.

Therefore, countries such as India can take a page from the U.S's book and establish specific provisions pertaining to the passive personality principle especially in light of member states to these instruments being legally bound by the terms of those conventions which they accede to or ratify.

II. THE EXISTING LAW IN INDIA: A ROBUST LEGAL FRAMEWORK TO NEGATE DOMESTIC TERROR

In the current context of the armed conflict in Syria and Iraq, India has not adopted any special legislation to combat the ever-degenerating situation and to prevent its own citizens from travelling to these war-ravaged areas.¹⁸ Therefore, to deter its own citizens from committing crimes in these war-afflicted areas, reliance can be placed only upon the already existing legislations, which in turn are adequate in putting a stop to this sprouting scourge.

¹⁶ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85 [Hereinafter 'Convention against Torture.'].]

¹⁷ For instance, *see* UN Convention against Transnational Organized Crime, Res. 55/25 of 15 November 2000, Art. 15(2)(a)art. The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1400 *U.N.T.S.* 231 (1973); 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 *U.N.T.S.* 178, Art. 5(3); International Convention for the Suppression of the Financing of Terrorism, 1035 *U.N.T.S.* 167 (1999), Art. 7.

¹⁸ Library of Congress, *Treatment of foreign fighters in select Foreign Jurisdictions*, United States Congress (Dec., 2014) <https://www.loc.gov/law/help/reports/pdf/2015-011419%20FINAL%20RPT.pdf>.

The pertinent legal framework in India is established through the Unlawful Activities (Prevention) Act, 1957,¹⁹ along with the Citizenship Act, 1955²⁰ and the Passports Act, 1967²¹ and the Indian Penal Code.

A. The Unlawful Activities (Prevention) Act, 1963

Section 39 of UAPA criminalizes any conduct which pertains to providing support to a terrorist organization and include acts such as inviting and procuring support for a terrorist organization, arranging meetings to further such organization's activities etc. This section is therefore the most efficacious provision to combat those individuals who draw support for terrorist organizations such as the IS using online means, the same of which is increasingly being resorted to not only to spread radicalism but also to lure individuals outside their domestic territory to travel and subsequently commit crimes in Iraq and Syria.²²

Section 15 defines what would constitute a terrorist act and includes acts which would threaten the unity, integrity, security or sovereignty of India²³ and necessarily imputes a physical act such as the use or making of bombs²⁴ while Section 2(1)(o) lays down the definition of unlawful activity and encompasses even those acts which are not covered under the purview of Section 15 such as acts of speaking or writing words. Therefore, these sections would catch within their ambit those acts committed by individuals with a view to spread fear and attack the sovereignty of India in furtherance of the IS's bidding. These provisions are imperative in repelling those attacks committed by fighters returning from Iraq and Syria who carry out attacks in their domestic countries due to their affiliation with the IS.²⁵

Additionally, by virtue of Section 20, those individuals who are members of the IS would be liable for imprisonment, which may extend to imprisonment to life, due to Section 20 proscribing membership to terrorist gangs and organizations. This is supplemented by a notification released by the Central Government²⁶ through which the IS as well as all its

¹⁹ Unlawful Activities (Prevention) Act, 1967 § 15 [Hereinafter 'UAPA'].

²⁰ Citizenship Act, 1955 § 10.

²¹ Passports Act, 1967 § 10(3).

²² *Profile on Mehdi Masroor Biswas*, The Times of India (Dec. 13, 2014) <http://timesofindia.indiatimes.com/india/Who-is-Mehdi-Masroor-Biswas/articleshow/45501624.cms>.

²³ *Hitendra Vishnu Thakur v. State of Maharashtra*, (1994) 4 S.C.C. 602.

²⁴ *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra*, (2010) 5 S.C.C. 246.

²⁵ Prominent examples are those of Jewish Museum of Belgium shooting in Brussels resulting in the deaths of four people, the November 2015 Paris attacks in France resulting in 130 deaths and the 2015 Ankara bombings in Turkey resulting in 103 civilian deaths.

²⁶ Government of India, *Banned Organisations*, Ministry of Home Affairs (Nov. 19, 2015) <http://www.mha.nic.in/BO>.

manifestations have been recognized as terrorist organizations²⁷ for the purposes of UAPA. Those sympathizers of the IS who raise funds for the outlawed terrorist organization, regardless of whether such funds are used for the purpose of carrying out terrorist acts,²⁸ would be penalized under Section 17, with prosecutions already being carried out against IS agents under the provisions of the same.²⁹

To conclude, the UAPA proscribes and criminalizes a range of conduct which would aid in disabling IS agents and sympathizers from mounting attacks from within the country and financially supporting such an outlawed organization. Attacks committed in pursuance to the IS's radicalism including the overt physical acts of making bombs etc. and acts which do not manifest to the former's level such as boosting support for the IS in the form of inflammatory speeches³⁰ would also attract the stringent provisions of UAPA, ensuring the protection of India's security, integrity and sovereignty from agents of the IS and returning fighters from mounting an offensive from within the country.

B. The Indian Penal Code, 1860

Section 125 of the Indian Penal Code illegalizes the act of waging war against the government of any Asiatic Power, with such government establishing an alliance with the Government of India or which is at peace with the Government of India and imposes a punishment of imprisonment for life or for a term which may extend to seven years. This provision recognizes the necessity of the Government of India to establish and safeguard its friendly relations with other Asiatic Powers and is based on the principle of international peaceful co-existence.³¹ Prosecutions have already been initiated under this provision against those who maintain online social-media handles and post pro-IS material either for the purposes fear-mongering or for garnering support for their cause.³²

²⁷ Bharti Jain, *Centre bans ISIS as terrorist organization*, The Times of India (Feb. 26, 2015) <http://timesofindia.indiatimes.com/india/Centre-bans-ISIS-as-terrorist-organization/articleshow/46385269.cms>.

²⁸ *Malsawmkimi v. National Investigation Agency*, Criminal Appeal Nos. 172 of 2011 and 65 of 2012 (Gauhati High Court, 10/9/12).

²⁹ *ISIS operative arrested in Sikar*, The Indian Express (Nov. 16, 2016) <http://indianexpress.com/article/india/india-news-india/rajasthan-isis-operative-arrested-in-sikar-4379307>.

³⁰ *Incidents and Statements involving SIMI: 2015*, South Asia Terrorism Portal (2015) <http://www.satp.org/satporgtp/countries/india/terroristoutfits/simi2015.htm>.

³¹ Gaur, *supra* note 8, at 235.

³² *Centre's nod needed to chargesheet Mehdi Masroor Biswas*, Deccan Chronicle, available at <http://www.deccanchronicle.com/150430/nation-current-affairs/article/centre%E2%80%99s-nod-needed-chargesheet-mehdi-masroor-biswas>, last seen on 5/5/2017.

Similarly, Section 126 make depredation on the territory of any state which is either at peace with the Government of India or has established an alliance with the Government of India an offence punishable with a term of imprisonment extending to seven years.³³ The only distinction between the current provision and the former provision is that the current provision is applicable to any foreign country while the former is only applicable for Asiatic Powers.³⁴ The combination of these two provisions would therefore serve as a potent deterrent against Indian nationals travelling to Syria and Iraq committing crimes against governmental forces.

C. The Citizenship Act, 1955 and The Passports Act, 1967

Section 10 of the Citizenship Act empowers the government to terminate the citizenship of an Indian for disloyalty to the Constitution and in cases of communicating or providing assistance to an enemy, which is at war with India. The termination of citizenship has the consequence of preventing an Indian's unencumbered movement into the country. Supplementary to the above is the Passports Act, 1967, which allows the government to refuse to issue or revoke a passport or travel documents in the interest of the security, sovereignty, unity and integrity of India.³⁵

Therefore, the provisions of the Citizenship Act and the Passports Act, which employed in cohesion with the penal provisions of the IPC and the UAPA are ample in deterring Indian citizens from travelling to Iraq and Syria and subsequently committing crimes upon such territories and also in quelling acts committed against India's sovereignty with a view of instilling fear within the nation.

III. EXERCISE OF JURISDICTION BY INDIAN COURTS FOR CRIMES COMMITTED EXTRATERRITORIALLY THROUGH THE PASSIVE PERSONALITY AND ACTIVE PERSONALITY PRINCIPLE

The roles played by both the active personality principle and the passive personality principle are crucial for deterring and subsequently putting an end to the crimes committed by the IS. The IS not only recruits members from Syria and Iraq, but also, due to the convoluted

³³ Gaur, *supra* note 8, at 236.

³⁴ *Supra* note 18.

³⁵ *Supra* note 21.

lifestyle it portrays on social media,³⁶ seeks support from those beyond the territory of affected states as well. To circumvent any radicalization and to prevent its citizens from travelling to the affected states and committing crimes on the IS's bidding, the active nationality principle plays an integral role. As the active personality principle pivots on the nationality of the offender, it enables the state (of which he is a citizen of) to assume jurisdiction over crimes committed by him, even if such crime was committed beyond the state.³⁷ Therefore, those individuals who flee from the territories of Syria and Iraq can be punished by a state through its municipal law for crimes which were not committed within the territorial confines of such state. Similarly, the passive personality principle enables a state to assume jurisdiction over crimes committed over its citizens abroad which would in turn have the effect of thwarting crimes against such citizens.

A. Jurisdiction Established Through the Active Personality Principle

The active personality principle is already well-developed and codified within the provisions of the Indian Penal Code, 1860 and the Code of Criminal Procedure, 1973. Section 4(1) of the IPC categorically and unequivocally lays down that the provisions of the IPC would extend to Indians wherever they may be outside India.³⁸ Section 3 further empowers the Indian courts to assume jurisdiction over Indians who have committed crimes outside the territory of India.³⁹ Therefore, the cumulative effect of Section 3 and Section 4 would be when any crime is committed by an Indian beyond the territory of India, the Indian courts can extend their jurisdiction over such crimes as if they were committed within the Indian territory.⁴⁰ Lastly, the procedure pertaining to the prosecution of Indians committing crimes abroad is laid down within Section 188 of the CrPC⁴¹ and therefore the active personality principle is definitively contained within Section 3 and Section 4 of the IPC and Section 188 of the CrPC.⁴²

To conclude, when any crime punishable by Indian law, is committed by an Indian in Iraq and Syria, the Indian courts can exercise jurisdiction over such crimes in pursuance of the active personality principle. This would have the effect of thwarting Indians from

³⁶ Jessica Stern & J. M. Bergerlenka, *ISIS: The State of Terror* 212 (1st ed. 2015).

³⁷ K.D. Gaur, *Commentary on the Indian Penal Code* 57 (2d ed., Universal Law Publishing 2013).

³⁸ *Id.* at 59.

³⁹ *Rao Bahadur Singh v. State of UP*, A.I.R. 1953 S.C. 394; *Central Bank of India Ltd v. Ram Narain*, A.I.R. 1955 S.C. 36.

⁴⁰ *Pheroze v. State*, 1964 (2) Cr.L.J. 533.

⁴¹ *Narayan v. Emperor*, A.I.R. 1935 Bom. 437.

⁴² Gaur, *supra* note 8.

committing crimes in Iraq and Syria and subsequently fleeing to the territory of India to avoid domestic prosecution.

1. The Maher H. Case

Though no such prosecution has taken place under the Indian law, the *Maher H. case*⁴³ is an important development of the active personality principle, especially with regard to the armed hostilities ongoing in Iraq and Syria. In this case, a Dutch national was the perpetrator of certain terrorist acts in Syria, who, whereupon the cessation of hostilities returned to the Netherlands. Furthermore, in his defence, he claimed that the Dutch criminal law pertaining to terrorism was inapplicable as an international armed conflict was taking place, and as he was an active participant of the same, he would be afforded with the protections as extended by the Geneva Conventions,⁴⁴ the end effect being that he could only be prosecuted for alleged war crimes and not for terrorism.

The defendant was exploiting the principle of ‘combatant immunity,’ a key feature present within innumerable International Humanitarian Law instruments.⁴⁵ Combatant immunity affords protection to lawful combatants from punishment under domestic law for committing lawful acts of war, and is available only for acts committed during an international armed conflict and not for a non-international armed conflict (“NIAC”).⁴⁶

However, the Dutch district court rejected this argument and did not afford such immunity to the accused as not only did a NIAC exist in Syria, but also found that participants in armed hostilities belonging to an organized armed group as opposed to members of armed forces were not permitted to resort to use of force in the context of an NIAC. Lastly, while concluding, the district court held that civilians who directly engage in any armed hostilities in the context of a NIAC would not be afforded with any combatant immunity and consequentially can be prosecuted for crimes committed in pursuance of their armed hostilities⁴⁷ and therefore the court could exercise jurisdiction over the crimes

⁴³ *Supra* note 12.

⁴⁴ Geneva Convention (I) for the amelioration of the condition of the wounded and sick in armed forces in the field, 75 U.N.T.S. 31 (12/8/1949), Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85 (12/8/1949), Geneva Convention (III) relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135 (12/8/1949), Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287 (12/8/1949).

⁴⁵ Marten Zwaneburg, Foreign Terrorist Fighters in Syria: Challenges of the “sending” state, *Int'l L. Stud.* 204, 210 (2016).

⁴⁶ Sandesh Sivakumaran, *The Law Of Non-International Armed Conflict* 514 (1st ed., OUP 2012).

⁴⁷ Zwaneburg, *supra* 45, at 211.

committed in Syria. The court convicted the accused and sentenced him to be imprisoned for a term of three years.⁴⁸

2. The Sharia4Belgium Case

Other prominent cases are those of the *Sharia4Belgium* case⁴⁹ and the *Context* case,⁵⁰ wherein 46 individuals were accused of terrorist-related crimes in Syria, of which 36 were tried *in absentia*, making it one of the largest prosecutions in Europe of foreign terrorist fighters. Convictions were also sustained against some of the accused on the basis of evidence ranging from testimonies of those terrorists who returned from Syria, tapped phone calls to evidence collected from social media.

The Context Case

The *Context* case⁵¹ involved 9 accused who were indicted for crimes pertaining to participating in terrorist training camps in Syria and conspiracy to commit murder or manslaughter with a terrorist motive in Syria. These accused were charged for the conspiracy to commit these crimes rather than the crimes itself, due to the relatively lower evidentiary burden of proving the same.

B. Jurisdiction Established Through the Passive Personality Principle

The passive personality principle permits a state to extend its jurisdiction over crimes which are committed against its nationals, regardless of where these crimes take place.⁵² This principle is based upon the doctrine that the state is burdened by the duty to protect its nationals abroad.⁵³ Therefore, under this principle, the sovereign is concerned with the crime's effect rather than where it occurs.⁵⁴ A limitation to this seemingly universal acceptance is that this principle has not received support for its application to ordinary crimes and torts, however there is a greater readiness to apply this principle to cases involving

⁴⁸ Bibi van Ginkel, *Prosecuting foreign terrorist fighters: What role for the military?* 8 (1st ed., Netherlands Institute of International Relations 2016).

⁴⁹ Prosecution of Fouad Belkacem, Case No. FD35.98.47-12 - AN35.F1.1809-12 (Court of First Instance in Antwerp, 11/5/2015).

⁵⁰ Context Prosecution, Case No. ECLI:NL:RBDHA:2015:14365 (District Court of The Hague, 8/6/2016).

⁵¹ *Id.*

⁵² Dickinson, *supra* note 7.

⁵³ United States v. Yunis, 681 F. Supp. 896, 901 (Columbia Circuit Court of Appeals, 1988); The Lotus Case (France v. Turkey), P.C.I.J. (ser. A) No. 10, at 55 (1923).

⁵⁴ United States v. Aluminium Corporation of America, 377 U.S. 271 (Supreme Court of the United States, 1964).

terrorism and hostage-taking⁵⁵ and this readiness is attributable to the severity associated with such crimes.⁵⁶

Though the early development and application of this principle had been mired with controversy, in recent times it has garnered greater support. During its nascent stage, this principle was not the recipient of any international sanction,⁵⁷ however gradually, it has accumulated considerable support.⁵⁸ This has crystallized in a greater acceptance, resulting in more countries incorporating this principle in their municipal legal framework. However, no discernible efforts have been adopted by the Indian legislature to incorporate this principle, even though the existence of such a principle is need of the hour in relation to terrorist and hostage-taking cases.

1. Passive Personality Principle in the US

Though India has made no inroads in incorporation of the passive personality principle, the efforts of the US would be in stark contrast to the same, cementing their jurisprudence to be in the forefront in relation to this principle. The relevant pieces of legislation of the US to prosecute crimes committed by members of the IS against US citizens are the Omnibus Diplomatic Security and Antiterrorism Act of 1986⁵⁹ and the Hostage-taking Act, 1984.⁶⁰ Though the US has not adopted any special legislation with regard to deterring its citizens from travelling and committing crimes in Iraq and Syria (similar to the Indian position), the existing framework is sufficient, especially in light of the relevant legislations incorporating the passive personality principle within them. The extension of jurisdiction of the US courts through the application of the passive personality jurisdiction is in accordance with the US' obligations under the 1979 International Convention for the Taking of Hostages.⁶¹

The relevant provisions of the abovementioned legislations which have codified the passive personality principle are Subsection (b) of the Hostage-taking Act and Section 1202 of the Antiterrorism Act. Subsection (b) of the Hostage-taking Act extends the court's

⁵⁵ Gerald Waltman III, *Prosecuting ISIS*, 85 Miss. L. J. 23 (2015).

⁵⁶ John G. McCarthy, *The Passive Personality Principle and Its Use in Combatting International Terrorism*, 13 Fordham Int'l L. J. 298, 302 (1989).

⁵⁷ W.E. Beckett, *The Exercise of Criminal Jurisdiction Over Foreigners*, 6 Brit. Y.B. of Int'l L. 44, 58 (1925).

⁵⁸ McCarthy, *supra* note 56, at 304.

⁵⁹ *Supra* note 10.

⁶⁰ *Supra* note 11.

⁶¹ *Supra* note 14.

jurisdiction over the crime of hostage-taking occurring outside the US, if the offender or the person seized or detained is a national of the US. Similarly, Section 1202 of the Antiterrorism Act permits the court to establish an extraterritorial jurisdiction over terrorist conduct abroad against US nationals.

2. Prosecutions Involving the Passive Personality Principle in the US

Two notable prosecutions, namely the *Yunis* case⁶² and the *Rezaq* case,⁶³ under the Hostage-taking Act have further solidified the application of the passive personality principle in the US for specific crimes committed abroad. In *Yunis*, the accused had allegedly hijacked a flight in Beirut, including two Americans, which enabled the US courts to exercise jurisdiction over the crimes. It is imperative to note that the only link enabling the US court to exercise jurisdiction was that the crime was committed against the hostages of which two were Americans. The accused claimed that the court would not have jurisdiction over such crime as it lacked the subject-matter and personal jurisdiction however this contention was rejected by the trial and subsequently by the appellate court.⁶⁴

The court explicitly held that the passive personality principle and the universal principle (as scholars unanimously agreed that the crimes of hostage-taking and aircraft piracy would fit within the category of heinous crimes for the purpose of asserting universal jurisdiction)⁶⁵ would allow the court to exercise jurisdiction over the crimes of the accused and therefore both these principles provided an appropriate basis for jurisdiction in the case.⁶⁶ The court also ruled that it is not necessary that a crime which is committed, was committed because of the victim's nationality, rather, the effect being that an offender does not have to intend to seize an American because of his nationality to be accountable under the Hostage-taking Act.⁶⁷

The *Rezaq* case involves similar facts as the *Yunis* case, wherein the accused hijacked an Air Egypt aircraft which was travelling from Athens to Malta. After the accused gained control of the plane, he started killing Israeli and American hostages due to the non-fulfilment of his demands while releasing the Egyptian and Filipino hostages. The accused

⁶² United States v. Yunis, 681 F. Supp. 896, 901 (Columbia Circuit Court of Appeals, 1988).

⁶³ United States v. Rezaq, 134 F.3d 1121, 1133 (Columbia Circuit Court of Appeals, 1998).

⁶⁴ Lynda M. Clarizio, *United States v. Yunis*. 681 F.Supp. 896, 83 The Am. J. of Int'l L. 94, 95-97 (1989).

⁶⁵ M. Cherif Bassiouni, *International Criminal Law: Crimes 31-32* (1st ed., Transnational Publishers 1986).

⁶⁶ Clarizio, *supra* note 64, at 97.

⁶⁷ Abraham Abramovsky, *Extraterritorial Jurisdiction: The United States Unwarranted Attempt to Alter International Law in United States v. Yunis*, 15 Yale J. Int'l L. 121, 135 (1990).

was apprehended soon after, and the Court of Appeals found that the United States could exercise jurisdiction over Rezaq through the application of the passive personality principle. The court further held that the American hostages were targeted and victimized due to their American citizenship due to which assuming such jurisdiction over Rezaq's crime would be proper.

Even though both the cases elucidate the same point of law pertaining to the assumption of extraterritorial jurisdiction through the passive personality principle, a divergence with regards to its application is established. The *Yunis case* unequivocally shows that the application of the passive personality principle is proper in those cases in which American citizens are taken as hostages regardless of whether the terrorist possessed any motivation to target any victim due to his American citizenship. In stark contrast, the *Rezaq case*, requires that the passive personality principle to be applied only in those cases in which a victim is targeted due to their nationality i.e. the hostage's nationality is the very reason the terrorists chose that particular hostage.⁶⁸ Despite these opposing viewpoints, it is largely accepted that the terrorist acts are predominantly committed on the basis of a victim's nationality.⁶⁹ Hence, the principle should apply only to those cases involving acts of international terrorism that are directed against individuals due to their nationality.⁷⁰

However, apart from the crimes proscribed by the Hostage-taking Act, 1984 and the Antiterrorism Act, 1986, the US courts have been cautious in extending its jurisdiction over other crimes committed on foreign soil against US citizens and apart from the aforementioned cases, have not had much occasion to further develop this principle.⁷¹

IV. INTERNATIONAL LAW OBLIGATIONS OF INDIA TO INCORPORATE THE PASSIVE PERSONALITY PRINCIPLE: POTENTIAL TO EXTEND PROTECTION TO INDIANS ABROAD

The preceding sections established that though no special legislations have been adopted in India with regards to the ongoing conflict in Syria and Iraq, the extant laws themselves represent a robust mechanism which empower courts to not only prosecute Indian nationals from committing crimes in those war-ravaged areas through the codified provisions

⁶⁸ Waltman, *supra* 55, at 28.

⁶⁹ D.H. Bell, *Comment: The Origins of Modern Terrorism*, 9 *TERRORISM* 307, 307-09 (1987).

⁷⁰ McCarthy, *supra* note 56.

⁷¹ Geoffrey R. Watson, *The Passive Personality Principle*, 28 *Tex. Int'l L. J.* 1, 11 (1993).

of the active nationality principle, but also protect India's sovereignty, security and unity by making affiliations, and criminal acts committed in pursuance to such affiliation illegal.

However, notwithstanding what has been said in the foregoing paragraph, the existing Indian laws are ineffectual and inadequate in protecting those Indian nationals who are currently on the Iraqi and Syrian territory and have not partaken in the armed conflict i.e. those Indians who have travelled to Iraq and Syria, but have done so not in support of the IS but rather to provide humanitarian assistance, covering the war due to a journalism assignment etc.

This position can be rectified by mimicking the efforts of the US in protecting their citizens in foreign territories which had been adopted in furtherance of their obligations imposed by the Terrorist Bombings Convention, Hostage-taking Convention and Convention against Torture. As India has ratified the Terrorist Bombings Convention,⁷² has acceded to the Hostage-taking Convention⁷³ and is a signatory to the Convention against Torture,⁷⁴ potential exists to incorporate such obligations within the domestic legal framework as the US has done.

India would be legally bound by the terms of the Terrorist Bombings Convention and the Hostage-taking Convention by virtue of its respective ratification and accession to these instruments, though the same has not been effected in municipal laws. The only stumbling-block would be with regards to the obligations under the Convention against Torture is that India is a mere signatory to the same.

A. Hostage-Taking Convention

The Hostage-taking Convention was formulated in light of a succession of incidents involving hostage-taking during the 1970's, especially against foreigners resulting in the international community being shaken to its core, with the preamble reaffirming this crime being a grave concern to the same.⁷⁵ Article 1 defines the crime of hostage-taking as one involving the seizing or detention of an individual for the purposes of compelling a third

⁷² International Convention for the Suppression of Terrorist Bombings, 1998, 2149 *U.N.T.S.* 284 (9/1/1998).

⁷³ International Convention against the Taking of Hostages, 1979, 1316 *U.N.T.S.* 205 (26/9/1978).

⁷⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 *U.N.T.S.* 85 (10/12/1984).

⁷⁵ Ben Saul, *International Convention against the Taking of Hostages*, Sydney Law School Research Paper No. 14/105, p. 5 (2014).

party to do or to abstain from doing a particular act, with Article 2 requiring the aforementioned provision to be made punishable in the domestic criminal law.

Article 5 lays down that that the member-states may establish jurisdiction over the crime of hostage-taking when such crime is committed against a national of such state, i.e. the hostage so taken is a national of such state, so as to compel a state to do or from abstaining to do an act.⁷⁶ Assimilating such measures within the Indian legal framework would be fruitful in deterring instances of Indians being taken by hostages, especially in Iraq and Syria. The instance of four Indians being beheaded publicly after being taken hostage for attempting to flee a warzone,⁷⁷ would lie squarely within the purview of this convention, showing the adoption of such provisions being need of the hour.

B. Terrorist Bombings Convention

The Terrorist Bombings Convention does not define the term “terrorism,” rather proscribes the intentional and unlawful placing and detonation of explosives in a place of public use, an infrastructural facility or a governmental facility with the intention of either causing death or bodily injury or causing destruction to the targeted area.⁷⁸ Article 6 allows states to exercise jurisdiction over the outlawed conduct when the offence is committed against a national of such state thus paving way for member-states to adopt a passive personality jurisdiction over such crime.

Therefore, India can meet its obligations under this convention by not only criminalizing the conduct proscribed by Article 2 but can also adopt a passive personality jurisdiction as prescribed within Article 6, over such crimes by incorporating such provisions within the domestic framework. Another example wherein Indian courts could have exercised passive personality jurisdiction over crimes committed by IS agents was the suicide attack mounted upon a Canadian embassy resulting in the death of two Indian nationals.⁷⁹

⁷⁶ United States v. Salad, 907 F.Supp.2d 743 (East District of Virginia, 2012).

⁷⁷ *4 Indians killed by ISIS in Syria*, India Today (Feb. 1, 2016) <http://indiatoday.intoday.in/story/4-indians-killed-by-isis-in-syria/1/585100.html>.

⁷⁸ International Convention for the Suppression of Terrorist Bombings, 1998, 2149 *U.N.T.S.* 284 (9/1/1998), art. 2.

⁷⁹ *Two Indians among 24 killed in Afghanistan, ISIS claim strike*, NDTV (Jun. 21, 2016) <http://www.ndtv.com/indians-abroad/two-indians-among-24-killed-in-afghanistan-isis-taliban-claim-stake-1421424>.

C. UN Convention against Torture

By becoming a signatory to this convention, India has established a provisional status for such treaty.⁸⁰ This status imposes an obligation upon the signatory to not to defeat the object and or the purpose of the treaty.⁸¹ Therefore, even though no legally binding obligation is formed for incorporating the provisions of this convention into the domestic framework, India has signalled its intention to accede to this convention later on by becoming a signatory. Through such a move, there exists a possibility for India to conform to the requirements laid down within this convention.

Through Article 2 of this convention, the crime of torture is illegalized, with an extensive definition of torture being established through Article 1. Article 5(1)(c) provides states with the power to take measures in order to establish jurisdiction over the crime of torture when the victim of such crime is a national of that state, hence establishing a passive personality jurisdiction for the crime of torture.⁸²

The ghastly kidnapping of an Indian Catholic priest in Yemen by the IS, who was subsequently tortured and crucified,⁸³ would be covered under the provisions of this convention, demonstrating a need for the expeditious adoption of the passive personality jurisdiction in relation to this crime.

D. Aut Dedere Aut Judicare: The Obligation to Prosecute or Extradite

A commonality found within all three of the aforementioned conventions is the existence of the principle of *aut dedere aut judicare*.⁸⁴ This principle obliges states to either extradite or prosecute an individual accused of a crime,⁸⁵ who is found on the territory of such states, and encompasses within itself the principles permitting the exercise of

⁸⁰ Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, [1951] I.C.J. Rep. 15 (May 28, 1951).

⁸¹ *Megalidis v. Turkey* (Turkish - Greek Mixed Arab Tribe), 4 Annual Digest of Public International Law cases 395 (1928).

⁸² Bruce Zagaris, *International White Collar Crime: Cases and Materials*, 237 (1st ed. Cambridge University Press 2010).

⁸³ Sarah Malm, *ISIS 'crucifies Catholic priest on Good Friday' after kidnapping him from old people's home where four nuns were shot dead*, DailyMail (Mar. 28, 2016) <http://www.dailymail.co.uk/news/article-3512288/ISIS-carries-Good-Friday-crucifixion-Indian-Catholic-priest-Yemen-kidnapped-three-weeks-ago.html>.

⁸⁴ Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell ed. 1901); "When appealed to, a State should either punish the guilty person as he deserves, or it should entrust him to the discretion of the party making the appeal".

⁸⁵ Monica P. Moyo, *Final Report on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)*, 54 Int'l Legal Materials 758, 761 (2015).

jurisdiction over crimes committed outside the territory of a state.⁸⁶ This principle is propounded in a catena of international conventions, with such conventions recognizing the critical role that such an obligation plays in preventing offenders from escaping justice and thereby establishing an international framework to fight impunity.⁸⁷

Treaties which contain this principle can be classified into two types:⁸⁸ first, those conventions which require the states to extradite the accused, and only when such extradition is refused, the obligation to prosecute domestically arises. Second, those in which the conventions oblige the states to prosecute, with extradition becoming an obligation after such state's failure to prosecute, or with both extradition and prosecution of the accused constituting as available options. The purpose behind such an obligation is to prevent perpetrators of serious crimes from escaping prosecution by making it certain that they cannot find refuge in any State.⁸⁹

The relevant provisions of the aforementioned conventions⁹⁰ clearly document the second principle by stating that when the state upon which the crime is committed refuses to extradite the accused, such state would be obliged (without any exception) to submit such case for prosecution in accordance with the laws of such state.

This obligation only arises after the coming into force of such convention (containing the obligation) for the state concerned. Therefore, after a state becomes a party to such a convention it would become entitled to request any other member-states to comply with the obligation to extradite or prosecute.⁹¹ As India is a member-state of the Hostage-taking Convention and the Terrorist Bombings Convention, it has to adopt measures for the implementation of this obligation, and with its failure to do so, would remain in breach of its obligation.

The importance of this principle cannot be understated, as its provisions pertaining to the extradition of an accused, enable and facilitate states to exercise a passive personality

⁸⁶ *Id.* at 762.

⁸⁷ *Id.* at 761.

⁸⁸ Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, ICJ Reports 2012, 422 (separate opinion of Judge Yusuf).

⁸⁹ *Id.*

⁹⁰ International Convention against the Taking of Hostages, 1979, 1316 U.N.T.S. 205 (26/9/1978), art. 8(1); International Convention for the Suppression of Terrorist Bombings, 1998, 2149 U.N.T.S. 284 (9/1/1998), art. 8(1); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 U.N.T.S. 85 (10/12/1984), art. 7(1).

⁹¹ *Id.* at 458.

jurisdiction, by seeking the extradition of an accused, for those crimes committed beyond their territory,⁹² and even if a request for an extradition is unheeded, then the state to which the request is made would be obliged to carry out domestic prosecution, ensuring that serious crimes do not go unpunished.

V. CONCLUSION: THE CRITICAL ROLE PLAYED BY INDIAN COURTS IN PROSECUTING THE IS

The wave of terror spread by the IS is unprecedented, with states around the world reinforcing their domestic laws to not only thwart attacks from within, but to also protect their citizens abroad. Such desperate times inexorably call for desperate measures, with the prevailing circumstances justifying resort to jurisdiction established through the passive personality principle. This form of jurisdiction is controversial, with criticism often being directed towards it due to the inability of domestic law enforcement agencies being unable to obtain custody of an accused,⁹³ resulting in the failure of prosecution on the basis of this principle. Another scathing criticism has been that when a state receives competing requests to extradite a particular accused from different states seeking to exercise their jurisdiction over such accused on the basis of a range of principles (i.e. territorial, active personality, passive personality, universal principle and the protective principle) more often than naught, the state receiving such requests would give preference to states asserting their jurisdiction over the accused through the nationality principle or territorial principle as opposed to the passive personality principle.

Even though this principle is not free from condemnation, it represents the most efficacious method that India can exercise to protect its citizens who are on foreign lands. By taking recourse to such a principle for exercising jurisdiction over serious crimes committed against Indians upon the territories of Iraq and Syria, members of the IS would be deterred from committing atrocities against Indians, thus protecting Indians abroad. Additionally, the already existing anti-terrorism laws in India are sufficient to impede the increase of IS's terror domestically, with criminal acts such as financing, being members of the IS and providing support to the IS attracting stringent punishments.

⁹² Xavier Phillipe, The principles of universal jurisdiction and complementarity: How do the two principles intermesh?, 88 Int'l Rev. of the Red Cross 375, 379 (2006).

⁹³ Watson, *supra* note 71, at 26.

By mimicking the efforts adopted by the US to extend protection to citizens abroad, India can not only meet its obligations under the Hostage-taking Convention, Terrorist-bombing convention and the Convention against Torture, but would also ensure a cessation of the crimes committed against Indians upon foreign territories. These efforts would also be compounded through the codified active personality principle under Section 3 and 4 of the IPC, ensuring that Indians who commit crimes in Iraq and Syria, and escape such lands, cannot thereby flee prosecution in India.

Conclusively, by adopting the legal framework suggested in the foregoing paragraphs, Indian courts would not only play a role in curbing this epidemic of terror domestically, but would also make a mark globally, ensuring that Indian members of the IS and those members who commit crimes against Indians in Iraq and Syria do not escape prosecution by seeking refuge within Indian territory.