Chapter Three

Pursuing State Interests: The Exercise of Maritime Enforcement Jurisdiction

3.1. Overview

This chapter discusses the primary tool employed by States in furthering their interest in reducing boat arrivals at their shores—that of interception. The legal regime within which this factual scenario must fit will be the subject of Part II of the book. The aim in this Part is that of identifying whether the current international legal regime is adequate to deal with this increasingly serious crime.

3.2. State Interests

States have an interest in upholding certain rights and policy interests. There is something of a mismatch between State interests and the rights available under the international legal system. This is brought into relief when one notes the difficulties inherent in the valid exercise of jurisdiction where the offence is situated in an area in which the State cannot legally act. It is also noted when one considers a State’s sovereign right to protect its borders and, thus, protect its national security, and the equally compelling humanitarian principles of protection.

States are aware of their obligation to discharge their responsibilities as regards any refugees who may be present in the influx of migrants arriving at their shores even if they would rather not have to be in a position to deal with asylum claims. Therefore, albeit somewhat reluctantly, States realize that they must comply with obligations under the Convention Relating to the Status of Refugees 1951 (the Refugee Convention). Their primary interest in this scenario is that such obligations are discharged with minimal discomfort to themselves.

State interests in the field of irregular migration are various. States want to prevent illegal migration and they do so by repelling aliens and arresting and
punishing the organizers of the offence, and even the migrants themselves to the extent that they pose a threat to the security of the State in the sense that, for example, the individual who has attempted the illegal entry has links to a terrorist organisation.¹

An increasingly significant State policy interest in this field is the war on terror; precisely because nothing about the individual is known until that person comes into contact with national authorities, the irregular entrant may as easily be a terrorist as he is a refugee.² Here, migrant smuggling is framed as a threat to national security. The fight against migrant smuggling—indeed, illegal immigration generally—has been linked to the war on terror, and many restrictive State policies on entry may be a result of the over-eagerness of States to forge this link. Unilateral State action is fundamentally prompted by these concerns.

Interception of boats carrying irregular migrants is the primary tool by means of which States attempt to stem the number of arrivals at their shores and thus fulfil their main policy aim in this area.

3.3. Interception

3.3.1. The Exercise of Jurisdiction

A preliminary distinction between the terms ‘jurisdiction’ and ‘control’³ indicates that while both terms are often synonymous, there are instances where control can be exercised in the absence of jurisdiction; therefore, while jurisdiction includes methods of control, the opposite is not always true. Perhaps the most obvious example to cite is the right of self-defence, where control, indeed force, may be exercised by a vessel (say, an aircraft carrier) in the exercise of the inherent right of self-defence. On this reasoning, it may be argued that a State has the power to prevent a vessel from coming within half a mile of one of its aircraft carriers, and may use force in pursuit of this aim, even though there is no jurisdictional basis for such action.

The basic principle governing the exercise of enforcement jurisdiction is that it is generally limited to the territory of the State exercising jurisdiction;

¹ Generally however, the rule is that migrants are not to be punished for their irregular entry: see Smuggling Protocol, Art. 5.
³ Further explored in Chapter 5.