

The Universality of *Hadd* Punishment
with Special Reference to Piracy and *Hirabah*

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ABSTRACT

Since time immemorial, piracy has become a major threat to the safety and security at sea. It has been conferred universal jurisdiction because it is considered as an enemy of humankind. Nevertheless, the punishment of this offence in international law varies from one county to another. For example in Malaysia the criminal would be punished under the Penal Code of Malaysia. On the other hand, in Islamic law the similar act of piracy or *hirabah* is punishable under the *hadd* punishment. This paper attempts to analyse the universality of the *hadd* punishment by making a comparison between the concept and punishments of piracy and *hirabah*. It is suggested that the *hadd* punishment for the offence of *hirabah* has universal character and is not changeable regardless of the place and time as compared to piracy in international law.

I INTRODUCTION

Piracy endangers sea lines of communication, interferes with freedom of navigation and the free flow of commerce, and undermines regional stability. It is an illegal act of violence or detention committed for private ends on the high seas or in any other place outside jurisdiction of any state.¹ Because of its nature of crime, it has been regarded as an enemy against all mankind and has for hundreds of years been conferred universal jurisdiction. This doctrine allows any nation to try the offender even if the crime, the defendant and the

¹ See Article 101 of the 1982 Convention on the Law of the Sea (UNCLOS III).

victims have no nexus with the state carrying out the prosecution. Nevertheless, there is lack of evidence of established State practice in international law with regard to universal jurisdiction. In most cases the practice of the matter would be dependent on the extent to which states are bound by the various sources of international law either customary or treaty law providing for universal jurisdiction.² Despite been given a universal jurisdiction, in reality it is the prosecuting state that is empowered to exercise its jurisdiction and punish the pirates in accordance with its domestic law. The international law has only imposed a duty to cooperate in the repression of piracy,³ but has not prescribed any specific punishments to the offenders. In other words, the punishment is not universal. As a result, the punishment of this offence in international law varies from one county to another.

On the other hand, *hirabah* under *shari'ah* law to some extent has similarities with the act of piracy under international law. Piracy may carry the punishment of *hirabah* if all the elements to establish such crime exist. Although, there is no consensus (*ijma'*) on the requirements to establish *hirabah* among scholars, the very basic of the punishment i.e *hadd* punishment imposed on the offender, remain unchanged throughout centuries. The paper attempts to highlight the universality of *hadd* punishment by analyzing the concept and punishment of piracy under international law, and *hirabah* under *shari'ah* law in order to give holistic view on the subject. It concludes with the finding that the divine revelation which specifies the punishment on *muharib* is definitely superior and applicable to all

² Report of the Commission on the Use of the Principle of Universal Jurisdiction by Some Non-African States as Recommended by the Conference of Ministers of Justice/ Attorney General. In the Executive Council 13th Ordinary Session, 24-28 June 2008, Egypt (EX.CL/411(XIII) P.7.

³ Article 100 of the UNCLOS III: 'All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.'

places and times without denying the right of the ruler to use *ta'zir* punishment in some cases when proven otherwise.

II THE CONCEPT OF PIRACY IN INTERNATIONAL LAW

Piracy is considered as one of the oldest crimes in the world. The classical piracy known as piracy *jure gentium* has been given a phrase of '*hostes humani generis*' which means enemy of all mankind which legal result would give any state a universal jurisdiction to punish the pirates. Cornelius Bynkershoek (1673-1743) a Dutch positivist jurist once said that 'those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands.'⁴ On the other hand, William Blackstone, a naturalist jurist (1723-1780) said that 'the offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would amount to felony there...'⁵ He had includes piracy as an offense that could properly be termed crime-like offences against the law of nations.⁶

The word piracy was first used by the English in connection with affairs in the Southeast Asia to include the politically organised seaborne Malayan soldiers. In fact, the act of the Sultan in controlling the Straits of Malacca against the colonial power was accused as an act of piracy.⁷ The confusion of opinion among the scholars and the states on the subject of piracy had led to the attempts to codify the international law of piracy which was commenced in 1924. Most jurisprudential thought seem to agree that the international law

⁴ AP Rubin *The Law of Piracy* (University of the Pacific, Honolulu 2006)108

⁵ AP Rubin *The Law of Piracy* (University of the Pacific, Honolulu 2006)109

⁶ For Blackstone, the 'Law of Nations' means national law of many states or the international law.

⁷ AP Rubin *The Law of Piracy* (University of the Pacific, Honolulu 2006)221

of piracy was a 'valid set of rules established by universal reasons and immediately applicable to individuals but enforced only through the intermediacy of states, implying universal jurisdiction...'.⁸ On the hand, the Harvard Research in International law adopted the view that:

...pirates are not criminals by the law of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offense by the law of nations.⁹

In the early stage, Harvard Researcher in view that, the absence of special international tribunal to prosecute pirates would make it unsuitable to be called as a crime by the law of nation. However, the current international law on piracy that develops through various phases have basically retain the key jurisprudential basis discuss above. Despite disagreement among the scholars on the original meaning of piracy and its essence, the world in twentieth century had finally accepted that piracy in international law is traditionally, enemy of humankind that would be subjected to the jurisdiction of any state. The discussion on the definition of piracy continues until the Convention on the Law of the Sea (UNCLOS III) was adopted in 1982 and came into force in 1994. Article 101 of the UNCLOS III defined piracy as consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

⁸ AP Rubin *The Law of Piracy* (University of the Pacific, Honolulu 2006)310

⁹ AP Rubin *The Law of Piracy* (University of the Pacific, Honolulu 2006)310-311.

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 101 was adopted from the Article 15 of the 1958 Geneva Convention on the High Seas with slight changes. Generally, the crime of piracy must be one which has alliance with the acts committed at the high sea and must be beyond any state territorial jurisdictions. It has also been regarded as *sui generis*¹⁰ before the international law because it is to be committed on the high seas which will make the pirates outside the protection of their national state. This is an important element that distinguishes between piracy by international and municipal law. A similar conclusion was reached by O'Connell when he said that 'it is the area of jurisdiction that establishes the different between international and municipal law.'¹¹ Thus, the question of universal jurisdiction will not arise in case where piracy occurs in territorial waters of a sovereign state.

Given the most accessible statistic of reported incidents of piracy and armed robbery produced by the International Maritime Bureau (IMB), one has to be aware of the

¹⁰ It is defined in the Oxford Dictionary as unique, or literally means 'of its own kind.' It is *Sui Generis* because it is unique and the law that prescribed for piracy is very special compare to other laws. See Keyuan Zou *Law of the Sea in East Asia Issues and Prospects* (Routledge, London 2005) 141. It is defined in the Oxford Dictionary as unique, or literally means 'of its own kind.'

¹¹ DP O'Connell *The International Law of the Sea* (Vol.2 Clarendon Press Oxford 1984) 966.

differences between the IMB and the UNCLOS III definition on piracy. IMB defined piracy as follows:

‘An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.’

Piracy as defined in the IMB piracy reporting centre disregards the whereabouts of the attacks. The wider definition of piracy in the IMB piracy reports would include an act that occurs in the territorial sea of a state. The definition has raised the issue of conflict of jurisdiction. Since piracy in international law bestows universal jurisdiction to all states to punish the perpetrators, an act of piracy within national water or accurately known as ‘armed robbery at sea’ would limit the jurisdictional sovereignty to the state that entitled this rights under the principles of international jurisdiction.¹²

III PUNISHMENT FOR PIRACY

The international law may just provide the drafting of the common accepted rules on a criminal act, but it relies on states that are parties to the treaties to further execute its provisions. As Bantekas and Nash comment that, this execution or enforcement of international law by the domestic court is ‘not necessarily be in identical manner, but with a certain degree of consistency and uniformity based on the object and purpose of each particular treaty.’¹³ Thus, it is unsurprising that in practice, the law and penalty over such

¹² For further discussion on the theory of jurisdiction see: R Cryer, (et.al) *An Introduction to International Criminal law and procedure* (2nd edn CUP, Cambridge 2010) 43-62.

¹³ Bantekas and Nash (2009) 1.

crime is vary from state to state, so long as the objective of the criminalization of crime is achieved.

Despite the legality of universal jurisdiction to combat piracy, states are reluctance, or hesitate or maybe unwilling to invoke universal jurisdiction due to many reasons one of which is potential of abuse of universal jurisdiction. It is suggested that although universal jurisdiction is a recognized jurisdiction basis in piracy,¹⁴ states usually use diplomatic way or invoke other ways to establish their jurisdiction to avoid controversial prosecution. Especially, when the 1982 Convention is silent on the method of prosecution and punishment for pirates. It leaves the matters of enforcement action which relates to substantive and procedural process to the individual state so that such universal crime would be subjected to the municipal law of an individual state.¹⁵ However, the enforcement might be difficult or impossible to be implemented if a state does not have any local law regulating piracy or the crime resemble to it. Thus, state needs to further incorporated relevant law pertaining the crime of piracy into their domestic legislation and to establish jurisdiction of the local court to try such crime.

THE MALAYSIAN PRACTICE

¹⁴ In the absence of any new law or rules, the incorporation of customary international law of piracy to the present 1982 Convention may also means to justifiably keep carry on the concept of universal jurisdiction

¹⁵ Dubner (1979) 488.

Although some countries like United Kingdom and Thailand have a specific law on piracy, it is not necessary for a country to have special law regulating piracy. Malaysia, for example, has no specific law regulating maritime piracy or armed robbery against ships. However, the Malaysia court may establish jurisdiction to prosecute the act of piracy by virtue of section 22 of the 1964 Court of Judicature Act (Revised-1972) which provides that:

- ‘(a) all offences committed-
 - (i) Within its local jurisdiction;¹⁶
 - (ii) On the high seas on board any ship or on any aircraft registered in Malaysia;
 - (iii) By any citizen or any permanent resident on the high seas on board any ship or any aircraft;
 - (iv) By any person on the high seas where the offence is piracy by law of nations;...

Thus, piracy has been acknowledged as a crime that could be punished in the local court. The general similarities in the wrongdoing of the crime of piracy and sea robbery may come within the ambit of the Malaysian Penal Code. The Penal Code was based on the Indian Penal Code (1860) and was first known as the Penal Code of Straits Settlements (SS) 1871. The SS Penal Code then was repealed by 1935 Federated Malay States and then 1948 Federation of Malaya before extended throughout Malaysia by the Penal Code (Amendment and Extension) Act 1976. It covers penalty against criminal act which is committed by a citizen or permanent resident of Malaysia, or non citizen living in

¹⁶ Local jurisdiction includes ‘territorial waters’: see Malaysia’s comments on the scope and application of the principle of universal jurisdiction, Pursuant to GA Resolution 64/117 of 16 December 2009. In <http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.../Malaysia.pdf> accessed on 18 November 2011.

Malaysia, or act occur within Malaysia.¹⁷ The general term ‘within Malaysia’ in Section 2 of the Penal Code includes all part of Malaysian territory including its territorial water. In addition, the punishment of the offences committed beyond Malaysia may still be tried in Malaysia in certain cases including criminal act of piracy or robbery on the high seas or an aircraft or beyond the limits of Malaysia if it is committed by the citizen or permanent resident of Malaysia whether or not such ship or aircraft is registered in Malaysia.¹⁸ Although there is no section dealing specifically with piracy in the Penal code, the perpetrator may still be charged under robbery, armed robbery, theft, assault or even kidnapping and murder as dealt with under section 302 to 402 of the Penal Code which are the most identical offences done during piracy incidents.¹⁹

As stated by Koh, Clarkson and Morgan: ‘Being codes, it would seem obvious that they are intended to deal exhaustively with all the offences and the defences contained in them.’²⁰ Robbery as clarified in section 390 would involves elements of theft or extortion.²¹ Meanwhile to be liable as a gang-robbery there must involve five or more persons as explicates in section 391, not less than that. It is matter in the sense that the punishment for

¹⁷ Refer Section 2 of the Penal Code Act 574

¹⁸ Section 4 (1) (a) & (b) of the Penal Code

¹⁹ Fadhilah & Hendun MLJ

²⁰ KL Koh, CMV Clarkson and NA Morgan *Criminal Law in Singapore and Malaysia* (MLJ Kuala Lumpur 1989) 5.

²¹ Section 390 of the Penal Code: in all robbery there is either theft or extortion.

Theft is ‘robbery’, if in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt or wrongful restraint or fear of instant death, or of instant hurt, or of instant wrongful restraint.

Extortion is ‘robbery’, if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

robbery and gang robbery is differ, with punishment for the latter is heavier than the former.

Section 392 stipulated that:

‘Whoever commits robbery will be punished with imprisonment for a term which may extend to ten years and shall also be liable for fine; and if the robbery be committed between sunset and sunrise the imprisonment may be extended to fourteen years, and he shall be liable to a fine or whipping.’

Punishment for gang robbery in section 395 stated that:

‘Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.’

If during the committing of the act, the gang-robbery also involves murder, the capital punishment of death sentence might be applicable to each and every one of the offenders.²²

In addition, if the offender during his act of committing or attempting robbery, armed with deadly weapon or cause death or grievous hurt he might also be charged under Firearm (Increased Penalty) Act together with causing hurt or grievous hurt. If the crime just involved petty theft on ship at anchor, that offender should be charged under section 379²³ of the Penal Code which punishable with imprisonment for a term which may extend to seven years, or with fine or with both. The offender shall be liable to a fine or to whipping if he repeat this criminal act.

IV THE CONCEPT OF HIRABAH IN SHARI’AH LAW

²² Section 396 of the Penal Code.

²³ Section 379 of the Penal Code: “Whoever commits theft shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both, and for a second or subsequent offence shall be punished with imprisonment and shall also be liable to fine or to whipping.”

Hirabah under Islamic law can be defined as highway robbery or major theft. It comes from the word *hariba* which means angry and enraged. Technically it is an offence committed with the intention of taking goods of others by force or conquest as to destruct the victims of making their way peacefully, either attacked individually or by a group of offenders.²⁴ *Hirabah* is an act of war against tranquility and peaceful living of the society, causing harm and fear. Due to its seriousness, it is made as an offence which infringes the rights of Allah, punishment to the offender (*muharib*) will continue to be inflicted even forgiveness is rendered by the family members or the goods stolen were returned to its owner.²⁵

A person can be called as '*muharib*' i.e highway robber if he commits any of acts below:

- i) if he goes out to take other person's property by way of force and he did scaring other people without taking another property and without murdering others.
- ii) If he goes out to take another property by way of force and he succeeded in doing so but he did not commit murder
- iii) If he goes out to take another property by way of force and he murdered somebody but did not take anything
- iv) If he commits all the above acts

It is important to note here that the element of intention to take property of another by way of force is important in *hirabah*.²⁶ The origin of *hirabah* can be seen in *Surah al Ma'idah*: 33:

²⁴ Wahbah Zuhaili, Vol 6, 140.

²⁵ Norfadilah Mohamad Ali, Hendun Abdul Rahman Shah, Piratical Activities in Malacca Straits: The UNCLOS, Malaysian Legal Framework and the Islamic point of view.

²⁶ Abdul Qader Audah, Al-Tasyri' al-Jinaiyy al-Islamiyy, Vol. 2, 14th Edition, 1998, Lebanon, Muassasah Ar-Risalah. pp 638-639

“*The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their degradation in the world, and in the Hereafter theirs will be an awful doom*”

The scholars have different opinion with regard to the above verses, the majority (*Jumhur*) of *Fuqaha*’ opined that the above verses were revealed to Muslim or *Zimmiy* who commits highway robbery or those who goes out with the intent to take the property of another by way of force.²⁷

According to *Jumhur*, *hirabah* can be done by one person or more i.e by a group of people. The *Hanafis* put a condition that the person (*muharib*) must have with him a weapon or anything that can be a weapon for example knife, rocks or wood. However according to *Shafiies*, *Malikis* and *Ahmad* there is no requirement of weapon in *hirabah*, suffice if the offender uses his own power that may cause reasonable apprehension of danger to the victims.

Hirabah should be differentiated from *sariqah* although it involves the same act i.e taking the property of another. Theft is taking another’s property secretly whereas *hirabah* is the act of going out to take another’s property openly by way of force.²⁸ Major limb of theft is the act of taking property of anothers’ whereas major limb of *hirabah* is the act of going out to take another’s property regardless of whether the property has been taken or not.

²⁷ Some of them said that this verse describing to the musyrikin who have make a pledge with the Prophet but then they did not fulfill their promise and had became a highway robber (*muharib*) and made destruction on the land. Some of the scholars were of the opinion that this verse was revealed to Book Believers (*Ahlul Kitab*).

²⁸ Abdul Qader Audah, *Al-Tasyri’ al-Jinaiy al-Islamiyy*, Vol. 2, 14th Edition, 1998, Lebanon, Muassasah Ar-Risalah. pp 638-639

Although it may be similar to the act of *hirabah* in term that it is committed explicitly, the absence of the element of force would distinguish it with *hirabah*. As for instance a thief takes clothes of another where the owner himself has just take off the clothes and the theft was committed in the presence and knowledge of the owner but without his permission.

It is important to note that for the offence of theft, there are four limbs that has to be fulfilled. The four limbs are as follows:

- (i) The act been committed secretly.
- (ii) The stolen thing must be of movable property
- (iii) The property is belong to another
- (iv) Bad intention²⁹

If all these four limbs have been fulfilled, the *hadd* punishment can be inflicted on the thief.

V PUNISHMENT FOR HIRABAH

Similar with piracy, the punishment of *hirabah* depends on the nature of the wrongful act committed.³⁰ This is because the act of *hirabah* comprise of various wrongdoings³¹ which carries their own punishments. However, the *Malikis* jurists were of the opinion that it is

²⁹ The act of taking property of another secretly cannot be regarded as theft unless the person has bad intention while committing the act .i.e he took the property with the knowledge that the act is prohibited and with the intention to possess the property without the knowledge and permission of the owner.

³⁰ This is the opinion of Jumhur i.e Abu Hanifah, Syafie, Ahmad and Syiah Zaidiyyah.

³¹ *Hirabah* may comprise of either one or a combination of the below act:

1. Threatened the road without taking property or committing murder;
2. Taking property;
3. Committing murder;
4. Taking property together with committing murder

on the Ruler to choose the appropriate punishment from the verse which listed down the punishment of *hirabah* i.e either be killed or crucified or have their hands and feet on alternate sides cut off, or will be expelled out of the land (*An nafyu*).³² According to *Malikis*, the Ruler may choose the above punishment except if the offender commits murder, the Ruler must only choose either one of these punishment i.e either be killed or be killed and be crucified.

For the offence of threatening the road, *Abu Hanifah* and *Ahmad* opined that the offender must be expelled (*an nafyu*). However this is different with *Syafiies* where they were on the opinion that the punishment is *ta'zir*³³ or be expelled because according to them there is no difference between *ta'zir* or been expelled since the later is also one type of *ta'zir*. The jurists have different views with regard to the meaning of expelled or *an-nafyu*. Some of them opined that the person be expelled from the world by inflicting murder punishment on him or be crucified. The others were on the view that *an-nafyu* means be expelled from Muslim country or in our today's context the offender will lose his citizenship. *Malikis* opined that *an-nafyu* means be imprisoned. There is no specific period of expulsion, suffice to note that the offender will be expelled until he repented.

For the offence of taking the property of another, the *Jumhur* were on the view that their hands and feet on alternate sides be cut off i.e right hand and left feet. It is important to

³² In which Allah says in Surah Al Maidah: 33; “*The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land.*”

³³ *Ta'zir* is punishment prescribed by the ruler which is different by had which punishment prescribed by Allah.

highlight that the property been taken must attain the level of nisab as been prescribed in the offence of theft³⁴.

For the third offence i.e the offence of murder, the *Jumhur* opined that the offender be killed as been prescribed under had punishment. However, according to another view the offender must also be crucified after been killed because the offender had committed *hirabah*. *Malikis* were on the view that the ruler must choose either to kill the offender without crucify or to punish the offender with both.

This is different if the offender has committed murder together with theft or robbery, both punishment i.e death penalty together with crucify must be inflicted on the offender. This is the opinion of *Jumhur* or majority; they also agreed that the offender should not be cut off his hand or leg. However *Abu Hanifah* opined that the ruler may choose either to cut off the hands and feet on alternate sides and impose death penalty and be crucified after that or not to cut the hands and feet but impose death penalty straight away for that offence.

Thus, there is no specific punishment for piracy as it is actually depends on the nature or types of offences committed during the act of piracy. However in Islam, the punishment of *hirabah* i.e had punishment has been prescribed in details in *Surah Maidah* verse 33, although the punishment is actually differs according to the wrongful acts committed during the act of *hirabah*.

As for the punishment of *hirabah* which shares some similarities with the contemporary piracy and armed robbery against ships, there are certain conditions to be fulfilled before *hadd* punishment can be imposed on to the offender. According to *Abu Hanifah*, the

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offence of *hirabah* must be committed in Muslim country, if it is committed in ‘*Darul Harb*’, the *hadd* punishment cannot be imposed on the offender because the Ruler did not have the jurisdiction on *Darul Harb*. Whereas *Jumhur* opined the *hadd* punishment can still be imposed on the offender regardless whether it is Muslim country or *Darul Harb*. Thus it is important to highlight this issue in light of *hirabah*. If the offence been committed in the town or city the *hadd* punishment cannot be imposed on the offender, this is because *hirabah* rarely been committed in the city or town but it was usually been committed in a street between city and residential area or village³⁵. However, according to Abu Yusuf, the *hadd* punishment is mandatory regardless of whether the offence has been committed in the city or village. Some other jurists such as *Maliki* and *Syafie* put a condition that the crime must be done at a place that is far away from source of help or assistance.

VI CONCLUSION

After examining the general concepts of piracy under international law and *hirabah* under *shari’ah* law, it interesting to note that *hirabah* shares most common features with the modern piracy. Basically, the Islamic law concept of *hirabah* is wider in the sense that it covers various aspects of criminal act or highway robbery regardless of whether it occurs on land or in the sea. According to *Shafies* and *Malikis*, there is no difference whether the offence of *hirabah* has been committed in deserts or town or in a village it is still be considered as *hirabah* so long as the act done comes under one of the four situation

³⁵ Opinion of Abu Hanifah.

mentioned above.³⁶ However the Hanafis were on the view that the crime must be committed in a place that far from residential area or city or town.

On the other hand, the discussion on the legal definition of piracy also involves the issue of the place where the crime has been committed. However, this offence must be committed on the high seas or place outside jurisdiction of any state.³⁷ If it occurs in the territorial sea it would not be called as piracy, instead it is best described as sea robbery. It is worth mentioning, that piracy is similar with *hirabah* in term that it is not required the actual taking of property. It is sufficient if the ‘illegal acts of violence or detention, or any act of depredation, committed for private ends’ and ‘against another ship or aircraft, or against persons or property on board such ship or aircraft.’³⁸ The perpetrator may still be charged under the law of piracy if he has inflicted injury or use of force and violence on the victim even though he is unsuccessfully taking the property.

Hirabah can be done by one person or more i.e by a group of people and would be sufficient with the use of force of the perpetrator even though no weapon is involved. This is *Jumhur*’s view which is very much compatible with the legal concept of piracy in the international law. Article 101 of the UNCLOS III has not mentioned about the requirement that the pirates have to be armed with weapon. As long as it is illegal acts of violence or detention, or any act of depredation, it is constituted piracy. However, it is undeniable that

³⁶ Cross refer to page 10.

³⁷ Article 101 of the UNCLOS 1982

³⁸ Article 101 of the UNCLOS 1982.

normally in most cases; such kind of violence would involve the use of weapons as required in the *Hanafis* whether for threatening the victim or actual inflicting on them.

As a conclusion, although piracy under international law has been conferred universal jurisdiction because it is regarded as '*hostis humani generis*', there is nowhere in the UNCLOS III elucidates specific punishment for piracy.³⁹ Thus, the mechanism to bring arrested pirates against ships before justice will depends on the domestic law of a particular state.⁴⁰ Since there is no specific provision or special legal framework governing the act of piracy or sea robbery, it would be sufficient for a state to establish its own jurisdiction over the crime of piracy. Meanwhile, the concept and punishment of *hirabah* under *shari'ah* law appear to be more comprehensive and universal in nature as compared to the universal principles for jurisdiction of piracy under international law. This is especially true in the sense that the source of punishment for *hirabah* has been prescribed in details from the divine revelation of Al Quran. Allah says in *Surah Al Maidah: 33*; "*The recompense of those who wage war against Allah and His Messenger and do mischief in the land is only that they shall be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land.*" However, the punishment is actually differs according to the wrongful acts committed during the act of *hirabah* where in some cases the sovereign rulers may imposed *ta'zir* punishment based on their discretion. Thus, it is suggested that

³⁹ Article 100 of the 1982 UNCLOS.

⁴⁰ Other than universal jurisdiction, a state may establish its jurisdiction against the perpetrator based on the general principles of international law by using one of the following: territorial jurisdiction, nationality jurisdiction, passive personality jurisdiction and protective jurisdiction: See Martin Dixon *Textbook in International Law* (6th edn. OUP, Oxford 2007) 142-153.

the *hadd* punishment for the offence of *hirabah* has universal character and is not changeable regardless of the place and time as compared to piracy in international law.