ASYLUM-SEEKERS AT SEA AND PIRACY IN THE GULF OF THAILAND

by

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Thailand has approximately 950 miles of coastline along the Gulf of Thailan (1). The term « Gulf of Thailand » refers to an area of the sea between Thailand, Kampuchea, Vietnam and Malaysia, to the west of the South China Sea (2). It has become the focal point of international attention within the past few years because of the problem of asylum-seekers at sea, better known as the « boat people » from Vietnam. Recently, this problem has been aggravated by the tragic link between these people and pirate attacks perpetrated against them.

Piracy is, by no means, a recent phenomenon in the Far East. As far back as A.D. 414, a Chinese traveller, by the name of Fah Hsein, wrote after travelling from Ceylon to Java. « In this ocean, there are many pirates who coming on you suddenly, destroy everything » (3). As trade between Europe and the Far East expanded from the 16th century, piracy became commonplace. The Malays from the Malay peninsular, the Dyaks from Sarawak, the Balanini from the Sulu islands, the Illanum from the Philippines, and the Chinese all indulged in piracy at one time or another. Indeed, it was not looked upon as a crime by many of the tribes of the region. As Stamford Raffles, the founder of Singapore once remarked, for the Malays from the peninsular, Sumatra and Java, it was an « honourable profession, especially for young nobles and needy great men » (4). Hence, the romantic image of the swashbucklers was not far from the truth.

Thai history also attests to the presence of piracy from days past. Some two hundred years ago, this Royal Decree was promulgated by King Rama I (the founder of the present Chakri dynasty) to certain officials from Nakhon Si Thammarat province :

(1) H.H. SMITH, *Area Handbook for Thailand,* 1968, p. 13.
(2) *Thai Geographical Dictionary,* Vol. 3, 1977, p. 581.
(3) MILLER, *Pirates of the Far East,* 1970, p. 14.
(4) *Ibid.,* p. 16.

« If you learn that dangerous Vietnamese pirates sneak in to grab the people, go and confront them in battle. Do not under any circumstances allow these pirates to intrude into the territory and seize one single person » (5).

More recently, in 1944, a piracy incident in the Andaman sea prompted a Thai writer to relate an account of it in a voluminous tome entitled « Pirates of Tarutao island » (6).

In retrospect, with the arrival of the British fleet in the Far East in the 19th century, instances of piracy became rare because of the successful counterpiracy campaign pursued by the fleet. Therefore, it is only recently that acts of piracy have caught the limelight again in the region. However, in this new context, the problem has an added dimension : while in the past, piracy tended to prey on commerce, contemporary piracy tends to prey on asylum-seekers at sea.

The fact that the Vietnamese boat people have been the worst affected by this resurgence of piracy is common knowledge (7). The fall of South Vietnam into Communist hands in 1975 has led to a continuous exodus of people seeking refuge by land and sea. As the coastline of Thailand and Malaysia is almost opposite that of Vietnam in the area under discussion, many people have resorted to the sea routes from Vietnam as being the most expedient in geographical terms. Inevitably, the Gulf of Thailand has become a centre of attraction for them.

As a corollary, acts of piracy have increased dramatically in the Gulf of Thailand. Statistics from various sources are available on incidents of piracy, and although uncorroborated, they do indicate that a very high percentage of the boat people encounter acts of piracy en route and are subjected to crimes such as robbery, rape, assault, abduction and murder. Moreover, recent reports indicate that acts of piracy committed against the Thais themselves are on the increase (8), nor is the Gulf of Thailand the sole area affected (9). Ironically, there are also reports of pirate attacks committed by the Vietnamese (10), in addition to one peculiar case, pending before a Thai court, in which certain Vietnamese boat people are being prosecuted for acts of piracy (11).

(5) BARANG, « Highwaymen of the Sea », *Far Eastern Economic Review,* April 1, 1981, p. 22.

(6) TUNGKABANHARN, *Pirates of Tarutao island,* 1950.

(7) See articles on piracy : BARANG, *op cit.* n. 5, and a report entitled « The Secret Ordeal : Rape at sea », *Time Magazine,* October 12, 1981, p. 25. Recent piracy reports in the *Bangkok Post* include : June 10, 1981 ; June 20, 1981 ; June 27, 1981 ; June 29, 1981 ; October 11, 1981 ; October 31, 1981 ; November 5, 1981 ; November 11, 1981 ; November 12, 1981.

(8) *Bangkok Post,* July 12, 1981.

(9) *Ibid.,* October 4, 1981.

(10) *Ibid.,* June 27, 1981 ; November 28, 1981.

(11) *Infra.*

THE CAUSES OF PIRACY IN THE GULF OF THAILAND

From the evidence available and the cases decided by Thai courts (12), it is apparent that certain Thais, particularly fishermen, have been actively involved in pirate attacks. The presence of the boat people has provided opportunists with an easy target, especially as the former are defenceless and are known to carry personal possessions with them. Moreover, one cannot rule out the possibility of innate antagonism towards the Vietnamese as being a factor conducive to such attacks.

The situation is aggravated by the fact that many fishermen are undergoing a spell of economic hardship due to rising fuel costs, inflation and less catch of fish generally. Many of them initially drifted down from the poor north-eastern part of Thailand to search for a better life as employees of fishing boats in the south of Thailand, but the present economic climate is such that they are finding their new livelihood threatened. One should also bear in mind that within the framework of the new directions of the law of the sea, Thailand and all her neighbours have declared a 200-mile Exclusive Economic Zone (13). Due to such concept, Thailand now finds herself in a geographically disadvantaged position of being a sea-locked or zone-locked State, with the consequence that her fishermen have less freedom than before to look for fish beyond the Thai Exclusive Economic Zone.

The nature of the present piracy problem is extremely difficult to tackle. The coastline of the Gulf of Thailand is long and there are insufficient facilities for providing effective blanketing against pirates. The fact that certain fishermen are acting as amateur pirates makes the task of catching them even more onerous. Moreover, it is often difficult to distinguish between genuine assistance being rendered by a local boat to a boat of asylum-seekers and acts of piracy - sometimes, it is both (14).

One caveat should also be lodged. In analysing the causes of contemporary piracy, the national policies of the States concerned in the area in question are highly relevant. Much can be done at the causative end of the migration of the boat people to alleviate their plight. In this respect, orderly departure arrangements implemented by the country of origin of such people offer a more viable and safer opinion for leaving than taking to boats as at present (15). Such arrangements would lead to less people using the sea routes in the

(12) *Infra.*

(13) Proclamation establishing the Exclusive Economic Zone of the Kingdom of Thailand, February 23, 1981. Burma and Vietnam declared a 200-mile Exclusive Economic Zone in 1977, and Kampuchea in 1978 : LEE YONG LENG, *Southeast Asia and the Law of the Sea,* 1980, pp. 12-13. The position of the ASEAN States is given in Table A; (See text in the Annexes.)

(14) See Case III discussed *infra.*

(15) One example of how orderly departures can be effected is seen from a Memorandum of Understanding between Vietnam and UNHCR, signed in 1979, although limited in scope. It embodies the following :

« 1. Authorised exit of those people who wish to leave Vietnam and settle in foreign countries - family reunion and other humanitarian cases - will be carried out as soon as possible and to the

Gulf of Thailand, thus preemptively preventing incidents of piracy from arising. Conversely, the national policy of the recipient State is also a deteminant factor for those resorting to leaving by boat - the less sympathetic such State is towards asylum-seekers at sea, the more adverse the attitude of the local population is likely to be towards them, thereby facilitating incidents of piracy (16).

The causes of the piracy problem in the Gulf of Thailand are thus a hotchpotch of social, economic, political and legal factors of greater complexity than an initial glance would reveal.

ASYLUM-SEEKERS AT SEA DEFINED ?

The term used primarily in this article is « asylum-seekers at sea ». The word « asylum » itself has never been conclusively defined, although two attempts at definition may be noted. According to the Institut de Droit International, « asylum » is the protection accorded by a State - in its territory or at some other place subject to certain of its organs - to an individual who comes to seek it (17). Professor A. Grahl-Madsen is more specific : « asy-

maximum extent. The number of such people will depend both on the volume and on receiving countries' ability to issue entry visas.

2. The selection of those people authorised to go abroad under this Programme will, whenever possible, be made on the basis of the lists prepared by the Vietnamese Government and the lists prepared by the receiving countries. Those persons whose names appear on both lists, will qualify for exit. As for those persons whose names appear on only one list, their cases will be subject to discussions between UNHCR and the Vietnamese Government or Government of the receiving countries, as appropriate.

3. UNHCR will make every effort to enlist support for the Programme amongst potential receiving countries.

4. The Vietnamese Government and UNHCR will each appoint personnel who will closely co-operate in the implementation of this Programme.

5. The personnel are authorised to operate in Hanoi and Ho Chi Minh City and, as necessary, to go to other places to promote exit operations.

6. Exit operations will be effected at regular intervals by appropriate means of transport.

7. The Vietnamese Government will, subject to relevant Vietnamese laws, provide UNHCR and the receiving countries with every facility to implement this Programme. »

Source : UNHCR.

A more extensive use of such agreement would be welcomed, especially apropos potential boat people.

(16) An analysis of Thai national policy towards refugees and displaced persons by the author can be found in an article entitled « Displaced persons in Thailand : legal and national policy issues in pespective », *Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of Refugees and Displaced Persons in Asia,* UNHCR, 1980, (.HEREINAFTER CITED AS « UNHCR article »), pp. 165-175. The present Thai policy, dating from August 15, 1981, is based upon a stricter policy known as « humane deterrence » by which the newly arrived would be placed in special confinement areas and would not be resettled in third countries unless the Government is satisfied with the rate of resettlement for those already in various camps on Thai soil.

(17) Institut de Droit International, *Tableau général des résolutions* (1873-1958) (Basel : Verlag fur Recht und Gesellschaft AG, 1957)58 and GRAHL-MADSEN, *Territorial Asylum,* 1980, p. 1.

lum » entails a right to live in the territory of the State granting asylum - not permanently, but so long as it may be necessary in order to escape persecution (18).

This article does not purport to solve the question : what is the best definition of the word « asylum » ? What should be discerned, however, is that the term « asylum-seekers at sea » has been espoused by the UNHCR (19) and covers the situation of the Vietnamese boat people. Yet, the term more frequently used in newspapers and amidst laymen is « refugees ». The reason why the use of the latter term has been avoided is because of the legal connotations emanating from it in international law, notably from Article 1 (A) (2) of the Convention relating to the Status of Refugees 1951 which defined a refugee as any person who :

> « As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it » (20).

Before examining why it would be inopportune to use the term « refugees » in the Thai Context, it is worth bearing in mind that the 1951 Refugee Convention contained a time limit in that it applied only to events occurring before January 1, 1951. Moreover, it was limited in its geographic scope in that it gave States Parties the option of limiting their obligations under such Convention to persons who had become refugees as a result of events occurring in Europe. The Protocol relating to the Status of Refugees 1967 discarded the time and geographic limitation, thus rendering the scope of the 1951 Refugee Convention applicable generally (21). Finally, it should be noted that the right to determine who is or is not a « refugee » under the definition above is that of the recipient State Party where the person seeks refuge, albeit subject to monitoring by the UNHCR (22).

Thailand is not a party to the above instruments. Ipso facto, the term « refugee » and its affiliation with the said instruments does not apply to

(18) GRAHL-MADSEN, *ibid.*, p. 50.

(19) UNHCR, *Conclusions on the International Protection of Refugees,* adopted by the Executive Committee of the UNHCR programme, 1980, pp. 43-44.

(20) UNTS n. 2545, Vol. 189, p. 137 and UNHCR, *Collection of International Instruments concerning refugees,* 1979, p. 11. For general discussion on refugees, see : GRAHL-MADSEN, *The Status of Refugees in International Law,* Vol. I (1966) and Vol. II (1972) ; HOLBORN, *Refugees : A Problem of Our Time. The Work of the UNHCR,* 1951-72, Vols. I and II (1975). For discussion on refugees and displaced persons in Asia, see : *Proceedings of the Round Table of Asian Experts on Current Problems in the International Protection of refugees and Displaced Persons in Asia, op. cit.,* n. 16 ; UNHCR, *the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia,* 1981.

(21) UNTS n. 8791, Vol. 606, p. 267.

(22) A handbook on this subject has been published by the UNHCR entitled *Handbook on Procedures and Criteria for determining Refugee Status,* 1979.

Thailand (23). The terms most frequently used in the Thai context have been « displaced persons » and « illegal immigrants » (24). In theory, since the Vietnamese boat people are, stricto jure, « displaced persons » and « illegal immigrants » entering Thailand in breach of the immigration law, they can be sent out of Thailand whether to their homeland (refouler) or to a third country, at Thailand's discretion.

Nevertheless, legal strictures have had to come to terms with reality, and pragmatism has, more often than not, prevailed. Although the above persons could be expelled, they have in the majority of cases been granted temporary refuge on Thai territory (25). Moreover, they have not generally been prosecuted for breach of the immigration law and instead, they have been kept in camps to await resettlement in third countries or a favourable political climate for their return to their country of origin (26).

The term « asylum-seekers » has been coined as a compromise term ; it avoids the legal connotations of the term « refugee » in international law and such municipal terms as « displaced persons » and « illegal immigrants ». Yet, it harks back to the need to assist those who are not, stricto jure, « refugees » and covers situations where States are not parties to the relevant instruments on refugees. In this respect, one should bear in mind two Declarations of the General Assembly of the United Nations which were adopted without any negative votes : the Universal Declaration on Human Rights 1948 (27) and the Declaration on Territorial Asylum 1967 (28), which have bearing on the term « asylum-seekers ». When the former was drafted, a provision ensuring to every individual a right to be granted asylum was rejected, but Article 14 of the former provided that « everyone has the right to seek and enjoy in other countries asylum from persecution » (29). This reinforced the position of « asylum-seekers » vis-à-vis the State from which they wished to leave.

The Declaration on Territorial Asylum took the matter one step further by providing in Article 3 that « no person (entitled to invoke Article 14 of the Universal Declaration of Human Rights) (30) shall be subjected to measures such as rejection at the frontier, or, if he already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution » (31).

(23) At the time of writing this article, 92 States had become parties to the 1951 Refugee Convention and/or its 1967 Protocol, including only two Asian States, i.e. the Philippines and Japan.

(24) MUNTARBHORN, UNHCR article, *op. cit.* n. 16, pp. 167-168, and *International Protection of Refugees and Displaced Persons : the Thai Perspective,* LAWASIA paper, 1981 (hereinafter cited as « Lawasia paper ») pp. 9-12.

(25) MUNTARBHORN, UNHCR article, *ibid.*, p. 169.

(26) MUNTARBHORN, *Lawasia paper, op. cit.,* n. 24, pp. 13-15.

(27) GA Resolution 217 A (III), *UN Doc. A/811.*

(28) GA Resolution 2312 (XXII).

(29) *Op. cit.,* n. 27.

(30) Added by the author.

(31) *Op. cit.,* n. 28.

Although the effect of the above resolutions is equivocal in the sense that General Assembly resolutions are generally treated as non-binding, the fact that principles for the protection of « asylum-seekers » have been enunciated at an international level is in itself significant, at least as a moral exhortation for the international community. In arguendo, they could now represent or evolve into customary norms of international law. As a corollary, even if the majority of Asian States are not parties to the 1951 Refugee Convention and its 1967 Protocol, they should, nevertheless, take heed of the principles propounded by the two Declarations in their treatment of « asylum-seekers ».

PIRACY DEFINED ?

The term « piracy » has been used in a general sense so far in this article. Juridically, however, the search for a comprehensive definition is not so simple.

It should first be remarked that there is a distinction between the notion of « piracy » as a crime jure gentium (in international law) and « piracy » as a crime under municipal law. Every State is entitled to enact laws on « piracy » in respect of ships within its own jurisdiction which need not be of the same characterisation as piracy jure gentium. Moreover, it has the right to capture and institute proceedings against all ships for the crime of piracy jure gentium on the high seas. « Every State is entitled but not bound to assume jurisdiction over pirates jure gentium on the high seas. International Law does not prescribe any specific penalty against piracy jure gentium, but authorises any State in the interest of the freedom of the seas to assume such jurisdiction and inflict condign punishment » (32). Therefore, in the context of piracy jure gentium, every State enjoys a concurrent jursidiction over suspected pirate ships (33).

Before the adoption of a definition of the term « piracy » by the Geneva Convention on the High Seas 1958 (34), several commentators had proposed definitions ranging from the general to the precise. Examples of the former trend can be seen from Fauchille who defined it as « le brigandage sur la mer » (35) and Kenny who saw it as « any armed violence which is not a lawful act of war » (36). The latter trend is visible from the Harvard Research definition as follows :

> « Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any State :

(32) SCHWARZENBERGER, *International Law* (3rd ed.), Vol. I, p. 154.

(33) VAN ZWANENBERG, « Interference with Ships on the High Seas », *ICLQ* 10 (1961), 785, 801.

(34) 450 *UNTS* 82, and *AJIL* 52 (1958), pp. 845-51.

(35) FAUCHILLE, *Traité de Droit International Public,* Vol. 1, 2nd Part, 1925, p. 72.

(36) KENNY, *Elements of English Criminal Law,* 1958, p. 407.

> Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character » (37).

Oppenheim also voiced this latter trend by stating the piracy is « every unauthorised act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel » (38).

The definition of the Geneva Convention on the High Seas can be found in Article 15 :

> « Piracy consists of any of the following acts :
>
> (1) Any illegal acts of violence, 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 :
>
> (a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft ;
>
> (b) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State ;
>
> (2) 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.
>
> (3) Any act inciting or of intentionally facilitating an act described in sub-paragraph 1 or subparagraph 2 of this Article » (39).

Meanwhile, Article 19 of this Convention confers upon every State the right to seize a pirate ship on the high seas, or in any other place outside the jurisdiction of any State, and arrest those responsible for the crime.

The definition embodied in the above Convention has given rise to many difficulties (40). What is particularly relevant to the Thai experience is the

(37) *Research into International Law (Harvard Law School),* 1932, Art. 3 (1).

(38) OPPENHEIM, *International Law,* Vol. I, 1955, p. 609.

(39) *Op. cit.*, n. 34.

(40) As a prelude to the Geneva Convention on the High Seas, see : DICKINSON, « Is the Crime of Piracy Obsolete ? », *Harv. L. Rev.* 38 (1925), 334 ; BINGHAM, « Piracy - introduction », *AJIL* 26 (1932), 749 ; JOHNSON, « Piracy in Modern International Law », 43 *Grot. Soc. Tr.,* 1957, 63.

As an aftermath of the same Convention, see : FORMAN « To define and punish piracies - the lesson of the Santa Maria, a comment », *NYUL Rev.* 36 (1961), 839 ; GREEN, « Santa Maria : rebels or pirates », *BYIL* 37 (1961), 496 ; VAN ZWANENBERG, *op. cit.*, n. 32 ; VALI, « Santa Maria case », *NUL Rev.* 56 (1961), 168 ; JACOBSON, « From piracy on the high seas to piracy in the high skies : a study of aircraft hijacking », *Cornell Int. L.J.* 5 (1972), 161 ; SUNDBERG, « Piracy : air and sea », *De Paul L. Rev.* 10 (1972), 72 ; GEHRING, « Defense against insurgents on the high seas : the Lyla Express and Johnny Express », *JAG J.* 27 (1973), 317 ; CROCKETT, « Toward a revision of the international law of piracy », *De Paul L. Rev.* 26 (1976), 78 ; BEHUNIAK, « Seizure and recovery of the S.S. MAYAGUEZ ; A LEGAL ANALYSIS OF United States claims », *Mil. L. Rev.* 82 (1978), 41 ; DUBNER, « Law of International Sea Piracy », *NYU Journal of Internat. Law and Politics* 11 (1979) (hereinafter cited as « Dubner article »), 471 ; DUBNER, *Law of International Sea Piracy,* 1980 (hereinafter cited as « Dubner book »).

implication from the Convention that piracy can be committed only on the high seas or in a place outside the territorial jurisdiction of any State, thus excluding the territorial sea and other areas landward of the territorial sea from the ambit of the definition (41). This aspect is related to the question whether the cases decide in the Thai courts, discussed below, have been cases falling under the international definition of piracy or whether they have merely been cases of municipal crimes other than piracy (42).

At this juncture, it should be observed that Thailand acceded to the Geneva Convention on the High Seas in 1958, and pursuant to it, declared a 12 mile territorial sea in 1966. Yet, under Thai municipal law, there is no definition of the term « piracy » - there is, indeed, no mention of the term « piracy » under the present Penal Code of 1956 (43), and the sole instance where the word « piracy » appears is section 43 of the Criminal Procedure Code of 1934 (44). The incidents named « piracy » by the international press have led to prosecutions based primarily on the sections tabulated in Table 1 (45), and on the ground of bringing aliens illegally into the country in breach of the Thai Immigration Act 1979 (46).

Before discussing the Thai court decisions concerning acts committed against asylum-seekers at sea, it would also be useful to bear in mind the « jurisdictional » sections of the present Thai Penal Code (47), namely those sections conferring jurisdiction upon the Thai courts to be seised of the grounds enumerated in Table 1. These « jurisdictional » sections are tabulated in Table 2 (48), in so far as they are of relevance to the cases in point. Of particular note is section 7(3) which refers to robbery and gang-robbery on the high seas as being offences committed outside Thailand and yet punishable in Thailand. This has much in common with the notion of « piracy » jure gentium, even though the latter term is not used in the Thai municipal context. There is thus an inherent affinity between the national and international jurisdictions.

(41) JOHNSON, *ibid.*, 63, 71 and Article 15 of the Geneva Convention on the High Seas, *op. cit.*, n. 34.

(42) The definition of « piracy » under the 1958 Convention has been left untouched by the Draft Convention of the Law of the Sea (Informal Text) 1980 : Article 101, *A / CONF. 62 / WP. 10 / Rev. 3.*

(43) An English translation of the present Penal Code has been compiled for the Thai Office of the Juridical Council by Ratanawichit, 1967. It should be noted that in the Penal Code of 1908, prior to the present Penal Code, there was specific mention of the term « piracy » in the sections tabulated in Table B. (See text in the annexes.)

(44) Act promulgating the Criminal Procedure Code, 1934 : section 43 whereby « In case of theft, snatching, robbery, gang-robbery, *piracy*... where the injured person has the right to claim the restitution of the property he has been deprived of through the offence, or the value thereof, the Public Prosecutor, when instituting the criminal prosecution, shall, on behalf of the injured person, apply for restitution of the property or the value thereof. » (Emphasis added.)

(45) See text in the annexes.

(46) *Government Gazette,* Vol. 96, n. 96, N. 28 ; (Special issue), March 1, 1979.

(47) *Op. cit.*, n. 43.

(48) *Ibid.*, see text in the annexes.

THAI COURT DECISIONS CONCERNING ACTS COMMITTED AGAINST ASYLUM-SEEKERS AT SEA

To date (1981), there have been seven Thai court decisions concerning acts committed against asylum-seekers at sea. Several other cases are pending, but due to lack of information, these have not been included. There is also a reference to one peculiar case, pending at present, which concerns the prosecution of certain Vietnamese boat-people. The decisions are as follows :

Case I (49) : This involved 7 Thais, fishermen from a Thai fishing boat « The Krisada 20 », who were alleged to have committed gang-robbery (section 340), false imprisonment (section 310) and rape (section 276) against 5 Vietnamese girls taken from a Vietnamese boat. Sections 91 and 83 were also relevant due to the commission as principals and accessories and concurrence of offences (50), while the Immigration Act 1979 was an additional ground for the indictment as it was alleged that they had brought the girls illegally into the country (51). The case appeared before the Songkla County Court.

From the facts stated in the proceedings, it was unclear whether the incident had taken place on the high seas or within Thai territorial waters, although it was evident that the accused had boarded a Vietnamese boat from their own boat and had left the Vietnamese boat to its own fate after taking the five girls from it.

The court seems to have inferred that at the time of the incident, the Thai boat and the Vietnamese boat were within Thai territorial waters, thus being seised of the issue under section 4, and possibly section 5, of the Penal Code (52). Although the word « pirate » does appear in the court report, the finding that the accused were guilty was based upon the charges above, i.e. gang-robbery, false imprisonment, rape and breach of the immigration law. The accused were given sentences of imprisonment ranging from 24 years to 8 years. It is also worth noting the link between this case and the fifth case *(infra)* where a new charge of murder and attempted murder was filed against the same accused persons.

Case II (53) : This concerned 3 Thai fishermen from the Thai fishing boat, « The Saeng Seri », who were initially charged with robbery, rape (54) and bringing 47 Vietnamese boat-people illegally into the country in breach of the Immigration Act 1979 (55). The first two charges were dropped and the accused were found guilty of the third charge by the Songkla County Court, with a sentence of six months' imprisonment for each.

(49) Case n. 676/2523, June 25, 1980. Songkla County (Provincial) Court.
(50) Table 1.
(51) *Op. cit.*, n. 45.
(52) Table 2.
(53) Case n. 710/2523, June 26, 1980. Songkla County (Provincial) Court.
(54) Table 1.
(55) *Op. cit.*, n. 46.

Case III (56) : This concerned 3 Thai fishermen from a Thai fishing boat, « The Sap Aroon Chai », who were alleged to have committed rape (section 276), indecent acts (section 278) and attempts related thereto (section 80) against two Vietnamese girls taken from a Vietnamese boat. Section 83 was also relevant on the question of principals and accessories (57), while bringing aliens illegally into Thailand under the Immigration Act 1979 (58) provided another ground for the indictment. The case appeared before the Songkla County Court.

From the facts stated in the proceedings, it was uncertain whether the initial encounter between the boat of the accused and that of the Vietnamese had taken place on the high seas or within Thai territorial waters (59). It appears that after giving water and food to the Vietnamese boat, the boat of the accused towed the Vietnamese boat towards the Thai seashore. However, after taking two girls from the Vietnamese boat, the accused cut the tow and left the latter to its own fate.

The accused were caught while perpetrating the crimes alleged above after taking the two girls to a hotel on the Thai coast.

The court sentenced two of the accused to six months' imprisonment solely on the ground of indecent acts (60), but the third was acquitted as he had not taken the girls into a hotel.

Case IV (61) : 6 Cases were joined as one case concerning 6 Thai fishermen from the boat « Suchinnawa », who were alleged to have committed rape (section 276), indecent acts (section 278), abducting a woman for indecent acts (section 284), and false imprisonment (section 310) against 7 Vietnamese women. Section 83, 90 and 91 were also relevant on the ground of principals and accessories, and concurrence of offences (62). The case appeared before the Pak Panang County Court.

It was alleged that the incidents had taken place on an island in the south of Thailand under Thai sovereignty, by the name of Koh Kra, where many boat-people had landed, including the 7 Vietnamese in question.

The case was dismissed as the court was not satisfied with the evidence concerning the identity of the perpetrators.

(56) Case n. 259/2523, August 13, 1980. Songkla County (Provincial) Court.

(57) Table 1.

(58) *Op. cit.*, n. 46.

(59) The interrelationship between sections 4, 5, 7 and 8 in Table 2 is thus unclear in this decision.

(60) Table 1.

(61) Case n. 145/2522, November 21, 1980.
Case n. 234/2522, December 3, 1980.
Case n. 144/2522, December 4, 1980.
Case n. 146/2522, December 4, 1980.
Case n. 232, 233/2522, December 11, 1980.
Case n. 240, 241/2522, December 15, 1980.

Pak Panang County (Provincial) Court.

(62) Table 1.

Case V (63) : This was a continuation from Case I *(supra).* The selfsame accused from Case I were prosecuted for conspiracy to murder under sections 288, 289, 80 and 83 (64). It should also be noted that in Case I, Vietnamese witnesses had testified that some of their relatives (15 in number) had been killed during the robbery committed by the accused. The case appeared again before the Songkla County Court.

It is unclear from the court report whether the incident took place on the high seas or within Thai territorial waters (65). One argument submitted by the accused to the effect that the incident had taken place outside the Thai territorial waters was not dealt with, and it can be implied that the court viewed the whole situation as taking place within Thai territorial waters.

However, the court held that this was a case of autrefois convict (66). As the accused had not been charged with murder or wilful attempt to murder in the previous case, the court had no jurisdiction to deliberate here as it would violate the principle stated.

Case IV (67) : This concerned a Thai boat captain who was accused of participating in gang-robbery (section 340) (68). It was alleged that he had robbed a boat-load of Vietnamese in the vicinity of Koh Kra island. There was an additional allegation that the accused had caused several Vietnamese to drown when he sank the Vietnamese boat after commiting the robbery, but he was not charged for murder.

The case appeared before the Pak Panang County Court, but was dismissed for insufficiency of evidence concerning the identity of the perpetrator.

Case VII (69) : This case arose from a successful attempt on the part of the Thai Government to catch would - be pirates - a decoy boat was used by the Thai navy to lure them into a trap (70). 5 Thai fishermen were accused of attempted gang-robbery (sections 80 and 340). Section 83 was also relevant due to the question of principals and accessories (71). The case appeared before the Songkla County Court.

There was irrefutable evidence that the incident had taken place in Thai territorial waters - the boat of the accused had rammed into the decoy boat, after which the accused boarded the latter and tried to stage a robbery. Moreover, during the trial, the accused confessed that they had mistaken it for a Vietnamese boat.

(63) Case n. 623/2523, December 15, 1980. Songkla County (Provincial) Court.

(64) Table 1.

(65) The interrelationship between sections 4, 5, 7 and 8 in Table 2 is thus unclear in this decision.

(66) By section 39 of the Criminal Procedure Code, *op. cit.,* n. 44, the right to institute a criminal prosecution is extinguished (in subsection 4) « by a final judgement in reference to the offence for which the prosecution has been instituted ».

(67) Case n. 92/2523, December 16, 1980. Pak Panang County (Provincial) Court.

(68) Table 1.

(69) Case n. 462/2524, July 14, 1981. Songkla County (Provincial) Court.

(70) See, *infra,* « solutions : the present ».

(71) Table 1.

In finding them guilty, the court imposed sentences of imprisonment from eleven to four and a half years.

Perhaps the most peculiar case at present, pending before the Pak Panang County Court, is that of 19 Vietnamese boat-people who have been accused of robbery, murder and receiving stolen goods. The incident is alleged to have taken place within Thai territorial waters and to have been committed against a Thai fishing boat. One may only await with acute interest the outcome of this strange scenario.

CONCLUSIONS FROM THE COURT DECISIONS

It can first be remarked that there have been relatively few prosecutions for acts committed against asylum-seekers at sea. The paucity of cases is indicative of difficulties in tracing and identifying the offenders, while the boat-people themselves have often been reluctant to testify for fear of retaliation or delay in resettlement.

The successful prosecutions have mainly been due to the accuseds' own negligence, such as being caught flagrante delicto committing the crimes or falling into a trap set for them. The interesting use of the immigration law to prosecute them for bringing aliens illegally into the country, as opposed to prosecuting the boat-people themselves for illegal entry, also provides some insight into Thai national policy and the pragmatic approach adopted as regards the latter.

In several cases discussed above, it was not possible to determine exactly whether the incidents had taken place on the high seas, within Thai territorial waters or both. Implictitly, the courts have treated them as falling under their competence due to the « jurisdictional » sections, either because they had been committed within Thailand and/or on board a Thai ship (section 4) whereby they were deemed to have been committed within Thailand ; because they had been committed partially within or with consequences in Thailand (section 5), or because they had been offences committed outside Thailand but justiciable under Thai law (sections 7 and 8) (72). The nexus between acts committed within Thailand and outside Thailand is conducive to the discussion which follows on the implications of the Thai experience for the international arena.

IMPLICATIONS FOR INTERNATIONAL LAW

The Thai experience on acts committed against asylum-seekers at sea provides food for thought in four areas of International Law :

A) Is the present geographic limitation inherent in the definition of « piracy » obsolete ?

(72) Table 2.

B) What is the effect of the concept of the Exclusive Economic Zone on the problem of piracy ?

C) How does the problem of piracy relate to the law on rescue at sea ?

D) Is the problem of piracy linked with that of durable solutions for asylum-seekers ?

A) IS THE PRESENT GEOGRAPHIC LIMITATION INHERENT IN THE DEFINITION OF « PIRACY » OBSOLETE ?

It has been stated that the traditional definition of « piracy » is that of incidents taking place on the high seas or outside the territorial jurisdiction of any State (73). The occasion is thus opportune to examine whether the rationale behind this geographic limitation is justified in contemporary conditions. The rationale proffered by one commentator is as follows : it is unnecessary to authorize the international community as a whole to assume jurisdiction over acts already subject to the jurisdiction of the coastal State in whose territory the act took place and of the State of the vessel subject to the act (74). Such rationale has, however, been impugned « because of the possibility that if a « pirate » craft were to operate from the high seas against shipping in the territorial waters of a State which lacked naval resources to prevent attacks, a State whose shipping had not yet been molested would be required to wait helplessly until the coastal State or a State that had already been harmed requested its intervention » (75).

The latter remark reflects the Thai context in the sense that acts committed against asylum-seekers at sea have been, or are being, committed within a hundred miles of the Thai coast, and it is the Exclusive Economic Zone and territorial sea of Thailand which have been affected. This is accentuated by the fact that Thailand does not, as yet, have sufficient naval resources to deal effectively with such problem. In this respect, Prof. Dubner has recommended that the international crime of sea piracy be extended to include areas outside the « normal baselines » (the low waterline along the coast) to cover acts committed up to the baseline (76). Thus, this would imply that the international definition of « piracy » should be extended to include the territorial sea, thus relegating the former definition to obsolescence.

This proposition purports to solve the characterisation of « piracy » by extending its geographical delimitation. Yet, it is submitted that the inclusion of the territorial sea within the notion of piracy would be impracticable. On the basis of the Dubner proposition, Vietnamese vessels would be able to enter Thai territorial waters to capture the offenders. It is ostensible that Realpolitik and State Sovereignty are the inevitable hurdles here. The Thai situation does not lend itself to so simple a solution as extending the

(73) *Op. cit.*, n. 34 and 40.

(74) JOHNSON, *op. cit.*, n. 40 ; 63, 71.

(75) Dubner article, *op. cit.*, n. 40, p. 474 referring to an observation by GREIG, *International Law*, 1976, p. 332.

(76) *Ibid.*, p. 489.

geographic extent of the notion of piracy. The solutions, intractable though they may be are suggested under the heading « solutions for the future » *(infra)*.

B) WHAT IS THE EFFECT OF THE CONCEPT OF THE EXCLUSIVE ECONOMIC ZONE ON THE PROBLEM OF PIRACY ?

The concept of the Exclusive Economic Zone is, by now, a familiar aspect of the new directions of the law of the sea (77). Thailand and all her neighbours have each declared a two hundred miles zone that is reminiscent of the concept embodied in the Draft Convention on the Law of the Sea 1980 (78).

One point worth investigating is whether such concept could have repercussions for the classical notion of piracy. Could piracy become an even more restricted notion in geographical terms due to the concept of the Exclusive Economic Zone ? As already stated, the notion of piracy is limited to the high seas or an area outside the territorial jurisdiction of any State, and as piracy depends upon the term « high seas », it is worth bearing in mind the definition of the latter under the Geneva Convention on the High Seas 1958 as comprising « all parts of the sea that are not included in the territorial sea or in the internal waters of a State » (79).

This provision is, however, modified by Article 86 of the Draft Convention on the Law of the Sea 1980 (Part VII entitled « High Seas ») as follows :

> « The provisions of the Part (including Articles 100-107 on « piracy » (80)) apply to all parts of the sea that are not included in the Exclusive Economic Zone, and the territorial Sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This Article does not entail any abridgment of the freedoms enjoyed by all States in the Exclusive Economic Zone in accordance with Article 58 » (81).

At first glance, therefore, Article 86 implies that the provisions on piracy, i.e. Articles 100-107 (82), subsumed under the words « The provisions of this Part », are excluded from the Exclusive Economic Zone and the territorial sea, thus limiting the notion of piracy to the high seas beyond the Exclusive Economic Zone and the territorial sea. However, Article 86 is qualified by Article 58(2) of the same Draft Convention (Part V entitled « Exclusive Economic Zone »), which states that :

> « Articles 88 to 115 (including Articles 100-107 on « piracy » (83)) and other pertinent rules of international law apply to the Exclusive Economic Zone in so far as they are not incompatible with this Part » (84).

(77) For developments till 1979, see : EXTAVOUR, *the Exclusive Economic Zone, a study of the evolution and progressive development of the International Law of the Sea,* 1979.
(78) *Op. cit.,* n. 13 and 42.
(79) *Op. cit.,* n. 34.
(80) Added by the author and see, *op. cit.,* n. 42.
(81) *Op. cit.,* n. 42.
(82) *Ibid.*
(83) Added by the author.
(84) *Op. cit.,* n. 42.

Article 58(2) therefore restores the Articles on piracy (Articles 100-107) and the notion of piracy to cover the Exclusive Economic Zone « in so far as they are not incompatible with this Part », i.e. Part V on the Exclusive Economic Zone (85). Yet, this final qualification could justify an argument by the coastal State that ships of other States wishing to exercise jurisdiction over piracy jure gentium should not do so within its Exclusive Economic Zones as it would be incompatible with the soverign rights of the coastal State over the Exclusive Economic Zone, i.e. it could argue that to exercise such jurisdiction to capture pirates would be a threat to the Exclusive Economic Zone. If such an argument were to prevail, it would reduce the geographic area of the classical notion of piracy and limit it to high seas areas beyond the Exclusive Economic Zone. The implications of such diminution are all the more significant because contemporary attacks against asylum-seekers usually take place within a hundred miles of the coast, thus falling under the ambit of the Exclusive Economic Zone.

On the basis of the argument above, if Thailand were to become a party to the Draft Convention under discussion, she would be in a position to treat the notion of piracy as applicable to high seas areas beyond her Exclusive Economic Zone. Consequently, other States would not be entitled to exercise their jurisdiction based on piracy jure gentium within the Thai Exclusive Economic Zone, and Thailand would be left with the sole responsibility of tackling such problem. Naturally, this would enhance Thai sovereign rights over the Exclusive Economic Zone, but it would hardly furnish solutions for acts committed against asylum-seekers at sea in the case where Thailand did not have sufficient means to overcome such acts.

Before glancing at the recent stance of the Thai Government, it should be noted that Cases I-VI discussed above took place before the proclamation of the Exclusive Economic Zone by Thailand (86). As for Case VII, it took place on the same day as such proclamation (February 23, 1981), but there was irrebuttable proof that it happened within Thai territorial waters. Thus the cases have no bearing on the Thai Exclusive Economic Zone.

At present, the official Thai stance seems to treat areas beyond the Thai territorial sea of twelve miles as subject to high seas « freedoms », thereby treating the notion of piracy jure gentium as covering areas seaward of the territorial sea. Indeed, Thailand has treated the problem of acts committed against asylum-seekers at sea as an international one, calling for solutions on an international scale (87), and the term « piracy » has often been used in this spectrum irrespective of the absence of such term in the Thai Penal Code (88).

(85) *Ibid.*
(86) Op. cit., n. 13.
(87) Statement of Secretary-General of the National Security Council, *Bangkok Post,* October 11, 1981.
(88) *Ibid.*

Again, it is submitted that the geographic problem posed by the concept of the Exclusive Economic Zone in the context of piracy has to be seen in the light of « solutions for the future » discussed later.

C) HOW DOES THE PROBLEM OF PIRACY RELATE TO THE LAW ON RESCUE AT SEA ?

The court decisions reported above are but some examples of instances where fishermen are alleged to have acted as opportunists preying on asylum-seekers at sea. In this respect what many of them have done is to violate the duty to rescue which is part of customary international law and embodied in many international instruments (89), in particular Article 12 of the Geneva Convention on the High Seas 1958 to which Thailand is a party. This Article stipulates that :

« 1. Every State shall require the master of a ship sailing under its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers :

(a) To render assistance to any person found at sea in danger of being lost.

(b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, in so far as such action may reasonably be expected of him.

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every costal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and - where circumstances so require - by way of mutual regional arrangements co-operate with neighbouring States for this purpose » (90).

The Draft Convention on the Law of the Sea 1980 has incorporated the above into Article 98 (Duty to render assistance) (91).

This aspect of the duty to render assistance to the boat people has not received sufficient attention in the national and international fora. Yet, realistically, the incentive for lending a helping hand is poor - there is no fund to compensate such gestures of charity (92). However, the more conscious people are of such duty, the greater the hope that they will act as good Samaritans. Thus dissemination of this area of international law is to be encouraged.

(89) Convention for the unification of certain rules with respect to assistance and salvage at sea 1910, Article 11, 37 Stat. 1658, T.S. n. 576, 1 Bevans 780 (1968) ; Geneva Convention on the High Seas 1958, Article 12 (1), *Op. cit.*, n. 34 ; International Convention for the safety of life at sea 1960, Ch. 5, reg. 10, 16 *U.S.T.* 185, *T.I.A.S.* N. 5780.

(90) *Op. cit.*, n. 34.

(91) *Op. cit.*, n. 42.

(92) PUGASH, « The Dilemma of the Sea Refugee : Rescue without Refuge », *Harv. Int. L.J.* 18 (1977), 577.

Clause 2 of Article 12 above provides added interest in that it adverts to the need for States to promote adequate facilities for rescue not only unilaterally but also by way of mutual regional arrangements. This esprit de corps is certainly worth exploring and will be touched upon in discussing « solutions for the future » *(infra).*

D) IS THE PROBLEM OF PIRACY LINKED WITH THAT OF DURABLE SOLUTIONS FOR ASYLUM-SEEKERS ?

In the international spectrum, durable solutions for refugees and asylum'seekers at sea take one or more of three forms, once they have left their country of origin :

i) voluntary repatriation to the country of origin. In the case of the boat people, Vietnam is the case in point, although she has given no indication of adopting this solution (93) ;

ii) assimilation within a country of refuge. In the case of the boat people, Thailand is the first country of refuge which has the opportunity of assimilating such people, but she has categorically rejected this solution, as seen in her national policy (94) ;

iii) resettlement in a country of refuge, implying a country other than the first country of refuge. In the case of the boat people, USA, France, Australia and Canada are but a few examples of countries of resettlement (95).

To date, much emphasis has been placed upon resettlement in third countries as a durable solution, in particular apropos the Vietnamese boat people (96). In future, more attention should be paid to the possibility of voluntary repatriation, a solution now propounded vigorously for the Kampucheans presently enjoying temporary refuge in Thailand (97).

From a purely humanitarian angle, what should be underlined is that the responsibility for finding durable solutions should not merely be that of the recipient States at the « tail-end » of the outflow of refugees and asylum-seekers at sea. The countries at the « causative end » » of the outflow should also act responsibly and cooperate in finding durable solutions.

(93) MUNTARBHORN, *Lawasia paper, op. cit.,* n. 24, p. 24. See also UNHCR, *Conclusions on the International Protection of Refugees, op. cit.,* n. 19, p. 39, whereby, inter alia, the Executive Committee of the UNHCR :

« () recognised that voluntary repatriation constitutes generally, and in particular when a country accedes to independence, the most appropriate solutions for refugee problems ;

(b) stressed that the essentially voluntary character of repatriation should always be respected ;

(c) recognised the desirability of appropriate arrangements to establish the voluntary character of repatriation, both as regards the repatriation of individual refugees and in the case of large-scale repatriation movements, and for UNHCR, whenever necessary, to be associated with such arrangements. »

(94) MUNTARBHORN, *ibid.,* p. 25.

(95) *Ibid.,* p. 35.

(96) *Ibid.,* p. 25.

(97) *Ibid.,* pp. 23-24.

One solution that deserves special attention in the context of the countries at the « causative end » is that of orderly departure programmes. By facilitating orderly departures, potential refugees from such countries would not have to resort to leaving so readily by boat as at present, thereby leaving the countries at the « tail-end » to shoulder the burden in toto. Such programmes, if effective, would curtail the number of people taking to boats and forestall the probability of their being attacked by pirates en route. In this respect, it is worth remembering the agreement between Vietnam and the UNHCR in 1979 on orderly departures (98) and hope for greater attention towards potential boat cases.

In obviating political invective about the rights and wrongs of the outflow, there is indeed room for compromise between the cause-and-effect countries in the quest for solutions.

SOLUTIONS : THE PRESENT

The Thai Government is very conscious of the problem of acts committed against asylum-seekers at sea, especially as unfavourable press comments are detrimental to the humanitarian image of Thailand (99). The solutions adopted till now at the national and international levels are analysed below.

At the national level, in March 1981, the Cabinet approved a six-point plan to improve anti-piracy suppression in the Gulf of Thailand, comprising the following :

- the Police Department must ensure that the provincial police work closely with the marine police to fight against piracy ;
- the Ministry of Interior will cooperate with other agencies and fishery associations to control trawlers and their crew ;
- the Navy is designated the task of taking proper measures to prevent piracy and the smuggling of goods to Vietnam and Kampuchea ;
- the Navy must cooperate with other agencies to train fishermen on how to combat piracy ;
- sufficient budgetary allocations must be made to the agencies responsible for piracy suppression ;
- the National Security Council will draw up a plan on the needs of the agencies concerned and seek assistance from the UNHCR (100).

Moreover, a committee to direct anti-piracy suppression operations has been established, although in its nascent stage (101). Complementary to this has been the role of other governmental authorities in arresting and prose-

(98) *Op. cit.*, n. 15.
(99) *Op. cit.*, n. 5 and 7.
(100) MUNTARBHORN, *Lawasia paper, op. cit.*, n. 12, p. 26 and *Bangkok Post*, March 4, 1981.
(101) *Ibid.*

cuting alleged perpetrators of acts against asylum-seekers at sea as seen in the court decisions above (102).

The establishing of a Centre for prevention and suppression of piracy in conjunction with a joint Thai-United States anti-piracy programme has proved an interesting innovation in piracy deterrence (103). The United States have provided financial assistance to the Thai navy for patrolling the Gulf of Thailand with particular use of decoy or « Q » boats as a bait for pirates. This method has led to the apprehension of several offenders, one example being Case VII already discussed (104). Unfortunately, the programme was set up with funds for six months only and was suspended in August 1981 for lack of further financial assistance. However, it is hoped that it will be resumed once negotiations on further financial assistance bear fruit.

The Thai Government has also issued instructions to the marine police to keep a close vigilance on the sea shore, especially in the area of Koh Kra island, notorious due to alleged incidents of attacks against the boat people. Simultaneously, it has indicated its willingness to control trawlers and their crew by three means : air reconnaissance by the navy's air unit over Thai waters and adjacent maritime areas ; sea checking points in some areas administered by the navy ; and improving registration of boats and crew for facilitation tracing. In addition, joint patrols with Malaysia, another country plagued with the piracy problem, have been under discussion for some time.

At the international level, the UNHCR has voiced its concern about the problem of piracy against asylum-seekers at sea in various international fora, including the Meeting of Experts on rescue operations for refugees and displaced persons in distress in the South China Sea in August 1979. A message was sent by the UNHCR to the Secretary-general of the United Nations calling for concerted international action in March 1980. In May 1980, the UNHCR brought the matter to the attention of the Inter-Governmental Maritime Consultative Organisation and a meeting of the Foreign Ministers of the five ASEAN States. In the same month, the UNHCR made available to the Thai Government a fast unarmed boat for patrolling operations as well as establishing a data bank for information on pirate attacks with a view to dissemination to governmental authorities. Interest in the problem of piracy against asylum-seekers is now widespread and currently, it is an important topic of discussion between the UNHCR, ICRS, LRCS, UNICEF and governmental representatives, albeit informally. Such interest has thus led to the most recent offer of $ 3.6 million to Thailand by the UNHCR for counter-piracy measures in December 1981.

(102) Cases I - VII, *supra.*
(103) MUNTARBHORN, *Lawasia paper, op. cit.,* n. 24, p. 26.
(104) *Op. cit.,* n. 69.

SOLUTIONS FOR THE FUTURE

Our guiding light for the future emanates from this dichotomy :

A) Piracy in the context of the evolving international law of the sea.

A) Piracy in the context of countries causing the outflow of asylum-seekers and recipient countries.

A) PIRACY IN THE CONTEXT OF THE EVOLVING INTERNATIONAL LAW OF THE SEA

From the analysis earlier on, three problems arise in this field which call for solutions :

i. there is the suggestion that the geographical definition of piracy with its limitation to the high seas or areas outside the territorial jurisdiction of any State is too restricted (105) ;

ii. there is the equivocal position of interpreting the concept of the Exclusive Economic Zone to exclude the notion of piracy from the zone, thus relegating it to high seas areas beyond the zone itself (106) ;

iii. the law on rescue at sea may need to be reviewed to create better incentives for rescuing asylum-seekers (107).

As regards the first problem, it is submitted that although, prima facie, the traditional geographic limitation of piracy is too restricted, it would not be viable, politically, to extend the notion of piracy jure gentium to cover the territorial sea. Although there is nothing to prevent a coastal State from allowing an international presence of counter-piracy boats and aircrafts operated by other States within the territorial sea of the coastal State, to extend the notion of piracy jure gentium to cover the territorial sea in this regard is likely to be viewed with suspicion and even regarded as an encroachment upon her Sovereignty. The most viable solution is to be found in the response of the international community, on a multilateral, regional or bilateral basis, in furnishing the coastal State with material assistance in the form of financial assistance and patrol boats and aircrafts to be operated by the coastal State itself. This would circumvent the issue of an actual, physical presence of boats and aircrafts operated by other States within the territorial waters of the coastal State (108).

(105) *Op. cit.*, n. 75 and 76.

(106) Article 86 of the Draft Convention on the Law of the Sea 1980, *op. cit.*, n. 42 and 81.

(107) *Op. cit.*, n. 92.

(108) It is interesting to note that in October, 1981, the ICRC proposed a preliminary study for an international programme of assistance and deterrence on the high seas, aimed not at assisting persons in territorial waters but in extra-territorial waters in the western part of the South China Sea and the Gulf of Thailand. The international waters concerned would be divided up into four sectors, with an international presence of deterrent ships and observation aircrafts from the international community. Even this proposal, which does not cover the territorial sea area, may be viewed with diffidence by the coastal States, although the author is of the opinion that the idea of patrolling areas up to the territorial sea is an attractive means of counteracting piracy.

In relation to the possibility of interpreting the concept of the Exclusive Economic Zone to exclude the notion of piracy from the zone, there is potential for dispute between those claiming that high seas « freedoms » are not excluded from the zone, thereby upholding the traditional notion of piracy as covering areas up to the territorial sea, and those claiming that the new concept limits the notion of piracy to areas of the high seas beyond the zone (109).

It is submitted that to restrict the notion of piracy to areas of the high seas beyond the Exclusive Economic Zone would be tantamount to rendering the notion of piracy well-nigh meaningless. For logistical reasons, pirate attacks tend to take place within a hundred miles of the coast and if the notion of piracy is to have any substance, it should cover the Exclusive Economic Zone too. Moreover, it is highly unlikely that a coastal State, especially a developing State, would have effective means of patrolling by itself the Exclusive Economic Zone in its totality. Thus it may be added that States other than the coastal State should also be entitled to patrol areas of the Exclusive Economic Zone up to the territorial sea of the latter as part of counter-piracy measures (110).

In regard to the law on rescue at sea, it has been observed that little dissemination has been made to render masters of ships and their crew more conscious of such duty. Moreover, there is no financial incentive for acts of charity on their part. It is thus submitted that a programme to disseminate the law in question should be set afoot. Moreover, an international fund should be established to compensate masters and crew of ships who rescue others at sea, including asylum-seekers (111). This incentive could, indeed, sway the intentions of would-be pirates to rescue others instead of resorting to crimes.

Finally, to add another dimension to the above, the solutions proposed for the future should be viewed in the perspective of the settlement of disputes as proposed by the Draft Convention on the Law of the Sea 1980. The idea of an international tribunal on the law of the sea could be explored so as to utilize its jurisdiction to decide problems relating to piracy, such as whether certain acts amounted to piracy and what penalties or sanctions should be applied (112).

B) PIRACY IN THE CONTEXT OF COUTRIES CAUSING THE OUTFLOW OF ASYLUM-SEEKERS AND RECIPIENT COUNTRIES

The cornerstone for solutions for the future is concerted action to be taken at the « causative end » and the « tail-end » of outflows. A more effective orderly departures programme in the country of origin of those wishing to depart should be implemented (113). In this way the disorderly caseload of

(109) Dubner article, *op. cit.*, n. 40, pp. 480, 486-7 ; Dubner book, *ibid.*, p. 20.
(110) *Op. cit.*, 108.
(111) *Op. cit.*, n. 92, p. 602.
(112) See Part XV of the Draft Convention on the Law of the Sea 1980, *Op. cit.*, n. 42 ; Dubner article, *op. cit.*, n. 40, pp. 490-493 ; Dubner book, *ibid.*, pp. 161-165.
(113) *Op. cit.*, n. 15.

the boat people would diminish, thus reducing the number of potential preys for pirates.

At the « tail-end » of the problem, more positive action could be taken by the recipient countries to prevent the recurrence of acts committed against asylum-seekers at sea. In this respect, the Executive Committee of the UNHCR has pinpointed the desirability of the following measures in its Conclusion No. 20 (XXXI) (1980) on protection of asylum-seekers at sea :

« 1) increased governmental action in the region to prevent attacks on boats carrying asylum-seekers, including sea and air patrols over areas where such attacks occur ;

2) adoption of all necessary measures to ensure that those responsible for such criminal attacks are severely punished ;

3) increased efforts to detect land bases from which such attacks on asylum-seekers originate and to identify persons known to have taken part in such attacks and to ensure that they are prosecuted ;

4) establishment of procedures for the routine exchange of information concerning attacks on asylum-seekers at sea and for apprehension of those responsible, and cooperation between Governments for the regular exchange of general information on the matter » (114).

Therefore, material assistance, patrols by air and sea, better registration of boats and crew, and interchange of information, whether on a multilateral, regional bilateral and or national basis, should facilitate the identification of the offenders and deter potential pirates from resorting to privateering vis-à-vis asylum-seekers at sea.

In the final analysis, lest we forget, piracy against asylum-seekers at sea is ostensibly not a self-contained subject for scrutiny - it is symptomatic of under-development and indicative of the need for durable solutions to the problem of asylum-seekers in general. Social and economic reasons are inextricably interlinked with political and legal considerations. Therefore, the greater the awareness of such multi-faceted dimensions, the more integrated and interdisciplinary the solutions are bound to be *.

(114) UNHCR, *Conclusions on the International Protection of Refugees, op. cit.,* n. 19, pp. 43-44.

* The author wishes to thank the staff of the UNHCR, Bangkok and Geneva, for their kind assistance is providing material for this article, and P. Horayangkura for reading the draft of this article. The views expressed in this article are purely personal.

TABLE A

ASEAN POSITION ON THE LAW OF THE SEA *

Country	*Territorial Sea*	*Exclusive Economic Zone*
Indonesia	12 miles + Archipelagic principle	200 miles (1980)
Malaysia	12 miles	200 miles (1980)
Philippines	Historic Waters + Archipelagic principle	200 miles (1978)
Singapore	12 miles	200 miles (1980)
Thailand	12 miles	200 miles (1981)

* Nautical miles used.

TABLE B

SECTIONS OF PENAL CODE OF 1908 ON PIRACY

Section	*Content*
10 (3) (application of Penal Laws)	Whoever commits an offence outside the country shall be punished in Siam, in the following cases : (3) If the offence be *piracy* *.
74 (recidive)	Whoever has been found guilty twice of any offence against life and body, or of any offence of theft, snatching, robbery, gang-robbery, *piracy* *... described in sections 249 to 259, and sections 288 to 323, and within five years commits any offence under any of the same sections, shall be liable to double the punishment prescribed for the subsequent offence, provided that the punishment inflicted for each prior offence was a period of not less than six months.
302 (piracy)	Whoever commits *piracy* * shall be punished according to the provisions of sections 298, 299, 300 or 301.
335 (24) (petty offences)	Whoever knowing that any offence likely to cause death, or any offence of rape, robbery, gang-robbery or *piracy* * is intended to be committed omits to give notice respecting the commission of such offence to any competent official or to the person against whom the offence is to be committed at a time when by giving such information the commission of the offence would have been prevented (shall be punished according to **) Class D.

* Emphasis added.
** Added by the author.

TABLE 1

RELEVANT SECTIONS OF PENAL CODE OF 1956 FOR COURT DECISIONS

Thai Penal Code of 1956 : Section	*Content*
80 on attempt	Whoever commences to commit an offence, but does not complete the commission, or completes the commission but its result is not purposely achieved, is said to attempt to commit an offence. Whoever attempts to commit an offence shall be liable to twothirds of the punishment provided for such offence.
83 on principals and accessories	Whenever any offence is committed by two or more persons, those taking part in the commission of such offence are said to be principals, and shall be liable to the punishment provided by law for such offence.
90 on concurrence of offences	Whenever one and the same act violates several provisions of the law, the provision prescribing the most severe punishment shall be applied to the offender.
91 on concurrence of offences	When the court is to pass judgment convicting any person, if it appears that such person has committed several independent offences, the Court may impose on such person the punishment prescribed for the most severe offence, provided that, in no case, the aggregate term of imprisonment, unless it be imprisonment for life, shall exceed twenty years.
276 on rape	Whoever has sexual intercourse with any woman, being not his wife, against her will, by threatening by any means, by committing any act of violence, by taking advantage of the woman being in the state of inability to resist, or by inducing her to mistake him for any other person, shall be punished with imprisonment of one to ten years and fine of two thousand to twenty thousand baht.
278 on indecent act	Whoever commits any indecent act on any person over thirteen years of age by threatening by any means, by committing any act of violence, by taking advantage of such person being in the state of inability to resist, or by including such person to mistake him for any other person, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both.
284 on taking away a woman for indecent act	Whoever takes away any woman for indecent act by any fraudulent or deceitful means, threat, violence, exercising undue influence or coercion, shall be punished with imprisonment not exceeding seven years and fine not exceeding fourteen thousand baht. Whoever conceals the woman so taken away according to the first paragraph shall be liable to the same punishment as the person taking her away. The offence according to this section is a compoundable offence.

288
on death

Whoever causes death to any person shall be punished with death, or imprisonment for life, or imprisonment of fifteen to twenty years.

289
on death
to specific
persons

Whoever causes death to :
(1) an ascendant ;
(2) any official in the due performance of his function, or by reason of performing or having performed his function ;
(3) any person who assists any official in the due performance of his function, or by reason of the fact that such person will assist or has assisted the said official.
(4) any person with premeditation ;
(5) any person by employing torture or acts of cruelty ;
(6) any person for the purpose of preparing or facilitating the commission of any other offence ; or
(7) any person for the purpose of securing the benefit obtained through any other offence, or of evading punishment for any other offence committed by him, shall be punished with death.

310
on false
imprisonment

Whoever restrains or confines any person, or by any other means deprives such person of liberty, shall be punished with imprisonment not exceeding three years or fine not exceeding six thousand baht, or both.
If the commission of the offence according to the first paragraph causes death or grievous bodily harm to the person under restraint, confinement or deprivation of liberty, the offender shall be punished as provided in section 290, 297 or 298.

340
on gang-robbery

Whenever three or more persons participate in robbery, every such person is said to commit gang-robbery, and shall be punished with imprisonment of five to ten years and fine of ten thousand to twenty thousand baht.
If any of the offenders engaged in gang-robbery, carries any arms, all the offenders shall be punished with imprisonment of ten to fifteen years and fine of twenty thousand to thirty thousand baht.
If the gang-robbery causes grievous bodily harm to another person, the offender shall be punished with imprisonment for life or imprisonment of fifteen to twenty years.
If the gang-robbery be committed by any act of cruelty and thereby causes bodily or mental harm to another person, or by discharging firearms, using explosives or any act of torture, the offender shall be punished with imprisonment for life or imprisonment of twenty years.
If the gang-robbery causes death to another person, the offender shall be punished with death or imprisonment for life.

TABLE 2

RELEVANT JURISDICTIONAL SECTIONS OF PENAL CODE OF 1956 FOR COURT DECISIONS

Thai Penal Code of 1956 : Section	*Content - jurisdictional*
4 on commission of offence within Thailand or on a Thai ship or plane	*Whoever commits an offence within the Kingdom shall be punished according to law.* *The commission of an offence on board a Thai ship* or airplane, *whenever it may be, shall be deemed as being committed within the Kingdom* *.
5 on commission of offence partially within Thailand or with consequences in Thailand.	*Whenever any offence is partially committed within the Kingdom, or its consequence occurs within the Kingdom as intended by the offender, or by the nature of the commission, its consequence should occur or should be foreseen to have occurred within the Kingdom, it shall be deemed that such offence is committed within the Kingdom.* *Any preparation or attempt to commit any act provided by law to be an offence which is done outside the Kingdom shall be deemed to have been done within the Kingdom if the consequence of such act, when carried through to the stage of accomplishment of the offence, will occur within the Kingdom* *.
7 on punishing of offences commited outside Thailand	*Whoever commits the following offences outside the Kingdom shall be punished in the Kingdom :...* (3) Offences relating to Robbery as provided in section 339, and *offence relating to Gang-Robbery as provided in section 340, which are committed on the high seas* *.
8 on punishing of offences commited outside Thailand	*Whoever commits an offence outside the Kingdom shall be punished in the Kingdom, provided that :* (a) *the offender be a Thai, and there be a complaint* from the Government of the country where the offence has been committed or *from the injured person,* or (b) the offender be an alien, and the Thai Government or a Thai be the injured person, and there be a complaint from the injured person ; *Provided further that the offence committed be any of the following :...* (3) *Offences relating to sexuality as provided in section 276,* section 280 and 285 only for the case relating to *section 276 ;* (4) *Offences causing Death as provided in sections 288 to 290 ;* (7) *Offences against liberty as provided in* section 309, *section 310,* section 312 to 315, and sections 317 to 320 ; (9) Extortion, Blackmail, Robbery and *Gang-Robbery as provided in sections* 337 to *340 ;...* *

* Emphasis added as being relevant to cases decided *(supra).*