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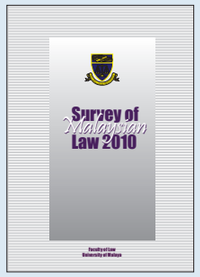

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Similarities of International Humanitarian Law and Islamic Law of Warfare: An Appraisal of The Principle of Distinction During Armed Conflict

Abdulrashid Lawan Haruna*
U.S. Abbo Jimeta**

Abstract

Principle of distinction obliges belligerents to always distinguish between combatants and civilians and between civilian objects and military objectives, and shall accordingly direct their military operations only against military objectives. The principle is derived from humanity as such it is one of the basic and fundamental rules guiding the conduct of hostilities under International Humanitarian Law (IHL) and Islamic Law of Warfare. The essence of the principle of distinction is to secure civilian population and their objects from the risks and dangers of attack in conduct of hostilities. Notwithstanding the significance of the principle, belligerents often fail to adhere to this principle thereby resulting in wanton killing of civilians and destruction of civilian objects. This has influenced the perception of some people towards the existence of such humanitarian principle under Islamic law, especially in conflicts that have religious elements. Thus, it is imperative that the article examines the principle within the legal framework of IHL and Islamic Law of Warfare in order to bring to light the platform for its effective application by both states and armed groups during armed conflicts.

I. INTRODUCTION

The need for general protection of civilian population and objects in conduct of hostilities has become a significant concern of the international community.[1] One of the essential principles set out for the purpose of according protection to civilians and their objects during armed conflicts is the principle of distinction.[2] The principle is now recognised as a basic and fundamental rule of warfare, which every civilized nation must observe and apply in the course of a war. The principle of distinction is a phenomenon conversant

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1 Kristin Bergtora Sandvik, "*Protection of Civilian: From Principle to Practice*" www.prio.no/Projects/Project/?x=1006. Site accessed on 23.4.2014.

2 IHL has set out certain basic principles that regulate conduct of belligerents with a view to providing adequate protection to civilians. These principles include: precaution; proportionality; prohibition of indiscriminate attack and principle of distinction. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996. Principle of distinction is considered as one of important principles of law of warfare that enhances the development of humanitarian principles. See theYoram Dinstein, "The Principle of Distinction and Cyber War in International Armed Conflicts" *Journal of Conflict & Security Law*, 2012, Vol 17(2), p.262.

within the legal framework of IHL and Islamic Law of Warfare.[3] The two legal regimes provide as a matter of obligation on part of the belligerents to meticulously distinguish between combatant and civilian, and between civilian objects and military objectives and they should accordingly direct their military operations only against military objectives.

However, the effective application of the principle under both regimes seems to be unrealistic and impracticable in view of the increasing civilian casualties in contemporary armed conflicts.[4] On certain occasions, conflicts that involved Muslim states or armed groups that have Islamic affiliation equally recorded high degree of civilian casualties despite the provisions protecting civilians. The problem can be attributed to either lack of knowledge of the ideals of Islamic warfare or blatant disregard for the norms protecting civilians and their objects. This calls for the need to push for strict observance of the basic humanitarian precepts in the conduct of hostilities by both Muslims and non-Muslims states.

Under Islamic law of Warfare, Almighty Allah says in surah *Al-Bakara* as follows: "Fight in the way of Allah those who fight you but do not transgress. Indeed, Allah does not like transgressors."[5] The status of the verse will be discussed later, but it can be deduced from the verse that combatant is a person who carries arms against Muslims and has the physical ability to engage in war and actually waged war directly or indirectly against Muslims.[6] The legitimacy of a target in the context of an armed conflict is typically determined by the capacity of that target or individual to fight against the Muslims. This by implication includes enemy soldier and leader, as well as adviser.[7] Sometimes a person can be considered a combatant even if he does not actually carry a weapon provided he

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3 The aspect of Islamic law that deals with warfare is known as *al-Siyar* (international law). This branch of law relates to the early Muslim community's relationship with non-Muslims, which initially pertained to conduct in war of the Prophet (PBUH). The concept of *al-Siyar* was first formalized and institutionalized by Imam Abu Hanafi in his series of lectures entitled "the Muslims laws of war and peace". Hanfis' lectures were later compiled and titled as "Introduction to the Laws of Nations" by Muhammad Ibn Hassan Shaybani, a student of Hanafi. Shaybani's work was later translated by Majid Khadduri serves as the foundation for the contemporary al-Siyar. The sources of al-Siyar's authority are the Qur'an, Hadith (tradition of the Prophet), Ijma (consensus opinion of Jurists) and Qiyas (analogical deduction). See Abdullahi Ahmed An-Na'ima, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law*, Syracuse University Press, Syracuse 1996, p.143; Majid Khadduri, "Islam and the Modern Law of Nations" *The American Journal of International Law*, 1956, Vol.50, p. 358. For a detailed discussion on the sources of Sharia, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence*, IIUM, Malaysia, 2001; Ahmed Souaiaia, "On the Sources of Islamic Law and Practices" *Journal of Law and Religion*, 2006, Vol. xx, p.102.

4 Noëlle Quénivet, "The 'War on Terror' and the Principle of Distinction in International Humanitarian Law" ACDI, 3 Especial, 2010, p.158.

5 Qur'an al-Bakara 2:190.

6 Muntaqa M. Mahboub, *War and the Protection of the Rights of Individuals: An Examination of Islamic and International Humanitarian Laws*, Triumph Publishing Co. Ltd, Kano (ND), p.19. Military objectives are defined as those objects that by their nature or use are intended for the pursuit of hostilities. Hamed Sultan, "Islamic Concept" in *International Dimensions of Humanitarian Law*, edi. UNESCO, UNESCO, Paris, 1988, p.38. A Civilian object loses its protection where such an object is used to prevent Muslim army from advancing or used to attack them, it has automatically become military objective subject to direct attack. Wahbeh Zuhili, "Islam and International Law" *International Review of the Red Cross*, 2005, vol. 87, No. 858, p.283.

7 Quintan Wiktorowicz and John Kaltner, "Killing in the Name of Islam: Al-Qaeda's Justification for September 11" *Middle East Policy Council Journal*, 2003, vol. X, No.2, p.2.

is an able bodied man from the enemy.[8] However, this position would be inconsistent with the provisions of the Quran, traditions of the Prophet and practice of the Caliphs of Islam as discussed thereunder.

Civilians on the other hand are those who take no active part in hostilities.[9] By virtue of tradition of the Prophet (PBUH) civilians includes women, children, old men and monks. Others include idiots, imbeciles, sick people, and the blind.[10] These people are recognised as civilians because they are categories of people who live a secluded life similar to that led by women. They are recognised as a separate category of person entitled to various degrees of immunity from attacks. The civilian population enjoys general protection from the dangers of hostilities and military operations provided they do not directly participate in the hostilities.[11] Where civilians take part in hostilities their non-combatant status and immunity are forfeited and replaced with combatant.[12]

Under IHL, combatant is defined with all possible precision in the third Geneva Convention of 1949[13] and the Additional Protocol I of 1977.[14] The third Geneva Convention defined combatant with particular reference to combatant status and prisoner of war status. While Additional Protocol I supplement the third Geneva Convention and goes further to clarify the combatant's right to directly participate in hostilities.[15] Combatant in the provision of Additional Protocol I is the most relevant to principle of distinction because of the generic meaning of combatants, which indicates persons who

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8 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2001, p.8. For instance, a person who came to wash and cook for American soldiers in order to feed them to fight such a person may be considered a combatant. See David Aaron, *In Their Own Words: Voices of Jihad*, RAND Corporation, Santa Monica, 2008, p.106.

9 Sultan, Islamic Concept, p.37.

10 Sayyid Sabiq, *Fiqh Us-Sunnah by the Doctrinal Writings of the Holy Prophet*, Trans. Matraji F.A.Z., Dar El Fitr, Beirut, 1996, p.53. See also M. Aduly, ed. *Bulug Al-Maram Min Adillat Al-Ahkam, Attainment of the Objective in Conformity With Evidence of the Legal Judgment*, Trans. Hibah G.A., Dar Al-Kotob Al-Ilmiyah, Lebanon, 2008, Hadith No. 1313.

11 See *Al-Muwatta of Imam Malik Ibn. Anas*, Trans. Aisha Abdurrahman Bewley, Madinah Press Inverness, Scotland, 2001, Jihad, Hadith No. 10.

12 Sultan, Islamic Concept, p.38.

13 Convention Relative to the Treatment of Prisoners of War, it came into force Oct. 21, 1950, 75 U.N.T.S. 335 (hereinafter "Geneva Convention III"). Combatants are members of the armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. It also include members of other militias and members of other volunteer corps including those of organised resistance movements, belonging to party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, who fulfill the following conditions: that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; And that of conducting their operations in accordance with the laws and customs of war. The convention also includes members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power. Article 4A (1)(2)(3) and (6), Geneva Convention III.

14 Protocol Additional to the Geneva Conventions of 12 August 1949,and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, it came into force Dec. 7, 1978, 1125 U.N.T.S. 3, reprinted in 16 I.L.M. 1391 (1977) (hereinafter "Additional Protocol I").

15 Article 43 (1), Additional Protocol I.

do not enjoy the protection of the law accorded to civilian against direct attack but without necessarily conferring combatant status.[16]

Meanwhile, civilian is defined negatively in relation to combatants and armed forces. A civilian is any person who does not belong to any category of combatants and who have taken no active part in hostilities.[17] In other words, a civilian is any person who is not a member of the belligerent armed forces, whether or not the authority upon which such a force depends is recognised by the adverse party or of associated militia, incorporated paramilitary police or volunteer corps, including organised resistance units, or of a *levee en masse*[18] acting in immediate resistance to invasion.[19] Thus, in non-international armed conflict, armed forces of a state and dissident armed forces or other organised armed groups are quite distinct from the civilian and civilian population.[20] Then from the definition of civilians emerges that of the civilian population, as it comprises of all persons who are civilians.[21] Since civilians belong to none of the category of combatants, they are immune from direct attack unless and for such time as they directly participate in hostilities.[22]

In spite of the numerous literature addressing principle of distinction from both IHL and Islamic Law, this work seeks to add to the field by considering the argument that distinction existed in Islamic law just as it does in IHL by creating obligation on part of armed groups with religious affiliation to respect immunity of civilians during hostilities. In view of this, IHL can substantively incorporate classical Islamic *jus in bello*, which makes Islamic ideals a complement of rules of IHL for the benefit of Muslim countries

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16 Jean-Marie Henkaerts, et al, *Customary International Humanitarian Law*, Vol. 1 Rules, Cambridge University Press, Cambridge, 2005, p. 3. The provision of Additional Protocol I considers combatant from the perspective of a person who has the right to fight and consequently loses protection accorded to civilian for the simple fact that he participates in the hostilities. See also the provisions of Article 43 (20), Additional Protocol I and Article 43 (3), Additional Protocol I.

17 See Article 51(3), Additional Protocol I; Frits Kalshoven, et al, *Constraint in Waging of War: An Introduction to International Humanitarian Law*, ICRC, Geneva, 2001, p.98.

18 *Levee en masse* refers to "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war". Article 4A(6), Geneva Convention III.

19 Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflict*, Dartmouth Publishing Company Limited, Aldershot, 1990, p.13. Civilian objects are defined in Article 52, Additional Protocol I as objects which are not military objectives. In other words, civilian objects are objects that do not by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time does not offer a definite military advantage. Kalshoven, et al., *Constraint*, p.100.

20 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, ICRC, Geneva, 2009, p.28. Any civilian who assumed a continuous military function which corresponds to that collectively exercised by an armed group as a whole for the purpose of conduct of hostilities on behalf of the non-state party to the conflict would certainly loses protection accorded to civilian. William H. Boothy, "Direct Participation in Hostilities- A Discussion of the ICRC Interpretive Guidance" *International Humanitarian Legal Studies*, 2010, Vol.1, p.153.

21 Article 50 (2), Additional Protocol I.

22 Richard R. Baxter, *Law and Responsibility in Warfare: The Vietnam Experience*, The University of North Carolina Press, United States of America, 1975, p.64.

as well as armed groups with Islamic link. It is against this background that the article attempts to examine principle of distinction under Islamic Law of Warfare and IHL. In doing so, it examines the principle and its imperative nature in conduct of hostilities under the two legal regimes. The article also makes comparative analysis of the essential elements that constitute the principle of distinction. Combatant and civilian, and civilian objects and military objectives will be considered in light of the principle under Islamic Law of Warfare and IHL. The last segment of the article considers the position of direct participation in hostilities under the two legal regimes.

II. PRINCIPLE OF DISTINCTION UNDER ISLAMIC LAW OF WARFARE

Islamic Law of Warfare has subsumed humanitarian considerations into warfare and it regulates in detail the conduct of Muslim armies during hostilities.[23] Among the humanitarian considerations that were subsumed into warfare is the principle of distinction and it serves as one of the basic rules of warfare in Islam. It is a duty under Islamic Law of Warfare to distinguish between two categories of persons in cases of armed conflict of whatever nature. Combatants must be distinguished from non-combatants and accordingly hostilities are directed only against combatants. Hence, the obligation to distinguish between civilian objects and military objectives is clearly imperative and firmly entrenched in Islamic law of warfare.[24]

The Almighty Allah has made it a duty upon a Muslim army to fight only the combatants. The Qur'an provides- "fight those who fight you but transgress not the limits. Truly Allah likes not transgressors."[25] This was the first verse about fighting that was revealed in Madinah, which according to some jurists the verse has been abrogated by subsequent verses on Jihad.[26] However, some jurists are of the opinion that the verse has not been abrogated. As such ever since the verse was revealed, the Prophet fought only those who fought him and avoided non-combatants. The phrase "those who fight you" in the verse refers to fighting only the enemies who are engaged in fighting Islam and its followers.[27] The verse also enjoins Muslims to fight for the sake of Allah and should not be transgressors. The point of concern now is whether the rubric the verse seeks to establish in this context can still be established in the light of the interpretation given to the verse coupled with the various traditions of the Prophet (PBUH) in similar respect.

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23 An-Na'im, *Islamic Reformation*, p.149.

24 Sultan, *Islamic Concept*, p.36.

25 Qur'an 2 Verse 190, Yusuf A. Ali, *The Holy Qur'an Text, Translation and Commentary* Dar al Arabia Publishing, Printing and Distribution, Lebanon, 1968, p.75.

26 The verses that abrogated the verse Qur'an *Al-Bakara* 2:190 are Qur'an *at-Tauba* 9:5 and 36. See Ibn Kathir, *Tafsir Ibn Kathir*, Abridged by a Group of Scholars Under the Supervision of Al-Mubarakpuri, S.S., (1st ed) Vol.1, Darussalam Publishers and Distributors, Riyadh, 2000, p.527; Muhammad Munir, "The Protection of Civilians in War: The Non-Combatant Immunity in Islamic Law" September 2011, p.7. http://works.bepress.com/muhammad_munir/13 Site accessed on 12.4.2013.

27 Muhammad Munir, Protection of Civilians, p.7

According to a theologian and famous commentator of the Qur'an Hasan al-Basri (d. 728 C.E), he interpreted the word "transgression" in *Al-Bakara* 2:190 to mean prohibition on mutilating the dead, theft (from the captured goods), killing women, children and old people who do not participate in warfare, killing priests and residents of houses of worship, burning down trees and killing animals without real benefit.[24] This interpretation of al-Basri provides the basic principle for the protection of civilians during hostilities, which can be further supported by traditions of the Prophet (PBUH). Accordingly, it was reported that during a war, the Prophet (PBUH) saw the corpse of a woman lying on the ground and observed that she was not fighting. How then was she killed? From this statement of the Prophet, jurists have drawn the principle that those who are non-combatants should not be killed during or after the war.[29] To further strengthen the assertion, in another narration the Prophet (PBUH) stated that Muslims should fight in the name of Allah and by Allah, and as to the creed of the messenger of Allah. They should not kill an old man, nor a young child, or a woman.[30] The Prophet (PBUH) further said: "Do not grudge, and gather your spoils and do good deeds and be benevolent."[31] Therefore, it is safe to conclude that Qur'an 2 verse 190 as well as the traditions of the Prophet (PBUH) has set the pace for the recognition and establishment of the obligation to distinguish between combatants and civilians during armed hostilities.[32]

There is no gain saying the fact that principle of distinction laid down by the Qur'an and the traditions of the Prophet has been followed by the rightly guided Caliphs. The first caliph of Islam Abu Bakar (d. 13/634) reaffirmed the position of Qur'an and traditions of the Prophet (PBUH) in his order to his commander. The Caliph's famous decree states that:

> I prescribe ten commandments to you; do not kill a woman, a child or an old man, do not cut down trees, do not destroy inhabited areas, do not slaughter any sheep, cow or camel except for food, do not burn date palm, nor inundate them, do not embezzle, nor be guilty of cowardness.[33]

It is clear from these set of instructions just as other similar codes of conduct deduced from the Qur'an and the traditions of the Prophet (PBUH) that distinction as

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28 See Ibn Kathir, *Tafsir Ibn Kathir*, pp.527-8.

29 Aduly, *Bulug al Maram*, Hadith No 1313.

30 F.H. Ruxton, *Maliki Law, Being a Summary from French Translations of the Mukhtasar of Sidi Khalid*, El-Nahar Press, Cairo, 2004, p.74. According to Ruxton, children, imbeciles, idiots, old men, impotent and sick people, the blind and monks living in cloisters are to be spared not because of their calling, for they are plunged even deeper than the others in infidelity but because they live a secluded life similar to that led by women. Ruxton, *Maliki law*, p.74.

31 Sabiq, *Fiqh us-Sunnah*, p.53. There are some orientalists who used to cite the tradition of the prophet (PBUH) where the messenger of Allah was asked about the household of the polytheists, whose land may be assaulted during the night and that some of their women and offspring may be killed or wounded. Then the Prophet replied 'they are from among them". Relying on this tradition, the orientalists alleged that Islam does not distinguish between combatants and civilians. However, the commentary of the Prophetic tradition shows that the reply of the Prophet was with respect to unintentional homicide of women and children, not the premeditated one. See Aduly, *Bulug al Maram*, p.418.

32 Sultan, *Islamic Concept*, p.37.

33 Imam Malik, *Al-Muwatta Malik*, Book 21, Hadith 21: 3: 10. See also Zuhili, International Law, p.282.

a principle of warfare constitutes a mandatory injunction for Muslim army to observe. This simply means that no Muslim army is allowed to overstep or breach this principle unless absolute military necessity requires incidental violation that cannot be averted.[34]

By and large, under Islamic law of Warfare, a clear distinction between combatants and non-combatants is drawn in an enemy country. As far as non-combatant population is concerned, the instruction of the Prophet (PBUH) has been 'do not kill them'.[35] In other words, civilian and the civilian population enjoy general protection from the effects of hostilities and military operations provided they do not directly participate in the hostilities. However, as an exception, when civilians take part in hostilities, their non-combatant status and immunity are forfeited and replaced with combatant. Therefore, right from the time of the Prophet, Islamic Law of Warfare distinguished between combatants and civilians and strongly condemned the random use of weapons against combatants and civilians alike.

Today, there is consensus of most Muslim jurists in international relations that persons who do not take part in the fighting are excluded from attack. The general protection accorded to civilians naturally implies that they are not subject to attack or to threat of violence.[36] Within the context of Islamic Law of Warfare, children, idiots, imbeciles, old men, sick people, the blind, monks and women are recognized as civilians because these categories of people live a secluded life similar to that of women, and women are not considered to be a threat to an Islamic state.[37]

Furthermore, when Iman Malik was asked whether or not Muslims could kill enemy women and children who stand on the ramparts and throw stones at the Muslims and cause confusion in their ranks, he answered: the Prophet has forbidden the slaying of women and children. Iman Malik went ahead to warn against killing women and children who even take active part in the hostilities.[38] However, the position of majority of Islamic scholars is that the elderly and monks, who were normally protected, could be attacked if they were involved in supporting the enemy cause. This stand is buttressed by the incident that happened in 630 AD after the conquest of Makka, during the battle of *Hunayn*, Muslim fighters killed a man who was over one hundred years old, in the presence of the Prophet. The old man was killed because he was alleged to have provided helpful intelligent advice

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34 Zuhili, International Law, p.283.

35 Abul A'la Maududi, *Human Rights in Islam*, Islamic Foundation, United Kingdom, 1980, p.36.

36 Sultan, Islamic Concept, p.638.

37 This position stands in case of apostasy, whoever commits apostasy constitute a threat not only against religion but also against the security of the Islamic state and the apostate should be put to death. In line with this, Hanafi jurists held that a woman apostate is not to be put to death. See Yahya Yunusa Bambale, *Crimes and Punishments under Islamic Law*, Malthouse Press Limited, Lagos, 2003, pp.79-80.

38 The Prophet (PBUH) was reported to have prohibited those who killed the son of Abu Al-Haqaiq from killing women and children. One of the people said, when the woman of the son of Abu Al-Haqaiq Harmed us with screaming I raised sword at her, but when I remembered the prohibition of Allah's messenger (PBUH), I gave up. But for this reason, we would have been relieved of her. Imam Malik Anas, *Al-Muwatta (the Approved)* Trans. Hibah G.A., Vol.I, Dar Al-Kotob AL-Ilmiyah, Lebanon, 2007, p.229.

to the enemy during battle.[39] It is believed that women and children could be attacked for taking part in the fighting or supporting the war effort of the enemy but only if it was proven that they had actually participated in the hostilities. Thus the conviction on direct participation of civilian could not be based simply on suspicion or likelihood but rather they must have actually served as combatants or guides.[40]

Under Islamic Law of Warfare, not only does the civilian population enjoy immunity from direct attack, but it also includes civilian objects. It is presumed that all objects are civilian unless proved otherwise. The nature, use and intended purpose of the objects are the criterion for distinguishing between civilian objects and military objectives.[41] Direct attack against civilian objects is prohibiled because they enjoy equal immunity with civilian population against direct attack. The Prophet gave instructions to the Muslim troops deployed against the advancing Byzantine army that "in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infant at the breast or those who are ill in bed. Refrain from demolishing the houses of the unresisting inhabitant; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children".[42] Thus the position is that during warfare destruction of property is prohibited, except in case of absolute military necessity.[43]

According to Yamani, any able bodied man is to be treated as a combatant, whether or not he is actually participating in the hostilities. Obviously, this definition seems to be inconsistent with the Qur'anic provisions, tradition of the Prophet and the orders given to Muslim army by the companions of the Prophet that hostilities are permitted only between combatants i.e. acts of war may be committed only by combatants.[44] Even the combatants have code of conduct during war such as: the prohibition of torture by fire to enemy combatant because the Prophet was reported to have said punishment by fire does not behove anyone except the Master of the fire; combatants should also accord protection to wounded soldiers who are not fit to fight because the Prophet said do not attack a wounded person and that no one should be tied to be killed as the Prophet was reported to have prohibited the killing of anyone who is tied or is in captivity.[45]

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39 Nesrine Badawi, "Islamic Jurisprudence and the Regulation of Armed Conflict" 2009, p.10 http://ihl.ihlresearch.org/_data/global/images/Islamic_Jurisprudence_ Regulation_AC.pdf Site accessed on 13.11.2010.

40 Karima Bennoune, "As-Salamu Alaykum? Humanitarian Law in Islamic Jurisprudence" *Mich. J. Int'l L.* 1994, Vol. 15, pp.630-631.

41 Sultan, Islamic Concept, p.38.

42 Cited in Bennoune, As-Salamu Alaykum, p.629. Similarly, Shafi'i strongly stressed that attack could not be directed against inhabited houses but only against fortresses, unless the homes were located very close to fortresses. He further asserted that all lifeless things could be killed but living creatures such as animals could be killed only if the Muslim army believed that the creatures' continued existence could strengthen their enemies. Bennoune, As-Salamu Alaykum, p.629.

43 For instance, destruction for army to penetrate barricades, or when that property makes a direct contribution to war, such as castles and fortresses used by the enemy to prevent the Muslim army from advancing. See Zuhili, International Law, p.282.

44 Zuhili, International Law, 282. See also Sultan, Islamic Concept, p.37.

45 Maududi, *Human Rights in Islam*, p.36.

It is important to point out at this juncture that despite the fact that Islamic law of warfare has subsumed humanitarian considerations as well as it regulates in detail the conduct of belligerents in warfare, this can only represent the classical period of Islamic civilization. Certainly, this does not portray the case of the contemporary Muslim states that are all parties to the Geneva Conventions and the Additional Protocols.[46] This simply means that contemporary Muslim States are bound to observe their obligations under the Geneva Conventions and as a matter of fact, there is no single Muslim state today that applies Islamic law of warfare as its jus in bello.[47]

III. THE PRINCIPLE OF DISTINCTION UNDER IHL

Principle of distinction entails that parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their military operations only against military objectives.[48] This principle is one of the most fundamental protections afforded to the civilian population in armed conflict. At the heart of IHL lies the principle of distinction between the armed forces who conduct the hostilities on behalf of the parties to an armed conflict and civilians who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operation.[49]

Prior to the codification of the Geneva Conventions and their Additional Protocols,[50] the principle of distinction was mentioned in the St. Petersburg Declaration in 1868 which states "the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy".[51] State practice also establishes that principle of distinction is a norm of Customary International Law applicable to both classes of conflicts (international and non-international armed conflicts)[52] and the continuous

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[46] For the names of States Parties to the Geneva Conventions and their Additional Protocols, see ICRC, 'The Geneva Conventions of 1949 and their Additional Protocols' <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/> Site accessed on 10.3.2014.

[47] *Jus in bello* refers to the law regulating conduct of belligerent during armed conflict, which is independent of the legality or otherwise of resorting to use of force.

[48] Article 48 (1), Additional Protocol I.

[49] Melzer, *Interpretive Guidance*, p.11; McCoubrey, *Regulation*,p.114.

[50] It is significant to mention that before the codification of principle of distinction, the principle has existed in several other laws and customs of war. For instance, Islam has considered distinction in warfare as a fundamental rule of war, which can be seen in the provision of Qur'an *Al-Bakara* 2:190 cited above and other traditions of the Prophet (PBUH) as well as the teachings of the rightly guided Caliphs have all established the obligation on Muslims to distinguish combatants from civilians during hostilities long before the contemporary IHL. See Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, pp.16-17; A.V.P. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 2004, p.1.

[51] Kalshoven, et al., *Constraint*, p.102.

[52] In *Prosecutor Vs Martic*, ICTY, IT-95-11-I, 1996, the applicability of these rules to all armed conflicts has been corroborated by General Assembly resolution 2444 (XXXIII) and 2675 (XXV), both adopted unanimously in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional protocol II. Both Protocols mentioned above prohibit attacks against the civilian population as such as well as individual civilians. Both provisions explicitly state that these rules shall be observed in all circumstances. The Appeal Chamber reaffirmed that both articles constitute customary international law. See also Henckaerts, et al, *Customary*, p.3.

respect for the principle is what makes it possible for humanitarian law to fulfill its aim of protecting the civilian population from the consequences of armed conflict.[53]

To distinguish between combatants and civilians is an important aspect of warfare and has long been recognised as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war.[54] The reason underlying the principle of distinction is that combatants have the right to participate in hostilities and consequently may be the object of attacks on the part of the enemy to disable them while civilians lack the right of direct participation. Distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the later be spared as much as possible.[55] The International Court of Justice (ICJ) in its advisory opinion in the Nuclear Weapons case stated that the distinction between combatants and non-combatants is one of the cardinal principles constituting the fabric of humanitarian law.[56] Similarly, in the same case of *Prosecutor v Martic*, the International Criminal Tribunal for the former Yugoslavia (ICTY) stressed the rule that civilian population as well as individual civilians shall not be the object of attack as a fundamental rule of IHL applicable to all armed conflict.

The fact that the principle of distinction is derived from the principles of humanity, no self-respecting state would challenge the applicability of such principles in both international and non-international armed conflict.[57] Therefore, the limitations set by the principle on the use of violence in war seek to achieve a reasonable balance between the necessary destruction of the military resources of the enemy in time of war and the equally compelling need not to cause unnecessary suffering, destruction and loss of life which confer no clear military advantage.[58]

Under international armed conflict, Article 48 of Additional Protocol I provides for the need to distinguish between civilian population and combatants and between civilian objects and military objectives.[59] A civilian loses the protection accorded to him under

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53 Avril McDonald, "The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities", A Paper Presented at the University of Teheran at a Round Table on the Interplay Between International Humanitarian Law and International Human Rights Law, April, 2004, (NP).

54 Kenneth Watkin, "Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy" *Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series*, Winter 2005, N0. 2, p.9.

55 See Kalshoven, et al., *Constraint*, p.99.

56 International Court of Justice, Advisory opinion on the legality of the threat or use of Nuclear Weapons, Report 1996, Para 76.

57 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford, 1989, p.74.

58 Richard R. Baxter, "The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)" in *International Dimensions of Humanitarian Law*, UNESCO, Paris, 1988, p.103.

59 Francoise Krill, "The Protection of Women in International Humanitarian Law" *Extract From the International Review of the Red Cross*, 1985, pp.13-14.

the principle of distinction when he takes a direct part in the hostilities.[60] This provision of the law is as a result of the desire to restrict warfare to acts of violence against the enemy, which is strictly necessary from a military standpoint. The provision is a cardinal rule and principle not only of the Additional Protocol, but also of the whole of IHL. In international armed conflict civilians are persons who are neither members of the armed forces of a party to the conflict nor participants in *levee en masse*.[61] Thus civilians as long as they are not incorporated into the armed forces, private contractors and civilian employees do not cease to be civilians simply because they accompany the armed forces and assume functions other than the conduct of hostilities that would traditionally have been performed by military personnel.[62]

Unlike Additional Protocol I, Additional Protocol II does not contain specific rules and definitions in respect of principle of distinction, however the short fall have been largely filled through state practice which forms the basic rules that are applicable as customary law to non-international armed conflict.[63] Additional Protocol II states that civilian population as well as individual civilians shall not be the object of attack and they shall enjoy protection against direct attack unless and for such time as they take a direct part in hostilities.[64] In the same vein, Common Article 3 also provides that High Contracting Parties shall accord protection to persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed *hors de combat*. It is observed that the traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of combatant is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities.[65]

IV. APPLICATION OF PRINCIPLE OF DISTINCTION IN CLASSES OF CONFLICTS

Additional Protocol I being the applicable regime in international armed conflict states that in order to ensure respect for and protection of civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly

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60 Article 51 (3), Additional Protocol I.

61 Toni Pfanner, "Military Uniforms and the Law of War" International Committee of the Red Cross, 2004, Vol. 86, No. 853, p.104; Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, Cambridge, 2010, p.202.

62 Melzer, *Interpretive Guidance*, p.39

63 Jean-Marie Henckaerts, "Study on Customary International Humanitarian Law: Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict" International Review of the Red Cross, 2005, Vol. 87, No. 857, p.189.

64 Article 13, Additional Protocol II. See also Article 3 (7), Additional Protocol II to the Convention on Certain Conventional Weapons which is also applicable in non-international armed conflicts.

65 Watkin, Warrior, p.9.

shall direct their operations only against military objectives.[66] Thus civilian population immunity last for as long as they do not take a direct part in the hostilities.[67]

In non-international armed conflict, Additional Protocol II and Common Article 3 do not contain detailed rules and definitions with respect to principle of distinction.[68] However, Article 13 of the Additional Protocol II provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operation. The civilian population as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded to them unless and for such time as they take a direct part in hostilities. Similarly, Common Article 3 to Geneva Conventions states that persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wound, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[69]

Obviously, the legal regime applicable to international armed conflict is quite distinct from the one covering non international armed conflict. But since the principle of distinction is derived from the principle of humanity, no self-respecting state should challenge the applicability of such principle in both international and non-international armed conflict.[70] Thus state practice establishes principle of distinction as a norm of customary international law applicable in both international and non-international armed conflict.[71]

Under Islamic Law of Warfare, a similar position is obtainable as one of the humanitarian considerations that were subsumed into Islamic law of warfare. Islam recognised principle of distinction as a basic rule of warfare and has made it a duty to distinguish between combatants and non-combatants and accordingly hostilities are directed only against combatants.[72] Almighty Allah in the Qur'an obliged Muslim army to distinguish between combatants and civilians and fighting is allowed between

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66 Article 48, Additional Protocol I.

67 Article 51 (3), Additional Protocol I.

68 Henkaerts, Rule of Law, p.189.

69 In addition, the prohibition on direct attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons and set forth in Protocol III to the Convention on Certain Conventional Weapons which has been made applicable in non-international armed conflict. The application of the Protocol to the Convention on Certain Conventional Weapons in non-international armed conflicts was made pursuant to an amendment of Article 1 of the Convention and was adopted by consensus in 2001. See Henkaerts, et al, Customary, p.5.

70 Meron, Customary Law, p.74.

71 Henkaerts, et al, Customary, p.3.

72 Sultan, Islamic Concept, p.37. It is also noted that in Islamic Law of Warfare, responsible leadership, strict discipline and absolute respect for Islamic law together constitute the criteria for drawing the essential distinction between combatants and civilians and between civilian objects and military objectives.

combatants.[73] The same principle was also decreed by the Prophet (PBUH) and the commands given by the righteous caliphs of the Islam after the demise of the Prophet.

The divine nature of sources of Islamic law has made it applicable to all classes of conflicts. In other words, Islamic Law of Warfare draws no distinction between the various types of war or armed conflict with respect to application of principle of distinction. Whether a war is waged to propagate the Islamic faith or inform people about it, or whether it be a defensive war or one directed against apostates, schismatics or rebels, the rules governing it are the same because they were laid down by the same divine authority to be observed by all and applied without distinction or discretion.[74] Therefore, as far as application of humanitarian rules is concerned especially principle of distinction under Islamic law, there can be no distinction between international and non-international armed conflicts.

By and large, the differences in the application of the principle of distinction under IHL to international and non-international armed conflicts have been abridged by recognizing the principle as a customary norm applicable to all classes of conflicts. The jurisprudence of International Tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) has further blurred the distinction in the application of the principle in international and non-international armed conflicts. This position is similar to that of Islamic law of Warfare as Islam did not differentiate the application of principle of distinction to different types of conflicts. In Islam, the applicable law in all classes of conflicts is drawn from divine sources (Qur'an, Sunnah, Ijma, Qiyas, etc) and it therefore covers all classes of armed conflicts regardless of their character or nature.

V. THE STATUS OF COMBATANTS AND CIVILIANS

As we earlier discussed, combatant in the provision of Additional Protocol I is adopted by given generic meaning to combatants, indicating persons who do not enjoy the protection of the law accorded to civilian against direct attack but without conferring combatant status.[75] While civilian is any person who does not belong to any category of combatants and who have not taken active part in the hostilities. The protection accorded to civilians is premised upon their restrain from participation in belligerent activities and upon their identifiability as non-combatant.[76]

Likewise, under Islamic Law of Warfare, the legitimacy of a target in the context of an armed conflict is typically determined by the capacity of that target or individual to fight against the Muslims. Civilians are those who take no active part in hostilities.[77] They

[73] Ali, Qur'an Translation, p.74.
[74] Sultan, Islamic Concept, p.32.
[75] Henkaerts, et al, Customary, p.3. See also the provisions of Article 43 (20), Additional Protocol I and Article 43 (3), Additional Protocol I.
[76] Kalshoven, *Constraint*, p.98; Baxter, *The Vietnam Experience*, p.64.
[77] Sultan, Islamic Concept, p.37.

are recognised as a separate category of person entitled to various degrees of immunity provided they do not take active part in the hostilities.

Therefore, it can be inferred from our earlier discussion that the Prophet and his companions instructed the Muslim troops at various occasions in a language that foreshadows modern International humanitarian rules and concerns. For instance, the Prophet said "in avenging the injuries inflicted upon us molest not the harmless inmates of domestic seclusion; spare the weakness of the female sex; injure not the infants at the breast or those who are ill in bed".[78] Similarly, the prohibition of attack on persons rendered hors de combat in Article 41, Additional Protocol I is either explicitly or implicitly covered by the Islamic Law of Warfare or form part thereof by means of reasoned deduction.[79]

It is obvious that the definition of combatants in Islamic Law of Warfare appears to be more generous than the modern humanitarian law definition as it covers any person who carries arms against Muslims and has either directly or indirectly waged war against Muslims. By this definition, a person who qualifies as a combatant under Islamic law may not be regarded as such under IHL. Under IHL, any person outside the definition of combatant contained in third Geneva Convention and Additional Protocol I, the individual is to be regarded as non-combatant. In other words, where a person is not covered within the provisions of the third Geneva Convention and Additional Protocol I and the person takes up arms against the enemy in the conduct of hostilities, he would be regarded as civilian who directly participate in hostilities. Yet, the slight discrepancy in the definition of combatant in IHL and Islamic Law of Warfare does not affect the position of combatant as a legitimate target under the two legal regimes.

Furthermore, the definition of civilian and civilian population given in Article 50, Additional Protocol I merely endorses and implements a basic rule of the Islamic concept. In addition, the basic rule in Article 48 of the same Protocol on distinction between combatants and civilians simply reflects the instructions given by the righteous caliphs Abu Bakar and Umar to their Muslim army.[80] Finally, Islamic humanitarian precept shows that the major categories of protected persons and restricted acts were present in Islamic law as it is obtained under IHL.[81]

VI. THE POSITION OF CIVILIAN OBJECTS AND MILITARY OBJECTIVES

As we earlier pointed out, the reason underlying principle of distinction is not only to distinguish between civilian and combatants, but to also distinguish between civilian objects and military objectives and consequently attacks shall only be targeted at military objectives. Under IHL, it is a basic requirement that during conduct of hostilities not only

78 Bennoune, As-Salamu Alaykum, p.635.
79 Sultan, Islamic Concept, p.35.
80 Sultan, Islamic Concept, p.37.
81 Bennoune, As-Salamu Alaykum, p.638.

lives and well-being of individual civilians and civilian population that is protected but also the protection of those objects that are civilian in character.[82] The Protocol defined civilian objects as objects which are not military objectives.[83]

Article 52(3) of the Additional Protocol I has made it clear that in case of doubt whether an object which is normally dedicated to civilian purposes such as a place of worship, a house or other dwelling or a school is being used to make an effective contribution to military action, it shall be presumed not to be so used. This position was further emphasized in the case of *Prosecutor Vs Stanislar Galic*.[84] The Trial Chamber of ICTY states that in case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used. The Trial Chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.

Military objectives on the other hand, are covered by Article 52 (2), Additional Protocol I and it states that attacks shall be restricted to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage. In IHL, the presence of civilians within or near military objectives does not render the objects immune from attack[85], meaning a military objective remains a military objective even if civilian persons are in it.[86]

On the other hand, Islamic Law of Warfare equally applies similar standard to that of IHL. All objects are presumed to be civilian objects unless it is proved otherwise. The nature, use and intended purpose of the objects are the criteria for distinguishing between civilian objects and military objectives. Attacks should therefore be strictly confined to military targets i.e. to objects which by their nature or use are intended for the pursuit of hostilities.[87] The instruction of the Prophet (PBUH) to Muslim troops reads "refrain from demolishing the houses of the unresisting inhabitants; destroy not the means of their subsistence, nor their fruit trees and touch not the palm and do not mutilate bodies and do not kill children".[88]

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82 Baxter, Duties of Combatant, p.119.

83 Article 52, Additional Protocol I. It is only those objects that qualify as military objectives may be made subject of attack, all other objects are protected against attack. See also Kalshven, F., et al, p.100

84 IT-98-29, ICTY, Trial Chamber Judgment of 5th December 2003, Para 5.

85 Henkaerts, et al, Customary, p.31.

86 Muhammed Tawfiq Ladan, *Introduction to International Human Rights and Humanitarian Laws*, Ahmadu Bello University Press, Zaria, 1999, p.138.

87 Sultan, Islamic Concept, p.38.

88 Cited in Bennoune, As-Salamu Alaykum, p.624. Similarly, Caliph Abu Bakar gave orders never to destroy palm trees, burn dwellings or cornfields, cut down fruit trees, kill livestock. But Muslims are allowed to eat from the enemy's fruit and livestock if they are constraints by hunger and never to lay hands on monasteries. Sultan, Islamic Concept, p.38.

To crown it all, Islamic Law of Warfare contains law of the requisite protection of civilian objects. Civilian object is protected as well as the environment which is now emerging as an important protected category in the contemporary IHL.[89] It suffices that, the scope of application of the protection of civilian objects is wider under the Islamic Law of Warfare than in the provision of Additional Protocol I, for it is more precise, more generous and more humanitarian. However, the stipulations, criteria and details enunciated in the provisions of the Protocol are indeed, in perfect harmony with the very essence of the Islamic Law of Warfare and can therefore be regarded as forming an integral part of it. Thus the general principle of the Islamic Law of Warfare with regards to the protection of the civilians and civilian objects are enshrined in the primary sources of Islamic law and in reasoned deduction. These principles are binding and constantly applicable through time and space, whatever the nature of the armed conflict in question.[90]

VII. THE POSITION OF DIRECT PARTICIPATION IN HOSTILITIES

One of the areas of uncertainty affecting the regulation of both international and non-international armed conflict under IHL is the absence of precise definition of the term direct participation in hostilities.[91] The uncertainty is the aftermath of lack of IHL treaty that define the concept and the lack of clear and resolved interpretation of the concept established from state practice or international law jurisprudence.[92] However, it is clear and uncontested that when a civilian uses weapons or other means to commit acts of violence against human or other material enemy forces, such a civilian is considered to have taken a direct part in the hostilities.[93]

Direct participation in hostilities is interpreted to mean that the persons in question perform hostile acts which by their nature or purpose are designed to strike enemy combatants or material.[94] In other words, the notion of direct participation in hostilities refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. To take a direct participation in hostilities is usually taken to mean to engage in a specific attack or attacks on an enemy combatant or object during a situation of armed conflict. In essence, there must be a direct causal relation between the activity engaged in and harm done to the enemy at the time and place where the activity occurs.[95]

Under IHL, for an act to qualify as direct participation in hostilities, the act must be likely to adversely affect the military operations or military capacity of a party to

89 Bennoune, As-Salamu Alaykum, p.637.
90 Sultan, Islamic Concept, p.37.
91 Henkaerts, Rule of Law, p.190.
92 Melzer, Interpretive Guidance, p.41
93 Henkaerts, Rule of Law, p.190.
94 Kalshoven, *Constraint*, p.99.
95 McDonald, Principle of Distinction, p.21.

an armed conflict or alternatively, to inflict death, injury, or destruction on persons or objects protected against attack; there must be a direct causal link between the act and the harm likely to result either from the act or from a coordinated military operation of which that act constitutes an integral part; and the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.[96] Thus for an act to amount to direct participation in hostilities, it must meet the three basic requirements of threshold of harm, direct causation, and belligerent nexus cumulatively. Therefore, the immunity of civilians was granted on the implicit understanding that the civilian population is harmless and consequently should not be attacked; and civilians who actively engaged in hostilities or committed any hostile act ceased to be harmless thereby become subject of attack.[97]

Similarly, under Islamic Law of Warfare, the civilian population enjoy general protection from dangers of hostilities and military operations provided they do not directly participate in the hostilities. Civilians who take a direct part in hostilities loses their immunity and their non-combatant status is forfeited and replaced by combatant status i.e. they become legitimate military target. The general protection accorded to civilians naturally implies that they are not subject to attack or to threats of violence.[98] In Islam, it is believed that women and children could be killed for taking part in the fighting or supporting the war effort against Muslims, but only if it was proven that they had actually participated in the hostilities.[99] Therefore, direct participation of civilian in hostilities serves as an exception to civilian immunity against direct attack both under IHL and Islamic Law of Warfare.

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96 Melzer, Interpretive Guidance, p.46.

97 Emily Camins, "The Past as Prologue: The Development of the Direct Participation Exception to Civilian Immunity" International Committee of the Red Cross, 2008, vol. 90, No. 872, p.867. In addition, Article 51 (1) (2) and (3), Additional Protocol I, states that the civilian population and individual civilians shall enjoy general protection against dangers arising from military operation. The civilian population as such as well as individual civilians shall not be the object of attack. Acts and threat of violence the primary purpose of which is to spread terror among the civilian population are prohibited. Civilians shall enjoy the protection afforded to them unless and for such time as they take a direct part in hostilities. See also Article 13, Additional Protocol II.

98 Sultan, Islamic Concept, p.38.

99 Bennoune, As-Salamu Alaykum, p.631. In addition, Imam Maliki took a more restricted position in favor of women and children. He is said to have gone far as to warn against killing women and children who take a direct part in hostilities. See Bennoune, As-Salamu Alaykum, p.630. However, there are some Islamic scholars who have contrary opinion with respect to killing of civilians during an armed conflict. They opined that once the unbelievers in the *dar al harb* (abode of war) had been invited to adopt Islam and refused to accept one of the alternatives, the Muslim army are allowed, in principle, to kill any one of them, combatants and non-combatants, provided they were not killed treacherously and with mutilation. They buttress their argument with the fact that prohibition of attack against women and children is interpreted to mean prohibition on targeting rather than on killing. Thus, they agree that women and children may die in the course of fighting as collateral. Shafi'I relied on the incident in which the Prophet (PBUH) was asked about the consequences of night raids and whether the raiders would be held accountable for their death and the Prophet responded that – they are from them and accordingly can be killed in the process. Badawi, Islamic Jurisprudence, 9. See also the commentary of Hadith No. 1311 in Aduly, Bulug al-Maram, p.416.

VIII. CONCLUSION

Principle of distinction under IHL and Islamic Law of Warfare are similar in the sense that both legal regimes articulate the obligation on belligerents to distinguish between civilians and combatants and between civilian objects and military objectives and shall direct their military operations only against military objectives. With the establishment of principle of distinction as a norm of customary IHL, the applicable law under the two legal regimes did not differentiate the types of conflicts when it comes to discharge of obligation imposed by the principle. The position of combatants and military objectives as legitimate military targets and that of civilians and civilian objects as protected against dangers of military operations are synonymous under the two legal regimes. In case a civilian directly participates in hostilities he loses immunity against attack and becomes legitimate military target both under IHL and Islamic Law of Warfare.

It is suggested that there is need for Islamic Humanitarian ideals, particularly the principle of distinction to be integrated and form part of the contemporary IHL in order to make the contemporary humanitarian norms a whole for its effective application by both state and non-state actors during conduct of hostilities. It is further suggested that Islamic scholars, International Committee of the Red Cross (ICRC) and other humanitarian organization should orient and educate fellow Muslims and non-Muslims through television programs, internet, social networks, newspapers and all other mediums of communication on the humanitarian norms contained in Islamic law of warfare in order to clarify the misconception on lack of humanitarian ideals, particularly on part of armed groups that have religious affiliation.

Terror on Diplomats and Diplomatic Missions in The Name of Jihād: Islamic Law Perspective

Muhammad-Basheer .A. Ismail*

ABSTRACT

Terrorist attacks on diplomats and diplomatic facilities have been on the increase in recent years. It has often been argued that most of the terrorist attacks have been perpetrated by Muslims in the name of Islam. These attacks on diplomatic personnel and facilities have generally provoked some questions among international and Islamic law experts from which emanate the subject of discussion in this paper. This article intends to critically examine the following questions: what is the relationship between the concept of *jihād* and terrorism?; what is the legality or otherwise of non-State actors declaring *jihād*?; can diplomatic envoys and missions be subject of attack even during a lawfully declared *jihād*?; can the maiming or killing of unarmed civilians be justified based upon the principles of *jihād*?; does the dichotomisation of the world into *dār al-harb (the abode of war) and dār al- Islām* (the abode of Islam) have any relevance to the concept of jihād?; and what are the responses of Muslim States to these terrorist attacks and how do they treat such violation of the principles of international diplomatic law based on the criminal justice system of Islamic law? This article argues that even in a war situation, Islamic law dictates that diplomatic envoys and facilities must be safely protected. This article further argues that since the principles of *jihād* are fundamentally diametrical to the act of terrorism, it will, therefore, be erroneous to equate the *jihād* ideology with terror-violence.

I. INTRODUCTION

Terrorist attacks on diplomatic missions have been on the increase in recent years.[1] Diplomats and diplomatic facilities have been soft targets for terrorist attacks in the so-called 'world-wide war' often perpetrated by non-state actors against various States.[2] These attacks are usually perpetrated in the form of murder, arson, kidnap and even

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1 B. Zagaris and D. Simonetti, "Judicial Assistance under U.S. Bilateral Treaties," in M. C. Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects*, Kluwer Academic Publishers, Netherlands 1988, p. 219.

2 B. M. Jenkins, "Diplomats on the Front Line," *Rand Corporation, Santa Monica*, California, 1982, p. 1.

detention often committed against diplomatic agents of foreign countries. In fact, since the attack on the World Trade Centre on 11 September, 2001,[3] terrorism has gradually, but sophisticatedly, become a global catastrophe requiring a global challenge.[4] A recent statistical survey, for instance, indicates that in 2012 various diplomatic institutions were attacked ninety-five times, out of which more than one-third of such attacks targeted United Nation personnel or facilities, with the remaining two-thirds spread across African Union, European Union, the World Bank, the World Health Organisation, including consulates, embassies, and diplomatic personnel representing Bulgaria, Canada, China, Egypt, Germany, Great Britain, India, Indonesia, Iran, Israel, Italy, Japan, Saudi Arabia, Syria, Tunisia, Turkey, and the United States.[5]

With the recent spate of terrorist activities within the Muslim States, and mostly perpetrated by Muslims, one may want to agree with the submission of Esposito that "the most widespread examples of religious terrorism have occurred in the Muslim world."[6] However, this must not be construed as if terrorism originated from amongst the Muslims.[7] The truth is that terrorism can be said to be as old as human history.[8] Surprisingly, the perpetrators of these attacks often claim inspiration from the Islamic *jihād*.[9] This article argues that even in a war situation between a Muslim State[10] and a non-Muslim State, there are some laid down principles according to Islamic law of war which must necessarily be complied with. For instance, Islamic law requires that during peace and war situation, diplomatic envoys must not be molested, imprisoned or killed; rather, they and their missions should be safely protected throughout their stay within a particular Muslim State. However, these incessant attacks on diplomatic personnel and facilities have generally provoked some questions which form the subject of discussion in this article. This article will, therefore, critically examine the following questions: (a) what is the relationship between the concept of *jihād* and terrorism? (b) is it legal for non-State actors to declare *jihād*? (c) can diplomatic envoys and diplomatic missions be targeted for attacks even during a lawfully declared *jihād*? (d) can the maiming or killing of unarmed civilians be justified according to the principles of *jihād*? (e) what is the relevance of *dār al-harb (the abode of war) and dār al- Islām* (the abode of Islam)

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3 J. Rehman, Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilisations' in the New World Order, Hart Publishing, Oxford, 2005, p. 71.

4 D. A Schwartz, "International Terrorism and Islamic Law," Colum. J. Transnat'l L. 1991, Vol. 29, p. 630.

5 *Annex of Statistical Information 2012*, National Consortium for the Study of Terrorism and Responses to Terrorism, A Department of Homeland Security Science and Technology Centre of Excellence Based at the University of Maryland, May 2013, p. 9.

6 J. L. Esposito, *Unholy War: Terror in the Name of Islam*, Oxford University Press, New York, 2002, p. 151. See also D. A. Schwartz, op cit. p. 630.

7 E. Kedourie, "Political Terrorism in the Muslim World," in B. Netanyahu (ed.), *Terrorism: How the West Can Win*, The Jonathan Institute, New York, 1986, p. 70.

8 See R. D. Law, *Terrorism: A History*, Polity Press, Cambridge, 2009, Pp. 1 and 5.

9 N. A. Shah, *Self-Defense in Islamic and International Law: Assessing Al-Qaeda and the Invasion of Iraq*, Palgrave Macmillan, New York, 2008, p. 47.

10 Muslism States are States that are predominantly Muslim majority, which also include States that specifically declare themselves as 'Islamic Republics' and those States that declare Islam, in their Constitutions, as the States religion. See M. A Baderin, *International Human Rights and Islamic Law*, OUP, Oxford, 2003, p. 8.

to the concept of *jihād*? (f) what are the responses of Muslim States to these terrorist attacks, and how do they treat such violation of the principles of international diplomatic law based on the criminal justice system of Islamic law? These issues will be analysed by relying on directives from the Qur'an, the prophetic instructions and advices from the Caliphs to their military commanders as expounded in the Islamic *siyar*.

II. TERRORISM AND ITS DEFINITIONAL PROBLEM

The ability to comprehend and explain the concept of terrorism is often impeded by a single and accepted universal definition. As such, there are divergent definitions of terrorism amongst policy-makers, international lawyers, academics, national legislators, regional organisations and even by the United Nations.[11] Perhaps, this definitional ambiguity may not be unconnected with the general aphorism that "one man's terrorist is another man's freedom fighter."[12] This may be one of the reasons why the international community has not been able to fashion out a binding and an acceptable definition of terrorism. Thus, Bassiouni's view that "the pervasive and indiscriminate use of the often politically convenient label of 'terrorism' continues to mislead this field of inquiry" appears to be correct.[13] Yet, it is very important that a clear-cut definition of terrorism be given as noted by the former President of Lebanon, Emile Lahoud, that "[i]t is not enough to declare war on what one deems terrorism without giving a precise and exact definition."[14] One begins to wonder whether it is sufficient, particularly in this era of political sensitivity, to generalise the definition of terrorism to cover "[w]hat looks, smells and kills like terrorism is terrorism."[15] Definitely not, for such generalisation will be too far-reaching. The fact remains that once an act is not terrorism, it can never be terrorism.

Multiple attempts have been made towards having a universal definition of terrorism since 1937[16] with the adoption of the Geneva Convention for the Prevention

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11 See B. Golder and G. Williams, "What is 'Terrorism'? Problem of Legal Definition," *UNSW Law Journal*, 2004, Vol. 27(2), p/ 270 See also J. Weinberger, "Defining Terror," *Seton Hall J. Dipl. & Int'l Rel*. 2003, Vol. 4, p. 63.

12 E. Rosand, "Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism," *AJIL*, 2003, Vol. 97, p. 334.

13 M. C. Bassiouni, "A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"," in M. C. Bassiouni (ed.), *Legal Responses to International Terrorism: U.S. Procedural Aspects*, Kluwer Academic Publishers, Netherlands, 1988, p. xvi.

14 *Beruit Wants Terrorism Defined*, ALJAZEERA, Jan. 13, 2004, available at http://english.aljazeera.net/NR/exeres/854F5DE3-FC2D-4059-8907-7954937F4B6C.htm. [accessed 10 February, 2012.

15 This was in a speech delivered by the former British Ambassador to the United Nations, Sir Jeremy Greenstock, following the pathetic incidence of September 11, 2001. See J. Collins, 'Terrorism' in J. Collins and R. Glover (eds.), *Collateral Language: A User's Guide to America's New War*, New York University Press, New York, 2002, Pp. 167 – 168.

16 In 1937 the then League of Nations which later became known as the United Nations made an attempt to define the word terrorism following the assassination of King Alexander I of Yugoslavia in 1934. See B. Saul, 'The Legal Response of the League of Nations to Terrorism', *J Int'l Criminal Justice*, 2006, Vol. 4, p. 79; G. Gullaume, 'Terrorism and International Law', *ICLQ*, 2004, Vol. 53, p.538.

and Punishment of Terrorism[17] up to 2002[18] following the infamous attack on the World Trade Centre in September 11, 2001 which still appears to be elusive. A working group set up by the United Nations (U.N.) General Assembly, for instance, came to define terrorism as an act

> intended to cause death or serious bodily injury to any person; or serious damage to a State or government facility, a public transportation system, communication system or infrastructure facility . . . when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing an act.[19]

This definition, though, tends to proscribe a wide range of criminal acts. Nevertheless, it is said to be inconclusive[20] as Malaysia, on behalf of the Organisation of Islamic Cooperation (OIC), proposed an exemption that "[p]eople's struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."[21] The aim of the proposal was to exclude the activities of national liberation forces from the reach of the convention by relying on Article 2 (a) of the 1999 Convention of the OIC on Combating International Terrorism.[22] The proposal by the 57 members of the OIC was rejected by a majority of the Western nations including Israel[23] on the ground that "a terrorist activity remained a terrorist activity whether or not it was carried out in the exercise of the right of self-determination."[24]

Any attempt to jettison the idea of proffering a universally accepted definition and purpose for this enigmatic concept called terrorism before engaging in ways of combating it, may only amount to an exercise in futility. The U.N. General Assembly

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17 The Convention for the Prevention and Punishment of Terrorism was signed on 16 November, 1937 with twenty-four States as signatories, while India was the only country that ratified it. See 19 League of Nations Official Journal (1938), p. 23. See also J. Borricand, 'France's Responses to Terrorism' in R. Higgins and M. Flory (eds.), op cit., p. 145.

18 That was when a working group was formed by the United Nations General Assembly following the incident of September 11, 2001 charged with the task of developing a comprehensive convention on international terrorism.

19 Measure to Eliminate International Terrorism: Report of the Working Group, U.N. GAOR 6th Comm., 55th Sess., Agenda Item 164 at 39, U.N. Doc. A/C.6/55/L.2 (2002).

20 G. Guillaume, 'Terrorism and International Law', *ICLQ*, 2004, Vol. 53, p. 539.

21 S. P Subedi, "The UN Response to International Terrorism in the Aftermath of the Terrorist Attacks in America and the Problem of the Definition of Terrorism in International Law," *International Law Forum du droit International*, 2002, Vol. 4, p. 163.

22 Article 2 (a) of the Convention of the OIC on Combating International Terrorism provides that: "Peoples struggle including armed struggle against foreign occupation, aggression, colonialism, and hegemony, aimed at liberation and self-determination in accordance with the principles of international law shall not be considered a terrorist crime."

23 See J. Friedrichs, "Defining the International Public Enemy: The Political Struggle Behind the Legal Debate on International Terrorism", *Leiden Journal of International Law*, 2006, Vol. 19, p. 75. See also N. Rastow, "Before and After: The Changed UN Response to Terrorism Since September 11th", *Cornell Int'l L.J.*, 2002, Vol. 35, p. 488.

24 SP Subedi, op cit., p. 163.

Resolution 42/159 of December 7, 1987 confirms this argument when it says that "the effectiveness of the struggle against terrorism could be enhanced by the establishment of a generally agreed definition of international terrorism." It is quite important to note that for a definition of terrorism to be generally accepted as such, it should encapsulate all forms of act regardless of the actor, perpetrator, target, place or time.[25] In other words, the definition should be devoid of double standards; irrespective of whether the terrorist activities are perpetrated by the State or non-State actors.

In international law, terrorism may be perceived as a crime which precipitates serious violations of individual and collective rights.[26] Such activities as armed assault on civilians, indiscriminate bombings, kidnapping, focused assassination, hostage-taking and hijacking have been generally considered by the international community to be illegal and criminal in nature.[27] It is beyond doubt that defining terrorism in international law remains problematic and very much complicated. This complication does occur usually when it comes to the question of differentiating a terrorist from a freedom fighter.[28] Labelling someone or a particular group as a terrorist or terrorist organisation appears to depend on "political persuasion and nationalistic sentiments."[29] No wonder, Nobel Peace Prize laureates Menachem Begin (d. 1992), Yasser Arafat (d. 2004) and Nelson Mandela (d. 2013) were, at different stages of their lives, famously labelled as terrorists.[30]

Most African States, including Muslim States, strongly viewed that the meaning of terrorism does not include those struggling against armed occupation and foreign aggression.[31] The majority of the Western States including the United States and Israel, on the other hand, contend that "state terrorism" cannot be included in the definition of terrorism.[32] Many scholars have, in their quest for a universal definition of terrorism, come to the conclusion that since States and regional organisations cannot be unanimous on the definition of terrorism, it would then be difficult to have or invoke a universal criminal jurisdiction on it.[33] In a recent article written in 1997, Higgins concludes that

> Terrorism is a term without legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both.[34]

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25 S. Zeidan, "Desperately Seeking Definition: The International Community's Quest for Identifying the Specter of Terrorism," *Cornell Int'l L. J*. 2004, Vol. 36, p. 492.

26 J. Rehman, op cit. (2005), p. 71.

27 A. P. Schmid, "Frameworks for Conceptualising Terrorism," *Terrorism and Political Violence*, 2004, Vol. 16:2, p. 197

28 J. Rehman, op cit. (2005), p. 73

29 Ibid, 74

30 See H. Gardener, *American Global Strategy and the 'War on Terror'*, Ashgate Publishing Limited, England. 2005), p. 74. See also O. Elagab, *International Documents Relating to Terrorism*, Cavendish Publishing Limited, London, 1995, p. iii

31 G. Levitt, op cit. p. 109

32 R. Higgins, "The General International Law of Terrorism," in Rosalyn Higgins and Maurice Flory (eds.), *Terrorism and International Law*, Routledge, London, 1997, p. 16

33 R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review*, 1974, Vol. 7, p. 380

34 R Higgins, "The General International Law of Terrorism," in R. Higgins and M. Flory (eds.), *Terrorism and International Law*, Routledge, New York, 1997, p. 28.

If Higgins' statement is anything to go by, it therefore means that different countries will have to adopt different definitions of terrorism depending on how terrorism is perceived by them. Invariably, there may be no universal definition of terrorism due to lack of unanimous acceptance from the international community.

However, for the purpose of this discussion which focuses on whether the principles of *jihād* sanction the acts of terrorism particularly against internationally protected persons, we may not have to belabour the issue concerning the universal definition of terrorism. Rather, we may want to agree with the argument canvassed by the United States Government that "convening a conference to consider this question (i.e., the universal definition of terrorism) once again would likely result in a non-productive debate and would divert the United Nations attention and resources from efforts to develop effective, concrete measures against terrorism."[36] It suffices, at least, that categories of acts that are identified and condemned by the international community as forming the acts of terrorism are domestically criminalised with the intent to prosecute or extradite the perpetrators in cooperation and with the understanding of other States.

III. MEANING AND LEGAL IMPLICATION OF JIHĀD IN ISLAMIC LAW

The statement that says that "to equate Islam and Islamic fundamentalism uncritically with extremism is to judge Islam only by those who wreak havoc"[37] may not be far from the truth. This observation becomes relevant in view of the amount of misunderstanding of the word *jihād* which is often considered as a synonym of terrorism[38] because it is a powerful religious concept which is frequently used by some "self acclaimed jihadists" as a justification for their nefarious acts.[39] The compatibility of Islamic law with the modern norm of international law has been a subject of deep controversy, partly due to the scepticism surrounding the acceptance of the concept of *jihad*, owing to the pejorative connotations it has acquired particularly in the minds of most Westerners.

It is thus, important to mention that the term "*jihād*" is not in any way identical with the phrase "holy war" or analogous to the concept of crusade as understood in Western Christendom.[40] Moreover, "*Harb al-Muqaddasah*" which is the Arabic equivalent of the

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35 J. M. Lutz and B. J. Lutz, *Global Terrorism*, 2nd edn, Routledge, New York, 2008, p. 14.

36 United Nations General Assembly, *Measures to Eliminate International Terrorism*, The Secretary-General's Report, A/48/267/Add.I, 21 September, 1993, p. 2.

37 John L. Esposito, "Political Islam: Beyond the Green Menace" (originally published in the journal *Current History* January, 1994), accessed 11 March, 2012, http://islam.uga.edu/espo.html.

38 N. A. Shah, op cit. p. 13.

39 See Micheal Cappi, *A Never Ending War*, Trafford Publishing, Victoria, 2007, p. 138. See also D. Bukay, "*The Religious Foundations of Suicide Bombing: Islamist Ideology*," Middle East Quarterly XIII, 2006, p. 27 article online at http://www.meforum.org/1003/the-religious-foundations-of-suicide-bombings [accessed 14 March, 2012].

41 See H. M. Zawati, *Is Jihad A Just War? War, Peace and Human Rights Under Islamic and Public International Law*, The Edwin Mellen Press, Wales, 2001, 13 See also R. Peters, *Jihad in Mediaeval and Modern Islam*, E. J. Brill, Leiden, The Netherlands, 1977, p. 4.

English phrase "*Holy War*" is not mentioned anywhere in the Qur'an or the authentic traditions of Prophet Muhammad (pbuh).[41] The word *Jihād* is an Arabic expression derived from the verb *jahada*, which means to strive or exert oneself in doing things to the best of one's ability.[42] Basically, the concept of *jihād* signifies self-exertion and peaceful persuasion for the sake of God in contradistinction to violence or aggression.[43] *Jihād*, at the time of Prophet Muhammad, was a challenge that required one to place everything at the disposal of Islam, which included the resort to force in self-defense, if need be.[44] According to al-Kāsāni, "jihad is used in expending ability and power in struggling in the path of *Allāh* by means of life, property, words and more"[45] just as it has been expressly stated in the Qur'an that:

> O you who have believed, shall I guide you to a transaction that will save you from a painful punishment? It is that you believe in Allah and His Messenger and strive in the cause of Allah with your wealth and your lives. That is best for you, if you only knew.*46*

In a more general context, *jihād* has been further defined by Esposito as the obligation incumbent on all Muslims, individuals, and the community to follow and realize God's will: to lead a virtuous life and to spread Islam through preaching, education, example, and writing. I also includes the right, indeed the obligation, to defend Islam and the Muslim community from aggression.[47]

Shah, in his explanation of the kinds of *jihād*, indicates that jihād could be viewed from two main perspectives: the internal *jihād* and the external *jihād*. He stresses that the internal *jihād*, which is a process of self-purification, "is a search for self-satisfaction by winning the pleasure and blessing of God."[48] External *jihād*, according to him, involves the "search for self-protection in several ways, including self-defense, self-determination, and the search for how to remove obstructions hindering self-protection."[49] In essence, jihād could be summed up as a search for self- satisfaction and self-protection.[50]

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41 J. Badawi,"Muslim/Non-Muslim Relations: An Integrative Approach," *J. Islamic L. & Culture*, 2003, Vol. 8, p. 38.

42 See S. Mahmassani, "The Principles of International Law in The Light of Islamic Doctrine," in *Hague Academy of International Law, Recueil Des Cours: Volume 117 1966/I*, Martinus Nijhoff Publishers, 1968, p. 280. See also N. Mohammad, "The Doctrine of Jihad: An Introduction," *Journal of Law and Religion*, 1985, Vol. 3, p. 385.

43 J. Rehman, "Islamic Criminal Justice and International Terrorism: A Comparative Perspective into Modern Islamic State Practices," *J. Islamic St. Prac. Int'l L*,. 2006, Vol. 2, p. 19.

44 M. C. Bassiouni, "Evolving Approaches to Jihad: From Self-Defense to Revolutionary and Regime-Change Political Violence," *Chi. J. Int'l. L*., 2007-2008, Vol. 8, p.120.

45 Al-Kaasaani, *Kitaab Badaa'i al-Sanaa'i*, vol. 7, 97.

46 Qur'an 61: 10-11.

47 J. L. Esposito, "Terrorism and the Rise of Political Islam," in Louise Richardson (ed.), *The Roots of Terrorism* Routledge, Oxon, 2006, p. 149.

48 N. A. Shah, op cit. p. 14.

49 Ibid.

50 Ibid.

The use of what has been termed "physical force" only forms an aspect of *jihād*, which presupposes that it will be incorrect to assume that *jihād* as a whole stands for violence.[51] But then, can one really say whether this aspect of *jihād*, in other words, the use of force, is purposely enjoined on Muslims in self-defense against persecution and aggression or for the purpose of launching offensive wars against the non-Muslims in the name of proselytisation? To answer this question, one has to consider whether jihād is indeed a defensive or an offensive war.

A. *Jihād as a Defensive War*

According to Islamic law, the use of force can be resorted to as self-defense to repel all forms of aggression and oppression against the Muslim community. This assertion is supported by an array of Qur'anic verses and historical facts. It may be argued that, in Islam, the general rule is to maintain and spread peace, while war, which is an aberration, will only be resorted to in exceptional conditions.[52] This argument comports with the ideological rationale behind the concept of *jihād* which is, as stated by Ibn Taymiyyah (d. 728/1328), "to defend Muslims against real or anticipated attacks; to guarantee and extend freedom of belief; and to defend the mission of Islam."[53] Therefore, according to the principle of *jihād*, war can only become permissible if the sole objective is to protect the Islamic faith and to preserve the lives of the Muslims.

There are some early Quranic verses that were revealed to Prophet Muhammad (pbuh) shortly after his emigration (*hijrah*) to Madinah emphasising the condition under which *jihād* could be fought.[55] At that time, Madinah was persistently under the fear of invasion from the non-Muslims.[56] These Qur'anic verses marked the genesis of armed struggle in Islam, "with the express purpose to defend the religious belief of the Muslims and to avoid extermination at the hands of the then dominant group [the idolatrous Arabs]."[57] It was revealed to Prophet Muhammad (pbuh) that:

> Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory. [They are] those who have been evicted from their homes without right - only because they say, "Our Lord is Allah. . .[58]

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51 S. H Hashmi (ed.), *Just Wars, Holy Wars and Jihads: Christian, Jewish and Muslim Encounters and Exchanges*, OUP, Oxford, 2012, p. 9.

52 See S. S. Ali and J. Rehman, "The Concept of Jihad in Islamic International Law," *Journal of Conflict & Security Law*, 2000, Vol. 10, p. 331.

53 Shams al-Islam Ahmad Ibn Taymiyyah, "Qaa'ida fi Qitaal al-Kuffaar," in Muhammad Haamidal-Faqi, *Majmu'at Rasaa'il Ibn Taymiyyah*, Matba'at al-Sunnah al-Muhammadiyyah, Cairo, 1949, Pp. 116-117.

54 That was on 09 September, 622 AD when Prophet Muhammad and his followers migrated from Makkah to Madinah in order to escape from the Makkans persecution.

55 John L. Esposito, *What Everyone Needs to Know About Islam*, OUP, Oxford, 2002, p. 120.

56 Ali and Rehman, op cit. (2000), Pp. 331-332.

57 Ibid, p. 332.

58 Qur'an 22:39-40.

These verses clearly indicate that for one to engage in *jihād* either individually or collectively, it must be for the purpose of redressing a wrong and in defense of the community.[59] Notable defensive *jihāds* in the more recent time may include the Afghan resistance against the Russian invasion in 1979 and the Palestinian struggle against Israel.[60]

According to Ibn Katheer (d. 774/1373),[61] Qur'an 22:39-40 and 2:190 are the first Qur'anic injunctions authorising the use of physical force against the unbelievers.[62] It is worth mentioning that the instruction to "fight in the way of Allāh" is not based on the non-acceptance of Islam, as "there shall be no compulsion in [acceptance of] the religion."[63] Badawi asserts that there is

> [n]o single verse in the Qur'an, when placed in its proper textual and historical context, which permits fighting others on the basis of their faith, ethnicity or nationality. To do so, contravenes several established values and principles.[64]

Once the enemies desist from their hostile and aggressive pursuit, and opted for peace, the Muslims are expected to reciprocate in the like manner and embrace peace[65] in conformity with the Qur'anic injunction that says: "And if they incline to peace, then incline to it [also] and rely upon Allah. Indeed, it is He who is the Hearing, the Knowing."[66] This verse and other similar verses of the Qur'an confirm the peaceful relationship that could exist and does exist between Muslims and non-Muslims contrary to the view of some scholars who argue that "in theory *dar al-Islam* was in a state of war [permanently] with the *dar al-harb*."[67]

B. *Can Jihād be Offensive?*

There are some Islamic scholars who contend that the Islamic faith should be spread peacefully, but, if there are any impediments against peaceful propagation, then the use of force could be resorted to.[68] In their argument, they often refer to some verses of the Qur'an that are known as the "sword verses" claiming that these verses have abrogated the earlier Qur'anic verses (Qur'an 22:39-40 and 2:190) known as the "peace verses" that

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59 A. L. Silverman, "Just War, Jihad, and Terrorism: A Comparison of Western and Islamic Norms for the Use of Political Violence," J. Church & St., 2002, Vol. 44, p. 78.

60 S. C. Tucker (ed.), The Encyclopaedia of Middle East Wars: The United State in the Persian Gulf, Afghanistan, and Iraq Conflicts, Vol. 1, ABC-CLIO Ltd., 2010, p. 653.

61 His full name was Abu Al-Fidaa' Isma'il ibn Katheer. He was the author of the famous commentary on the Qur'an named 'Tafseer al-Qur'an al-'Azeem'.

62 Abu Fidaa' Isma'il ibn Katheer, Tafseer al-Qur'an al-'Azeem, Vols. 1 and 2, Dar al-Marefah, Beirut, 1995, Pp. 233 and 235.

63 Qur'an 2:256.

64 J. Badawi, op cit. p. 40.

65 N. A. Shah, op cit. (2008), p. 17.

66 Quran 8:61.

67 M. Khadduri, op cit. p. 13.

68 Shah, op cit. p. 15.

establish the defensive nature of the Islamic *jihād*.[69] As such, they allege that the "sword verses" legitimise absolute offensive war citing Quran 9:5 which says that:

> And when the inviolable months have passed, then kill the polytheists wherever you find them and capture them and besiege them and sit in wait for them at every place of ambush.[70]

This verse should not and cannot be read in isolation. It should be read together with the previous and subsequent verses, i.e. Quran 9:1-15, for one to fully comprehend the textual and historical context inherent in the verse. Those verses including Qur'an 9:5 were revealed as a result of the Makkan's breach of the *Treaty of Hudaybiyyah* (628 AD)[71] when the Banu Bakr, a tribe that was an ally to the Makkans, attacked the Banu Khuza'ah, a tribe in alliance with the Muslims.[72] Surprisingly, the Makkans had to surrender to the Muslims without fighting, thereby rendering the application of these verses unnecessary. Moreover, if one thoroughly considers the "sword verse" and the "peace verses", one would see that the "sword verse" appears to be absolute (*mutlaq*) while the "peace verses" are qualified (*muqayyad*).[73] The "peace verses" are qualified in that they provide specific reasons for declaring *jihād* against the polytheists, while the sword verse does not provide any reason for waging war. Since the "peace verses" and the "sword verse" convey the same ruling, which is the declaration of war, and the same subjects, according to the Muslim jurists, the conditions in the "peace verses" will automatically apply to the "sword verse".[74] This takes away the question of the "sword verse" abrogating the "peace verses".

Moreover, the contention that Qur'an 9:5 has abrogated the peace verses was considered 'not plausible' by Ibn Katheer[75] because Allah has specifically instructed the Muslims to "fight against the disbelievers collectively as they fight against you collectively."[76] According to Ibn Katheer, this means that

> [y]our [the Muslims] energy should be spent on fighting them [the polytheists], just as their energy is spent on fighting you, and on expelling them from the areas from which they have expelled you, as a law of equality in punishment.[77]

Esposito made a similar remark that

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69 J. L. Esposito, op cit. (2002), p. 121.

70 Qur'an 9:5.

71 It is also known as 'Sulh al-Hudaybiyyah'. It was signed between the Muslims of Madinah as represented by Prophet Muhammad on the one hand, and the Quraysh tribe of Makkah as represented by Suhayl bin 'Amr on the other hand. See, W. M. Watt, Muhammad at Medina, Oxford University Press, Karachi, 1981, Pp. 46-52.

72 M. Munir, "Public International Law and Islamic International Law: Identical Expression of World Order," *Islamabad Law Review*, 2003, Vol. 1:3 and 4, p. 375.

73 See Ibid. p. 378.

74 M. H. Kamali, *Principles of Islamic Jurisprudence*, The Islamic Texts Society, Cambridge, 1991, p. 111.

75 Abu Al-Fidaa' Isma'il Ibn Katheer, *Tafseer Al-Qur'an Al-'Azeem* Vol 1 Dar Al-Ma'rifah, Beirut, 1995, p. 233.

76 Qur'an 9:36

> [a]lthough this verse has been used to justify offensive jihad, it has traditionally been read as a call for peaceful relations unless there is interference with the freedom of Muslims.[78]

Similarly, Sayyid Qutb (d. 1966),[79] an Egyptian scholar, strongly condemned those who erroneously interpret Qur'an 9:5 to mean an outright extermination of the unbelievers when he says that:

> Some people may feel differently, taking the order to mean that when the truce was over, the Muslims were meant to kill all unbelievers. . . But this view is wrong.[80]

Obviously, the reasons for enmity between the Muslims and the polytheists were not as a result of their different religious beliefs. Rather, it was due to the Makkan's hostility, persecution and aggression towards the Muslims.[81]

Those who argue in support of the offensive *jihād* theory also refer to Qur'an 9:29 to buttress their argument thus:

> Fight against those who do not believe in Allah or in the Last Day and who do not consider unlawful what Allah and His Messenger have made unlawful and who do not adopt the religion of truth [i.e., Islam] from those who were given the Scripture . . .[82]

The understanding of some Muslim scholars about this verse is that it has abrogated all the peace verses in the Qur'an; as such, it marks the final stage of the Muslim-non-Muslim relations.[83] Apparently, the reasons for the revelation of Qur'an 9:29 were not obscure. In the summer of 630 AD there was information that the Byzantine Empire, which was predominantly Christian, was getting prepared to launch an offensive attack on the Muslims. As expected, Prophet Muhammad (pbuh) set out with about thirty thousand men with the intention of stopping the Roman soldiers from invading Madinah.[84] The Muslim forces eventually retreated back to Madinah when it was discovered that the Christian army had withdrawn their plan to invade Madinah.[85] The Muslim forces might

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77 Abu Al-Fidaa' Isma'il Ibn Katheer, *Tafseer Al-Qur'an*, p. 233.

78 J. L. Esposito, *Unholy War*, p. 35.

79 Sayyid Qutb was an Egyptian author, Islamic theorist and a leading member of the Egyptian Muslim Brotherhood. He was executed by hanging in August 29, 1966 by the Egyptian President, Gamal Abdel Nasser.

80 S. Qutb, *In the Shade of the Qur'an* Vol. VIII Surah 9 available at http://archive.org/details/InTheShadeOfTheQuranSayyidQutb [accessed 05 April, 2013].

81 A. Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Macmillan, New York 2011, p. 48.

82 Qur'an 9:29.

83 See S. Qutb, *Fi Zilaal al_Qur'an*, vol. 3, Daar al-Shuruq, Cairo 1417/1996, Pp. 1619-1650.

84 See Bakircioglu, op cit. p. 65 See also H. A. Adil, *Muhammad, the Messenger of Islam: His Life and Prophecy* Islamic Supreme Council of America, Washington 2002, Pp. 533-537.

85 M. Munir, op cit. (2003), p. 378.

have retreated because war is only allowed for the purpose of self-defense. It may be wrong to take Qur'an 9:29 out of its specific historical context if it has general application under Islamic law.[86] It will thus be erroneous to interpret the "sword verses" to mean an indiscriminate military *jihād* against all non-Muslims. Rather, the "sword verses" are meant for non-Muslims who attack or threaten to attack the Muslim community since "wars of aggression in general, and terrorism in particular, are diametrically opposed to the very idea of the Qur'an."[87]

Having discussed the position of Islamic law concerning the defensive or offensive nature of *jihād*, the next questions that need to be answered are: who declares *jihād*; is it the Muslims or the Muslim government? What are the pre-conditions that must be fulfilled before the Muslims could exercise their right to declare *jihād*? These are pressing questions that must be answered in view of the multiple attacks in the form of suicide missions; killings; injuries; arsons; and kidnapping, being perpetrated particularly against diplomats and diplomatic facilities of non-Muslim countries and their allies in the Muslim States. It is worth mentioning that these attacks are often organised by non-state actors. These are the issues to be considered in the next section.

C. *Who Declares the Call for Jihād?*

When it becomes necessary to resort to physical *jihād* or the use of force in self-defense either due to an actual invasion or a threat of aggression on the Muslim territory, there has to be a declaration of *jihād*. Both the classical and modern jurists are unanimous that the decision to initiate war according to Islamic jurisprudence must be taken by a legitimate authority.[88] Basically, at the earliest time in Islam, the sole legitimate authority that must declare the commencement of *jihād* was Prophet Muhammad (pbuh) who, according to the Qur'an, was commanded to "urge the believers to battle."[89] The responsibility of initiating *jihād* was placed upon Prophet Muhammad (pbuh), perhaps, due to the fact that *jihād* was then, just as it is now "an issue of public safety."[90]

With the demise of Prophet Muhammad (pbuh), the power to declare *jihād* devolved upon the Imam or Caliph,[91] being the head of the Muslim polity.[92] It is not for the individual

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86 N. A. Shah, op cit. (2008), p. 20.

87 Bakircioglu, op cit. p. 427 See also Sachedina, "The Development of *Jihad* in Islamic Revelation and History," in J. T. Johnson and J. Kelsay (eds.), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, Greenwood, New York 1990, p. 43.

88 A. Al-Dawoody, op cit. (2011), p. 76.

89 Qur'an 8:65.

90 N. A. Shah, op cit. (2008), p. 22.

91 Qur'an 4:59 says 'O you who have believed, obey Allah and obey the Messenger and those in authority among you.'

92 See A. Mikaberidze, *Conflict and Conquest in the Islamic World: A Historical Encyclopedia*, ABC-CLO, LLC, California, 2011, p. 827; N. J. DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad*, I. B. Tauris & Co. Ltd., London, 2007, p. 203.

Muslims or an organisation(s), not even the '*ulama* (Islamic jurists) to declare *jihād* without the definite directive of the Caliph or the Islamic head of State.[93] Abu Yusuf (d. 182/798) was very clear on this point when he observed that "no army marches without the permission of the Imam."[94] Ibn Qudamah (d. 620/1223), a renowned Hanbali scholar, expresses the view that "[d]eclaring Jihad is the responsibility of the Ruler and consists of his independent legal judgment."[95]

There are, of course, exceptional situations that may necessitate the declaration of *jihād* by non-State actors (individuals or group of individuals) notwithstanding the existence of an Islamic head of State. One of such situations is when there is a physical attack on a Muslim territory and the Muslim leader or the Islamic head of State appears to be incapable or refuses to declare a defensive *jihād* to protect the lives and properties of the Muslims, then the Muslims in that country will be justified to initiate a defensive *jihād*.[96] The Afghanistan war against the Russian occupation of their land in 1979 serves as a typical example of a defensive *jihād* declared not by the Muslim ruler, but by the consensus of Afghan Muslim religious leaders.[97] The defensive *jihād* embarked upon by the Afghans, which was a kind of collective and self-defensive war against the Russian invasion, was said to be compatible with Article 51 of the Charter of the United Nations[98] which provides that:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.[99]

Can individual or an organisation declare *jihād* against other nation(s) relying on the exceptional situations given above, even though there was no actual physical attack from invader(s)? It is very much doubtful if such a declaration can ever be legitimate under Islamic law. This is because, as stated earlier, there must be an actual physical attack on the Muslim State from a non-Muslim State. Until then, the declaration of *jihād* will remain the prerogative of the Islamic head of State. Reference will, for instance, be made

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93 Shaykh MH Kabbani, "Jihad in Islam," in Vincent J. Cornell (ed.), *Voices of Islam: Voices of the spirit* vol. 2 (Westport: Praeger Publishers, 2007), 219.

94 Abu Yusuf Ya'qub Ibn Ibraahim, *Kitaab al-Kharaaj*, (Beirut: Daar al-Hadaatha, 1990), 349.

95 See Ibn Qudamah, *Al-Mughni*, vol. 9, 184.

96 See Sohail H. Hashmi, "9/11 and the Jihad Tradition," in DJ Sherman and T Nardin (eds.), Terror, Culture, Politics: Rethinking 9/11 (Bloomington: Indiana University Press, 2006).

97 See M. Sageman, Understanding Terror Network, University of Pennsylvania, 2004, p. 2.

98 N. A. Shah, op cit. (2008), p. 23.

99 Charter of the United Nations and Statute of the International Court of Justice, (San Francisco, 1945), Pp. 10-11, , http://treaties.un.org/doc/Publication/CTC/uncharter.pdf [accessed 22 April, 2012].

to the two declarations of *jihād* made by Al-Qaeda[100] in 1996[101] and 1998.[102] Usama bin Laden, who was the leader of Al-Qaeda, issued *jihād* declarations both in 1996 and 1998 calling on all Muslims of the world "to kill the Americans and their allies, civilians and military."[105] The 1998 declaration further stresses that

> [it] is an individual duty of every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque [in Jerusalem] and the Holy Mosque [in Mecca] from their grip and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.[105]

Several verses of the Qur'an were cited in the 1996 and 1998 declarations wherein the Muslims were reminded of their duty to Allah and Islam concerning waging *jihād* against the infidels.

Most attacks that were launched against diplomats and diplomatic missions were, for instance, most likely, inspired by these two declarations of *jihād* by Al-Qaeda,[106] prominent among which were the two attacks on the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania both of which occurred on 7 August, 1998. Not less than 200 people lost their lives in the two attacks, leaving more than 1,000 people with severe injury.[107] The 1996 and 1998 declarations of *jihād* made by Usama bin Laden in collaboration with some group leaders in Pakistan, Egypt and Bangladesh remain inconsistent with the classical traditions of Islamic law.[108] The recent terrorist attack on the

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100 Al-Qaeda is generally known as an international terrorist network led and established by Usama bin Laden in 1988. See http://www.globalsecurity.org/military/world/para/al-qaida.htm [accessed 22 April, 2012]

101 This is a fatwa released by Usama bin Laden entitled 'Declaration of War against the American Occupying the Land of the Two Holy Places' first published in Al-Quds Al-Arabi, a London-based newspaper, in August, 1996 which was substantially the same as the 1998 declaration. See PBS *Newshour*, August, 1996 http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html [accessed 23 April, 2012]

102 This is the 1998 *jihaad* declaration by Usama bin Laden and his associates entitled 'Jihad against Jews and Crusaders World Islamic Front Statement' [23 February 1998] available at http://www.fas.org/irp/world/para/docs/980223-fatwa.htm [accessed 23 April, 2012]. The Arabic language text of this document: *World Islamic Front for Jihad Against Jews and Crusaders: Initial "Fatwa" Statement* also available at http://www.library.cornell.edu/colldev/mideast/fatw2.htm [accessed 23 April, 2012]

103 He was shot dead by the American forces on May 2, 2011 during a raid on his hitherto secret residence in Abbottabad, Pakistan. See *The Guardian*, Monday 2 May, 2011, available at: http://www.guardian.co.uk/world/2011/may/02/osama-bin-laden-dead-obama [accessed 23 April, 2012]

104 The 1998 *jihaad* declaration, op cit., (*supra fn*. 92)

105 Ibid.

106 A car bomb that was detonated outside the US Consulate in Karachi, Pakistan on 15 June, 2002 which killed 11 people was linked to Al-Qaeda terrorist network. See *The Telegram*, 15 June, 2002 available at: http://www.telegraph.co.uk/news/worldnews/asia/india/1397397/Karachi-car-bomb-kills-11-outside-US-consulate.html [accessed 23 April, 2012]. The double bombing of the British Consulate in Istanbul along with the HSBC Bank on 15 November, 2003 which left at least 27 people dead including top UK diplomat, Consul-General Roger Short, was also linked to Al-Qaeda. See *BBC News*, Thursday, 20 November, 2003 available at: http://news.bbc.co.uk/1/hi/world/europe/3222608.stm [accessed 23 April, 2012] .

107 See *BBC News*, 7 August, 1998 available online: http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm [accessed 23 April, 2012].

108 N. A. Shah, op cit. (2008), p. 58.

United Nations building in Abuja, the Nigerian capital, by a group popularly referred to as Boko Haram,[109] killing at least 21 and injuring 60 in the summer of 2011 is also worth mentioning.[110] The Boko Haram is a group that is believed to have received training from al-Qaeda in the Lands of the Islamic Maghreb (AQIM).[111] *Jihād* has now become a word that is loosely and commonly used by war mongers among the Muslims who camouflage as 'Muslim *Jihādists'* employing the *jihād* as a justification for illegitimately spilling the blood of non-Muslims, and even Muslims who do not subscribe to their ideological manifestation, all in the name of Islam.

Jihād, according to Islamic jurisprudence, as a defensive mechanism is a last resort and should not be understood as an aggressive warfare method. Moreover, since *jihād*, according to Ibn Taymiyyah, is "a defensive war against unbelievers whenever they threatened Islam,"[112] it therefore means that peace, if desired by the non-Muslims, should ordinarily characterise interaction between the Muslims and the non-Muslims.

D. *Protection of Diplomatic Envoys and Civilians during Jihād*

Jihād is now being embarked upon by some individual Muslim groups and organisations under the pretence of Islam, to carry out some nefarious activities against diplomatic personnel, non-Muslim as well as Muslim civilians as if they were legitimate targets. We must not forget that these groups always make references to Islamic sources (the Qur'an and *Sunnah*) to justify their actions, but the truth is that their actions regarding the practice and conduct of *jihād* clearly contradict the rules and norms in Islamic jurisprudence.[113] The killing of the US ambassador to Libya, Christopher Stevens, and three other Americans in the US Consulate, Benghazi in September 12, 2012, is one of the most recent examples of these terrorist activities perpetrated in the name of Islamic *jihād*.[114] The attack on the US Consulate was sparked by a film produced in America entitled 'Innocence of Muslims' which was reported to have insulted the Islamic faith. The generality of Muslim States were unanimous in their condemnation of the attack on the diplomatic mission particularly the killing of its diplomatic personnel. The OIC has seriously condemned the killing of Chris Stevens, the US ambassador to Libya, and three US diplomats in the Benghazi consulate, stating that their death "is not a loss for the Americans only, but for the international diplomatic vitality."[115] Perhaps, this explains

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109 The organisation is known as Jama'atu Ahlis Sunna Lidda'awati wal-jihad (translation: People Committed to the Propagation of the Prophet's Teachings and Jihad) but popularly referred to as 'Boko Haram' which means 'Western education is forbidden.'

110 See J. J. F. Forest, *Confronting the Terrorism of Boko Haram in Nigeria* Joint Special Operation University, 2012, p. 67.

111 See "*The National Strategy for Counter Terrorism*" The White House, 2011, p. 16 available at: http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf [accessed 10/09/2014].

112 See MF Sharif, "Jihad in Ibn Taymiyyah's Thought," The Islamic Quarterly Vol. 49:3, 183-203

113 P. Ahmed, op cit. (2007-2008), Pp. 772.

114 See '*Chris Stevens, US Ambassador to Libya, Killed in Beghazi Attack*' Wednesday 12 September, 2012 The Guardian, available online at http://www.guardian.co.uk/world/2012/sep/12/chris-stevens-us-ambassador-libya-killed [accessed 03 May, 2013].

115 See '*OIC: It was Deliberate Incitement*' Tuesday 18 September, 2012, Arab News, also available online at http://www.arabnews.com/oic-it-was-deliberate-incitement [accessed 03 May, 2013].

why Al-Qaeda's and other similar organisations' violent activities have been found to be unacceptable to the classical norms of Islamic *jihād*.[116]

The diplomatic personnel have a special kind of protection in Islamic law bestowed on them by the provisions of the Qur'an, numerous traditions of Prophet Muhammad (pbuh) and the practice of the various Muslim States. Such protections as personal inviolability, immunity from court's jurisdiction, freedom of religion and exemption from taxation are all guaranteed under Islamic diplomatic law.[117] It is well known both in the classical and modern periods of Islamic history that diplomatic envoy must not be imprisoned, maltreated, injured or killed while he or she is within the Muslim territory.[118] If Prophet Muhammad (pbuh) did not severe the heads of the two diplomatic envoys of Musaylimah (the false prophet),[119] despite the verbal confirmation of their belief in the acclaimed prophethood of Musaylimah,[120] which was considered a culpable offence according to Islamic law, what justification would Al-Qaeda and their likes have in targeting diplomats and diplomatic facilities in their attacks? Moreover, al-Shaybani who is often referred to by many scholars as one of the foremost contributors to the development of international law,[121] discussed the principles that entrenched the safety and immunity of diplomatic envoys even during the course of *jihād*.[122]

At least, it is obvious that out of the fifty-seven Muslim States in the world, none has been attacked by a non-Muslim State as at the time Usama bin Laden, Al-Qaeda and other similar organisations declared their global *jihād* particularly against the United States of America and their allies. Even if the declaration of *jihād* by Al-Qaeda were legitimate, without conceding, is it permissible or do they have the legal authority to injure or kill those that are under the protection of diplomatic immunity or civilian having valid entry visas which may be considered as having *aman* – safe conduct under Islamic law? Of course, the answer will be no. This is because the Muslim jurists have unanimously agreed that the diplomatic envoy including his wealth, family and aides will continue to enjoy the right of immunity for as long as they remain within the Islamic territory.[123] While

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116 See P. Ahmed, op cit. (2007-2008), Pp. 772-773.

117 See M. B. A. Ismail, "Justifications and Principles of Diplomatic Immunity: A Comparison between Islamic International Law and International Law," *Journal of Islamic State Practice in International Law*, 2013, Vol. 9:1, Pp. 80-87. See also M. C. Bassiouni, "Protection of Diplomats Under Islamic Law," *American Journal of International Law*, 1980, Vol. 74:3, Pp. 609-610.

118 See H. M. Zawati, op cit. (2001), p. 79.

119 His full name was Musaylimah ibn Habib. He was one of those who laid false claim to prophethood almost around the same time with Prophet Muhammad. He was nicknamed by the Prophet as '*al-kadhdhab*' (the liar).

120 Abu Muhammad Abdul Maalik Ibn Hishaam, *As-Seeratu-n-Nabawiyyah*, Vol. IV, Darul Gadd al-Jadeed, Al-Monsurah, Egypt, p.192.

121 K. R. Bashir, "Treatment of Foreigners in the Classical Islamic State with Special Focus Diplomatic Envoys: Al-Shaybani and Aman," in Marie-Luisa Frick and A. Th. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, Martinus Nijhoff Publishers, Leiden, 2013, p. 146.

122 K. R. Bashir, op cit. p. 152.

123 L. A. Bsoul, "Islamic Diplomacy: Views of the Classical Jurists," in Marie-Luisa Frick and A. Th. Muller (eds.), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives*, Martinus Nijhoff Publishers, Leiden, 2013, p. 134.

explaining the essence of Qur'an 9:6, Sharbini stressed that Islam categorically forbids the killing of diplomatic envoys and urges that they must be accorded full diplomatic immunity during the duration of their stay within the Muslim territory until they return back to their destination.[124]

The Islamic law of armed conflict is clear when it comes to determining those who are the combatants (*ahl al- qitāl*) and the non-combatants (*ghayr ahl al- qitāl*). The combatants are those who are actively engaged in war or preparing to engage in war either as military officers or volunteers.[125] The non-combatants, on the other hand, are those who do not fight and are indifferent to the effects of war. This will normally include children particularly those below the age of fifteen,[126] women (provided she is not a queen of the enemy),[127] the very old, the monks, the sick and the disabled persons,[128] diplomats, peasants and merchants.[129] These categories of persons are protected under the Islamic law from any kind of attack in times of war, unless they are found to have compromised their immunity by partaking in the fight or by providing assistance to the enemies.[130] In fact, Ibn Taymiyyah (d.728/1328), whose legal pronouncements on the issue of *jihād* have often been misinterpreted or quoted out of context by some radical Muslim groups, is of the opinion that non-combatants who do not participate in war should not be killed.[131]

The immunity given to non-combatants is based on the Islamic law principle that "everything is immune from attack unless it is explicitly permitted to be attacked."[132] The immunity granted to those who are not directly engaged in active combat or providing any kind of assistance to the enemies is particularly authorised in various verses of the Qur'an and specific Prophetic instructions given to Muslim fighters. When the Qur'an, for instance, says "Fight in the way of Allah those who fight you but do not transgress,"[133] that could also mean that the Muslims are restrained from fighting those who do not fight them; otherwise it could amount to transgression.[134]

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124 Sharbini Muhammad Khattib, *Mughni al-Muhtaj*, Vol. 4, Cairo, 1958, p. 236 cited in L. A. Bsoul, op.cit, p. 135-135.

125 See W. al-Zuhayli, *Athar al-harb fi al-fiqh al-Islami: diraasa muqaarana* Dar al-Fikr, Beirut, 1981, p. 503 cited in S. H. Hashmi, "Saving and Taking Life in War: Three Modern Muslim Views," The Muslim World, 1999, Vol. LXXXIX:2,: p. 169.

126 Mahmassani, Al-Qanun wa al-'*Alaqat al-Dawliyyah fi al-Islam* Dar al-Ilm lil Malayin, Beirut, 1972, p. 239

127 A. Al-Dawoody, op cit. (2011), p. 113.

128 S. Mahmassani, op cit. (1968)), p. 301.

129 See H. M. Zawati, op cit. (2001), p. 44.

130 S. Mahmassani, op cit (1968), Pp 302-303.

131 Ibn Taymiyyah, *Al-Siyasa al-Shari'yyah fi Islah Al-Ra'i wa Al-Ra'iyyah* edited by Ali b. Muhammad al-Imaran Saudi Arabia: 2008, p. 158 .

132 N. A. Shah, *Islamic Law and the Law of Armed Conflict*, Routledge, Abingdon, 2011, p. 47.

133 Qur'an 2:190.

134 See M. Munir, "*The Protection of Civilians in War: Non-Combatant Immunity in Islamic Law*," pp. 6-7, available at: http://works.bepress.com/muhammad_munir/13 [accessed 28 April, 2012] .

IV. THE REALITY OF THE CONCEPTS OF *DĀR AL-ISLĀM AND DĀR AL-HARB*

The *dār al-Islām and dār al-harb* are concepts which distinguish territories that are strictly under the governance of Islamic law from those that are not so governed. Aside from the Muslim citizens, there were also non-Muslim residents of *dār al-Islām*. These were people who had acquired the status of *dhimmi*, (those given protection) on the condition that their poll taxes, commonly referred to as *jizyah*, had to be paid.[135] Diplomatic immunity and inviolability were granted to non-Muslim foreign envoys during their visitation to the Muslim territories. *Aman* (safe-conduct) was equally granted to non-Muslims from *dar al-harb* who were visiting *dār al-Islām* for peaceful purposes. In a nutshell, *dār al-harb* can be described as a territory which does not tolerate the freedom to practice Islam and where the lives and properties of the Muslims are not safe.

There are controversies among modern Islamic scholars regarding the meaning of *dār al-Islām* and *dār al-harb*, most especially with "[t]he growth of Muslim communities in non-Muslim countries during the last decades of the twentieth century [which] has accentuated old dilemmas and created new ones."[136] There are those with the most radical view who contend that dār al-Islām is any country that is governed purely by the *sharī-ah*.[137] One wonders if such country exists today. There are some scholars who maintain a moderate position by defining *dār al-Islām* as any country where the Muslims have the liberty to freely practice the tenets of Islam regardless of whether the country is a secular or non-Muslim State. This view has been supported by Boisard who maintains that "a non-Muslim State which does not threaten the community of believers, respect justice, and guarantee freedom of worship, should not be considered *dār al-harb*."[138]

It must be understood that the creation of this universal dichotomy between *dār al-Islām* and *dār al-harb* was neither Qur'anic nor contained in any Prophetic traditions.[139] It was the creation of the medieval Islamic scholars based on their respective *ijtihād*. If one may ask: Can the *dār al-Islām* consider the rest of the world as *dār al-harb* with which *jihād* becomes inevitable in the present world order? The likes of Al-Qaeda may want to answer this question in the affirmative. The answer, in my opinion, will be in the negative. First of all, as earlier stated, the two concepts of *dār al-Islām* and *dār al-harb* never originated from the Qur'an or from the *Sunnah*. After all, the existence of other nations is recognised in the Qur'an when it says: "O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another."[140] Secondly, this may also be impossible because of the absence of

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135 J. E. Campo, *Encyclopedia of Islam* Infobase Publishing, (New York, 2009, p. 182.

136 S. Bar, *Warrant for Terror: Fatwās of Radical Islam and the Duty of Jihād*, Rowman & Littlefield Publishers, Maryland, 2006, p. 19.

137 Ibid.

138 M. A. Boisard, *Jihad: A Commitment to Universal Peace*, The American Trust Publication, Indianapolis, 1988, Pp. 8-9.

139 See B. Tibi, op cit. (2008), p. 47.

140 Qur'an 49:13.

the relevant conditions that are necessary before a territory could assume the status of either *dār al-Islām* or *dār al-harb*. The establishment of the United Nations has brought all countries of the world together with the agreement to live in peace with each other. That has invariably brought an end to "this whole theoretical, historical, circumstantial division" of the world into what is known as *dār al-Islām* and *dār al-harb*.[142]

The division of the world into *dār al-Islām* and *dār al-harb* was, in fact, temporary and not permanent, quoting the words of Munir that presently "Muslims are safe everywhere and can carry out their religious practices anywhere they want."[143] He says further that "Muslim states have signed almost every international convention, especially the UN Charter that gives equal status and sovereignty to every state."[144] Hence, *jihād*, according to Islamic law, cannot be based on the theoretical dichotomy of the world into *dār al-Islām* and *dār al-harb*, which does not seem to exist anymore. Rather, *jihād* will continue to be used, whenever the need arises, as a means of protecting Muslims against oppression, and to defend the freedom of religion and social order, and to prevent aggression and injustice.[145]

Moreover, it has also become clear that this theoretical division of the world into *dār al-Islām* and *dār al-harb* cannot be a basis for a permanent tension or state of war between the Muslim States and the non-Muslim States since Allah has enjoined the Muslims to remain "righteous towards them (the non-Muslims) and acting justly towards them (the non-Muslims)" once the non-Muslims are not at war with them. It therefore means that in the absence of war or war-like situation, peaceful diplomatic relations could and should be established between the Muslim States and the rest of the world.

V. HOW TERRORISM IS CONSIDERED UNDER MUSLIM STATES PRACTICES

Modern Muslim State practices have condemned the acts of terrorism in all its ramifications and forms. In fact, there was a concordant criticism by individual Muslim States as reflected in one of the conferences of the OIC which says that:

> Such shameful terrorist acts are opposed to tolerant divine message of Islam which spurns aggression, calls for peace, coexistence, tolerance and respect among people, highly prizes the dignity of human life and prohibits the killing of the innocent. It further rejected any attempts to allege the existence of any connection or relation between the Islamic faith and the terrorist acts, as such attempts are not in the interest of multilateral efforts to combat terrorism and further damage relations among people of the world. It stressed as well the need to undertake a joint effort to promote dialogue and create between Islamic world and the West

141 M. H. Kamali, "Methodological Issues in Islamic Jurisprudence," *Arab Law Quarterly 1996*, Vol. 11:1, p. 11.
142 Al-Dawoody, op cit. (2011), p. 95.
143 M. Munir, op cit. (2003), p. 407.
144 Ibid Pp. 407-408.
145 S. Mahmassani, op cit. (1968), p. 279.

> in order to reach mutual understanding and build bridges of confidence between the two civilizations.[146]

Truly, terrorism has gone far beyond a domestic problem; it has, in fact, become a global crisis that could necessarily require a global solution. The current spate of terrorism, particularly in the Muslim States, has continuously served as a constant reminder of the efficacy of domestic counter-terrorism legislations which complement the various international conventions that were created to combat terrorism. Virtually all the Muslim States are parties to most of the international conventions on terrorism. Some of these international conventions are the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents; 1979 International Convention against the Taking of Hostages; 1997 International Convention for the Suppression of Terrorist Bombings; 1999 International Convention for the Suppression of the Financing of Terrorism; and 2005 International Convention for the Suppression of Acts of Nuclear Terrorism. In conformity with provisions in other treaties on terrorism,[147] the provisions of Article 2 of the 1973 Convention on the Prevention of Crimes against Internationally Protected Persons, including Diplomatic Agents adopt a similar approach which directly considers specific actions of the perpetrators without attaching any importance to their ulterior motives or intentions. It specifically spelt out such crimes which each State shall make punishable by appropriate penalties which take into account their grave nature as: intentional commission of murder, kidnapping or other attack upon the person or liberty of an internationally protected person; violent attack upon the official premises, the private accommodation or the means of transport of such person likely to endanger his person or liberty, a threat or an attempt to commit any such attack; an act constituting participation as an accomplice in any such attack. Article 3 further empowers each State party to establish its jurisdiction over those crimes stated in Article 2 above whether the crime is committed within the territory of the State or the alleged offender is within the territory of the State.

The Muslim States have unanimously echoed the tenets of Islamic law which rejects all forms of violence and terrorism in conformity with the principles and rules of international law by also ratifying the 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism.[148] Aside from re-enforcing protection, security and safety of diplomatic and consular persons and missions and regional and international organisations within the territories of member States,[149] the Convention

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146 Final communique of the ninth extraordinary session of the Organization of the Islamic Conference of Foreign Ministers, held at Doha, Qatar on 10 October 2001 available at: http://www.un.org/documents/ga/docs/56/a56462.pdf [accessed 30 April, 2012].

147 Examples of such provisions are: Article 2 of the 1979 International Convention against the Taking of Hostages; Article 4 of 1997 International Convention for the Suppression of Terrorist Bombings; Article 4 1999 International Convention for the Suppression of the Financing of Terrorism; and Article 5 of the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism.

148 This Convention was adopted at the Organization of the Islamic Conference's twenty-sixth session of the Islamic conference of foreign ministers in Ouagadougou, Burkina Faso, in July 1999.

149 Article 3(A)(6) of the 1999 Convention of the Organisation of the Islamic Conference on Combating International Terrorism.

also makes provision for the Muslim States to arrest perpetrators of terrorist crimes and prosecute them in accordance with the national law or extradite them pursuan to the provisions of this or other existing Conventions between the requesting and requested States.[150] Member States are thus conferred with the domestic jurisdiction to try offences that fall under the meaning of terrorism, that is States that are parties to these Conventions can have local laws with the enabling jurisdiction to convict any person found guilty of the offence of terrorism.

Modern scholars of Islamic jurisprudence are of the view that the traditional meaning of *hirābah*, which forms one of the *hudūd*[151] offences, should be extended to incorporate the act of terrorism.[152] This justified the argument canvassed by Crane that terrorists should be held to account under the Islamic crime of *hirābah* in the following words:

> They [the extremists] are exhibiting the most serious crime condemned in the Qur'an, which is the root of almost all the other crimes, namely, arrogance. They are committing the crime of *hirabah*, which is the attack on the very roots of civilization, and justifying it in the name of Islam. There can be no greater evil and no greater sin. If there is to be a clash of civilizations, a major cause will be the muharibun, those who commit inter-civilizational *hirabah*.[153]

Ibn Hazm (d. 456/1064), a Spanish Muslim jurist, has meticulously defined a *hirābah* offender as:

> One who puts people in fear on the road, whether or not with a weapon, at night or day, in urban areas or in open spaces, in the palace of a caliph or a mosque, with or without accomplices, in the desert or in the village, in a large or small city, with one or more people . . . making people fear that they'll be killed . . . whether the attackers are one or many.[154]

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150 Ibid., Article 3(B)(1).

151 Crimes are designated as *huduud* (sing. *hadd*) when they fall within the categories of 'prohibitions ordained by Divine Law [Shari'ah], from which we are restrained by God with punishment decreed by Him; they form an obligation to God.' These are offences with specific punishments contained in the Qur'an and Sunnah otherwise known as '*uquubaat muqaddarah*. These crimes are theft (*sariqah*); drinking of alcohol (*shrub al-khamr*); unlawful sexual intercourse (*zinah*); false accusation of unlawful sexual intercourse (*qadhf*); banditry and highway robbery (*hiraabah*); and apostacy (*ridda*). See J. L. Esposito, *The Oxford Dictionary of Islam*, OUP, Oxford, 2003, p. 10.

152 See C. S. Waren, *Islamic Criminal Law*, OUP, Oxford 2010, p. 9.

153 R. D. Crane, *Hirabah versus Jihad* available at: http://www.irfi.org/articles/articles_301_350/hirabah_versus_jihad.htm [accessed May 11, 2012].

154 Quoted in A. Quraishi, "An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective," in G. Webb (ed.), *Windows of Faith: Muslim Women Scholar-Activists in North America*, Syracuse University Press, New York, 2000, p. 130.

Aside from the two countries, Saudi Arabia[155] and Iran,[156] that, most probably, embrace the classical Islamic law in their legal systems, there are some of the Muslim States such as Pakistan,[157] Sudan[158] and most of the northern States of Nigeria[159] that have recently re-introduced the Islamic criminal law into their respective legal systems.[160] According to the classical Islamic criminal law which forms part of the legal systems of these Muslim countries, *hirābah*, that is waging war against God and His Apostle and spreading corruption on the earth, being one of the *hudūd* offences, has been generally argued to include the offence of terrorism. The Kingdom of Saudi Arabia stresses in one of the counter-terrorism reports it submitted to the United Nations Security Council that:

> The commission of terrorist acts and support for such acts are included among the crimes of hirabah in the Islamic Shariah as applied by the Kingdom. This is the category that includes the most serious crimes and those for which the severest penalties are prescribed in the hirabah verses of the Holy Koran [Koran 5:33]. In accordance with the statutes in force in the Kingdom, the courts have jurisdiction to decide all cases relating to terrorism and, in accordance with its Statute, the Commission for Investigation and Public Prosecution investigates such crimes and prosecutes them in the courts.[161]

The Islamic Republic of Iran also made a similar commitment to combating terrorism by saying that "based on the sublime teachings of Islam, which denounce and prohibit incitement to terrorist acts, Iran is determined to combat the culture of terrorism."[162]

The crime of and punishment for *hirābah* is specifically mentioned in the Qur'an thus:

> Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is

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155 The Saudi Arabian legal system strictly applies the uncodified Hanbali School of law. See Sherifa Zuhur, March, 2005, *Saudi Arabia: Islamic Threat, Political Reform, and the Global War on Terror*, p. 15, available at: http://www.carlisle.army.mil/ssi [accessed May 10, 2012].

156 The Islamic Republic of Iran operates a criminal justice system based on the *Twelver Shi'i* School of law. See F. E. Vogel, "The Trial of Terrorists Under Classical Islamic Law," *Harvard Int'l L. J.*, 2002, Vol. 43:1, p. 54.

157 It was during the regime of Zia-ul-Haq that introduced the *Hudood* laws 'so as to bring it [the existing law] in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah.' See N. A. Shah, *Women, The Koran and International Human Rights Law*, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 127.

158 K. B. Gravelle, "Islamic Law in Sudan: A Comparative Analysis," *ILSA J. Int'l & Comp. L.*, 1999, Vol. 5, p. 1.

159 See P. Ostien, *Sharia Implementation in Northern Nigeria 1999-2006: A Sourcebook*, Spectrum Books Limited, Ibadan, 2007.

160 F. E. Vogel, op cit. (2002), p. 54.

161 A Counter-Terrorism report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/722/76/PDF/N0172276.pdf?OpenElement [accessed May 14, 2012].

> a great punishment, except for those who return [repenting] before you apprehend them. And know that Allah is Forgiving and Merciful.[163]

Alternative punishment for *hirābah* according to the Holy Qur'an includes death, crucifixion, amputation of the hand and foot as well as exile, depending on the circumstances of each case. For instance, terrorizing the public without killing and taking any property is punishable with banishment, which also implies life imprisonment according to the Hanafi jurists;[164] one that terrorizes the public by taking away their properties will have his right hand and left foot amputated; one that terrorizes by killing without taking any property will be sentenced to death by beheading; and the one that terrorizes the public by taking their properties and killing them will, of course, be beheaded and crucified thereafter.[165]

Hirābah is considered, in Islamic criminal law, to have the severest punishment. It is also extremely detrimental, in the words of the Maliki jurist, Al-Qurtubi, who says that:

> [B]ecause it prevents people from being able to earn a living. For indeed, commerce is the greatest and most common means of earning a living, and people must be able to move in order to engage in commerce . . . But when the streets are terrorized (*ukhifa*), people stop travelling and are forced to stay at home. The doors to commerce are closed and people are unable to earn a living. Thus, God instituted the severest punishment for *hirabah* as a means of humiliating and discouraging the perpetrators thereof and in order to keep the doors of business open.[166]

According to the Saudi legal system, terrorism is considered a serious crime which, of course, attracts strict penalties. It is thus, stated that:

> [i]n as much as terrorist offences come under serious crimes included in the category of crimes against society (*hirabah*), the penalties imposed for them are severe, ranging up to execution. Saudi Arabia is known internationally for having the severest penalties for perpetrators of terrorist offences. The reason for this is its adherence to the provisions of the Islamic *Shariah*, which criminalizes all forms of terrorism.[167]

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162 A Report submitted by the Islamic Republic of Iran to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) as well as the country's response to resolution 1624 (2005) dated 13 March, 2007, p. 17 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/269/28/PDF/N0726928.pdf?OpenElement [accessed May 14, 2012].

163 Qur'an 5:33-34.

164 S. A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition," *The Muslim World*, 2001, Vol. 91, p. 300.

165 F. E. Vogel, op cit. p. 59.

166 Al-Qurtubi, *Al-Jami' li ahkam al-Qur'an* vols. 11, K. Mays (ed.), Dar al-Fikr, Beirut, 1419/1999, p. 3:88.

167 A third report submitted by the Kingdom of Saudi Arabia to the UN Security Council pursuant to paragraph 6 of resolution 1373 (2001) of 28 September, 2001 dated 29 May, 2003 also available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/384/65/PDF/N0338465.pdf?OpenElement [accessed May 14, 2012].

Similarly, in Sudan, the severity of the punishment for committing any act of terrorism or participating in any terrorist activities is such that, upon conviction, the person might be executed or made to serve life imprisonment.[168] It is not a surprise that those who engage in the acts of terrorism by waging illegitimate war against their own State's governments and terrorising innocent people are usually considered as 'Muhaaribun' in Islam.[169] Therefore, if one considers the strictness in the punishments set down for the act of terrorism by the Islamic criminal jurisprudence, which cannot be compared with the conventional penalties,[170] it will, obviously, sound ridiculous to then equate Islam or the Islamic *jihād* with terrorism.

VI. CONCLUSION

The need to protect diplomats and diplomatic facilities from the onslaught and deadly attacks by terrorists cannot be over-emphasised. It has been established in this article that terrorist attacks that are unleashed on diplomatic establishments, particularly those perpetrated by Muslims within the Muslim and non-Muslim States cannot be justified as being a lawful *jihād* under Islamic law. The reasons have been summarised as follows: 1) *Jihād* is generally the prerogative of the Muslim head of State. It is hardly declared by individual or a group of individuals. In an exceptional situation where the lives and properties of Muslims are endangered by external aggression and the Muslim head of State appears to be too weak or refuses to call for *jihād* in defence of the Muslims, the responsibility of declaring *jihād* will then rest on individual Muslims or Muslim organisations; 2) it is a fundamental principle of Islamic *jihād* that diplomatic facilities and their personnel along with non-combatants should not be deliberately targeted for attack; 3) usually, *jihād* is resorted to as a defensive mechanism to fight all forms of aggression and oppression against the Muslim community. But terrorist attacks are, in most cases, offensively launched mainly for ideological goal; 4) the act of terrorism, being one of the offences of *hirābah* under Islamic penal law, is strictly punishable with death and or amputation. As such; it is unanimously condemned by all the Muslim States. The foregoing points further confirm the incongruity between the Islamic *jihād* and terrorism. They are two parallel lines that remain permanently far apart and can never meet.

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168 Articles 5 & 6 Terrorism (Combatting) Act, 2000 of Sudan See appendix VIII available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N02/210/61/IMG/N0221061.pdf?OpenElement [accessed May 14, 2012].

169 A. N. Kobeisy, *Counseling American Muslims: Understanding the Faith and Helping the People*, Praeger Publishers, Westport, 2004, p. 30.

170 T. Winter, "Terrorism and Islamic Theologies of Religiously-Sanctioned War," in D. Fisher & B. Wicker (eds.), *Just War on Terror?: A Christian and Muslim Response*, Ashgate Publishing Limited, Surrey, 2010, p. 21.

Cultural Repercussion on Mediation: Exploring A Culturally Resonant Mediation Approach Germane to Asia

*Jamila A. Chowdhury**

Abstract

Cultures always have profound impacts on what people do, and more importantly how they do it. The practice of mediation is not an exception. Therefore, a dynamic mediator also endeavours to mitigate 'cultural conflict' in a dispute so that cultural departure does not exacerbate or create another conflict. Adapting Hofstede's theory on 'style of dispute resolution practices in Asian commercial organizations' into mediation, this paper explains why a bit of an evaluative approach from mediators would be more appreciated and fruitful in Asian cultural context. Practices of mediation in indigenous Asian societies are also analyzed to deduce that historically Asian people are accustomed with practicing evaluative mediation to resolve their disputes. In brief, theories and practices of mediation synthesized in this paper would assist puzzled practitioners and policy makers in Asia to choose between evaluative and facilitative mediation. This paper, however, forms a strong argument why practice of evaluative mediation would be more productive and apposite in Asian context.

I. INTRODUCTION

Mediation is essentially an assisted conflict resolution process where parties need to negotiate with each other, with the assistance of a third party mediator, to attain a better outcome. A mediator, therefore, needs to be conscious about factors which may hinder effective negotiation between mediating parties.[1] Mediators need to understand conflict – how it arises and evolves in interpersonal relationship requiring mediation. Conflict is a state of antagonistic human relationship that may begin from a difference of opinion. As explained by Simpson[2] a conflict may arise because of opposing views on three different issues: material assets, psychological needs for control or recognition, and conflict divergence of value. Conflict may also be evident in different spheres. While intra-personal conflict is a person's disharmony with his or her own morality, inter-personal conflict is between two people, intra-group conflict is between group members

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1 J.A.Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2012, p. 13.

2 C. Simpson, *Coping through Conflict Resolution and Peer Mediation,* The Rosen Publishing Group, New York,1998, p. 2.

while inter-group conflicts are between groups. Therefore, differentiation itself may be the cause of inter-personal or family conflict.[3] According to Nichols & Schwartz:[4]

> *The goal of Bowen's therapy became the differentiation of self of key family members, so they could help the whole family differentiate. This emphasis on differentiation, meaning control of reason over emotion, betrays Bowen's psychoanalytic roots.*

Though Bowen[5] developed this concept from a family relationship perspective, it is equally applicable in other inter-personal conflicts. Thus, the level of differentiation of each person's *"self," "full-self,"* or *"half-self"* is an important factor in mitigating or accelerating conflict. When a person's ability is esteemed with "full-self" (i.e. a self-esteem vigour with capability and separateness independent from the feelings of others), in contrast to "half-self" (i.e. a *"symbiotic relationship"* when *"one feels angry and upset, the other becomes equally upset and angry"*), he or she will have an advantageous position in mediation. However, whether the conflict in mediation accelerates or mitigates due to a person's differentiation depends on the level of such differentiation. In other words, if both parties in mediation are of "full-selves," the conflict will be much higher when either or both parties are of "half-selves".[6] Since mediation is an empowering process,[7] a dynamic mediator tries to take a holistic approach by combining the concept of differentiation and conflict so that half-self parties will be empowered and differentiated in this process and conflict will not be escalated.

Further, culture always has a profound impact on what people do, and more importantly how they do it. The practice of mediation is not an exception. Therefore, a dynamic mediator also endeavours to mitigate 'cultural conflict' in a dispute so that cultural departure does not exacerbate or create another conflict. An intervention by a mediator mitigating the cultural conflict *"at the right time and in the right way can speed the process of de-escalation"*.[8] Though mediation, along with different other non-adversarial dispute resolution mechanisms, is widely used in different developed and developing countries, still the approach or mode of mediation that might be used to provide better justice to its recipients is a widely debated issue among scholars around the globe.

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3 Heather K Alvarez, "Applying Family Systems Therapy in Schools", in R. W. Christnerand R.B. Mennuti (eds.), *School Based Mental Health: A Practitioner's Guide to Comparative Practices*, Routledge, New York, 2009, p. 255.

4 M. P. Nichols and R. C. Schwartz, *Family Therapy: Concepts and Methods*, 5th ed., Allen and Bacon, Boston, 2000, p. 123.

5 M. Bowen, *Family Therapy in Clinical Practices*, J. Aronson, New York, 1978.

6 A. Taylor, *The Handbook of Family Dispute Resolution: Mediation Theory and Practice*,Jossey-Bass, San Francisco, 2002, p. 35-37.

7 Albie M. Davis and Richard A. Salem, "Dealing with Power Imbalances in the Mediation of Interpersonal Disputes", *Mediation Quarterly*, 1984, Vol. 6, No. 4, pp. 17-26, 18-19. See also, David Neumann, "How Mediation Can Effectively Address the Male-Female Power Imbalance in Divorce", *Mediation Quarterly,*1992, Vol. 9, No. 3, pp. 227-39, 231-32.

8 A. Taylor, n 6, p. 65.

Western scholars consider mediation as a process of dispute resolution where two parties negotiate to find a consensual outcome with the help of a neutral and impartial third party mediator who merely facilitates the process and not beyond that.[9] Such Western-fashioned '*facilitative mediation'* fosters greater cooperation among parties to resolve their disputes, without any primary concern about the content.[10] According to the definition of facilitative mediation, mediators should not make deterministic statements about "what should or should not" be done by either of the parties to avoid the dispute. However, as indicated earlier, the nature of assistance that a mediator may provide to its parties is still a debated issue, because the nature of assistance provided by mediators in Western society cannot be unswervingly adopted in other Asian countries. Rather, it should be carefully handled due to the cultural variations in different jurisdictions.[11] This paper, therefore, endeavour to explore a culturally resonant mediation technique to Asia. With this objective in mind, this paper provides firstly a brief explanation of Asian culture and how it affects the dispute resolution mechanisms followed in different Asian countries. Accordingly, by defining culture, cultural root, and cultural values, the following section demonstrates how ingrained cultural values may affect the nature of mediation. Based on this cultural background and its predicted impact on mediation, the next section explains how the high-power distance culture creates an expectation of mediators' evaluative intervention among disputing parties attending mediation. This theoretical underpinning is then matched with historical trend and current practice of *'evaluative mediation'* in different Asian countries including China, India, Singapore, Malaysia, Japan. Finally, this paper concludes with a view that people generally do not deviate much from their core cultural values and carry on their cultural values over time and space.

II. CULTURE, CULTURAL ROOT, CULTURAL VALUES AND THEIR IMPACT ON APPROACHES TO MEDIATION

Culture can be defined as a set of values or principles commonly shared by people living in a society. Peterson[12] defined cultural values as *"principles or qualities that a group of people will tend to see as good or right or worthwhile."* Though cultural practices may be polar opposites in two or more cultures, they are still appropriate in their own

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9 A. Stitt, *Mediation: A practical guide*, Cavendish Publishing, London, 2004. See also, Kimberlee K. Kovach and Lela P. Love, '"Evaluative'" Mediation is an Oxymoron", *Alternatives to High Cost Litigation*, Vol. 14, 1996, pp. 31-32.

10 G. Tillett and B. French, *Resolving Conflict: A Practical Approach*. Oxford University Press, Oxford, 2006. See also, National Alternative Dispute Resolution Advisory Council (NADRAC), *Terminology: A Discussion Paper,* National Alternative Dispute Resolution Advisory Council, Canberra:,2002. See more, R. Fisher, William Ury and Bruce Patton, *Getting to Yes - Negotiating an Agreement without Giving in*, 2nd ed., Penguin, New York, 1991.

11 R.W.Christnerand M.R. Mennuti (eds)., *School-Based Mental Health: A Practitioner's Guide to Comparative Practice*, Routledge, New York. See also, D. W. Augsberger, *Conflict Mediation across Cultures: Pathways and Patterns*, John Knox Press, Kentucky, 1992. See more, A. Taylor, n 6.

12 B. Peterson, *Cultural Intelligence: A Guide to Working with People from other Cultures*. Intercultural Press, Yarmouth,2004, p. 22.

context.[13] For example, the United States may be considered a country of *"masculine culture"* that makes a clear distinction between male and female, while Sweden may be distinguished for its *"feminine culture"*.[14] We may have a special preference for a specific type of culture, but we may not make a judgement on whether another culture is good or bad. A clear distinction between *"preference"* and *"judgement"* has been demonstrated by Jennifer Nedelsky.[15] As she describes it, we may express our preference by saying *"I like this painting"*; however, we are expressing our judgement when we say *"This is a great painting."* Though there could be thousands of sub-cultures within a culture, it is still possible to generalize cultural values.[16] Further, people from any particular culture may not always behave according to their cultural values. Such values, however, are reflected through the repeated behaviours made by individuals over a long period of time.[17]

As explained by Peterson:[18]

> *There are exceptions to every rule, but generalisation that come from research and from the insight of informed international cultural experts and professionals allows us to paint a fairly accurate picture of how people in a given country are likely (but never guaranteed) to operate.*

However, identification of cultural roots may not be immediately forthcoming as considerable debate exists on whether cultural values change over time. While modernisation theorists such as Karl Marx and Daniel Bell argue that cultural values change with the socio-economic development of a society, cultural theorists such as Max Weber and Samuel Huntington claim that cultural values cast an enduring and autonomous influence over societies.[19] Though paradoxical, it is possible that cultural values may change yet remain inherently identical over time. As expressed by Peterson:[20]

> *The trunk and basic form of the tree remain essentially the same over the years, but the leaves change colour every season and are replaced every year … In spite of these changes, though, a willow is always a willow and a redwood remains a redwood.*

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13 P. Rack, *Race, Culture and Mental Disorder*, J.W. Arrowsmith Ltd., Bristol, 1983.

14 Ben Shaw-Ching Liu, Olivier Furrer and D. Sudharshan, *Journal of Service Research*, Vol. 4, No. 2, 2001, pp. 118-129, 122.

15 Jennifer Nedelsky, "Embodied Diversity and Challenges to Law", *McGill Law Journal,* Vol. 42, 1997, pp. 91-117, p. 107.

16 B. Peterson, n 12, p. 23. See also, J. T. Wood, *Communication in Our Lives*. Wadsworth Cengage Learning, Boston, 2011.

17 Jerzy J. Smoliczand Margaret J. Secombe, "Sociology as a Science of Culture: Linguistic Pluralism in Australia and Belarus" in E. B. Rafael (ed.), *Sociology and Ideology,* Brill, Leiden, 2003, p. 56.

18 B. Peterson, n 12, p. 27.

19 R. Inglehart and C. Welzel, *Modernization, Cultural Change, and Democracy: The Human Development sequence*, Cambridge University Press, Cambridge, 2005.

20 B. Peterson, n 12, p. 28.

To differentiate the part of culture that remains static over time from the other part that accepts changes, Peterson[21] introduced the concept of *"big C-culture"* and *"small c-culture"*. Peterson[22] also explained that in every part of a culture, either big or small, only a fraction is visible like the tip of an ice-berg and the rest remain hidden. As culture has both core and mixed parts, every piece of behaviour of an individual may not be explainable readily by his/her culture. Therefore, to understand the cultural root we need to concentrate on Big C-culture because Small c-culture may change over time as people from any particular culture interact with people or knowledge from other cultures.

Table 1: Cultural paradigm

	Big C-culture	**Small c-culture**
Invisible culture	***Example:*** Core values, attitudes or beliefs, society's norms, legal foundations, assumptions, history, cognitive process.	***Example:*** Popular issues, opinions, viewpoints, performances or tastes, certain knowledge (trivia, facts).
Visible culture	***Example:*** Historic architecture, geography, classical literature, presidents or political figures, classical music.	***Example:*** Gestures, body posture, use of space, clothing style, food, hobbies, music, artwork.

Source: Adopted from B. Peterson, Cultural Intelligence: A Guide to Working with People from other Cultures. Intercultural Press, Yarmouth, 2004, p. 25.

It is better to have an understanding about cultural values because *"if [we] can adjust [our] own behaviours to dovetail with [others], [we] are much more likely to find comfortable, compatible, and fruitful ways of working together"*.[23] As mediators have to work closely with parties to a dispute, the same argument also applies to mediation. Further, to suggest a more congruent approach of mediation for any given culture, it is required to identify the cultural root, not its branches. Identifying the root is important because *"[b]behaviour that [we] see is a branch; the roots, the part [we] don't see make the branch what it is"*.[24]

Culture may bring an important component into mediation. The culture of dispute resolution affects the mode of mediation.[25] If a mediator is not aware of the culture of the parties, it is possible that he/she may act so as to, or do something which may, create a cultural shock to the disputing party or parties and ultimately make negotiation difficult. Thus, a mediator also needs to be aware of the meaning of culturally located

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21 B. Peterson, n 12, p. 28.
22 B. Peterson, n 12, p. 28.
23 B. Peterson, n 12 , p. 24.
24 R. R. Thomas, *Beyond Race and Gender: Unleashing the Power of Your Total Work.,* AMACOM, New York, 1992, p. 51.
25 J. Adamopoulos and Y.Kashima, *Social Psychology and Cultural Context*, Sage, Thousand Oaks, 1999.

responses which parties may make during mediation. Response of parties to negotiation and mediation may vary according to culture, and if a mediator cannot appropriately recognize and interpret such responses, it may create confusion.[26] Bouleehas defined three different contrasting types of culture which may have significance on choosing effective negotiation strategies.[27] These are:

- Individualistic culture vs. collective culture;
- Egalitarian culture vs. hierarchical culture ; and
- Low-context culture vs. high-context culture

While Western society can be considered as a more individualistic, egalitarian and low-context culture, Asian cultures can be termed as collective, hierarchical and high-context culture.[28] In an individualistic Western society, people are more focused on individual benefit and social benefits receive only secondary interest. Therefore, a negotiator may not get any extra benefit by showing a social benefit during negotiation, if his/her counterpart is from a Western culture. However, substantial benefit in negotiation may be attained by offering a more socially acceptable solution when his/her counterpart in negotiation is from an Eastern or Asian culture. Similarly, as Western values are more egalitarian or based on equal right to all people depending on their age, sex, or employment status, a negotiator may not expect to get any advantage of his/her greater age in comparison to the age of his/her counterpart. However, in Asian culture, age or employment status might add some extra value to the arguments given by a person during negotiation.

Furthermore, in a low-context Western culture, people place more value on what is said than the context. Therefore, in a western culture 'silence' may be considered as a sign of evasiveness. However, in a high-context culture, more emphasis is given on the 'context' of a dispute. In an Asian culture, silence may signify a shame which may not be discussed with others, or fear of retaliation. Therefore, knowing this cultural difference is very important when negotiators come from different cultures. Without having such understanding, one may misinterpret the non-verbal signals generated by others, or some of their verbal claims may be counterproductive because of different cultural orientation.

In a related vein, anthropologist Edward Hall distinguished between high-context and low-context cultures, and understanding such differences in cultures is important for a mediator.[29] In high-context (Eastern) cultures such as Japan, Korea, China, people

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26 L. Boulle, *Mediation: Principles, Process, Practice,* 3rd ed.,Butterworths, Sydney, 2011, p. 133.
27 L. Boulle, n 26, p. 133.
28 M. C. Pryles, *Dispute Resolution in Asia,* Kluwer Law International, Bedfordshire, 2006.
29 L. A. Samovar, R. E. Porter, and E. R. Mc. Daniel, *Intercultural Communication: A Reader*, 13th ed., Wadsworth, Boston, 2012.

may not express all their feelings and emotions through words, and inference, gesture, or even silence may have a specific cultural meaning which warrants a culturally specific response.[30] In low-context (Western) cultures such as Australia, Canada, Germany, Scandinavia and North America, most interaction is expressed verbally and very little is embedded in the context or explained through body language.[31] High-context cultures are motivated by the principles of *"indirectness as part of the forms of politeness"* and *"shared values of esteem for others."* The approach of low-context cultures is direct, as indirectness is thought of as cowardly and lacking in self-esteem,[32] and principled negotiation is conducted by separating people from the problem.[33] However, in high-context cultures, people and problems are deemed to be interrelated and thus inseparable. According to Augsberger:[34]

> *The low-context cultures tend to view the world in analytic, linear, logical terms that allow them to be hard on problems but soft on people, focused on instrumental outcomes but easy on affective issues; while high-context cultures perceive the world in synthetic, spiral logic that links the conflict event and its impact, issue, actors, content, and context.*

Therefore, a cultural understanding is important for a mediator to comprehend the desire, anger and emotion of parties attending mediation, particularly in a high-context culture. It is also important to understand how much authoritative and evaluative approach a mediator may apply in resolving disputes among parties from different cultural backgrounds. Pertinently, as discussed later in this paper, considering the cultural expectation on mediation, Western concept of facilitative mediation and the neutrality of mediators may not fit well in Asia. As observed by Boullee,[35] "*In many cultural contexts, neutrality might be neither a recognized nor a desirable attribute for mediators*". Rather, some advisory or evaluative role of mediators is appreciated. For example, as identified by Palmer:[36]

> *The Chinese mediator does not merely act as a channel of communication between the disputants; he is expected to propose possible solutions, to explain the framework of law within which the agreement must be reached, and to take an important part in the parties' negotiations*.

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30 L.A.Samovar, R. E. Porter, and E. R. Mc. Daniel, n 29.

31 L.A.Samovar, R. E. Porter, and E. R. Mc. Daniel, n 29.

32 A. Taylor, n 6.

33 F. Strasser, and P. Randolph, *Mediation a Psychological Insight into Conflict Resolution*, Cronwell Press Ltd., London, 2004.

34 D. W. Augsberger, *Conflict Mediation across Cultures: Pathways and Patterns*, John Knox Press, Kentucky,1992, p. 91.

35 L. Boulle, n 26, p. 79.

36 Michael Palmer, "The Revival of Mediation in the People's Republic of China", in W. E. Butler (ed.),*Yearbook on Socialist Legal Systems: 1987*, Transnational Publishers, Inc., New York,1988, p. 244.

III. CULTURAL REPURCUSSION IN PEOPLE'S EXPECTATION FROM MEDIATION IN ASIA

The impact of culture on mediation can be better understood from a study made by Hofstede.[37]Although Hofstede in his study showed cultural impact to explain dispute resolution approaches used in resolving commercial disputes, the result of his study can also be replicated to understand the cultural impact on mediation in resolving other civil disputes. In analyzing the impact of culture on approaches to dispute settlement, a distinction between high-power-distance culture and low-power-distance culture has been suggested by Hofstede.[38] According to Hofstede,[39] high-power-distance and low-power-distance culture are parallel with the high-context and low-context culture mentioned above. However, a distinction made on the basis of power-distance or hierarchy has a greater implication for mediation and other forms of dispute resolution modelled under different cultural contexts.For instance, as observed by Macduff:[40]

> *In low-power-distance cultures, there is a greater degree of flexibility, mobility and ambiguity in relationship and status, matched by more direct communication and the avoidance of verbal, communicative ambiguity: directness and avoidance of ambiguity reflect the pattern of low-context communication in which the meaning is almost wholly contained in the words; and*
>
> *In high-power-distance cultures, the reverse applies; there is less ambiguity in roles, states and hierarchy, matched by a higher degree of willingness and need to use ambiguity in communication: hence the indirect style of high-context communication. Apparent communicative ambiguity reflects the high-context expectation that meaning will be understood.*

The distinction between high-power-distance and low-power-distance culture has special significance for the role of a third party involved in a dispute resolution process. As observed by Adamopoulos and Kashima,[41] disputants in high-power-distance cultures place more reliance on high-authoritative third party intervention in resolving their disputes, than on their own negotiation capabilities. In most of the disputes, there could be an *"asymmetry of influence"*.[42] While in a low-power-distance culture, it is expected that such asymmetry in dispute resolution would be removed by facilitating equal participation and agency of the disputants, in a high-power-distance culture such asymmetry is accepted by the disputants as a *'normative feature'* of their engagement. As observed by Macduff:[43]

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37 G. Hofstede, *Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations,* SAGE, Thousand Oaks, 2001.

38 G. Hofstede, n 37.

39 See Hofstede, above n 37.

40 Ian Macduff, "Decision making and Commitments: Impact of Power Distance in Mediation", in J.Lee, and HweeTeh (eds.), *An Asian Perspective on Mediation,* Academy Publishing, Singapore,2009, pp. 111-44, 115.

41 J. Adamopoulos and Y.Kashima, n 25.

42 Ian Macduff, n 40, p. 124.

43 Ian Macduff, n 40, p. 124.

> *Inequality of relationship and decision-making authority in negotiation counterparts is not likely to be mitigated merely through the adoption of a set of process norms that, for example, assume or seek to create equality of participation and voice in any transaction.*

Therefore, a more interventionist role of a mediator remains a cultural expectation from the parties in Asian countries attending mediation. Discussions made so far indicate that high-context Asian countries such as China Thailand, Malaysia and India also possess high-power-distance cultures in which mediators historically command higher value in the society and use social and cultural norms to make their evaluations during mediation.[44] On the other hand, mediators from low-context Western countries such as the USA and Australia, place more emphasis on *'facilitative mediation'* and *'strict neutrality'* on their part, rather than on their own evaluation or active intervention in disputes.[45]

Table 2: Power Distance Index (PDI)

Asian Countries	PDI value	Western Countries	PDI value
Malaysia	104	France	68
Philippines	94	Belgium	65
China	90	Italy	50
Indonesia	78	USA	40
India	77	Australia	36
Singapore	74	Germany	35
Thailand	64	United Kingdom	35
Japan	54	New Zealand	22

Source: adopted from G. Hofstede, Culture's Consequences: Comparing Values, Behaviors, Institutions and Organizations across Nations, SAGE, Thousand Oaks, 2001, p.89

As shown in the Table 2, countries in the Asia including Malaysia, the Philippines, China and Indonesia have higher PDI values in comparison to their Western counterparts such as the United States, the United Kingdom, New Zealand and Australia. Therefore, it is expected that mediators from Malaysia or Indonesia would not be as neutral as mediators

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44 Richard Cohen, "Mediation Standards", *Australasian Dispute Resolution Journal,* Vol. 6, No. 1, 1995, pp. 25-32. See also, B. G. Chen, *Law without Lawyers, Justice without Courts: on Traditional Chinese Mediation,* Ashgate, 2002; See also, K. Siddiqui, *Local Government in Bangladesh,* The University Press Limited, Dhaka, 2005.

45 Susan Douglas, "Neutrality in Mediation: A Study of Mediator Perceptions", *Queensland University of Technology Law and Justice Journal*, Vol. 8, No. 1,2008, pp. 139-157; See more, Leda M. Cooks, and Claudia L. Hale, "The Construction of Ethics in Mediation", *Mediation Quarterly,* Vol. 12, 1994, pp. 55-76; Leah Wing, "Wither Neutrality? Mediation in the 21st Century", in M. A. Trujillo, L. J. Myers, P. M. Richards, and B. Roy (eds.),*Re-Centering Culture and Knowledge in Conflict Resolution Practice,* Syracuse University Press, New York, 2008.

from Australia, and would bring in more evaluation during mediation. For instance, as explained by Wall and Callister[46] while defining Malaysian community mediation, *"the ketua kempung [village head man] usually talked to each party separately, listened to each, and suggested some concessions or relocations."* The same strategy is currently being followed by mediators in the Malaysian Mediation Centre (MMC). "*The mediator is authorized to conduct joint and separate meetings with the parties and to suggest opinions for settlement"*.[47] Similarly, respected people in China, Thailand, Malaysia, and India have been serving for many centuries as mediators and settling local disputes according to social norms and cultural values. Therefore, as demonstrated in the next section of this paper, use of evaluation by mediators remains a cultural expectation by disputing parties attending mediation from Asian societies.

Following the cultural context of Asia discussed above, Suvanpanich[48] in Thailand, Boo[49] in Singapore, and Chowdhury[50] in Bangladesh all observed the need for an advisory role of mediators in their respective cultural contexts. An advisory or evaluative role is generally applied to the content of a dispute. An evaluative role means that advice is given, or comment is made, from a mediator about what should or should not be done, or what could be done to avoid conflict when one party is legally obliged to pay to the other, or advising the other party on what to do to resolve the dispute. An evaluative mediation is a dispute resolution process where a third party mediator takes an interventionist role, controls the process of mediation and may also provide his /her evaluation on the content of a dispute and advises parties regarding alternative available remedies and probable court outcomes. *However, evaluative mediators do not determine the outcome for the parties and let parties determine it for themselves*. Such an advisory role may be practiced even by in-court mediators.[51] In many cases, such an advisory or evaluative role is played under the shadow of a law.[52]

It is argued by many Western scholars that an advisory role or an evaluative role of mediators affects the process of self-determination and the parties' autonomy in mediation. For many western scholars, evaluative mediation is said to be *'bad mediation'* or, in fact, not mediation at all.[53] Professor Lela has said explicitly that evaluative mediation is 'bad' and should be *'discouraged or prohibited'*.[54]For Lela and Kovach, as well as many others,

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46 James A. Wall, and Rhonda R. Callister, "Malaysian Community Mediation", *Journal of Conflict Resolution,* Vol. 43, No. 3,1999, pp. 343-65, 344.

47 Sharifah. S. Ahmad and Rajasingham Roy,"The Malaysian Legal System, Legal Practice and Legal Education", IDE Asian Law Series, No. 4,2001, p. 47.

48 Thawatchai Suvanpanich, "Thailand", in M. Pryles, (ed.), *Dispute Resolution in Asia,* Kulwer Law International, Netherlands,1997, pp. 261-292.

49 Lawrence Boo, "Singapore", in M. Pryles, (ed.), *Dispute Resolution in Asia,* Kulwer Law International, Netherlands, 1997, pp. 207-250.

50 J. A. Chowdhury, *Women's Access to Fair Justice in Bangladesh: Is Family Mediation a Virtue or a Vice?,*Unpublished PhD thesis, University of Sydney, Sydney, 2011.

51 J. A. Chowdhury, n 50. See also, Lawrence Boo, n 49.

52 J. A. Chowdhury, n 50.

53 James J. Alfini, "Evaluative Versus Facilitative Mediation: A Discussion", *Florida State University Law Review*, Vol. 24, 1996-97, pp. 919-35, 927.

54 Kimberlee K. Kovach and Lela P. Love, n 9.

only facilitative mediation can be considered as *'pure mediation'*.[55] However, if these criticisms of evaluative mediation are directly transferred from western culture to eastern culture, irrespective of cultural variations between two societies, such transportation may fail to achieve desired result of mediation in that society.[56] Further, evaluative roles by mediators do not exclude parties from taking an active part in discussion, developing options for settlement and controlling the final outcome.[57] Rather, sometimes such an evaluative role helps to attain some *"higher good"*.[58]

Therefore, an evaluative mode of mediation, contrary to the facilitative mode of mediation in Western societies, may allow Asian mediators to provide advice which would help parties to reach an informed and a mutually favourable solution. Evaluative role of mediators may also be applied in other multi-cultural developed countries like Australia or USA. For instance, while explaining a mediator's advisory role The National Mediator Accreditation Scheme (NMAS)[59] of Australia states:

Some mediators may also use a blended process that involves mediation and incorporates an advisory component, or a process that involves the provision of expert information and advice, where it enhances the decision-making of the participants provided that the participants agree that such advice can be provided. Such process may be defined as … "evaluative mediation."

This evaluative process of mediation is sometimes termed as *"substance-oriented mediation"*.[60] In a substance-oriented mediation, *"the mediator is often an authority figure who evaluates the case based on experience and offers recommendations on how the case should be resolved."* Therefore, for the purpose of this paper, the culturally resonant mediation in Eastern countries, especially Asian countries, refers to an *'evaluative mediation'* as opposed to *'facilitative mediation'* that is practices in Western countries. The rationale and importance of the practice of evaluative mediation in Asian countries, however, are ingrained in their cultural contexts as discussed in the following section, that is to say, historically high power distance Asian countries are following evaluative mediation in resolving their disputes.

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55 James J. Alfini, n 19, p. 929. See also, Donna Cooper and Rachael Field, "The Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner", *Queensland University of Technology Law and Justice Journal,* Vol. 8, No. 1, 2008, pp. 158-75; See more, N. Alexander, *Global Trends in Mediation*, 2nd ed., Kluwer Law International, Hague, 2006.

56 J. Tomlinson, *Cultural Imperialism: A Critical Introduction,* Continuum, London, 1991.

57 Donna Cooper and Rachael Field, n 55. See more, Nadja Alexander, n 55.

58 A. Taylor, "Concepts of Neutrality in Family Mediation: Contexts, Ethics, Influence, and Transformative Process", *Mediation Quarterly*, Vol. 14, No. 3, pp. 215-36, 1997, p. 222.

59 National Mediator Accreditation System (NMAS), *Practice Standard,* Federal Court of Australia, Sydney, 2007.

60 T.Sourdin, *Alternative Dispute Resolution,* 3rd ed., Law Book Co., Pyrmont, NSW, 2008, p. 54.

IV. APPROACHES OF MEDIATION IN ASIA: A HISTORICAL UNDERPINNING TOWARDS INDIGENOUS CULTURE OF EVALUATIVE MEDIATION

As discussed above, the big C culture does not change over time, while the small c culture or the surface of culture may change with economic development and other institutional arrangements. Further, the power distance character of a society depends on its big C culture. Therefore, this section demonstrates that Asian countries with high power distance are actually following their indigenous practice of evaluative mediation that is also an indication of high power distance society. Societies of high power distance also demonstrate more cohesion to collective interest, respect to social hierarchy, and high context attitude. As Asian culture is characterized as collective, hierarchical and high-context culture, the evaluative approach in mediation under elderly or socially honorable mediators would be much appreciated here.The theoretical understanding on impact of culture on mediation can be verified by analyzing the historical practice of mediation in different Asian countries. As expected by the theory of cultural impact on mediation, different high-power distance Asian countries adhere to evaluative mediation as discussed below:

A. *Mediation in the People's Republic of China*

Chinese mediation has developed from a unique historical social and cultural background that promotes the Confucian philosophy of maintaining peace and harmony in a society. Mediation in the People's Republic of China (PRC) promotes socials values of selflessness and promotion of social harmony rather than individualism and personal justice promoted by the West.[61] The PRC has a long history of community mediation. While it is not possible to pin-point the time period in which the practice of mediation started in the PRC, a rich practice of community mediation can be found in Confucianism. The lesson of Confucius (551–479 B.C.) is to forgive, tolerate, and cooperate with others rather than making complaints. More pertinently, one should "persuade" the other person to get his or her cooperation. In short, Confucianism highly values compromise and persuasion, as well as the intermediary who was able to secure them[62]. The success of Chinese mediation largely lies on this principle of social harmony. As observed by Triandis:[63]

> *In a society where harmony is the ideal and "doing the right thing" is essential for good relations, one often does what one believes to be socially desirable even if one's attitudes are inconsistent with the action*.

Following its rich culture of mediation, in the PRC during the nineteenth century the unofficial mediators tended to dominate the dispute-resolution arenas, settling disputes

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61 Wenshan Jia, "Chinese Mediation and Its Cultural Foundation", in G-M Chen and R. Ma (eds.), *Chinese Conflict Management and Resolution,* Ablex Publishing, Westport,2002, pp. 289-295.

62 Richard Cohen, n 44; See also, B. G. Chen, n 44.

63 Harry C. Triandis, "The Self and Social Behavior in Different Cultural Contexts", *Psychology Review*, Vol. 96, 1989, pp. 269–89, 80.

within families, clans, and villages.[64] The disputes were taken to a formal authority only when informal mediation failed. However, community mediation in the PRC became more institutionalized after the Chinese revolution in 1949. In 1954, People's Mediation Committees (PMC) were formed in almost every neighbourhood of the PRC, and comrades from the Chinese Communist Party were involved in PMCs to resolve local disputes. It is argued that the PMCs' resolutions of disputes are not only based on local values but also reflect party policies.[65]

There are about one million mediators in the PRC[66]—about one for every one thousand people. As indicated by Ren,[67] the number of mediators per 100 people of the PRC exceeds the number of judges per 100 people in the USA. This indicates a great commitment to the practice of community mediation in the PRC. As observed by Jia,[68] in contrast to USA mediators, the Chinese mediators' knowledge about disputants is a major asset which enables them to determine who is right or wrong in a dispute. To a Chinese mediator, the major goals are eliminating the dispute and defusing anger. No one expects the mediator to be neutral, and most mediators and citizens think that the mediator's determination on who is correct simply expedites resolution of the dispute. Unlike mediators in the West, Chinese mediators do not wait for the parties to initiate the process. Rather, they promptly find and insinuate themselves into the dispute before positions become harden.[69]

In addition to community mediation, the PRC also has a practice of court-connected mediation. According to Articles 85 and 87 of the *Civil Procedure Law* (1991)of the PRC, courts invite parties to resolve their disputes through mediation. Though participation in mediation is voluntary, any agreement reached through this process becomes as legally binding as court judgements.[70] The PRC also has a practice of mediation in international trade disputes. In these situations, parties may attend mediation under mutually agreed rules or procedures before attending trial or arbitration. Any agreement reached through mediation is considered as private contract between the parties.[71] In August 2010, legislators in the PRC first considered a law to provide a legal basis to community mediation. *It recognised the PMC as a legal authority to resolve community disputes and specified its legal structure.*[72] By doing so, the PMC got formal authority

64 Philip C. C. Huang , "Divorce Law Practices and the Origins, Myths, and Realities of Judicial 'Mediation' in China", *Modern China*, Vol. 31, No. 2, 2005, pp. 151 – 203.

65 Philip C. C. Huang, n 64, p. 715.

66 G. M. Laden, "While Mediation is Wide-Spread in China, Trade with West Calls for New DR Methods, *ADR Report*, No. 2, 1988, pp. 398-400.

67 R. Xin, "*Tradition of the Law and the Law of the Tradition: Law, State, and Social Control in China*", Westport, Connecticut, Greenwood Press 1997.

68 Wenshan Jia, n 61.

69 Wenshan Jia, n 61; See more, B. G. Chen, n 44.

70 Michael J. Moser, "Peoples Republic of China", in M.Pryles (ed.), *Dispute Resolution in Asia*, Kulwer Law International, London,1997, p.81.

71 Michael J. Moser,n 70, p. 82.

72 Liew Carol, "Recent Developments in Mediation in East Asia"in A.Ingen-Housz, *ADR in Business. Practice and Issues across Countries and Cultures*, Vol. II, Kluwer Law International BV, The Netherlands, 2011, pp. 515-557, 532.

to conduct mediation under the purview of the People's Mediation Law (PML) of the PRC. According to this law, PMCs are formed to resolve local disputes. According to Article 17 of the PML, parties have autonomy to accept or reject the invitation to attend mediation and, according to Article 21 of PML, *"in the process of mediating disputes among the people, people's mediators shall stick to principles, make legal reasoning and do justice to the parties concerned."* Therefore, the practice of mediation is evaluative though participation remains voluntary.

B. *Mediation in Thailand*

Like mediation in the People's Republic of China, mediation in Thailand is also a part of the indigenous culture where people used to submit their dispute to the respected elderly people of their society.[73] As indicated by Limparangsri and Yuprasert,[74] mediation was even practiced in Thailand 700 years ago during the era of King *Ramkamhang* who used to act as mediator to resolve disputes among his subjects. However, mediation in Thai society was practiced without an institutional mandate and without specific rules or guidelines.[75] In traditional Thai mediation, initially the mediator tried to attain a consensual decision between parties, and if this failed, mediators provided their evaluation on the dispute. Though mediators' evaluation was not binding upon parties, they usually abided by it to avoid social sanction.[76] Moreover, according to Section 850 of the *Civil and Commercial Code of Thailand* (BE 2468), a mediation agreement would be binding upon parties if they wrote a document outlining their compromise agreement and signed it.[77] To illustrate the evaluative nature of Thai mediation and its acceptance in Thai culture, Pryles[78] explained:

> *In earlier times, disputing parties would submit their dispute to an elder person whom both parties respected ... The method by which the elder person would resolve a dispute was very simple. Simple negotiation was usually tried first. If the parties could not resolve their problem, the elder person would make the decision ... At present, though Thai society has changed dramatically, such a method of resolving disputes is still prevalent.*

Despite the sporadic practice of mediation in Thai society over centuries, it was not until the beginning of 1990s when an increased number of caseloads in Thai courts, followed by a financial crisis, made the policy makers think about mediation as a cost effective alternative for litigation.[79] In 1994, mediation was first introduced in Thai Civil Courts

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73 Thawatchai Suvanpanich, n 48.

74 SorawitLimparangsri, and PrachyaYuprasert, "Arbitration and Mediation in ASEAN: Laws and Practice from a Thai Perspective", paper presented in *The ASEAN Law Association 25th Anniversary Commemorative Session*, Manila, 2005, 24-27 November.

75 Sorawit Limparangsri, and PrachyaYuprasert, n 74

76 Thawatchai Suvanpanich, n 48.

77 Thawatchai Suvanpanich, n 48.

78 M. C. Pryles, *Dispute Resolution in Asia.* Kulwer Law International, Bedfordshire, 2006, p. 431.

79 Sorawit Limparangsri, and PrachyaYuprasert, n 74.

under the slogan *"convenient, quick, economical and fair"*. Under this scheme, judges were encouraged to resolve cases at the pre-trial stage.[80] To facilitate court-annexed mediation during trial, further amendment was made in the *Civil Procedure Code* of Thailand in 1999. This amendment allowed Thai judges to appoint third party mediators at any stage of a trial and also to conduct *caucus* to resolve cases through mediation (Section 183). All civil court proceedings in Thailand need to be conducted in public. However, before the enactment of this amendment, there was confusion as to whether judges could hold *caucus* to conduct court-annexed mediation once a trial begins.[81]

In a court-annexed mediation, judges in Thai civil courts try to create an informal environment by holding the mediation session outside the courtroom, by not wearing gowns, and by serving drinks.[82] Further, the historical mediation practice has an influence on the mode of mediation practiced by judges in court-annexed mediation. As stated by Suvanpanich:[83]

> *The civil court has guidelines for judges who act as mediators. For example, they have to read a case accurately and seek the real need of both parties and ascertain a satisfactory resolution which may lead the parties to end their case.*

Therefore, from the practice of mediation in both in- court and out-of-court, it can be reasonably concluded that a practice of evaluative mediation persists in that society.

C. *Mediation in Malaysia*

Malaysia has a tandem court system, one secular and the other Islamic. At the top of the secular system,it has nine-member supreme court, and the subordinate courts consist of the sessions court, magistrates court, and native court. As in most legal systems, these courts branch out to lower courts in the criminal and civil system. In addition to these secular courts, there are separate Islamic or *kadi* courts that have jurisdiction over Muslims but only on cases related to Islamic law. Further, that Malaysia has three primary groups/ cultures: Malays, Indians, and Chinese. The Chinese tend to live in large cities, whereas the Malays and Indians are not as heavily concentrated in urban areas. Some live in the cities; others, in the villages.

As is revealed in other countries of Asia, Malaysia has a rich culture of community dispute resolution in their villages. Since the 1600s or earlier,[84] each village has been administered by a *ketua kampung* (i.e., village head man). This leader, almost always a

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80 Thawatchai Suvanpanich, n 48.

81 Sorawit Limparangsri, and PrachyaYuprasert, n 74.

82 Thawatchai Suvanpanich, n 48.

83 Thawatchai Suvanpanich, n 48, p. 274.

84 Lim LanYuan, 2003, *"Mediation Styles and Approaches in Asian Culture"*, paper presented at the Asia Pacific Mediation Forum,<http://www.asiapacificmediationforum.org/resources/2003/limlanyuan. pdf>.Site accessed on 5.10.2014.

male, is responsible, directly and indirectly, for a large number of municipal activities such as interactions with higher authorities, housing, road maintenance, utilities, law enforcement, and so on. Also, as in many village societies[85] one of his responsibilities is to handle disputes that are brought to him. As already mentioned the *ketua kampung* usually talked to each party separately, listened to each, and suggested some concessions or reallocations. If this failed, he would, in turn, ask each disputant to demonstrate respect for the leader's relationship with the other by following the leader's suggestions. He then made several suggestions; the disputants would agree to cease quarreling and attend a feast together at the *ketua kampung's* house. Besides *ketua kampung*, sometimes *Imams* of village mosque who conducts religious ceremonies, runs the mosque, and in general directs religious affairs in the village, also mediates disputes brought to him.

However, not all different types of issues are mediated by every mediator. As observed by Wall and Callister,[86] among the four different types of disputes: (a) agricultural, (b) community (non-agricultural), (c) husband-wife, and (d) family (other than husband-wife), the first two categories are mostly resolved by *ketua kampung* whereas the last two categories are mostly dealt with by *Imams*. Though this division of mediating different types of disputes is categorized between *Ketua kampung* and *Imam,* it is not strictly maintained rather their jurisdictions are overlapping with each other to some extent.

Table 3: Type of disputes taken to *Ketua kampung* and *Imam*

	Number of disputes	
Type of dispute	Ketua kampung	Imam
Agriculture	29	2
Community	82	9
Husband-wife	8	27
Family (other than husband wife)	8	14

Source: Wall J.A. & Callister R.R. (1999), Malaysian community mediation, Journal of Conflict Resolution, vol. 43(3), pp. 343, 350.

Mediators devote significant time and effort to meeting with the parties; specifically, they meet separately with the disputants, meet with them together, or bring them together for a meeting. In these separate and joint meetings, the mediators listen to the disputants' points of view, gather information from them, and turn to outsiders-third parties for information. Concomitant with and subsequent to the meetings and data gathering, the

[85] Sally E. Merry, "Mediation in Non-industrialized Societies" in K. Kressel and D. G. Pruitt (eds.),*Mediation Research*, Jossey-Bass, San Francisco, 1989, pp. 68-90.

[86] J.A.Wall and R.R.Callister, "Malaysian Community Mediation", *Journal of Conflict of Resolution*, Vol. 43, No.3, 1999, pp. 343-365

mediators present one disputant's point of view to the other. Having set this base, the mediators turn to a wide variety of techniques. There was frequent reliance on third parties; to attend meetings, to provide information, to provide assistance to the disputants, and less frequently to suggest how the disputants should behave and the specific concessions they should make.

D. *Mediation in India*

From time immemorial, various forms of informal justice systems prevailed in the Indian sub-continent and have been governed by the religious and cultural norms of the society.[87] It is said that the "villages' self-governance is as old as the villages themselves".[88] Rig Vedas, the oldest Hindu religious script, dating from 1200 BC, mentions the existence of village self-governance in India. Some historical basis for the resolution of disputes by the heads of neighbourhoods is also found in the work of Sen[89] who claims the existence of dispute resolution at the village level during the period of the *Dharmashastra* (Hindu religious mandate). At that time, the terms *Panchayet*, later *Shalish*, were used to indicate informal justice systems that were very similar to current day concept of evaluative mediation.[90]

It is generally assumed that this kind of local government was the basic form of government until the sixth century BC when large kingdoms began to emerge and the role of local government become subject to the central authority.[91] During 1500 BC to 1206 AD, when Hindu rulers governed the sub-continent, the king was considered the "fountain of justice" and was the highest authority in the Court of Appeal in the state.[92] Government officials ran other courts and tribunals to administer justice under the authority of a king,[93] but the central authority left local people to resolve civil and petty criminal matters through their local village councils, i.e. *panchayets*.[94] Village *panchayets* were made up of a council of village headmen, the composition of which varied depending on the economic and social structure of the villages being governed. As noted by Siddiqui,[95] *panchayets* resolved different forms of disputes. Sometimes they were formed to ensure that the members of a caste adhered to the religious and social norms of their caste and to settle disputes among members. *Panchayets* also maintained public order and inter-caste relationships among the villagers. Additionally, *panchayets*

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87 K. Siddiqui, n 44; See more, Mustafa Kamal, "Introducing ADR in Bangladesh: Practical model", paper presented in the seminar on *Alternative Dispute Resolution: In Quest of a New Dimension in Civil Justice System in Bangladesh*. Dhaka, 2002, 31 October.

88 K. Siddiqui, n 44, p. 29.

89 Amartya K. Sen, "Family and Food: Sex Bias in Poverty", in A. K. Sen(ed.),*Resources, Values and Development,* Basil Blackwell, Oxford.

90 J. A. Chowdhury, n 1.

91 K. Siddiqui, n 44.

92 M. A. Halim, *The Legal System of Bangladesh.* 3rd ed., CCB Foundation, Dhaka,2008, p. 36.

93 M. A. Halim, n 92.

94 K. Siddiqui, n. 44.

95 K. Siddiqui, n. 44.

served to resolve labour disputes, such as those among servants and farmers or among the servants of different farmers. Village *panchayets* were also responsible for resolving civil disputes within the area.[96] As *panchayets* were the local bodies for resolving disputes among people in a locality, justice administered by this indigenous system was very much influenced by the custom and religion of that locality. As Siddiqui[97] observed:

> *Custom and religion made the panchayets so important that they often had an almost sacred status—although they could hardly be described as unbiased and objective. The panchayets never made their decisions by voting, but by a "consensuses" arrived at by the upper caste members of the panchayet, and this was generally accepted by the lower castes. This method well suited the purpose of the conservative village leadership, which wanted to maintain the status quo in society*.

Because of the high impact of customs and religions on the decision of *panchayet/ shalish*, these qualities are often found in present day evaluative mediation. Further, the effectiveness of *panchayet* can be seen in the words of Jain:[98]

These panchayets fulfilled the judicial functions very effectively and it is only rarely that their decisions gave dissatisfaction to the village people. The members of the panchayets were deterred from committing an injustice by fear of public opinion in whose midst they lived.

According to Islam,[99] *"the panchayet served civil and policing functions, coordinating rent given etc., while the shalish was a village Sabha or council that was called on to settle moral and ethical issues."* Therefore, *shalish* can be perceived as a variation of *panchayet* that resolved civil issues among local habitants. The term *shalish* is derived from the Arabic word *shalish* meaning "three." It conveys the sense of "middle"—middle man—the third party in a conflict resolution. In traditional villages, *shalish* was generally conducted by a group of the village people, including village headmen and other local elites. Whatever the variation of the terms *panchayets /shalishs*, *t*he central government body did not interfere with the decisions even when they contravened the central administrative laws, and no appeal could be made against their decisions.

The glorious history of the system of *panchayets /shalishs* during the *Mughal* period (1526 AD–1756 AD), however, was drastically curtailed by the advent of the British in the sub-continent. The East India Company started to intervene in the administration of

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96 G. S. Rahman ,*Bangladesher Ainer Itihash* [Legal History of Bangladesh], Dhaka, 1997. See also, Nusrat Ameen, "Dispensing Justice to the Poor: The Village Court, Arbitration Council *vis-a-vis* NGO", *The Dhaka University Studies Part F,* pp. 103-22.

97 K. Siddiqui, n 44, p.33.

98 M. P. Jain, *Outline of Indian Legal History.* Tripathy, Bombay, p. 61.

99 F. Islam,*TheMadaripurModel of Mediation: A new dimension in the field of dispute resolution in rural Bangladesh.* Dhaka: unpublished research paper, p. 22.

justice in British India under a Royal Charter in 1726.[100] Later, with the decline in *Mughal* rule, the East India Company controlled the administration of the Bengal province. Initially, the company adopted a new *Zamindari* system to administer justice by curbing the authority of the deep-rooted indigenous *panchayet* system.[101] However, the *Zamindari* system proved inefficient as the *Zamindars*(landlords) were usually biased, oppressive and concerned with profit (Jain 1999, 31). Realising the importance of the long-adopted *panchayet* system, the British revived this indigenous system of administering justice by promulgating the *Chowkidari Act1870*. Though the village *panchayet* system was revived as *Chowkidari Panchayet* under the *Chowkidari Act 1870*, it remained mostly unpopular.[102] After the independence of India in 1947, many *Naya*(New) *Panchayets* were formed all over India under its constitutional mandate.[103]

In addition to community mediation, the possibility of mediation of court intervention in civil cases settled outside the court was introduced through Section 89[104] of the *Code of Civil Procedure (Amendment) Act 1999 (*Act No. XXXXVI of 1999). It was not until an amendment of the Code, namely the *Code of Civil Procedure (Amendment) Act 2002* (Act XXII of 2002) that the court-connected mediation was incorporated in Indian courts. The first initiative was taken through a pilot project at the *Hazari* Court complex in Delhi in August 2005 to train judges to provide judicial mediation at their chambers (Liew 2011, 539). Further, the Delhi Mediation Centre (DMC) was established at the *Hazari*Court complex in October 2005. Though the *Civil Procedure (Amendment) Code 2002* did not provide a definition of mediation, as referred by the DMC, explaining mediation in CPC, Justice Sharma adopted a definition given by International Labour Organisation as follows:

Mediation may be regarded as a half way house between conciliation and arbitration. The role of the conciliator is to assist the parties to reach their own negotiated settlement and he may make suggestions as appropriate. The mediator proceeds by way of

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100 M. A. Halim, n 92.

101 K. Siddiqui, n 44.

102 P. Datta,and C. Datta,"The Panchayet System in West Bengal", in Ganapathy Palanithurai, *Dynamics of New Panchayet Raj System in India,* Concept Publishing Company, Palanithurai, 2002.

103 Arvind K. Sinha, *Panchayet Raj and Empowerment of Women,* Northern Book Centre, New Delhi.

104 Section 89 dealt with settlement of disputes outside the Court. It runs: *"(1) Where it appears to the court that there exist elements of a settlement which may be acceptable to the parties, the court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observation of the parties, the court may reformulate the terms of a possible settlement and refer the same for-(a) arbitration; (b) conciliation (c) judicial settlement including settlement through LokAdalat; or (d) mediation. (2) Where a dispute had been referred (a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act. (b) to LokAdalat, the court shall refer the same to the LokAdalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 and all other provisions of that Act shall apply in respect of the dispute so referred to the LokAdalat; (c) for judicial settlement, the court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a LokAdalat and all the provisions of the Legal Services Authority Act, 1987 shall apply as if the dispute were referred to a LokAdalat under the provisions of that Act; (d) for mediation, the court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."*

conciliation but in addition is prepared and expected to make his own formal proposals or recommendations which the family court judge may be accepted.

Following the success of the pilot programme at the *Hazari* Court, judicial mediation was initiated and another mediation centre was established at *Karkardooma* Court complex in December 2005 and May 2006 respectively. By June 30, 2010, more than 28,000 cases of a different nature were referred to DMC that attained a success rate ranging from 60 to 79 per cent during the same period.

E. *Mediation in Bangladesh*

Though Bangladesh emerged as an independent country in 1971, it got its legacy from the British ruled Indian sub-continent. As described under traditional dispute resolution system in India, the traditional system of dispute resolution in Bangladesh through village *shalish* is also following the evaluative mode of mediation. Sometime it is more authoritative and comprises far more directive roles from third party mediators. Like India, the history of *panchayet*/*shalish* also plays a pivotal role in governing informal and traditional dispute resolution system in this region. It is already indicated that the practice of evaluation in a traditional dispute resolution system in the form of *panchayet*/*shalish* was a common phenomenon in this region. It is not a recent phenomenon in Bangladeshi culture, rather a customary practice of the informal justice system that has a history of more than thousand years.[105] Thus, it is not unlikely that the evaluative nature of traditional dispute resolution system conducted in out-of-court settings also might have some influence on our current-day practice of court-annexed mediation in Bangladesh. The justification of practising evaluative/directive mediation in court-connected mediation can be observed in the words of Hasan,[106] the former Chief Justice of Bangladesh:

We found that for the present, pure mediation in every case is not really suitable for our legal system. It took many years for the USA to reach the present stage through trial and error. Our experience is only a few months old. Slowly it dawned on us that instead of pure mediation if it is combined with a little bit of directive method, to which our judges, lawyers and litigants are familiar with, the judges would be more successful in their efforts.

Due to historical coherence towards evaluative/directive type of mediation, the approach of mediation being practiced in Bangladesh is not facilitative; rather, it is an evaluative mode of mediation conducted under the shadow of law. In this mode, mediators are directive. They make their evaluation on the content of a dispute and guide the outcome towards a standard that is embedded in law. Chowdhury demonstrated that the reason that mediation in Bangladesh appears to be protective of women's rights is not just that mediators are being directive or using an *evaluative* style, it is that they are

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105 K. Siddiqui, n 44; See also, Mustafa Kamal, above n 83.

106 K. M. Hasan, "A Report on Mediation in the Family courts: Bangladesh Experience", paper presented at the *25th Anniversary Conference of the Family Courts of Australia*, Sydney, 2001, 26-29 July, p. 14.

insisting that the norms and values used in the mediation are those that derive from the law and which gives women legal rights.[107]

F. *Mediation in Other Asian Countries*

Mediation in Singapore

Singapore is an inhabitance of people from China, Malaysia and India. The indigenous mediation practice of Singapore, therefore, reflects the mediation culture of these three countries discussed above. Historically, community mediation in Singapore was conducted by Chinese clan leaders, headman in Malay villages and *panchayets* in Indian communities residing in Singapore. However, the modernization process introduced with the economic progress in 1960 also had some impact on its traditional dispute resolution system. System of dispute resolution got more formal shape and formal and institutional mediation was introduced in Singapore.[108] In 1994, Singapore introduced mediation in their court system and establishes mediation centres to reduce case loads in subordinate courts. In 1997, the first commercial mediation center- Singapore Mediation Center (SMC) was established in Singapore. Following this milestone progress in institutional mediation, the Community Mediation Centers (CMC) Act was passed in Singapore to resolve community disputes through out-of-court mediation. Under this CMC Act, community mediation centers are resolving neighborhood and family disputes through mediation. Though these CMCs were formed in a more formal way, it tries to preserve the *Kampong ketua* system where village elders performed mediation to promote community cohesion.[109] To continue with their indigenous system of mediation under the influence of elder community leaders recently Singapore has introduced a "*Persuader Scheme*". Under this scheme, grassroots mediators or selected community leaders visit residence of disputed parties who refuses to attempt community mediation rather attempt to approach police for assistance.[110] It indicates that, despite their enormous economic development, endogenous approach to community mediation under persuasion still continues.

Mediation in Indonesia

Traditionally, *Musyawarch Mufakat* or '*dialog to reach consensus*' is being used in Indonesia to resolve community disputes. It is a kind of negotiation by which disputing parties initially try to resolve their disputes by themselves. If for any reason the negotiation effort fails to resolve the dispute, the dispute is referred to a respected or elderly person of the community who hear from both parties and provide his/her evaluation. It is a kind of conciliation or mediation that is traditionally being practiced in Indonesia to resolve their

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[107] J. A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*,2012.Cambridge Scholars Publishing, Newcastle upon Tyne.

[108] Goh Joon Seng (2003), "*Mediation in Singapore: the law and practice"*, Workshop 4: Arbitration and Mediation in ASEAN: The Law & Practice, ASEAN Law <http://www.aseanlawassociation.org/docs/w4_sing2.pdf>. Site accessed on 30.04.15.

[109] Gloria Lim (2003) *"Community mediation in Singapore*", paper presented at the 2nd Asia-Pacific Mediation Forum, Singapore, <http://www.asiapacificmediationforum.org/resources/2003/glim.pdf>. Site accessed on 30.04.15.

community disputes. This mechanism of *musyawarah*or indigenous system of dispute resolution plays a vital role in settling disputes or conflicts among the society members in Indonesia. As observed by Barnes (2007) this dispute resolution mechanism is used to resolve both private and public disputes. Recently, this *"musyawarah has gained acknowledgement from the community"* due to a declined confidence in court system to provide quicker resolution of disputes and also because *"all disputants share ideas in the process"*. Therefore, despite their move to modern judicial system, the indigenous evaluative system of dispute resolution still prevails in and preserved by Indonesian community.

Mediation in Hong Kong

Traditional mediation in Hong Kong followed the tradition of Chinese mediation system. However, due to a long period of western colony in Hong Kong, the modern mediation practice in Hong Kong grows under western fashioned facilitative mode. For instance, according to Hong Kong Mediation Accreditation Association Limited, mediation is a voluntary, confidential, non-binding, private dispute resolution process in which a neutral person, (i.e. the mediator), helps the parties to reach their own negotiated settlement agreement. The mediator has no power to impose a settlement. Mediator's function is to overcome any impasse and encourage the parties to reach an amicable settlement. Therefore, despite its cultural root in Chinese culture, the current day mediation practice cannot be strictly adhered to its root. Therefore, the present days institutional practice may also be taken as a point of exception in this analysis.

In addition to the countries discussed above, other Asian countries like the Philippines,[111] Sri Lanka,[112] Japan, Pakistan and Afghanistan are also following an evaluative practice in their community dispute resolution. Therefore, while designing mediation rules we may not ignore community practice.

V. CONCLUSION

The discussion so far on development and historical perspectives of mediation in Asia indicates that Asian culture view the *"people and the problem as inseparable and*

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[110] Gloria Lim, n 109.

[111] Despite centuries of colonial oppression, indigenous dispute resolution process and *Katarungang Pambarangay* or neighborhood or village justice system still remains vibrant in Filipino's life. In contrast with facilitative approach, where a third-party merely plays the role of a facilitator, an authoritative role by the elders are usually observed in these dispute resolution processes . See more on Susan Aro, *"Feature: 'Tongtongan,' an indigenous conflict resolution"* (2011) <http://archives.pia.gov.ph/?m=7&r=CAR&id=34349&y=2011&mo=05>. Site accessed on 30.04.15.

[112] In Sri Lankan community mediation system, mediators are moral authorities and respected figures of the village, which is in contrast to the North American model of mediation where mediators merely plays a facilitative role. Due to their moral authority, it is expected that they might use persuasion in resolving a dispute. See moe on Nadja Alexander, "*From Communities To Corporations: The Growth of Mediation In Sri Lanka"* (2002) <http://mediate.com/articles/alexander.cfm >; See also, Peter Woodrow, "*Mediation in the Sri Lankan Context*" (2003) <http://www.beyondintractability.org/audiodisplay/woodrow-p-3-sri-lanka1>. Site accessed on 02.05.15.

interrelated," the Western cultures see their relation as separate.[113] The Asia has a rich culture in which to practise mediation in their out-of-court settings where mediators have considerable power to intervene in disputes in order to attain a fair and amicable solution. Such practice suggests an evaluative approach of mediation, in contrast to Western mediation, where the mediators follow a facilitative approach, take a non-interventionist role and focus on interests rather than rights. The interventionist and legally informed role of mediators in the Asia contributes more on rights/positions of the parties, rather than on their interests. Since the social and cultural context of Asia is more *"widely diverse"* than Western liberal democratic countries,[114] approaches and critiques relevant to Western societies may not be applicable in Asian societies. Thus, an unsuitable transfer of knowledge and ideas without considering the context could lead to cultural imperialism. Such cultural imperialism may involve *"the use of economic and political power to exalt and spread the values and habits of a foreign culture at the expense of a native culture"*.[115] If action is taken on the basis of research and critique from one culture into another, it may fail to achieve positive change in that society.[116] For example, LeResche[117] observed that Korean Americans with Asian heritage follow a process of dispute resolution that is very different from the American *'problem-solving style'* in terms of their starting assumption and process dynamics.[118] Therefore, the contextual and cultural differences are considered carefully while discussing other traits of mediation. Considering the *'high-context culture'* propounded by Boulle,[119] which Hofstede[120] describes as *'high-power distant culture'* of Asia, it can be reasonably concluded that evaluative mediation with more interventionist role from mediators would be more culturally resonant and apposite mediation approach to be applied in Asian countries having similar cultural root.

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113 A. Taylor, n 6, p. 99.

114 A. Taylor, n 6,p. 257.

115 Bullock and Stally brass cited in, J. Tomlinson, *Cultural Imperialism: A Critical Introduction,* Continuum, London, p. 3.

116 J. Tomlinson, n 56.

117 Diane LeResche, "Comparison of the American Mediation Process with a Korean-American Harmony Restoration process", *Mediation Quarterly.* Vol. 9, no. 4, pp. 323-39.

118 Diane LeResche,n 116; cited Taylor, n 6. Pp. 258-59.

119 L. Boulle, n 26.

120 G. Hofstede, n 37.

A Comparative Study: ISA 1960, SOSMA 2014 and the Federal Constitution

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Abstract

The Internal Security Act (ISA) 1960 was the preventive detention law in force in Malaysia prior to the enactment of the current preventive law, the Security Offences (Special Measures) Act, ('SOSMA') 2012. ISA 1960 was enacted after Malaysia gained independence from Britain in 1957. It allowed for detention without trial for criminal charges under limited, legally defined circumstances. On 15 September 2011, the Prime Minister of Malaysia, Dato Seri Najib Tun Razak said that this legislation will be repealed and replaced. The SOSMA 2012 was passed by the Parliament to replace the ISA 1960 and it was given the royal assent on 18 June 2012. Since the first Act came into play in 1960, there has been an ongoing debate as to its implication and necessity which the new Act has not laid to rest. Since its enactment, this new Act has been scrutinized and debated upon at various levels both locally and internationally. This research analyses the SOSMA 2012 to identify whether the new Act has removed all the concerns raised against the previous Act, the ISA 1960. It also aims to ascertain if any of the rights upheld in the Federal Constitution are being violated by the provisions in the new Act. The findings indicate that there is still room for concern on the implications of the Act in reference to infringement of the rights upheld in the Federal Constitution. However, these infringements can also be said to be in alignment with Article 149 of the Federal Constitution. The paper ends with a comment that it is too early to make any judgment be it positive or negative as the Act is still new and it has to run its course before any conclusion can be made.

I. INTRODUCTION

The battle against Internal Security Act (ISA) 1960 has now progressed into a battle against Security Offences (Special Measures) Act (SOSMA) 2012. There are arguments for and against the Act and its implication on the balance between protecting basic human rights and the nation's security. Syed Husin, an ex-detainee of ISA 1960, in a forum at Universiti Malaya lamented on the introduction of the Security Offences (Special Measures) Act 2012, saying those arrested under this Act were treated almost like criminals.[1] "At least

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1 Syed Husin, 2014, "*The People Have To 'Bangkit": Sedition Act Will Only Be Repealed If Public Fights It"*. <http://www.malaysia-chronicle.com/index.php?option=com_k2&view=item&id=379901:the-people-have-to-bangkit-sedition-act-will-only-be-repealed-if-public-fights-it-syed-husin&itemid=2#ixzz3gjsxnm3c> Site accessed on 30.10.2014.

under the ISA, we could claim to be political detainees. Unfortunately, if you are arrested under SOSMA 2012, you are no more than a criminal", he added further. Datuk Mohd Noor Abdullah, a former Court of Appeal judge in an interview with Malay Mail Online on April 15 2014 claimed that the Prime Minister Datuk Seri Najib Tun Razak had made a big mistake by repealing the ISA and warned him against repeating it by abolishing the Sedition Act, a law he said should now be strengthened instead.[2] According to him, strengthening the Sedition Act by incorporating the offences into SOSMA 2012 would strike fear in those who wish to instigate racial strife as it would give the authorities arbitrary detention powers quite similar to that of the now-repealed ISA 1960. In his concern, he raised the issue that there are a lot of people in the Islamic schools and most of the militants are making use of the Islamic knowledge/teaching to influence people to go into militancy. Malaysia's Deputy Home Minister, Wan Junaidi Tuanku Jaafar said although the development of militancy is not that serious but we cannot ignore it and despite the authorities' belief that they have a handle on the situation, it is not the same as when the ISA 1960 was in existence for it had allowed for detention without trial but "(u)nfortunately under SOSMA 2012, ample evidence is needed against those involved to bring them to court.[3] This argument is debatable on the basis of justice and fairness.

The recent decision in High Court where it decided to throw out the maiden charges filed SOSMA 2012 shows that authorities must come to terms with the loss of arbitrary detention powers they once wielded before the repeal of the ISA 1960. In the case,[4] Justice Kamardin Hashim ordered Yazid Sufaat and his friends, Halimah Hussein and Muhammad Hilmi Hasim, to be freed after allowing their applications to strike out the charges made against them for "inciting unrest" in Syria. The basis of the decision is that the charges and the application of the SOSMA 2012, which was enacted under Article 149 of the Federal Constitution cannot be used to prove the charges against them as the Article is only applicable to acts of threats in Malaysia. Thus, by replacing the ISA 1960, the SOSMA 2012 has lost the former's arbitrary powers to detain an individual indefinitely and without charge. Proponents of the ISA 1960 believe this reduced power may hamper its ability as a security law to be used against global terrorism, but critics contend that there are already adequate laws to deal with such instances.[5]

Since the debate on the ISA 1960 has not been laid to rest, this research analysed SOSMA 2012 to identify whether the new Act has removed all the concerns raised against the previous act, ISA 1960, and also to identify if any of the rights upheld in the Federal Constitution are being violated.

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2 Mohd Noor Abdullah , 2014, cited in Syed Jaymal Zahiid). "*Put sedition offences under SOSMA , ex-judge suggests". The Malaymail Online*. <http://www.themalaymailonline.com/malaysia/article/put-sedition-offences-under-sosma-ex-judge-suggests> Site accessed on 30.10.2014.

3 Sumisha Naidu, 2014, "*Malaysia believes militancy in country under control"*, <http://www.eikawaz.com/malaysia-believes-militancy-in-country-under-control/>. Site accessed on 30.11.2014.

4 Public Prosecutor v Yazid bin Sufaat & Ors (2015) 1 MLJ 571-27 January 2014.

5 Anonymous, 2013, "*Maiden SOSMA case collapse highlights post-ISA learning curve*", The Malaysian Insider, <http://www.themalaysianinsider.com/malaysia/article/maiden-sosma-case-collapse-highlights-post-isa-learning-curve#sthash.0HjO2NlW.dpuf>.Site accessed on 30.11.2014.

II. LITERATURE REVIEW

Providing internal security for its own citizens is among the essential public goods any state has to deliver and ranks high among its primary sources of legitimacy.[6] Although Malaysia has not felt the full presence of international terrorist groups, unlike some of its neighbours, there are some local insurgents.[7] In the years preceding the end of the colonial rule in Malaysia, a communist insurgency arose that agitated for independence more aggressively than other nationalist forces then established in the country.[8] The British colonial authorities responded with Emergency Regulations, the ISA 1960's precursor, which similarly provided for detention without trial. Malaysia retained the Regulations at independence in 1957 but in 1960, the new Parliament enacted the ISA 1960, aimed at suppressing the insurgent militants who continued to mobilize, particularly along the borders.[9] According to Bennoum,[10] in the face of terrorism, human rights law's requirement that states "respect and ensure" rights necessitates that states take active steps to safeguard their populations from violent attack, but in so doing do not violate rights. He went on to add that security experts usually emphasize the aspect of ensuring rights while human rights advocates largely focus on respecting rights. He concluded that the trick, which neither side in the debate has adequately referenced, is that states have to do both at the same time.

The ISA 1960 was introduced by the then, Deputy Prime Minister, Tun Abdul Razak, on 1 August 1960 for the sole purpose of fighting the communist insurgency in Malaya. Tun Abdul Razak made "a solemn promise to the Parliament and the nation that the ISA 1960 would never be used to stifle legitimate opposition and silence lawful dissent." The purpose of ISA 1960, being a preventive detention law empowered the police to detain any person for up to 60 days without trial for any act which allegedly prejudices the security of the nation. After the 60 days, the Minister for Home Affairs can extend the detention period for up to a period of two years, renewable indefinitely, thus permitting indefinite detention without trial. In order to understand how draconian this law is, we must compare it to ordinary criminal law where an arrested person has to be brought before a Magistrate within 24 hours of arrest. When produced before the Magistrate, the Magistrate may allow the person to be detained by the arresting authority pending further investigation pursuant to the Magistrate's powers under s. 117 of the CPC.[11]

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6 Mitsilegas, V., Monar, J. & Rees, W, "*The European Union and Internal Security: Guardian of the People?",* New York: Palgrave Macmillan, 2003, pp.5.

7 Political Overview. (2012). Malaysia Defence & Security Report, 1, pp. 68-74.

8 Fritz , N. and Flaherty, M, "Unjust Order: Malaysia's Internal Security Act 26" Fordham Int'l L, 2002 ,Vol 26 (5), pp 1-95.

9 Fritz , N. and Flaherty, M, "Unjust Order: Malaysia's Internal Security Act 26" *Fordham Int'l L,* 2002 ,Vol 26 (5), pp 1-95.

10 Bennoun, K, Terror/Torture. *Berkeley Journal of International Law,*2008 Vol 25 (1), pp 1-61.

11 Malaysian Bar's Memorandum on the Security Offences (Special Measures) Bill 2012, Amendments to the Penal Code, Amendments to the Evidence Act 1950, and Amendments to the Criminal Procedure Code, <http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=4558> . Site accessed on 30.9.2014.

For years, many countries around the world have been contending with horrific patterns of terrorism, including fundamentalist terrorism, which have claimed tens of thousands of lives and governments of many political stripes have been regularly responding to this violence with atrocity. Bennoun asserts that this is a global problem requiring a global response.[12] He went on to add that terror/torture represents a spectrum of brutalizing practices often justified in the name of a greater good or higher purpose[13] but he criticized those who justify torture, and other atrocities, in the name of fighting terror for it undermines the very respect for human dignity and the universality needed to sustain comprehensive global norms against terrorism.[14]

The ISA 1960, is often considered extreme, as it serves to severely curtail and undermine civil liberties and human rights and it contributes to the creation of a deeply authoritarian political environment, in which attacks on independent voices – whether they emanate from the media, academia or the opposition - are routine.[15] The ISA 1960 is thus critically deployed to impede mobilization on the part of the political opposition and any other groups deemed undesirable by the government. The ISA 1960 itself became the subject of a mass based campaign - the Abolish ISA Movement ("AIM") – and groups like the Malaysian Bar Council had called for its repeal'.[16] According to Phil Robertson,[17] Deputy Asia Director at Human Rights Watch, "the detention of 13 people under the ISA shows that it's still business as usual in Malaysia when it comes to trampling suspects' basic rights," and he went on to add that Malaysia's duty to provide security for its population needs to be consistent with international human rights standards. If there is evidence that the 13 were involved in criminal offenses, they should be quickly brought to court, publicly charged with specific offenses under the Malaysian criminal code, and given a prompt and impartial trial. If there is insufficient evidence to charge them with specific offenses, then they should be immediately and unconditionally released.[18]

When the Malaysian Prime Minister, Datuk Seri Najib Razak announced plans to repeal the country's controversial ISA 1960, the Minister of Home Affairs made his case for keeping the ISA, declaring it has only been used "sparingly" and "no person has ever been detained only for their political beliefs" and he argued that the ISA 1960 "continues to be relevant and crucial as a measure of last resort for keeping the country safe and secure".[19] Former Malaysian Prime Minister, Tun Dr Mahathir Mohamad encapsulated

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12 Bennoun, K, Terror/Torture, *Berkeley Journal of International Law,* 2008, Vol 25 (1), pp 1-61.

13 Bennoun, K, n13, pp 1-61.

14 Bennoun, K, n13, pp 1-61.

15 Fritz , N. and Flaherty, M, "Unjust Order: Malaysia's Internal Security Act 26" *Fordham Int'l L,* 2002 ,Vol 26 (5), pp 1-95.

16 Memorandum from the Malaysian Bar Council, supra n.12, at 1, 1998, Malaysian Bar Council's general meeting . <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1899&context=ilj> Site accessed on 12.11.2014.

17 Human Rights Watch, 2011, "Malaysia: end use of internal security act", < http://www.hrw.org/news/2011/11/21/malaysia-end-use-internal-security-act > Site accessed on 12.11.2014.

18 Human Rights Watch, 2011, "Malaysia: end use of internal security act", < http://www.hrw.org/news/2011/11/21/malaysia-end-use-internal-security-act > Site accessed on 12.11.2014.

19 Chen. S, 2011, *"Singapore: Human rights and the Internal Security Act",* <http://asiancorrespondent.com/66146/singapore-human-rights-and-the-internal-security-act/> Site accessed on 29.11.2014.

the paradox when he expressed his support for his government's decision in terms of winning the "moral high ground" over other developed countries. He compared those detained under the Act to those held in Guantanamo Bay, saying, "Previously, they [the US] criticized Malaysia for purportedly being cruel by detaining people without trial. But they are the ones doing it now".[20] Laurie Berg, a practicing lawyer from Australia, who had been given the mandate to observe and report the entire preliminary hearing of habeas corpus application presented the report to the press and urged the Government of Malaysia to repeal the ISA 1960 in its entirety as indefinite detention without trial violates international human rights standards.[21] The recommendation was in line with the universally recognized human rights norms and fundamental freedoms, particularly the right to "participate in peaceful activities against violation of human rights and fundamental freedoms" as enunciated in Article 12 of the Declaration on Human Rights Defenders.[22]

Malaysia, being a member state of the United Nation was urged to comply with the fundamental principles of justice and universally recognized human rights norms enshrined in the Universal Declaration of Human Rights, particularly on the prohibition of arbitrary arrest, detention or exile.[23] The use of ISA 1960 demonstrated various violations of human rights such as the right to fair and public trial, the right to be presumed innocent until proven guilty, the right to answer the charges against those arrested under the Act and the right not to be arbitrarily detained and the Observatory Report further stated that in some of the cases, the Government had failed to show illegal or dangerous act had taken place as alleged to have threatened national security. The use of the ISA 1960 also undermined the independence of the judiciary to scrutinize evidence of the alleged illegal or dangerous act.[24] According to Hishammudin Rais (Ex-ISA Detainee, Civil Rights activist), the ISA 1960 was like a guillotine that is continuously hanging on the heads of the citizens of Malaysia.[25] Where a conflict occurs between human rights and national security, national security should be given the highest consideration because without the existence of a peaceful country, there will be no humans to enjoy their rights.[26] The historic decision of Prime Minister, Datuk Seri Najib Tun Razak made in September 2011 to repeal the ISA 1960 in response to popular pressure could affect the country's ability to deal with suspected terrorists, over 100 of whom had been arrested under the notoriously

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[20] Chen. S, 2011, *"Singapore: Human rights and the Internal Security Act",* <http://asiancorrespondent.com/66146/singapore-human-rights-and-the-internal-security-act/> Site accessed on 29.11.2014.

[21] Fadiah Nadwa, 2008, "*Observatory Report : ISA is a violation of human rights principle*", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

[22] Fadiah Nadwa, 2008, "*Observatory Report : ISA is a violation of human rights principle*", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

[23] Fadiah Nadwa, 2008, "*Observatory Report : ISA is a violation of human rights principle*", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

[24] Fadiah Nadwa, 2008, "*Observatory Report : ISA is a violation of human rights principle*", <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16232>. Site accessed on 20.11.2014.

[25] *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

[26] Paneir Selvam, R, 25th May 2014, "*Adopt UK or Aussie anti-crime laws*" New Straits Times. <http://www2.nst.com.my/nation/adopt-uk-or-aussie-anti-crime-laws-1.336221> Site accessed on 10.11.2014.

harsh ISA 1960 since May 2001.[27] Thus, the nation was looking forward to the changes in the new Act, SOSMA 2012 that replaced the ISA 1960 but unfortunately the new Act has raised numerous criticisms as it is advocated that the provisions are similar to those in the ISA 1960 or even more restrictive of basic human rights.

The Security Offences (Special Measures) Act (SOSMA) 2012 by its name indicates that it is a legislation providing for special measures relating to security offences. It was enacted pursuant to Article 149 of the Federal Constitution and it replaced the ISA 1960. In a nutshell, the legislation deals with the special manner of arrest, procedures for trial and its rules of evidence, as well as the handling of sensitive information or publication in respect of security offences.[28] According to Mathilde Tarif,[29] the new internal security law, SOSMA 2012, replaced the former law on internal security – the ISA 1960 – that was considered as authoritarian, given the fact that it gave powers to detain suspects for a several-year period without any trial, only based on suspicions affecting internal security which is seen through the provisions of the Act. Although, under section 8 (1) of the Act, it is stated that custody shall not exceed a two-year period but section 8 (2) gets round this limit, allowing its two-year sentence to be renewed as many times as needed, under the same accusations as the first warrant or under brand new ones.

According to Sharif,[30] some of the highlights of the Act are:

1. The person arrested may be detained for 24 hours for investigation.

2. The period of detention may be extended up to 28 days. This may be reviewed every five years.

3. There will be no recourse for detainees to challenge their arrest or subsequent incarceration.

4. The public prosecutor may authorize the police to intercept, detain and open any postal article.

5. Police can also intercept any message transmitted or received in any form and also intercept and listen to any conversation.

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27 Political Overview. (2012). Malaysia Defence & Security Report, 1, pp. 68-74.

28 Aingkaran Kugathasan, 2013, "War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012", Special Report" <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

29 Mathilde Tarif , 2013, "Malaysia Keeps Ruling Under Controversial Security Laws In Secret translated By Florence Carré", <http://www.lejournalinternational.fr/Malaysia-keeps-ruling-under- controversial-security-laws-in-secret_a1131.html> Site accessed on 20.9.2014.

30 Aizat Sharif, 8th February 2013, "*What is the Security Offences (Special Measures) Act 2012*?' Astro Awani, <http://english.astroawani.com/malaysia-news/what-security-offences-special-measures-act-2012-6715> Site accessed on 15.11.2014.

6. The police can with a permit enter any premises to install devices to intercept and retain any form of communications.

7. Sensitive information can be admitted as evidence in court.

Since the new Act has evoked a lot of criticism from various parties, this research will analyse the SOSMA 2012 in reference to the ISA 1960 and the Federal Constitution to evaluate the validity of these criticisms. The following section discusses the findings from this analysis.

III. FINDINGS

The findings will be divided into specific headings starting with the source of authority to offences listed under the law, powers of arrest, trial processes and judicial powers as well as the comparison of ISA 1960 and SOSMA 2012 with the Malaysian Federal Constitution.

A. *Source of Authority*

The ISA (ISA) 1960 was originally enacted by the Malaysian government in 1960 under Article 149 of the Malaysian Constitution. The ISA 1960 was initially intended as a temporary measure to fight the communist insurgency. The SOSMA 2012 was also enacted under the same article and it aims "to provide for special measures relating to security offences for the purpose of maintaining public order and security and for connected matters". The SOSMA 2012 replaced the ISA 1960. The Act was approved in the Parliament on 17 April 2012, given the Royal Assent on 18 June 2012 and gazetted on 22 June 2012.

B. *Comparison of Preliminary Details under the Acts*

Table 1 shows the detailed analysis of the various sections of ISA 1960 and SOSMA 2012. The analysis is divided into three main parts; the provisions on introduction and definitions, the provisions on the trial process and the provisions on implementation. Table I shows the comparison of the preliminary details in the Acts.

Table 1: Analysis of ISA 1960 and SOSMA 2012

	ISA 1960	**SOSMA 2012**
INTRODUCTION	An Act to provide for the internal security of Malaysia, **preventive detention, the prevention of subversion, the suppression of organized violence against persons and property in specified areas of Malaysia, and for matters incidental thereto.** WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia— (1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons **and** property; and (2) **to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established;** AND WHEREAS **the action taken and threatened is prejudicial to the security of Malaysia;** AND WHEREAS **Parliament considers it necessary to stop or prevent that action;**	An Act to provide for special measures relating to **security offences** for the purpose of maintaining public order and security and for connected matters. WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia— (1) to cause, or to cause a substantial number of citizens to fear, organized violence against persons **or** property; (2) **to excite disaffection against the Yang di-Pertuan Agong**; (3) which is prejudicial to public order in, or the security of, the Federation or any part thereof; or (4) **to procure the alteration, otherwise than by lawful means, of anything by law established;** AND WHEREAS Parliament considers it necessary to stop such action;

PART 1	Preliminary "Advisory Board" means an advisory board constituted under Article 151(2) of the Federal Constitution; "ammunition" means ammunition for any firearm as hereafter defined and includes grenades, bombs and other like missiles whether capable of use with such a firearm or not and any ammunition containing or designed or adapted to contain any noxious liquid, gas or other thing; "Chief Police Officer" includes a Deputy Chief Police Officer and any police officer for the time being lawfully authorized to exercise the powers and perform the duties conferred or imposed upon a Chief Police Officer by this Act and in the application of this Act to Sabah and Sarawak references to a Chief Police Officer shall be construed as references to a Divisional Superintendent of Police; "controlled area" means any area declared to be a controlled area under section 49; "danger area" means any area declared to be a danger area under section 48; **"document" includes any substance on which is recorded any matter, whether by letters, figures, marks, pictorial or other representation, or by more than one of those means;**	Preliminary **"security offences" means the offences specified in the First Schedule;** "court" means the Sessions court; **"sensitive information" means any document, information and material—** relating to the cabinet, cabinet committees and State Executive Council; or (b) that concerns sovereignty, national security, defense, public order and international relations, **whether or not classified as "Top Secret", "Secret", "** confidential" or "Restricted" by a minister, the Menteri Besar or chief Minister of a State or any public officer appointed by a minister, the Menteri Besar or Chief Minister of a State; "Minister" means the Minister charged with the responsibility for home affairs; **"protected witness" means a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being**

	"entertainment" means any game, sport, diversion, concert or amusement of any kind to which the public has or is intended to have access and in which members of the public may or may not take part, whether on payment or otherwise; "exhibition" includes every display of goods, books, pictures, films or articles to which the public has or is intended to have access, whether on payment or otherwise; "explosive" shall have the meaning assigned thereto in the Explosives Act 1957 [Act 207], and includes any substance deemed to be an explosive under that Act; Internal Security "firearm" means any lethal barreled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing, and includes any component part of any such weapon as aforesaid; "Inspector General" means the Inspector General of Police and, in relation to Sabah and Sarawak, includes the Commissioner in control of members of the Royal Malaysia Police in each of those States; "offence against this Act" includes an offence against any regulations made under section 71; "periodical publication" includes every publication issued periodically or in parts or numbers at intervals, whether regular or irregular;	

	"Police District" has the same meaning as "police district" in the Police Act 1967 [Act 344]; "police officer" includes a reserve police officer, an auxiliary police officer and a special police officer appointed in accordance with any written law for the time being in force; "promoter", in the case of an entertainment or exhibition promoted by a society, includes the secretary and officials of the society and, in the case of a society organized or having its headquarters outside Malaysia, the officials in Malaysia of the society; "proprietor" includes the owner, tenant or other person in possession or control of premises and any person who receives payment for the use of premises; "protected place" means any place or premises in relation to which an order made under section 50 is in force; "publication" includes all written, pictorial or printed matter, and everything of a nature similar to written or printed matter, whether or not containing any visible representation, or by its form, shape or in any other manner capable of suggesting words or ideas, and every copy, translation and reproduction or substantial translation or reproduction in part or in whole thereof; "public place" includes any highway, public street, public road, public park or garden, any sea beach, water-way, public bridge, lane, footway, square, court, alley or passage, whether a thoroughfare or not, any unalienated land, any rubber estate, any plantation, any land alienated for agricultural or mining purposes	

	, any theatre or place of public entertainment of any kind or other place of general resort admission to which is obtained by payment or to which the public have access, and any open space to which for the time being the public have or are permitted to have access, whether on payment or otherwise; "public road" means any public highway or any road over which the public have a right of way or are granted access, and includes every road, street, bridge, passage, footway or square over which the public have a right of way or are granted access; "security area" means any area in respect of which a proclamation under section 47 is for the time being in force; "security forces" includes the Royal Malaysia Police, the Police Volunteer Reserve, the Auxiliary Police, persons commissioned or appointed under the Essential (Special Constabulary) Regulations 1948 [G.N. 1694 of 1948], the armed forces, any local force established under any written law in force in Malaysia, and any force which is a visiting force for the purposes of Part I of the Visiting Forces Act 1960 [Act 432], and in respect of whom all or any of the powers exercisable by the armed forces or their members under this Act have been made exercisable by an order made under any such law; "supplies" includes ammunition, explosives, firearms, money, food, drink, clothing, medicines, drugs and any other stores, instruments, commodities, articles or things whatsoever;	

	"terrorist" means any person who— (a)by the use of any firearm, explosive or ammunition acts in a manner prejudicial to the public safety or to the maintenance of public order or incites to violence or counsels disobedience to the law or to any lawful order; (b)carries or has in his possession or under his control any firearm, ammunition or explosive without lawful authority therefor; or Internal Security 13 (c)demands, collects or receives any supplies for the use of any person who intends or is about to act, or has recently acted, in a manner prejudicial to public safety or the maintenance of public order.	

If the Introduction Part of the Acts are analysed, there are notable differences that could raise concern. It must be noted that the enforcement has increased from two to four points. The ISA 1960 protects both the public (both person and property)[31] and the government[32] while the SOSMA 2012 has been extended to cover not only violence against person and property[33] but also the Yang di-Pertuan Agong,[34] and which is prejudicial to public order in, or the security of, the Federation or any part thereof;[35] or to procure the alteration, otherwise than by lawful means, of anything by law established.[36] Further analysis of the provisions would show that there are similarities in provisions 1 (to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property) and 2 (to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established) in the ISA 1960 with 1 and 4 of SOSMA 2012. However, if provision 2 of the ISA 1960 and provision 4 of the SOSMA 2012 are scrutinized, it would reveal some differences. This is seen in the phrases 'of the lawful Government of Malaysia by law established' which has been replaced with the phrase 'of anything by law established'. This change has widened the scope of application. In addition to this widening of jurisdiction, the addition indicated by provisions 2 of the SOSMA 2012 (to excite disaffection against the yang di-Pertuan Agong) and 3 of the SOSMA 2012 (which is prejudicial to public order in, or the security of, the Federation or any part thereof) too have increased the ambit of application. In the ISA 1960, the phrase 'prejudicial to the security of Malaysia' is used while in the SOSMA 2012, the phrase 'prejudicial to public order in, or the security of, the Federation or any part thereof' is used. It must be noted at this point that all these changes do not reflect positively on the law makers for instead of addressing the criticism that the provisions and application of the ISA 1960 is too wide, it has further widened the scope by giving room for possibility of further erosion of human rights.

Parts 1 of the Acts define key words/terms that are used in the Act. Some of these words which allows for comparison are discussed. In the ISA 1960, the term 'document' is defined to include any substance on which is recorded any matter, whether by letters, figures, marks, pictorial or other representation, or by more than one of those means'. In the SOSMA 2012, this term is replaced with 'sensitive information'. Here, the term is made more specific in terms of definition. However, in terms of coverage of materials under it, it is equally broad as the definition in the ISA 1960. The coverage is divided into two; relating to the Cabinet, Cabinet Committees and State Executive Council; or that concerns sovereignty, national security, defense, public order and international relations. It appears very restrictive for any material which is related to the list given, despite not being classified as "Top Secret", "Secret", "Confidential" or "Restricted" by a Minister, the Menteri Besar or Chief Minister of a State or any public officer appointed

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31 Introduction No 1, *Internal Security Act 1960.*
32 Introduction No 2, *Internal Security Act 1960.*
33 Introduction No 1, *SOSMA 2012.*
34 Introduction No 2, *SOSMA 2012.*
35 Introduction No 3, *SOSMA 2012.*
36 Introduction No 4, *SOSMA 2012.*

by a Minister, the Menteri Besar or Chief Minister of a State falls within the ambit of 'sensitive information'.

With regards to definition of key words used in the Acts, it would appear that the ISA 1960 has a more extensive list while the SOSMA 2012 only defines five key words; security offences, court, sensitive information, Minister and protected witness. The long list of words defined in the ISA 1960 is no longer relevant as most of the provisions dealing with these terms have been removed from the SOSMA 2012. Among these would be control area, danger area, promoter, proprietor, protected place, public road, security area, security forces, supplies, firearm, entertainment and ammunition. The sections relating to these terms which have been removed are s. 48 (Danger areas), s. 49 (controlled areas), s. 50 (Protected place), s. 54 (Power to order destruction of certain unoccupied buildings), s. 55 (Power to control roads, etc), s. 57 (Offences relating to firearms, ammunition and explosives) and s. 59 (Supplies). This does not mean that these sections which impose restrictions have been removed totally in the SOSMA 2012 for a detailed analysis would indicate that they are covered under general terms such as "which is prejudicial to public order in, or the security of, the Federation or any part thereof" where terms such as protected place, public road and security area are covered. On the other hand, the phrase "to cause, or to cause a substantial number of citizens to fear, organized violence against person or property" would cover possession of firearm and ammunition. These broad definitions are of concern to many. For example, the Bar Council president, Lim Chee Wee said on 10 April 2012 that the definition of "security offences" under section 3 of the new bill was still too broad.[37] As a result, the Bar had recommended the government to use the definition found in the International Convention for the Suppression of the Financing of Terrorism adopted by the United Nations in 1999. It limits the definition of terrorist acts to those "intended to cause death or serious bodily injury" to civilians in order to intimidate a population or compel a government to do or abstain from certain action.[38]

A similar view was also highlighted by Spiegel, even before the Act was made law[39] where he asserted that the SOSMA 2012's definition of a security offence—"an act prejudicial to national security and public safety"—is overly broad; as it gives the government sufficient power to bring partisan politics into decisions as to what is or is not a security breach. He went on to cite an example where the government could decide that the then ongoing Bersih "clean elections" campaign is a security offence as it is

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37 Gan Pei Ling, 18th May 2012, "*SOSMA: Sizing up the new security bill*" Selangor Times, <http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill> Site accessed 11.11.2014.

38 Gan Pei Ling, 18th May 2012, "*SOSMA: Sizing up the new security bill*" Selangor Times, <http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill> Site accessed 11.11.2014.

39 Spiegel,M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act'*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

intended to influence or compel the government to change electoral practices that help preserve the status quo. According to Malaysian human rights campaigners, the SOSMA 2012 remains far too broad. So far the definition of 'security offence' and committing acts 'prejudicial to national security and public safety' has resulted in arrests for wearing a T-shirt depicting Che Guevara and other non-security issues.[40]

Another term defined in the SOSMA 2012 which must be discussed is the phrase 'protected witness' which is defined as 'a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being'. This is a newly introduced term and it has been included to complement the new provisions in SOSMA 2012 which deals with trial procedures relating to sensitive information, specifically s. 16 (1), protection of witness' identity. These provisions specify some procedures which have given rise to a number of criticisms in terms of rights upheld in Rule of Law as well as the Federal Constitution. These are discussed in length later in this paper.

The next part of the discussion is on the provisions relating to actions taken when offences are committed in both the ISA 1960 and the SOSMA 2012. Table 2 shows the powers that the courts and police have in cases where offences are committed under the ISA 1960 and the SOSMA 2012. The analysis is divided into five parts namely; powers to arrest and detain, powers to inform next-of-kin and provide consultation with a legal practitioner, power to intercept communication, electronic monitoring device and detention pending exhaustion of legal process. The analysis indicates that the enforcement provisions for offences under these Acts have more differences than similarities. The improvements that the SOSMA 2012 promised are very limited while the additions made are more restrictive of the rights upheld in the principles of Rule of Law and Federal Constitution.

The next part of the discussion is on the laws indicated by the sections in both the ISA 1960 and the SOSMA 2012. Table 2 shows the findings of the analysis.

[40] Massoud Shadjareh, Mohdieen Abdul Kader & Mohammed Nasir, 2014, *"Human Rights in Malaysia: An Overview of Concerns"*, <http://www.ihrc.org.uk/events/10953-human-rights-in-malaysia-an-overview-of-concerns>. Site accessed 14.11.2014.

Table 2: Analysis of the Laws in the Acts.

KEY AREAS	ISA 1960	SOSMA 2012
Power to arrest and detention	**8.** *(1) If **the Minister** is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he **may make an order (hereinafter referred to as "a detention order") directing that that person be detained for any period not exceeding two years.** (2) In subsection (1) "essential services" means any service, business, trade, undertaking, manufacture or occupation included in the Third Schedule. (3) Every person detained in pursuance of a detention order shall be detained in such place (hereinafter referred to as "a place of detention") as the Minister may direct and in accordance with any instructions issued by the Minister and any rules made under subsection (4). (4) The Minister may by rules provide for the maintenance and management of places of detention and for the discipline and treatment of persons detained therein, and may make different rules for different places of detention. (5)If **the Minister** is satisfied that for any of the purposes mentioned in subsection (1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence or employment, but that for that purpose it is	**4.** (1) **A police officer may, without warrant, arrest and detain any person whom he has reason to believe to be involved in security offences.** (2) **A person arrested** under subsection (1) **shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest.** (3) **No person shall be arrested and detained under this section solely for his political belief or political activity.** (4) **The person** arrested and detained under subsection (1) **may be detained for a period of twenty-four hours for the purpose of investigation.** (5) Notwithstanding subsection (4), **a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days**, for the purpose of investigation. (6) If the police officer is of the view that further detention is not necessary under subsection (5**), the person may be released but an electronic monitoring device may be attached on the person in accordance with subsections (7) and (8**) for the purpose of investigation. (7) If the police officer intends to attach an electronic monitoring device on the person upon his release; he shall submit a report of the investigation to the Public Prosecutor.

	unnecessary to detain him, he may make an order (hereinafter referred to as "a restriction order**") imposing upon that person all or any of the following restrictions and conditions:** ***(a)* for imposing upon that person such restrictions as may be specified in the order in respect of his activities and the places of his residence and employment;** ***(b)* for prohibiting him from being out of doors between such hours as may be specified in the order, except under the authority of a written permit granted by such authority or person as may be so specified;** ***(c)* for requiring him to notify his movements in such manner at such times and to such authority or person as may be specified in the order;** ***(d)* for prohibiting him from addressing public meetings or from holding office in, or taking part in the activities of or acting as adviser to, any organization or association, or from taking part in any political activities; and** ***(e)* for prohibiting him from travelling beyond the limits of Malaysia or any part thereof specified in the order except in accordance with permission given to him by such authority or person as may be specified in such order.** (6) Every **restriction order shall continue in force for such period, not exceeding two years,** as may be specified therein, and may include a direction by the Minister that the person in respect of whom it is made shall enter into a bond with or without sureties and in such sum as may be specified for his due compliance with the restrictions and conditions imposed upon him. (7) **The Minister may direct that the duration of any detention order or restriction order be extended for such further period, not exceeding two years, as he may specify, and thereafter for such further periods, not exceeding two years at a time, as he may specify, either—**	(8) Upon receipt of the report under subsection (7), the Public Prosecutor may apply to the Court for the person to be attached with an electronic monitoring device in accordance with the provisions in Part III for a period which shall not exceed the remainder of the period of detention allowed under subsection (5). (9) **One week before the expiry of the period of detention under subsection (5), the police officer conducting the investigation shall submit the investigation papers to the Public Prosecutor.** (10) **This section shall have effect notwithstanding anything inconsistent with Articles 5 and 9 of the Federal Constitution and section 117 of the Criminal Procedure Code [*Act 593*].** (11) **Subsection (5) shall be reviewed every five years and shall cease to have effect unless, upon the review, a resolution is passed by both Houses of Parliament to extend the period of operation of the provision.** (12) For the purpose of this section, **"political belief or political activity" means engaging in a lawful activity through—** ***(a)* the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [*Act 335*] as evidenced by—** **(i) membership of or contribution to that party; or (ii) open and active participation in the affairs of that party;**

	***(a)* on the same grounds as those on which the order was originally made;** ***(b)* on grounds different from those on which the order was originally made; or** ***(c)* partly on the same grounds and partly on different grounds:** Provided that if a detention order is extended on different grounds or partly on different grounds the person to whom it relates shall have the same rights under section 11 as if the order extended as aforesaid was a fresh order, and section 12 shall apply accordingly. (8) The Minister may from time to time by notice in writing served on a person who is the subject of a restriction order vary, cancel or add to any restrictions or conditions imposed upon that person by that order, and the restrictions or conditions so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the unexpired portion of the period specified under subsection (6) or (7) 64. (1) **Any police officer may without warrant arrest any person suspected of the commission of an offence against this Part.** (2) The powers conferred upon a police officer by subsection (1) may be exercised by any member of the security forces, by any person performing the duties of guard or watchman in a protected place, and by any other person generally authorized in that behalf by a Chief Police Officer. 73. (1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe—	the expression of an opinion directed towards any Government in the Federation; or the pursuit of a course of action directed towards any Government in the Federation.

	***(a)* that there are grounds which would justify his detention under section 8; and** ***(b)* that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.** (2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof. **(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:** Provided that— *(a)* he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector; *(b)* he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and *(c)* he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.	

Power to inform next-of-kin and consultation with legal practitioner		**5.** (1) When a person is arrested and detained under section 4, a police officer conducting investigation shall— *(a) i*mmediately notify the next-of-kin of such person of his arrest and detention; and *(b)* subject to subsection (2), allow such persons to consult a legal practitioner of his choice. (2) A police officer not below the rank of Superintendent of Police may authorize a delay of not more than forty-eight hours for the consultation under paragraph (1)*(b)* if he is of the view that— *(a)* there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence; *(b)* it will lead to harm to another; *(c)* it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or *(d)* it will hinder the recovery of property obtained as a result of such an offence. (3) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution.
Power to intercept communication		**6.** (1) Notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer— *(a)* to intercept, detain and open any postal article in the course of transmission by post; *(b)* to intercept any message transmitted or received by any communication; or *(c)* to intercept or listen to any conversation by any communication. (2) The Public Prosecutor, if he considers that it is likely to contain any information relating to the communication of a security offence, may—

		(a) require a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communications service provider; or *(b)* authorize a police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such evidence. (3) Notwithstanding subsection (1), a police officer not below the rank of Superintendent of Police may— *(a)* intercept, detain and open any postal article in the course of transmission by post; *(b)* intercept any message transmitted or received by any communication; or *(c)* intercept or listen to any conversation by any communication, without authorization of the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation. (4) I f a police officer has acted under subsection (3), he shall immediately inform the Public Prosecutor of his action and he shall then be deemed to have acted under the authorization of the Public Prosecutor. (5) The court shall take cognizance of any authorization by the Public Prosecutor under this section. (6) This section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution. (7) For the purpose of this section— "communication" means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means; "communications service provider" means a person who provides services for the transmission or reception of communications.

Electronic monitoring device		**7.** (1) Upon application by the Public Prosecutor under section 4, the Court shall order the person to be attached with an electronic monitoring device for a period as the Court may determine but which shall not exceed the remainder of the period of detention allowed under subsection 4(5) for purposes of investigation. (2) The Court shall explain the operation of the electronic monitoring device and the terms and conditions of the electronic monitoring device to the person. (3) The person shall sign a form as specified in the Second Schedule and deposit the form with the Court. (4) The person shall be attached with an electronic monitoring device by a police officer. (5) The person shall comply with all the terms and conditions of the electronic monitoring device and shall report to the nearest police station at such time as specified in the form. (6) Any person who fails to comply with the terms and conditions under subsection (5) commits an offence and shall, on conviction, be liable to imprisonment for a term of not exceeding three years. (7)Any person who tampers with, or destroys, the electronic monitoring device commits an offence and shall, on conviction, be liable to imprisonment not exceeding three years and such person shall be liable to pay for any damage to the electronic monitoring device arising from his action. (8) Upon expiry of the period referred to in subsection (1), the person shall report to the nearest police station for removal of the electronic monitoring device.

		(9) This section shall have effect notwithstanding anything inconsistent with Article 9 of the Federal Constitution.
Detention pending exhaustion of legal process		**30.** (1) Notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence **the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor.** (2) Upon application by the Public Prosecutor under subsection (1), the court shall remand the accused in prison pending the filing of the notice of appeal. (3) When the Public Prosecutor files a notice of appeal against the acquittal, the Public Prosecutor may apply to the trial court for an order to commit the accused remanded in custody of the police to prison pending the disposal of the appeal. (4) Upon application by the Public Prosecutor under subsection (3), the court shall commit the accused to prison pending the disposal of the appeal. (5) I f the appeal of the Public Prosecutor is dismissed and the order of acquittal is affirmed, the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against the decision of the Court of Appeal by the Public Prosecutor. (6) Upon application by the Public Prosecutor under subsection (5), the court shall remand the accused in prison pending the filing of the notice of appeal. (7) An accused committed to prison under this section shall be held until all appeals are disposed of.

The sections which give power to arrest and detain are the most important ones in the two Acts; the ISA 1960 and the SOSMA 2012. Under the ISA 1960, a person can be detained for up to sixty days, without warrant or trial and without access to legal counsel, on suspicion that "he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to maintenance of essential services therein or to the economic life thereof."[41] At the end of sixty days, the Minister of Home Affairs can extend the period of detention without trial for up to two years.[42] This unjust detention can be renewed every two years without charge or an appearance before a court of law, effectively allowing for indefinite detention without trial. According to Ramdas Tikamdas,[43] under this law, the Minister of Home Affairs may detain a person for a period not exceeding two years (and renewable for two-year periods indefinitely) on the suspicion or belief that the detention of that person is necessary in the interest of public order or security and no grounds need be given by the Minister for the initial order or the extension. It is significant to note that in law, this is an executive detention order and not a detention pursuant to a judicial decision. According to de facto Law Minister, Nazri Abdul Aziz,[44] a total of 10,883 people were held under the ISA between 1960 and mid-2012.

As a result of the extensive power given by the sections in the ISA 1960, large groups of people have been arrested in the past. In the last 50 years, over 10,000 people have been detained under the ISA.[45] In 1987, *Operasi Lalang* saw the arrests of 106 persons under the ISA 1960 along with the revoking of the publishing licenses of two dailies, The Star and the *Sin Chew Jit Poh* and two weeklies, The Sunday Star and *Watan*. Prominent detainees include both political and non-political detainees such as opposition leader and DAP Secretary-General Lim Kit Siang, ALIRAN President Chandra Muzaffar, DAP Deputy Chairman Karpal Singh, MCA Vice President and Perak Chief Chan Kit Chee, PAS Youth Chief Halim Arshat, UMNO MP for Pasir Mas Ibrahim Ali, and UMNO Youth Education Chairman Mohamed Fahmi Ibrahim. In addition to these, other prominent non-political detainees include *Dong Jiao Zhong's* (Chinese Education Associations) Chairman Lim Fong Seng, Publicity Chief of the Civil Rights Committee Kua Kia Soong, and Women's Aid Organisation leader Irene Xavier.[46]

In total, 37 political activists and politicians were arrested. In addition, 23 social activists and 37 ordinary civilians were also arrested. Amongst them was a Malay

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41 Section 8 (1), Section 64, Section 72 and Section 73, *Internal Security Act 1960.*

42 Section 8 (7) *Internal Security Act 1960.*

43 Ramdas Tikamdas, *National Security and Constitutional Rights: The Internal Security Act 1960*. The Journal of the Malaysian Bar,2003, Vol XXXII (1), pp 89-92.

44 Hansard (2012) Dewan Rakyat [House of Representatives] 17 April 2012 DR-14042012.

45 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

46 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

Christian called Hilmy Noor, who was accused of "disrupting the Malay culture by being a Christian."[47] In 1991, seven opposition leaders in Sabah were arrested for their alleged plans to secede the state from Malaysia, allegedly known as Operation Talkak. All were either leaders or prominent members of the Kadazan Cultural Association (KCA), Institute for Development Studies (IDS), Sabah Foundation, and opposition party Parti Bersatu Sabah (PBS). In 2001, 6 political activists who were involved in the 'Reformasi' movement pushing for political reform and justice following the sacking and sham trial of ex-Deputy Prime Minister Anwar Ibrahim were detained under the ISA. They included Raja Petra Kamarudin, Tian Chua, Hishammudin Rais, Lokman Adam, Badrulamin Bahron and Saari Sungib.[48] After *Ops Lalang*, the Weeding Operation carried out in October 1987, the next intensely political and widespread use of the ISA 1960 occurred in the Reformasi era mass arrests during Anwar Ibrahim's sodomy and corruption trials where Anwar himself was detained under the Act, and it was subsequently used to detain several of his key supporters and intimidate others.[49]

In 2007, a number of Hindu Rights Action Force (Hindraf) leaders were arrested under the ISA and 5 were subsequently detaineed without trial.[50] This group had led large demonstrations in the capital, pushing for equal rights and opportunities for marginalised minority Indians.[51] In 2008, Raja Petra Kamarudin, an outspoken political activist and respected blogger was arrested for the second time under the ISA for allegedly "insulting Islam and publishing articles on his website that tarnished the country's leadership to the point of causing confusion among the people.[52]" He was detained for 56 days. Around the same time, Tan Hoon Cheng, a journalist with leading daily *Sin Chew Jit Poh* was arrested for reporting on the perceived racist remarks of a leading UMNO politician. She was released after 18 hours.[53] Teresa Kok, opposition MP was also arrested under the ISA in 2008 for allegedly insulting Islam, an allegation that was later found to be baseless. She was released after 7 days. Cheng Lee Whee, a SUARAM human rights activist was also arrested in 2008 for allegedly insulting the police. He was released after 48 hours.[54] According to Whiting, apart from these mass detentions, the ISA 1960 has been used frequently but episodically since 1960, with the incarceration of suspected

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47 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

48 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

49 US Department of State, 2002; The Star, 12 April 2001; and SUHAKAM, 11 April 2001.

50 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

51 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

52 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

53 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

54 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014*

terrorists usually receiving less publicity than detention of opposition politicians, students, journalists, bloggers and public interest activists.[55]

The assumption that we can make on this is that ISA 1960 does not discriminate. Anyone, at any time can be on the sharp end, simply for thinking or saying something which the government considers to be against the status quo.[56] The government, however, gives a very simplistic answer to this serious criticism. Some ministers in justifying the continued use of the ISA question why Malaysia should get rid of it when Western countries have followed by creating such laws too, and the counties comparison are the US and UK.[57] The truth in their defense cannot be denied for it is true that laws that allow for detention without trial, such as the USA Patriot Act 2001, and the UK's Terrorism Act 2006, came about as needful responses to the 11 Sept 2001 World Trade Centre attacks and the 7 July 2005 London bombings.[58] However, Loh[59] went on to highlight a key flaw in the comparison for an overview of the ISA 1960, Patriot Act and Terrorism Act shows that key differences lie in the safeguards and access to legal recourses for detainees to challenge their detention which is given emphasis in the other Acts. This is supported by the Bar Council Human Rights Committee Chairman, Edmund Bon who claims that such statements are shallow and motivated by political agenda for he asserts that the most unjust part of the ISA 1960 is the prohibition of judicial review on the minister's decision.

An analysis of the criticism against the ISA 1960 shows that it starts with the provision in the Act that gave arbitrary detention powers without warrant. The SOSMA 2012 also has similar provisions for arrest and detention. Under s. 4 of the SOSMA 2012, a police officer may arrest or detain without warrant any person whom he has reason to believe to be involved in an offence in this Act. However, unlike the ISA 1960, s. 4 (2) stipulates that a person who is arrested must be informed on the grounds of arrest by the police officer making the arrest. Further under s. 5, there is a requirement for the police officer conducting the investigation to notify the next-of-kin of the person arrested and also to allow the person to consult a legal practitioner of his choice. These sections allows for a positive view of the SOSMA 2012 but the positive changes are superficial for s. 5 (2) empowers a police officer who is not below the rank of Superintendent of Police to authorize a delay of 48 hours for the consultation. Besides these, there are other sections

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55 Some examples cited by Amanda Whiting of ISA detentions include: politicians – socialist party members (Straits Times (Malaysia), 6 September 1973), HINDRAF organisers in 2007 (Malaysiakini, 12 December 2007); student and academic protestors in 1974 (Means, 1991: 37); journalists – the editor of the New Straits Times in 1976, a senior journalist at Watan in the mid-1980s (Means, 1991: 56; New Straits Times, 18 October 1981); a socio-political blogger, a mainstream journalist and a DAP MP in 2008 (Aliran,13 September 2008).

56 *Malaysian Civil Liberties Movement (MCLM), 2013, ISA - Internal Security Act <mclm.org.uk/health/382-isa-internal-security-act.htm>Site accessed on 20.11.2014.*

57 Loh, D, 2008, *What's wrong with the ISA?*. The Nut Graph, <http://www.thenutgraph.com/what-is-wrong-with-the-isa/> Site accessed 11.12.2014.

58 Loh, D, 2008*, What's wrong with the ISA*?. The Nut Graph, <http://www.thenutgraph.com/what-is-wrong-with-the-isa/> Site accessed 11.12.2014.

59 Loh, D, 2008*, What's wrong with the ISA*?. The Nut Graph, <http://www.thenutgraph.com/what-is-wrong-with-the-isa/> Site accessed 11.12.2014.

which show that SOSMA 2012 is also restrictive like ISA 1960. Section 6, for instance permits the interception of communication which may infringe personal liberty and the right to privacy. Further, s. 30 compels the court, upon application by the public prosecutor, to commit an acquitted person pending exhaustion of all appeals.

In comparison to the ISA 1960, these provisions are not that harsh. Under the SOSMA 2012, the police have powers to arrest and detain any person whom they have reason to believe is involved in security offences for only 28 days unlike the 60-days period, under the ISA 1960. However, under the SOSMA 2012, there is a new imposition that an electronic tracking device can be placed on released suspects. What is of serious concern is that the definition of "security offence" in the SOSMA 2012 is broad and vague. It includes "activity which is detrimental to parliamentary democracy". Two important sections in the SOSMA 2012 which aim to ensure that the Act is not misused is seen in s. 4 (3), where it asserts that political belief or political activity of a person cannot be the sole reason for a person to be arrested and detained. This section must be read with s. 4 (12) which explains the meaning of 'political belief or political activity'. The Act defines the phrase as engaging in a lawful activity through three means listed below:

> the expression of an opinion or the pursuit of a course of action made according to the tenets of a political party that is at the relevant time registered under the Societies Act 1966 [Act 335] as evidenced by—
>
> (i) membership of or contribution to that party; or
>
> (ii) open and active participation in the affairs of that party;
>
> (b) the expression of an opinion directed towards any Government in the Federation; or
>
> (c) the pursuit of a course of action directed towards any Government in the Federation.

These provisions are also part of those which have brought forth criticism. According to Spiegel,[60] even the much-applauded language stating that "No person shall be arrested and detained…solely for his political belief or political activity" is less than it appears due to the SOSMA 2012's definition of political activity and belief as opinion or action reflecting the views of a political party that is legally registered under the Societies Act. He went on to add that the Registrar of Societies, a political appointee, has unassailable power to refuse or delay registration ad infinitum—a power that has been used repeatedly for political ends such as denying registration to a newly formed political party and concludes that this may make those holding demonstrations for or against certain legislation to be committing a security offence.

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[60] Spiegel,M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act'*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

As indicated in Table 2, under s. 6 (1) of the SOSMA 2012, the Public Prosecutor may authorise any police officer 'to intercept, detain and open any postal article in the course of transmission by post, to intercept any message transmitted or received by any communication; or to intercept or listen to any conversation by any communication' if he is of the opinion that it is likely to contain information which is likely to relate to the commission of a security offences. These powers are extended under ss. 2 (a) and (b) to empower the public prosecutor to require a communication service provider to intercept and retain specified communication as well as authorizes a police officer to enter any premise and install any device for the interception and retention of specified communication. Besides these extensive powers of interception by the Public Prosecutor, a police officer not below the rank of Superintendent of Police can, under s.6 (3) (a), intercept, detain and open any postal article in the course of transmission by post; (b) intercept any message transmitted or received by any communication; or (c) intercept or listen to any conversation by any communication, without permission from the Public Prosecutor in 'urgent and sudden cases' (a phrase which is open for subjective interpretation) and this is given cognizance under ss. 6 (4) and 6 (5). Aingkaran Kugathasan[61] compares s. 6 with Article 12 of Universal Declaration of Human Rights (UDHR) and Article 17 of International Covenant on Civil and Political Rights (ICCPR). Article 12 denotes that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation while Article 17 of ICCPR also states the right to privacy and right to the protection of the law against such interference or attacks. The power given to the police to intercept communication under s. 6 is thus a clear violation of human rights under aforesaid international instruments. He went on to highlight the seriousness of this section. This power is most dangerous and certainly an invasion of privacy for it is done without the knowledge of the affected individual and with no stipulation as to the time frame that this invasion of privacy is permitted.[62]

Although the Act does not specifically refer to social media, according to s. 6 (7) the term 'communication' means a communication received or transmitted by post or a telegraphic, telephonic or other communication received or transmitted by electricity, magnetism or other means, which gives police the power to intercept a wide range of communications, including electronic communications. If the police use the power under s. 2 (b) by entering premises and installing these devices to psychologically instill 'fear' and attempt to silence activists and other public figures, the ruling party (the government) can simply abuse the power to repress the opposition parties or movements.[63]

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61 Aingkaran Kugathasan, 2013, "War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012", Special Report" <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

62 Aingkaran Kugathasan, 2013, "War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012", Special Report" <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

63 Aingkaran Kugathasan, 2013, "War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012", Special Report" <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

According to Tan Sri Abdul Gani Patail, modern investigation's techniques are incorporated in the SOSMA 2012 such as the power to intercept communication and he asserts that such exercise is efficient not only upon procurement of high-tech gadgets and infrastructures but he warns that this will become effective only with good coordination and sharing of intelligence amongst all relevant quarters.[64] He went on to highlight that under s. 6 (3) (c), the power to intercept can be done even without prior authorization by the Public Prosecutor in urgent and sudden cases where immediate action is required leaving no moment of deliberation. The Public Prosecutor nevertheless, should be immediately informed of the interception and the exercise will be deemed to have been acted under the authorization of the Public Prosecutor.[65] The Malaysian Bar Council is of the opinion that the Act serves to further erode citizen rights and individual protection by ceding to the police force rather than the judges the power to intercept communications and at trial, to keep the identity of the prosecution witnesses classified negates the process of cross-examination.[66] According to Nancy Shukri, similar provisions are also contained in s. 27A of the Dangerous Drugs Act 1952 (Act 234), s. 11 of the Kidnapping Act 1961 (Act 365), s. 43 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) and s. 116 C of the Criminal Procedure Code.[67] According to Bukit Mertajam MP, Steven Sim, due to the vagueness and broadness of the ground for executing interception, this provision is surely open to abuse especially against political dissent[68]. He went on to stress that the act does not provide any guidelines on the "interception" and the "government can legally 'bug' any private communication using any method, including through trespassing to implement the bugging device and there is no stipulated time frame such invasion of privacy is to be allowed".

SUHAKAM too states that some of the provisions of the SOSMA 2012 could violate the human rights of detainees. They cited the following sections:

- Section 4 does not provide for judicial oversight when the detention period is extended up to 28 days.

- Section 5 allows the police to deny immediate access to legal representation for a period of up to 48 hours.

- Section 6 permits the interception of communication which may infringe personal liberty and the right to privacy.

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64 Abdul Gani Patail, 2013, SOSMA 2012: *Its Implications on Defence and Security*, <http://midas.mod.gov.my/files/speech/Teks%20Ucapan%20AG%20MIDAS%20TALK%202013.pdf>. Site accessed on 14.11.2014 .

65 Section 30 (4), *SOSMA 2012.*

66 Kesatuan Penuntut Undang-Undang Malaysia (KPUM), 2014, *Law Today: Security Offences (Special Measures) Act 2012 [SOSMA]*. <http://www.kpum.org/2014/03/law-today-security-offences-special-measures-act-2012-sosma/> Site accessed on 12.11.2014.

67 Nancy Shukri, citied in 16th June 2014, *Minister: Police can intercept communications if there is illegal element,* The Sun Daily, <http://www.thesundaily.my/news/1083508> Site accessed on 13.11.2014.

68 No Author, 31 October 2013, *New Act Allows Government to Tap our Phones*, Malaysia Today, <http://www.malaysia-today.net/new-act-allows-government-to-tap-our-phones/> Site accessed on 20.11.2014.

- Section 30 compels the court, upon application by the Public Prosecutor, to commit an acquitted person pending exhaustion of all appeals.[69]

The SOSMA 2012 also allows the police to gather information in violation of privacy laws[70] where statements from dead persons or persons that cannot be found can be admitted[71] as evidence, to secure a conviction by lowering the standard of proof. This creates a court procedure that does not meet the requirements of a fair trial.[72] The Act also allows the accused to be detained pending appeal even after the High Court has acquitted the accused. This is provided for under s. 30 (1) where the public prosecution has the power to compel the court to commit an acquitted person pending exhaustion of all appeals. This can be said to be an affront to due process and a degradation of the Rule of Law and a return to the rule of men. Should a suspect be acquitted despite all these roadblocks, the SOSMA 2012 preserves a way to detain individuals for years by simply filing appeals.[73] Spiegel went on to say that as long as the appeal process continues, an acquitted suspect may be detained or tethered to a monitoring device, a blatant denial of personal liberty that could potentially take years to resolve.[74] He concluded that although the process may be different, but the resultant detention without trial is no different than the ISA 1960's two-year renewable terms. In fact, from initial arrest to final appeal, a person may be kept under lock and key indefinitely. This is supported by Aingkaran Kugathasan, who criticizes s. 30 for the same reason.[75] If s. 30 is seen to be an affront to basic human right, s. 7 can be seen to further erode personal liberty. Under this section, the Public Prosecutor may make an application to the court for the person to be attached to an electronic monitoring device for a period not exceeding the period allowed under subsection 4 (5). In addition, there is a sunset clause in the bill that allows the 28-day detention period to be reviewed every five years.[76] Figure 1 shows the comparison period of detention without charge adopted in other nations where Malaysia and Britain tops the list.

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69 Suhakam, 2012, *Annual Report 2012,* <http://www.suhakam.org.my/wp-content/uploads/2013/11/SUHAKAM-BI-2012.pdf> Site accessed on 12.10.2014.

70 S 6 (1), *SOSMA 2012.*

71 S 18, *SOSMA 2012.*

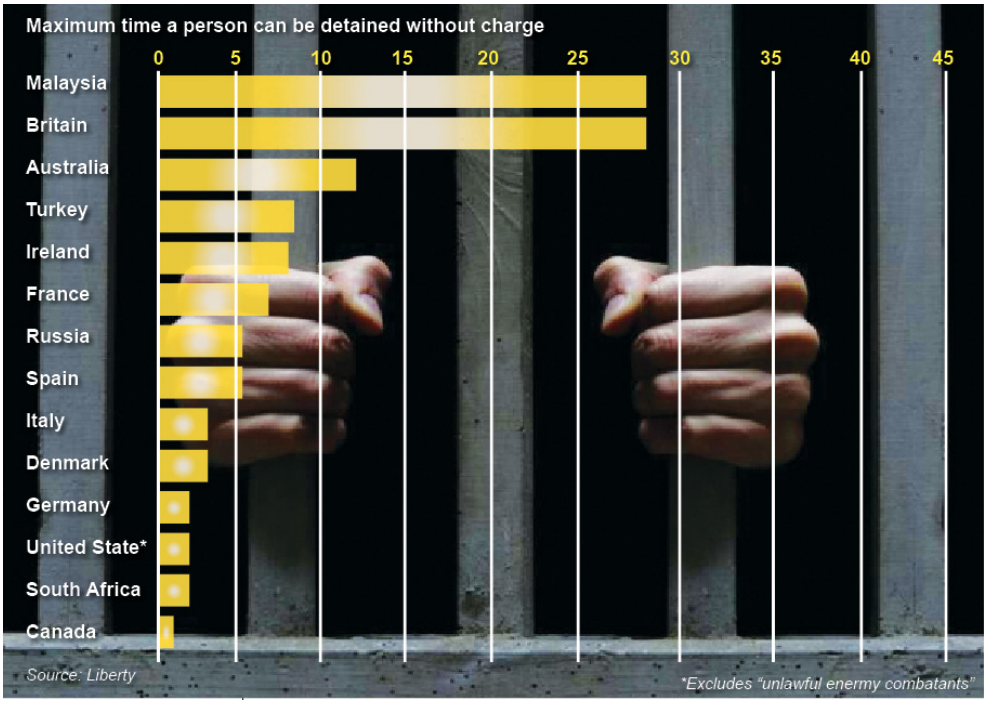
72 S 17, *SOSMA 2012.*

73 Spiegel,M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act'*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

74 Spiegel,M, 14th June 2012, *Smoke and Mirrors: Malaysia's "New" Internal Security Act'*, Asia Pacific Bulletin, <http://www.hrw.org/sites/default/files/related_material/2012_Malaysia_EastWest.pdf> Site accessed 12.11.2014.

75 Aingkaran Kugathasan, 2013, *"War on terrorism versus civil liberties of individuals: An analysis of the Malaysian Security Offences (Special Measures) Act 2012", Special Report*" <http://www.monitor.upeace.org/archive.cfm?id_article=961> Site accessed on 24.11. 2014.

76 Gan Pei Ling, 18th May 2012, "*SOSMA: Sizing up the new security bill*" Selangor Times, <http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill> Site accessed 11.11.2014.



(Source: Aingkaran Kugathasan, 2013)

FIGURE 1: Comparison of the Period of Detention without Charge among Nations

Despite these harsh provisions, it must be noted that the new security Act does provide some considerations to basic human rights. Among these would be the necessity to inform next-of-kin and allow consultation with a legal practitioner. These requirements must be done immediately after the arrest and detention is done. Section 5 of the Act entitles any person arrested or detained to immediately notify his next-of-kin on the arrest and to consult a legal practitioner of his choice. However, according to s. 5 (2), the consultation can be delayed up to 48 hours by a police officer not below the rank of Superintendent of Police in four circumstances. Firstly, if he is of the view that there are reasonable grounds for believing that the exercise of that right will interfere with evidence connected to security offence; secondly it will lead to harm to another; thirdly, it will lead to the alerting of other person suspected of having committed such an offence but who are not yet arrested; or fourthly it will hinder the recovery of property obtained as a result of such an offence.[77] Despite the power given to delay the consultation, the provision of this Act is better in the sense that in the previous Act, there was no provision for such rights.

[77] S 5 (2), *SOSMA 2012.*

Table 3 shows the special procedures that the SOSMA 2012 caters for with regards to sensitive information. The sections that are related to these procedures are ss. 16, 28 and 29. These special procedures are not found in the ISA 1960.

Table 3: Trial Procedures Relating to Sensitive Information

AREAS	SECTIONS IN SOSMA 2012
Procedures related sensitive information	8.(1)Notwithstanding section 51A of the criminal procedure code, if the trial of a security offence involves matters relating to sensitive information **the public prosecutor may, before the commencement of the trial, apply by way of an ex parte application to the court to be exempted from the obligations under section 51A of the criminal procedure code.** 9.(1)if an accused reasonably expects to disclose or to cause the disclosure of sensitive information in any manner, in his defense, **the accused shall give two days' notice to the public prosecutor and the court in writing of his intention to do so.** 10.(1) Upon receiving the notice under section 9 from the accused the court shall conduct a hearing in camera.
Protected witness	**16.** (1) Notwithstanding any written law to the contrary, any report through any means on a protected witness shall not reveal or contain— *(a)* the name; *(b)* the address; *(c)* the picture of the protected witness or any other person, place or thing which may lead to the identification of the protected witness; or *(d)* any evidence or any other thing likely to lead to the identification of the protected witness . (2) Any person who prepares a report in contravention of subsection (1) commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years and also to a fine not exceeding ten thousand ringgit.
Protection of informer	**28.** (1) **No complaint by an informer as to a security offence under this Act shall be admitted in evidence in any civil or criminal proceeding whatsoever, and no witness shall be obliged or permitted to disclose the name or address of any informer, or state any matter which might lead to his discovery.** (2) I f any books, documents or papers which are in evidence or liable to inspection in any civil or criminal proceeding whatsoever contain any entry in which any informer is named or described or which might lead to his discovery, **the court before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the informer from discovery, but no further.**
Access to detainees/ prisoners by police	**29.** Notwithstanding any other written law**, a police officer conducting an investigation under this Act shall be allowed to have access to any person whom he has reason to believe to be involved in a security offence who is—** ***(a)* **being detained under any other written law; or** ***(b)*****under confinement in prison, whether convicted or not.**

Table 3 shows the provisions in the SOSMA 2012 which caters for the special procedures related to sensitive information. These special procedures are not found in the ISA 1960. Having compared the SOSMA 2012 with the ISA 1960 in terms of definitions and powers of arrest and detention, it is noted that the SOSMA 2012 has some new additions, such as powers of interception and retention of communication as well as the use of electronic monitoring device. Another important difference that is found in the SOSMA 2012 which is not in the ISA 1960 is the section on trial procedures relating to sensitive information. This comprises of four key elements namely; procedures related to sensitive information, protected witness, protection of informer and access to detainees by the police. This is indicated in Part IV of the Act. Part IV of the SOSMA 2012 talks about special procedures in dealing with sensitive information as defined under section 3 of the Act to be disclosed and used as evidence in court either by the prosecution, the accused or in any event sensitive information which arises during trial.[78] As mentioned, the Act defines "protected witness" as a witness whose exposure will jeopardize the gathering of evidence or intelligence or jeopardize his life and well-being.[79] It is crucial to discuss s. 8 and s. 9 which deals with the procedures related to sensitive information. Section 8 deals with the procedures for the public prosecutor where the trial involves matters relating to sensitive information. This section empowers the public prosecutor to apply to the court by way of an ex parte application to be exempted from the obligation under s. 51 A of the Criminal Procedure Code. Section 9 on the other hand requires the accused to give two days' notice in writing to the public prosecutor and the court should he intend to disclose or cease the disclosure of sensitive information.

According to Tan Sri Abdul Gani Patail, the provisions under ss. 8 - 10 in the SOSMA 2012 will ensure that no classified or sensitive information to be exposed either to the accused or the public or to be revealed by the accused as his defense during trial.[80] He went on to add that should in any event the sensitive information must be disclosed then the trial will be held in camera so as to preserve its confidentiality. Under s. 11 (4) of the SOSMA 2012, the court is denied the right to direct the Public Prosecutor to produce a document which contains sensitive information which arises during the trial. Abdul Gani Patail also highlights this section as contravening basic human rights. This is further reinforced by the Permatang Pauh MP, who stated that this process will be open to abuse as a witness who bears grudges towards the accused may produce biased testimonies yet he or she will not be cross-examined.[81] This was supported by Fadiah Nadwa Fikri[82]

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78 Abdul Gani Patail, 2013, SOSMA 2012: *Its Implications on Defence and Security*, <http://midas.mod.gov.my/files/speech/Teks%20Ucapan%20AG%20MIDAS%20TALK%202013.pdf>. Site accessed on 14.11.2014.

79 S 3, *SOSMA 2012.*

80 Abdul Gani Patail, 2013, SOSMA 2012: *Its Implications on Defence and Security*, <http://midas.mod.gov.my/files/speech/Teks%20Ucapan%20AG%20MIDAS%20TALK%202013.pdf>. Site accessed on 14.11.2014.

81 Gan Pei Ling, 18th May 2012, "*SOSMA: Sizing up the new security bill*" Selangor Times, <http://www.selangortimes.com/index.php?section=insight&permalink=20120516152209-sosma-sizing-up-the-new-security-bill> Site accessed 11.11.2014

who represented Mohd Hilmi Hasim. She and the other lawyers argued that SOSMA 2012 is unconstitutional since it allows evidence which does not follow provisions in the Evidence Act. She went on to add that "Anyone can easily be convicted," and the law is against Article 8 of the Constitution which guarantees equal protection of the law for every person. Under ss. 14 and 16, the identity of the witness is protected in a comprehensive manner where under s. 14 (4), the court may disallow any questions to be put forth to the witness's identification and s. 16 (2) makes it an offence liable to imprisonment not exceeding ten thousand ringgit if any person prepares a report in contravention of s. 16 (1). According to Syukri Razab,[83] trials under SOSMA 2012 were one-sided, as s. 14 of the Act allowed public prosecutors to withhold the identity of prosecution witnesses from the accused and their lawyer. Syukri Razab[84] went on to add that "what has happened is that police are not only delaying family access, but the detainees are also not allowed to meet their family without permission from the investigating officer, even after the 48 hours have lapsed." He said this when submitting the memorandum to SUHAKAM's office in Kuala Lumpur. Besides protecting the identity of the witness, the Act also protects informers. Section 28 (1) states that no complaint by an informer as to a security offence under this Act shall be admitted in evidence in any civil or criminal proceeding and no witness shall be obliged or permitted to disclose the particulars of the informer which might lead to his identification. Section 28 (2) further empowers the court to conceal or obliterate any evidence in any books, documents or papers used as evidence which could lead to identification of the informer.

The following section discusses the findings from the analysis of the SOSMA 2102 with the Federal Constitution. Table 4 shows the findings.

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82 Zurairi AR, 18th February 2013, "*Family challenges detention, claims law 'unconstitutiona*l". The Malaysian Insider, <http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1> Site accessed on 16.11.2014.

83 Jamilah Kamarudin, 19th May 2014, "*Security Offences Act violates human rights, says Suaram",* The Malaysianinsider. http://www.themalaysianinsider.com/malaysia/article/securities-offences-act-violates-human-rights-says-suaram#sthash.Pc7YRIl8.dpuf>. Sie accessed on 16.11.2014.

84 Jamilah Kamarudin, 19th May 2014, "*Security Offences Act violates human rights, says Suaram",* The Malaysianinsider. http://www.themalaysianinsider.com/malaysia/article/securities-offences-act-violates-human-rights-says-suaram#sthash.Pc7YRIl8.dpuf>. Sie accessed on 16.11.2014.

TABLE 4: Analysis of SOSMA 2012 in relation to Malaysian Federal Constitution (FC)

Right Protected	Federal Constitution	Infringement under the SOSMA 2012
Supremacy of Federal Constitution	**4 (1)** This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.	S 4 (10) - Arts 5 and 9 of the FC S 5 (3) –Art 5 of the FC S 6 (6) – Art 5 of the FC S 7 (9) -Art 9 of the FC S 14 (1)
	5. (1) No person shall be deprived of his life or personal liberty save in accordance with law. **(2)** Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him. **(3)** Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. **(4)** Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority	S 4 (1) S 4 (2) S 4 (4) S 4 (5) S 5 (2)
	7.(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed. **(2)** A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.	S 30 (1) –(7)

	8. (1) All persons are equal before the law and entitled to the equal protection of the law. **(3)** There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of the State.	S13 (1) S 8 (1) S 14 (1)
	9. (1) No citizen shall be banished or excluded from the Federation. **(2)** Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.	S 7 (1) S 30 (1)
	10.(1) Subject to Clauses (2), (3) and (4) -**(a)** every citizen has the right to freedom of speech and expression; **(b)** all citizens have the right to assemble peaceably and without arms; **(c)** all citizens have the right to form associations. **(2)** Parliament may by law impose - **(a)** on the rights conferred by paragraph (a) of Clause (1),such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence; **(b)** on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, or public order; **(c)** on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.	S 6 (1) S 6 (2)

	13. (1) No person shall be deprived of property save in accordance with law. **(2)** No law shall provide for the compulsory acquisition or use of property without adequate compensation.	
	149. (1) If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation - **(a)** to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or **(b)** to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or **(c)** to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or **(d)** to procure the alteration, otherwise than by lawful means, of anything by law established; or **(e)** which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or **(f)** which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. **(2)** A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.	

As a general principle most of us agree that the Malaysian Constitution is the highest law in Malaysia but in reality, we also understand that it is not the absolute truth and we have no problem of accepting that the rights in the Constitution are couched in such a way that it allows the Parliament:

> To make law which impose….on the rights….such restrictions as it deems necessary or expedient in the interest of the security of the federation or part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence".[85]

According to Abdul Aziz Bari, the scenario in Malaysia can be compared with the First Amendment to the American Constitution which categorically provides, inter alia, that the "Congress shall make no law ……abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".[86] According to Schwartz[87] this has always been regarded as fundamental by the American constitutional lawyers, something which serves as the basis of the political system; a character that makes their institutions symbols of freedom and equality. This is not available in the Malaysian scenario. Abdul Aziz Bari[88] went on to add that under the authority given by the Constitution, Parliament has passed laws such as the Sedition Act 1948, Printing Presses and Publications Act 1984 and Official Secrets Act 1971 and although the essence of the legitimacy of these laws could be accepted, what has triggered uneasiness and criticisms has been the way the laws have been used. In the same line, the new security Act, the SOSMA 2012 has been passed and again, it has become a debatable issue.

As shown in Table 4, the supremacy of the Constitution has been undermined by some sections of the SOSMA 2012 which stipulates that the law supersedes anything in the Constitution especially Article 4. According to Article 4 (1) of the Federal Constitution, the Constitution is the supreme law and anything passed which is inconsistent with it shall be void. Among the sections that contravene are s. 4 (10): this section shall have effect notwithstanding anything inconsistent with Articles 5 and 9 of the Federal Constitution and s. 117 of the Criminal Procedure Code [*Act 593*], s. 5 (3): this section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution, s.

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85 Article 10(1)(a), Federal Constitution.

86 Abdul Aziz Bari, "*Freedom of Speech and Expression in Malaysia After Forty Years (Part 1)"*, <http://anwarite.tripod.com/freespeech.html>. Site accessed on 21.11.2014.

87 Schwartz, B, "*American Constitutional Law*", Cambridge University Press, United Kingdom, 1955.

88 Abdul Aziz Bari, "*Freedom of Speech and Expression in Malaysia After Forty Years (Part 1)"*, <http://anwarite.tripod.com/freespeech.html>. Site accessed on 21.11.2014.

6 (1): notwithstanding any other written law, the Public Prosecutor, if he considers that it is likely to contain any information relating to the commission of a security offence, may authorize any police officer to intercept communication, s. 6 (6): this section shall have effect notwithstanding anything inconsistent with Article 5 of the Federal Constitution, s. 7 (9): this section shall have effect notwithstanding anything inconsistent with Article 9 of the Federal Constitution, s. 14 (1): notwithstanding Article 5 of the Federal Constitution and s. 264 of the Criminal Procedure Code, where at any time during the trial of a security offence, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the court for the procedures in this section to apply, s. 16 (1): notwithstanding any written law to the contrary, any report through any means on a protected witness shall not reveal or contain information regarding the said witness, s. 26 (1): notwithstanding any Rule of Law or any other written law to the contrary, in any proceedings against any person for a security offence (a) no witness shall be regarded as an accomplice by reason only of such witness having been in any manner concerned in the commission of the security offence or having knowledge of the commission of the offence; and (b) no agent provocateur shall be presumed to be unworthy of credit by reason only of his having attempted to abet or abetted the commission of a security offence by any person if the attempt to abet or abetment was for the sole purpose of securing evidence against such person, s. 26 (2): notwithstanding any Rule of Law or any other written law to the contrary, and that the agent provocateur is a police officer whatever his rank, any statement, whether oral or in writing made to an agent provocateur by any person who is subsequently charged with a security offence shall be admissible as evidence at his trial and s. 30 (1): notwithstanding Article 9 of the Federal Constitution, if the trial court acquits an accused of a security offence the Public Prosecutor may make an oral application to the court for the accused to be remanded in prison pending a notice of appeal to be filed against his acquittal by the Public Prosecutor.

The common phrase used in these sections which underline the supremacy of the Federal Constitution is that the section is said to have effect "notwithstanding anything inconsistent with an article in the Federal Constitution". These phrases are clear indications of how SOSMA 2012 contradict the supremacy of the Constitutions. Although these may raise concerns, the government aims to defend the need for these kinds of law. In a nationally televised speech on Malaysia Day in September 2011, Prime Minister, Datuk Seri Najib Tun Razak called for Malaysia "which practices functional and inclusive democracy, where peace and public order are safeguarded in line with the supremacy of the Constitution, the Rule of Law and respect for basic human rights and individual rights."[89] However he added that there had to be "checks and balances … between national security and personal freedom," and ensuing reforms have favored security

[89] Human Rights Watch, "*World Report 2013"*, <http://www.hrw.org/world-report/2013/country-chapters/malaysia?> Site accessed on 9.11.2014.

over internationally recognized human rights.[90] On the other hand, Lawyers for Liberty calls for caution against placing offences from the Penal Code and the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIP) as suggested by some parties when amending the SOSMA 2012.[91] It believes that these amendments reflect an attempt to widen the very draconian ambit of security offences in Malaysia. It went on to state that the inclusion of these offences would widen the ambit of security offences under the SOSMA 2012 and will allow the state to derogate from its responsibilities in upholding constitutional rights and standards of fair trial.

It must be noted that s. 6 (6) treads directly on Article 5 of the Federal Constitution no less – which deals with the fundamental liberty of a person – by asserting that it is to have effect notwithstanding anything inconsistent with Article 5.[92] Md Zubair Kasem Khan too supports the findings that there are a number of sections in the SOSMA 2012 which undermines the supremacy of the Federal Constitution. Among these are s. 4 (10) where W- Surveillance is said to have effect notwithstanding anything inconsistent with Articles 5 and 9 of Federal Constitution, Section 5(3) where it is stated that a delay of notifications shall have effect notwithstanding anything inconsistent with Article 5 of Federal Constitution, s. 6 (6) where the power of the police officer or public prosecutor to intercept communications is said to have effect notwithstanding anything inconsistent with Article 5 of Federal Constitution and s. 7 (9) where special procedures relating to electronic monitoring device is said to have effect notwithstanding anything inconsistent with Article 9 of Federal Constitution. [93] Md Zubair Kasem Khan[94] went on to state that it is noted that there is no such provision to ensure the confidentiality of this personal report. Some certainty in this aspect is warranted because the officer deals with data in electronic form, which is more prone to leak, disclosure or security threats. Last but not least, it is observed that there is no provision that confers rights to a suspected criminal offender to appeal or contest the ruling to wear this electronic monitoring device or otherwise to ask the reason why he needs to wear such device. Under s. 14 (1) it is stated that "Notwithstanding Article 5 of the Federal Constitution and Section 264 of the Criminal Procedure Code, where at any time during the trial of a security offence, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the court for the

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90 Human Rights Watch, "*World Report 2013"*, <http://www.hrw.org/world-report/2013/country-chapters/malaysia?> Site accessed on 9.11.2014.

91 Yesuda, M, 5th March 2013, "*SOSMA amendments needless, dangerous"*, <http://www.freemalaysiatoday.com/category/opinion/2013/10/23/sosma-amendments-needless-and-dangerous/> Site accessed on 11.11.2014.

92 No Author, 31 October 2013, "*New Act Allows Government to Tap our Phones"*, Malaysia Today, <http://www.malaysia-today.net/new-act-allows-government-to-tap-our-phones/> Site accessed on 20.11.2014.

93 Md. Zubair Kasem Khan, 2014, "Electronic Surveillance And Privacy Concern In Malaysia: A Quest For Consensus" <http://www.slideshare.net/zubairrumi9/electronic-surveillance-and-privacy-concern-in-malaysia-a-quest-for-consensus> Site accessed on 13,11.2014.

94 Md. Zubair Kasem Khan, 2014, "Electronic Surveillance And Privacy Concern In Malaysia: A Quest For Consensus" <http://www.slideshare.net/zubairrumi9/electronic-surveillance-and-privacy-concern-in-malaysia-a-quest-for-consensus> Site accessed on 13,11.2014.

procedures in this section to apply". In such cases, the public prosecutor can hold an inquiry in camera in the absence of the accused and his counsel. This contravenes Article 5 (3) of the Federal Constitution where the person detained has the right to be defended by a legal practitioner of his choice. By denying access to cross-examination of the witness by the defense council is an inhibition of proper defense procedure.

Thus, in summary, under s. 4 (1), a police officer may, without warrant, arrest and detain any person whom he has reason to believe to be involved in security offences, and under the s. 4 (2), the person arrested under subsection (1) shall be informed as soon as may be of the grounds of his arrest by the police officer making the arrest. Further, under s. 4 (3), it is stated that no person shall be arrested and detained under this section solely for his political belief or political activity Under s. 4 (4), the person arrested and detained under subsection (1) may be detained for a period of twenty-four hours for the purpose of investigation but under s. 4 (5), a police officer of or above the rank of Superintendent of Police may extend the period of detention for a period of not more than twenty-eight days, for the purpose of investigation. Further, under s. 5 (2), the Superintendent of Police may authorize a delay of not more than forty-eight hours for consultation if certain condition prevail'. All the sections discussed are in breach of Article 5 of the Federal Constitution. Article 5 (1) states that no person shall be deprived of his life or personal liberty save in accordance with law, Article 5 (2) gives authority for the court to intervene and order the person to be brought before the court if a complaint is made to a High Court or any judge that a person is detained unlawfully. Article 5 (3) imposes a rule that the person who is arrested must be informed on the grounds of his arrest and should be allowed to consult a legal practitioner of his choice. Article 5 (4) imposes a condition on the police to produce the person arrested before a magistrate within twenty four hours. Thus, an analysis of the sections in the SOSMA 2012 are clearly in violation of all the stipulations under Article 5 of the Federal Constitution. Despite the clear stipulation as to the invalidity of laws passed which supersede the Federal Constitution, the validity of these sections are upheld by Article 150 which allows the enactment of laws during a period of 'emergency' when there is imminent danger which threatens the security or public order in the Federation. Article 150 (6) states that laws made in such a condition are valid as seen in the words, "no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution".

Further, in defense to the claim that some of the sections in the SOSMA 2012 seems to contravene the rights upheld in the Malaysian Federal Constitution, it must be noted that Article 149(1) had laid out six areas in which any law enacted is valid even though it could be inconsistent with articles on personal liberties in Articles 5, 9, 10 or 13 of the Federal Constitution.[95] In the same article, it was stated that the six

[95] No Author, (2014), "*Something amissing about SOSMA*", <http://anotherbrickinwall.blogspot.com/2014/05/something-amissing-about-sosma.html>. Site accessed on 31.10.2014.

areas could tantamount to the definition of national security; involvement in organized crime, uprising against King, racial incitation, unlawful overthrow of government, and anything involving public order. Thus, in essence, it cannot be said to contravene Federal Constitution. Amidst these ongoing debates, a new line of argument has been brought forth by lawyers of Malay rights group, Perkasa which claims that the government's recent abolition of the controversial ISA 1960 is unlawful.[96] Perkasa president, Datuk Ibrahim Ali said the ISA 1960 was enacted to protect Article 149 of the Federal Constitution, but its replacement, the SOSMA 2012, does not have the same scope as the ISA 1960. He went on to say that the SOSMA 2012 cannot act against those who insult the position of the Malay rulers and Islam.[97]

IV. CONCLUSION

The responsibility to safeguard and ensure public safety is foremost and always on the shoulder of the government and one of the biggest transformations that have been made is the repeal of the ISA 1960 and the enactment of its replacement, the SOSMA 2012. The ISA 1960 was abolished after 50 years since it was enacted. Our Prime Minister, Datuk Seri NajibTun Razak stated that this is in line with the nation's effort to ensure public safety, and to maintain peace, harmony and prosperity of the nation. Thus, the enactment of the SOSMA 2012 is to guarantee safeness among the public. However, many claim that it is just a new name and the situation has not changed much in comparison to the draconian ISA 1960. Whiting's,[98] in her essay, demonstrates that the legislative changes fell well short of the reforms that had long been demanded by the Malaysian Bar and civil and political rights campaigners who have rightly been deeply concerned about the health of Malaysian democracy and the erosion of constitutional governance and the rule of law. The analysis of the SOSMA 2012 in line with the ISA 1960 and the Federal Constitution proves that there are transgressions from basic human rights. Among the key findings which shows these transgression would be the broad definitions given in the SOSMA 2012 such as the phrases 'security offences' under s. 3 of the Act and 'protected witness' under s. 3. These wide definitions have raised concern as some critics believe that they provide immeasurable power to the government to decide what is and what is not a security offence and also control over information access and hearing procedure that the defendant and his counsel have (protected witness).[99]

The findings also show that the concerns raised against the ISA 1960 has not been resolved as the provisions in the SOSMA 2012 are more restrictive and violate more

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96 Zurairi AR, 18th February 2013, "*Family challenges detention, claims law 'unconstitutiona*l". The Malaysian Insider, <http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1> Site accessed on 16.11.2014.

97 Zurairi AR, 18th February 2013, "*Family challenges detention, claims law 'unconstitutiona*l". The Malaysian Insider, <http://www.themalaysianinsider.com/malaysia/article/family-challenges-sosma-detention-claims-law-unconstitutional#sthash.4MN2z9dn.dpuf1> Site accessed on 16.11.2014.

98 Whiting, Amanda, *Emerging from Emergency Rule? Malaysian Law 'Reform'* 2011-2013. Australian Journal of Asian Law, 2013, Vol 14 No 2, Article 9: 1-55.

99 S 16, SOSMA 2012.

rights. The most obvious sections that show that the concerns raised against the ISA 1960 has not been addressed are s. 5 (2) and s. 6 where under the first, consultation with a legal practitioner can be delayed for 48 hours at the authority of a police officer not below the rank of Superintendent of Police while under the latter, the police is given the authority to intercept communication infringing personal liberty and right to privacy. The section that can be considered as the worst is s. 30 which compels the court to continue the detention of a person who has been acquitted until the exhaustion of all appeals (which could be a very lengthy duration) if there is an application to do so from the public prosecutor. The analysis of the SOSMA 2012 in reference to the Federal Constitution has highlighted a number of sections which violate the rights upheld in the Federal Constitution. Among these would be ss. 4 (10), 5 (3), 6 (1), 7 (9), 14 (1), 16 (1), 26 (1), 26 (2) and 30 (1) where the use of phrases such as 'this section shall have effect notwithstanding anything inconsistent with' a specific Article in the Federal Constitution are clear evidences of these contraventions.

Despite the findings that indicate the SOSMA 2012's failure to address the criticism raised against the ISA 1960 and the fact that there are evidences that some of its sections have violated the rights upheld in the Federal Constitution, it is important to view these violations in reference to Articles 149 and 150 of the Federal Constitution. Article 149 empowers the Parliament to enact laws to combat acts of subversion by only utilizing a simple majority procedure. The legality of these laws are never questioned even though they are in violation to the guarantees of freedom of movement, personal liberty, freedom of speech, assembly and association; and right to property. The only exception to this extraordinarily wide power is that emergency laws may not touch the constitutional provisions concerning Islamic law, Malay custom and native custom of East Malaysia (Sabah and Sarawak), citizenship, language or religion (arts 150 (6), (6A)). On the other hand, Article 150 empowers the Parliament to legislate on any matters even if it contradicts the Federal Constitution in times of emergency. However, the danger of this provision was noted Raja Aziz Addruse[100] who asserted that 'exceptional laws are liable to be abused and fundamental liberties abridged', and that the Emergency 'has spawned regulations that are contrary to the spirit of the Federal Constitution and quite possibly violate the fundamental rights as guaranteed by the constitution'.

Thus, it can be concluded that there are clear evidences that the SOSMA 2012 has not eliminated the criticism made against the ISA 1960 and that the provisions are in breach of human rights upheld in the Federal Constitution. The initial analysis of the provisions in the SOSMA 2012 has shown that there are violations of some fundamental human rights upheld in the Federal Constitution as seen in the wide definition given to some of the terms used in the act which could lead to the possibility of misuse by the Government.

[100] Raja Aziz Addruse (1969) 'Editorial: The Constitution, Parliamentary Democracy and the Emergency', 3(3) INSAF, July; Raja Aziz Addruse (1969) 'Editorial', 3(4) INSAF, October.