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Loss of Innocence

The interdiction of the Grace 1 and the use of economic sanctions to limit innocent passage

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Abstract

The right of innocent passage has been a staple in maritime law since the 17th century and is an important part of the freedom of the seas, granting free passage to ships that wants to travel a state's sea territory. With the growing complexity of the world however, the freedom of the seas is slowly being pushed away by coastal states increasing need to regulate and protect their own shores and waters. The 4th of July 2019, Gibraltar took the decision to take it a step further and decided to detain an Iranian oil tanker named the Grace 1 that was headed for Syria. The reason for this was to enforce EU's economic sanctions, sanctions not in any way related to the right of innocent passage or Iran, a state with no responsibility to follow EU's sanctions. With an already crumbling freedom of the seas, the danger of such a decision taken by an entity such as Gibraltar is clear. What makes this matter worse is the tool Gibraltar chose to use, economic sanctions. Economic sanctions are a highly criticized and volatile tool, often with terrible consequences to an innocent population. Gibraltar's decision to use it for hindering the passage of ships risks expanding the use of such a tool as well as giving further recognition to it, damaging the stability of the world in the process.

The thesis examines Gibraltar's conduct when it detained the Grace 1 from the perspective of international maritime law and examines the consequences should Gibraltar's conduct continue. It examines the right of innocent passage together with economic sanctions as a tool for limiting it and compares it to other alternatives for interdiction. The thesis concludes that if Gibraltar's conduct would continue it could have a large negative impact on the right of innocent passage and that Gibraltar should not have interdicted the Grace 1, regardless of method used to legitimize it or the intention behind it.

List of Abbreviations

ADA	Americans for Democratic Action
ATCSA	Anti-Terrorism, Crime and Security Act 2001
BGTW	British Gibraltar Territorial Waters
CS	Continental Shelf
CJEU	Court of Justice of the European Union
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EU	European Union
ICJ	International Court of Justice
IEEPA	International Emergency Economic Powers Act
IMO	International Maritime Organization
IRGC	The Islamic Revolutionary Guard Corps
IRNA	The Islamic Republic News Agency
LOSC	Law of the Sea Convention
NATO	The North Atlantic Treaty Organization
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PSI	Proliferation Security Initiative
SC	The United Nations Security Council
SOLAS	International Convention for the Safety of Life at Sea
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
SUA	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TSC	Convention on the Territorial sea and the Contiguous Zone
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
US(A)	United States of America
USSR	Union of Soviet Socialist Republic

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'For even that ocean wherewith God hath compassed the Earth is navigable on every side round about, and the settled or extraordinary blasts of wind, not always blowing from the same quarter, and sometimes from every quarter, do they not sufficiently signify that nature hath granted a passage from all nations unto all?' – Hugo Grotius, Mare Liberum, page 11.[1]

1 Introduction

The detention of the Grace 1 the 4th of July 2019 was not one that went unnoticed in the international community. For the duration of its detention, it was the centre of an international crisis between Iran and the western countries.[2] The UK claimed it had detained the vessel lawfully, to uphold the heavy sanctions put on Syria by the European Union, while Iran on the other hand claimed that the detention had been done in violation of international law; even claiming piracy.[3] Iran was however not the only one who criticized this action, and the comment from former Swedish prime-minister Carl Bildt quickly became popular in media outlets, questioning the legality of the action and stating that 'EU as a principle doesn't impose its sanctions on others. That's what the US does'.[4] The whole situation escalated when Iran in turn detained a UK-flagged tanker, and when the Grace 1 finally was released after promises from Iran that it wouldn't go to Syria, its cargo ended up in Syria anyway.[5] The UK's victory was ultimately a hollow one.

Some would perhaps argue that the incident was inevitable: Conflict between Iran and the west has been brewing for years, and warnings of a potential tanker-war had been issued even before the incident occurred.[6] Economic sanctions have also become increasingly more common, and the threat of hindering a ships passage to Syria due to economic sanctions by the UK came as early as 2012, when a Russian vessel allegedly planned to ship war-material to the Syrian Government.[7] Yet, these threats were never actualized and the UK by detaining the Grace 1

[1] Hugo Grotius, *The Free sea* (Richard Hakluyt trs, David Armitage ed and introduction, with William Welwod's Critique and Grotius's Reply, Liberty fund Indianapolis 2004) 11. Emphasis added.
[2] Verity Ratcliffe, Julian Lee, Arsalan Shahla, 'U.K. Marines Seize Tanker, Causing Diplomatic Row With Iran' (*Bloomberg*, 4 July 2019) <https://www.bloomberg.com/news/articles/2019-07-04/gibraltar-says-it-seized-oil-tanker-carrying-crude-to-syria> Accessed 20 November 2019.
[3] Roland Oliphant, Dominic Nicholls, 'Iran blasts Britain's 'piracy' after Royal Marines detain oil tanker in Gibraltar' *The Telegraph* (London, 5 July 2019) (Henceforth 'Oliphant, Nicholls') <https://www.telegraph.co.uk/news/2019/07/04/royal-marines-gibraltar-detains-supertanker-suspected-delivering/> accessed 17 November 2019.
[4] David Uren, 'Sanctions: the new economic battlefield' (*The Strategist*, 6 august 2019) <https://www.aspistrategist.org.au/sanctions-the-new-economic-battlefield/> Accessed 19 November 2019; Patrick Wintour 'Gulf crisis: story began with UK's seizure of Iranian-flagged ship in Gibraltar', *The Guardian* (London, 20 July 2019) <https://www.theguardian.com/world/2019/jul/20/gulf-crisis-tanker-retaliation-iran-hormuz> Accessed 19 November 2019.
[5] 'Grace 1 tanker: UK condemns Iran over Adrian Darya 1 delivery of oil to Syria' (*Sky News*, 10 September 2019) <https://news.sky.com/story/grace-1-tanker-uk-condemns-iran-over-adrian-darya-1-delivery-of-oil-to-syria-11806407> accessed 20 November 2019.
[6] Paul Adams, 'Gulf crisis: Are we heading for a new tanker war?' (*BBC*, 21 June 2019) <https://www.bbc.com/news/world-middle-east-48709049> accessed 20 November 2019.
[7] Matthew Happold, 'Economic sanctions and international law' in Matthew Happold and Paul Eden (eds), *Economic Sanctions and International Law* (Hart Publishing 2016) 1 (Henceforth 'Happold') ; David Usborne, 'Tensions between UK and Russia soared over Syria-bound helicopters', *The Independent* (London, 21 June

has taken an unprecedented step towards realizing its foreign objectives. What truly is concerning though is that although the UK's action to detain the Grace 1 is seemingly purely political in nature, it has the potential to damage international law to its core. The legal aftermath of the UK's decision to stop a neutral vessel due to EU's economic sanctions in its territorial waters could be severe, for when dealing with international law it is not the legality *per se* that that is important, but the consequences of the action taken. If the use of economic sanctions for hindering vessels in a coastal state's territorial sea or strait becomes the norm, it could risk eroding the very foundation of innocent passage, a rule in international law that has insured safe passage of every kind of ships on the seas for hundreds of years. The damage to innocent passage could in turn have effects to both state and non-state actors and the entire shipping industry.

While the incident still could be seen as isolated and the risk to innocent passage due to that incident minimal, many influential states have come out with their support. The USA seems to have endorsed the actions in Gibraltar, and acknowledgement from large flag-states such as Panama signals a potential acceptance of this conduct.[8] It is therefore of importance that the legality surrounding the incident is examined, as well as what consequences this could have. For while the legality of the incident is of interest, it is not the legality itself that have potential to affect the law on the seas, but what would happen if this conduct became accepted among the international community.

1.1 Background

To be able to fully discern what henceforth in this thesis will be called the 'Grace 1 incident', it is of importance to not only understand the context in which the incident happened, but also to understand the broader geopolitical situation surrounding the incident. Before detailing the events of the Grace 1 incident, what will follow first is therefore a brief account of the Syrian Civil War in relation to the rest of the international community, and thereafter a short summary of Iran's political situation in relation to the parties involved in the Grace 1 incident.

1.1.1 The Syrian civil war

The Syrian Civil War has been ongoing since 2011, and is the second most deadly war of the 21st century, only eclipsed by the Second Congo War between 1993 and 2003.[9] Syria's government, led by president Bashar al-Assad has been in conflict with several rebel groups that oppose the rule of Assad. The civil war has had both regional and international

2012) <https://www.independent.co.uk/news/world/politics/tensions-between-uk-and-russia-soared-over-syria-bound-helicopters-7869850.html> accessed 20 November 2019.

[8] Dan Sabbagh, 'UK caught in middle of US power play with Iran' *The Guardian* (London, 15 August 2019) <https://www.theguardian.com/world/2019/aug/15/uk-caught-in-middle-of-us-power-play-with-iran> accessed 20 November 2019; Anonymous, 'Grace 1 no longer Panama-registered' (*Insurance Marine News,* 8 July 2019) <https://insurancemarinenews.com/insurance-marine-news/grace-1-no-longer-panama-registered/> accessed 17 November 2019.

[9] 'Syria civil war fast facts' (*CNN*, 11 October 2019) <https://edition.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html> accessed 17 November 2019; Michael Ray, '8 Deadliest Wars of the 21st century', *Encyclopaedia Britannica* <www.britannica.com/list/8-deadliest-wars-of-the-21st-century>, accessed 17 November 2019.

consequences, as more international actors has decided to get involved in the conflict.[10] In 2013, the UN released a report that the Assad-government had used chemical weapons against their opposition, and UN's secretary-general Ban Ki-moon accused the Assad-government of war crimes.[11] This has led to heavy economic sanctions from major international actors such as the USA and the EU, but no sanctions from the UN directly relating to the Assad-government.[12]

1.1.2 Iran's political situation

Iran is a country under large international and economical pressure, especially from the USA which withdrew from the Joint Comprehensive Plan of Action, or the 'Iran nuclear deal' in May 2018 and later reinstated economic sanctions that previously had been lifted due to the deal.[13] Iran's economy has been hit hard and the relation between Iran and the USA and its allies have become increasingly hostile.[14] In June 2018, the USA branded the Islamic Revolutionary Guard Corps (IRGC), a military organization equivalent to Iran's military agency, as a Foreign terrorist organization.[15]

1.1.3 The Grace 1 incident

1.1.3.1 The detention

While the exact details of the Grace can be questioned and the reasons behind the ships actions are blurred, it all seems to have started in mid-April when a large oil-tanker named the Grace 1 departed from Kharg Island, Iran.[16] Loaded with crude oil it was headed towards the Mediterranean Sea, but instead of going through the Suez Canal it opted to travel the considerably longer route around the southern tip of Africa instead. Some experts claim the reason for not going through the Suez Canal was because there it would have had to temporarily

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[10] A more detailed description of who the international actors are can be found here: 'Syria's civil war explained from the beginning' (*Aljazeera*, 14 April 2018) <www.aljazeera.com/news/2016/05/syria-civil-war-explained-160505084119966.html>; 'Syria war: A brief guide to who's fighting whom' (*BBC*, 7 April 2017) <https://www.bbc.com/news/world-middle-east-39528673> accessed 17 November 2019.

[11] Josh Levs, Holly Yan, ''War crime': U.N. finds sarin used in Syria chemical weapons attack' (*CNN*, 17 September 2019) <https://edition.cnn.com/2013/09/16/politics/syria-civil-war/index.html> accessed 12 December 2019.

[12] 'Restrictive measures against Syria' (*EU Sanctions Map*, 11 September 2019) <https://www.sanctionsmap.eu/#/main/details/32/?checked=&search=%7B%22value%22:%22syria%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D> accessed 9 December 2019; 'Syria Sanctions' (*U.S. Department of the Treasury*, 2 April 2019) <https://www.treasury.gov/resource-center/sanctions/Programs/pages/syria.aspx> accessed 17 November 2019.

[13] 'Iran nuclear deal: Key details' (*BBC*, 11 June 2019) <www.bbc.com/news/world-middle-east-33521655> accessed 17 November 2019; Mark Landler, 'Trump abandons Iran Nuclear Deal He Long Scorned', *The New York Times* (New York, 8 Maj 2018) <www.nytimes.com/2018/05/08/world/middleeast/trump-iran-nuclear-deal.html> accessed 17 November 2019.

[14] 'Six charts that show how hard US sanctions have hit Iran' (*BBC*, 2 May 2019) <www.bbc.com/news/world-middle-east-48119109> accessed 17 November 2019; Lucia Binding, 'Iran says it's ready for war with US after Saudi oil attack accusations' (*Sky News*, 16 September 2019) <https://news.sky.com/story/iran-says-its-ready-for-war-with-us-after-saudi-oil-attack-accusations-11810252> accessed 17 November 2019.

[15] 'How Trump's terrorist designation of Iran's revolutionary guard impacts its economy' (*CNBC*, 12 April 2019) <www.cnbc.com/2019/04/12/trump-terrorist-designation-of-irans-irgc-the-economic-impact.html> accessed 17 November 2019.

[16] Jonathan Saul, Parisa Hafezi, 'Tehran fumes as Britain seizes Iranian oil tanker over Syria sanctions' (*Reuters*, 4 July 2019) <www.reuters.com/article/us-mideast-iran-tanker/tehran-fumes-as-britain-seizes-iranian-oil-tanker-over-syria-sanctions-idUSKCN1TZ0GN> accessed 20 November 2019.

'unload its cargo and refill after passing through'[17], which would could have put it at risk to seizure.[18] In the beginning of July 2019, it came to the government of Gibraltar's attention that an oil tanker carrying crude oil, flying a Panamanian flag, was travelling the Strait of Gibraltar and was heading for what they believed was Baniyas Refinery in Syria.[19] Gibraltar's chief minister Fabian Picardo claimed that on the basis of that information he took the decision to detain the ship after it had entered British Gibraltar territorial waters (BGTW).[20] The Spanish Foreign minister commented that it was done 'at the request of the United States'[21], but sources within the UK's government have denied this.[22] With the help of British royal Marines, the ship was boarded at 2 AM the 4th of July and detained.[23] At the moment of the detention, the ship had left the strait, and entered Gibraltar's territorial waters due to needed repairs.[24] The reason the ship was detained was due to potential violation of EU economic sanctions.[25] Picardo commented that the Baniyas refinery 'is the property of an entity that is subject to European Union sanctions against Syria'.[26] At a later date he made a similar statement, saying that there were 'reasonable grounds to suspect that the Grace 1 was being used in breach of applicable EU Sanctions against Syria'.[27] Since the ship only can be held for a limited time without a court-order according the Gibraltar's Sanctions Act, on the 5th of July Gibraltar Supreme Court took the decision to extend the detention for fourteen days.[28] This decision was made due to 'reasonable grounds to consider that the detention of the Grace 1 is required for the purposes of compliance with the EU Regulation 36/2012 on sanctions on Syria'.[29] After the fourteen days the court extended the detention another 30 days.[30]

[17] Jonathan Saul, Parisa Hafezi, 'Tehran fumes as Britain seizes Iranian oil tanker over Syria sanctions' (*Reuters,* 4 July 2019) <www.reuters.com/article/us-mideast-iran-tanker/tehran-fumes-as-britain-seizes-iranian-oil-tanker-over-syria-sanctions-idUSKCN1TZ0GN> accessed 20 November 2019.
[18] Ibid.
[19] Oliphant, Nicholls.
[20] 'Chief Minister's Statement on the release of The Grace 1 – 595/2019' (*Her Majesty's Government of Gibraltar*, 15 August 2019) (Henceforth 'Chief Minister's statement') <https://www.gibraltar.gov.gi/press-releases/chief-ministers-statement-on-the-release-of-the-grace-1-5952019-5187> accessed 10 December 2019; Specified ship notice 2019, LN. 2019/132.
[21] Oliphant, Nicholls.
[22] Andrew England, David Bond, 'UK veers off course in Iran tanker dispute' *Financial Times* (London, 22 July 2019) <https://www.ft.com/content/f0330414-ac95-11e9-8030-530adfa879c2> accessed 20 November 2019.
[23] Chief Minister's statement.
[24] Ibid; 'US issues warrant to seize Iranian oil tanker Grace 1' (*Aljazeera*, 17 August 2019) <https://www.aljazeera.com/news/2019/08/issues-warrant-seize-iranian-oil-tanker-grace-1-190817051000847.html> accessed 17 November 2019.
[25] Oliphant, Nicholls.
[26] Ibid.
[27] Chief Minister's statement.
[28] 'Gibraltar Supreme Court Orders Extension of Grace 1 Detention - 515/2019' (*Her Majesty's Government of Gibraltar*, 5 July 2019) <www.gibraltar.gov.gi/press-releases/gibraltar-supreme-court-orders-extension-of-grace-1-detention-5152019-5103> accessed November 2019.
[29] Ibid.
[30] 'Grace 1 Detention - 548/2019' 2019' (Her Majesty's Government of Gibraltar, 19 July 2019) <https://www.gibraltar.gov.gi/press-releases/grace-1-detention-5482019-5136> accessed 15 December 2019.

1.1.3.2 Wrong flag-state

It was later revealed that the Grace 1 had been removed from Panama's international registry on the 29th of May 2019, months before the incident.[31] Panama responded that reason behind the delisting was due to information they had received 'that the ship had participated in or was linked to terrorism financing'.[32] The country of Iran instead claimed ownership, and the ship later changed its flag to Iranian, and renamed it to Adrian Darya.[33] Panama later told reporters that they had decided to withdraw flags from 60 other ships that was in violation of sanctions and international legislation, with ties to Iran and Syria.[34]

1.1.3.3 Iran's response and the Stena Impero

When the ship was detained in Gibraltar, Iran was quick to condemn the action, calling it both unlawful as well as an act of piracy.[35] Iran's state-governed media IRNA as well as Iran-officials pointed out that the ship was traveling the strait and that neither the EU or the UK had any right to stop an Iranian ship based on EU unilateral sanctions, 'extraterritorially'. [36] Iranian officials also claimed that the ship's destination wasn't Syria; a claim that was repeated during the whole incident, calling it 'false allegations'.[37] A high-ranking official of Iran threatened on social media that if the Grace 1 wasn't released, Iran would seize a British oil tanker as response.[38] On the 20th of July news broke that Iran detained a British flagged, Swedish-owned tanker, the Stena Impero in the Strait of Hormuz.[39] The detention was done in Omani waters, and brought to Iran waters before UK navy had time to reach the ship.[40] Iran said the detention

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[31] Anonymous, 'Grace 1 no longer Panama-registered' (*Insurance Marine News*, 8 July 2019) <https://insurancemarinenews.com/insurance-marine-news/grace-1-no-longer-panama-registered/> accessed 17 November 2019.

[32] Ibid.

[33] Emer Scully, 'Iran CHANGES the name of its tanker Grace 1 to Adrian Darya a day after the vessel was released by Gibraltar - as the US issues a fresh warrant to seize it', *Daily Mail* (London, 17 August 2019) <https://www.dailymail.co.uk/news/article-7367431/Iran-changes-seized-tanker-Persian-moniker-Adrian-Darya-issues-warrant-seize-it.html> accessed 17 November 2019. Due to the ship being named 'Grace 1' the majority of the incident, as well as being the name used in media and in official documents etc., this thesis will continue to address the ship as 'Grace 1' to avoid any confusion.

[34] Marianna Parraga, Elida Moreno, 'Exclusive: Panama to withdraw flags from more vessels that violate sanctions' (*Reuters*, 12 July 2019) <https://www.reuters.com/article/us-mideast-iran-tanker-panama-exclusive/exclusive-panama-to-withdraw-flags-from-more-vessels-that-violate-sanctions-idUSKCN1U72DS> accessed 15 December 2019.

[35] Oliphant, Nicholls; 'Iran summons UK ambassador in tanker seizure row' (*BBC*, 4 July 2019) <https://www.bbc.com/news/uk-48871462> accessed November 2019.

[36] 'UK seizure of Iranian oil tanker amounts to sea piracy: Official' (*IRNA*, 5 July 2019) <https://en.irna.ir/news/83381904/UK-seizure-of-Iranian-oil-tanker-amounts-to-sea-piracy-Official> accessed 17 November 2019.

[37] Parisa Hafezi, Guy Falconbridge, 'Iran says Britain might release oil tanker soon, Gibraltar says not yet' (*Reuters*, 13 August 2019) <https://www.reuters.com/article/us-mideast-iran-tanker/iran-says-britain-might-release-oil-tanker-soon-gibraltar-says-not-yet-idUSKCN1V30J5> accessed 17 November 2019. 'Iran says seized tanker was not headed to Syria, accusing UK of 'maritime robbery'' (*Middle east Eye*, 7 July 2019)<https://www.middleeasteye.net/news/iran-says-seized-tanker-was-not-headed-syria-accusing-uk-maritime-robbery> accessed 30 November 2019.

[38] 'Iranian official threatens to seize British oil tanker' (*BBC*, 5 July 2019) <https://www.bbc.com/news/uk-48882455> accessed 20 November 2019.

[39] 'Iran seizes British tanker in Strait of Hormuz' (*BBC*, 20 July 2019) <https://www.bbc.com/news/uk-49053383> accessed 3 December 2019; 'Fleet List' (*Stena Bulk*) <https://www.stenabulk.com/our-fleet/fleet-list> accessed 2019.

[40] 'Tanker seizure: Jeremy Hunt urges Iran to release Stena Impero' (*BBC*, 20 July 2019) <https://www.bbc.com/news/uk-49059066> accessed 3 December 2019.

was due to the ships violation of international maritime rules, but the UK denied this, instead calling it an act of piracy.[41] What exact violation Iran claimed the ship had breached was unclear; first it was reported that it was for 'turning off its tracking devices to avoid Iranian forces and colliding with a fishing boat'[42], but was at a later date specified by Iran's Foreign ministry spokesman Abbas Mousavi on social media, to be 'violations and damages inflicted on the environment'.[43] After Iran's action in the Strait of Hormuz the British navy started to escort British ships through the strait, although due to the large amount of traffic experts have commented that this would not be a viable solution for the future.[44]

1.1.3.4 Claims from the USA and Shurat Hadin

The USA as well as the Israeli-activist organization Shurat Hadin both made claims on the Grace 1, calling for its seizure. The 15th of August 2019 the USA's Department of Justice applied at Gibraltar Supreme Court to extend the detention and ultimately seize the ship.[45] The USA's argument was that the ship and its crew, by transporting oil to Syria, was to be considered helping IRGC which (as mentioned above) had been classified as a terrorist organization.[46] The organization Shurat Hadin also got involved and supported the USA's request, wanting it seized as monetary compensation for terrorist-attacks which they claimed Iran had supported.[47] Gibraltar denied the USA's request, a request which Iran's Foreign Minister labelled as an attempt of piracy by the USA.[48]

1.1.3.5 The release

On august the 15th 2019, The Gibraltar High Court released the ship, now renamed Adrian Darya, after receiving a written assurance from Iran that 'the destination of the Vessel will not

[41] 'Iran seizes British tanker in Strait of Hormuz' (*BBC*, 20 July 2019) <https://www.bbc.com/news/uk-49362182> accessed 17 November 2019.
[42] 'Seized UK-flagged tanker Stena Impero leaves Iranian port' (*Aljazeera*, 27 September 2019) <https://www.aljazeera.com/news/2019/09/uk-flagged-tanker-stena-impero-seized-july-leaves-iranian-port-190927062425000.html> accessed November 2019.
[43] 'Stena Impero: Iran 'still investigating' seized British tanker' (*BBC*, 25 September 2019) <https://www.bbc.com/news/world-middle-east-49826807> accessed 17 November 2019.
[44] Mo Abbas, 'British navy to escort ships through Strait of Hormuz' (*NBC*, 25 July 2019) <https://www.nbcnews.com/news/world/british-navy-escort-ships-through-strait-hormuz-n1034456> accessed 17 November 2019.
[45] Michael Holden, 'U.S. has applied to seize Grace 1 tanker, Gibraltar says' (*Reuters*, 15 August 2019) <www.reuters.com/article/us-mideast-iran-tanker-gibraltar-stateme-idUSKCN1V50WQ> accessed November 17 2019; Sara Mazloumsaki, Lauren Said-Moorhouse, Vasco Cotovio, 'Gibraltar defies US and releases seized Iranian tanker Grace 1' (*CNN*, 16 August 2019) <https://edition.cnn.com/2019/08/15/middleeast/gibraltar-grace-1-oil-tanker-gbr-intl/index.html> accessed 17 November 2019.
[46] Sara Mazloumsaki, Lauren Said-Moorhouse, Vasco Cotovio, 'Gibraltar defies US and releases seized Iranian tanker Grace 1' (*CNN*, 16 August 2019) <https://edition.cnn.com/2019/08/15/middleeast/gibraltar-grace-1-oil-tanker-gbr-intl/index.html> accessed 17 November 2019.
[47] Bryan Reyes, 'As Iran condemns British 'piracy', Israeli organisation launches legal bid to seize Grace 1', *Gibraltar Chronicle* (Gibraltar, 16 July 2019) <chronicle.gi/as-iran-condemns-british-piracy-israeli-organisation-launches-legal-bid-to-seize-grace-1/> accessed 17 November 2019. They also made other objections, but those are irrelevant for this discussion.
[48] 'Iran oil tanker: Gibraltar orders release of Grace 1' (*BBC*, 15 August 2019) <www.bbc.com/news/uk-49362182> accessed 17 November 2019.

be an entity that is subject to European Union sanctions'.[49] Gibraltar's Chief Minister released a statement saying:

> [T]his assurance has the effect of ensuring that we have deprived the Assad regime in Syria of more than one hundred and forty million dollars of valuable crude oil. (…) In light of the assurances we have received, there are no longer any reasonable grounds for the continued legal detention of the Grace 1 in order to ensure compliance with the EU Sanctions Regulation.[50]

He continued, ending his statement with:

> The net effect is that this operation has become the most successful implementation of the European sanctions regime to date. It also amounts to a demonstration that Gibraltar is a jurisdiction that acts in keeping with the law and is committed to the rules based, international legal order. Gibraltar can be proud of the role it has discharged in guarding the entrance to the Mediterranean and enforcing EU sanctions.[51]

1.1.3.6 The aftermath

The USA did not seem satisfied with the release of the Grace 1, and quickly responded by releasing a warrant for the seizure of it.[52] The USA also allegedly tried to bribe the captain of the ship, as well as publicly stating a reward for anyone that could help.[53] These attempts were unfruitful, and a couple of weeks later it travelled to the Coast of Syria, where the oil most likely was unloaded.[54] The UK condemned Iran for this, alleging that Iran had broken their given assurance.[55] When Chief Minister Picardo was asked about this, he responded that it was unclear if Iran had broken their assurance. 'We did not have an undertaking that the oil would not end up in Syria. We had an undertaking from the Iranian government that they would not sell the oil to any EU sanctioned entity.'[56] Iran later confirmed this, and told reporters that they

[49] Specified ship notice (LN. 2019/132) relating to the M.V. Grace 1 (IMO: 9116412) Notice of revocation of specification of ship, LN 2019/164, section 14 (Henceforth 'Specified ship notice (LN 2019/164)') ; Chief Minister's statement.
[50] Chief Minister's statement.
[51] Ibid.
[52] 'Unsealed Warrant and Forfeiture Complaint Seek Seizure of Oil Tanker 'Grace 1' for Unlawful Use of U.S. Financial System to Support and Finance IRGC's Sale of Oil Products to Syria' (*The United States Department of Justice*, 16 August 2019) <www.justice.gov/opa/pr/unsealed-warrant-and-forfeiture-complaint-seek-seizure-oil-tanker-grace-1-unlawful-use-us> accessed 17 November 2019.
[53] Tom O'Connor, 'Iran mocks U.S. after it reportedly tried and failed to pay off oil tanker' (*Newsweek*, 4 September 2019) <www.newsweek.com/iran-mocks-us-after-it-reportedly-tried-failed-pay-off-oil-tanker-1457705> accessed 17 November 2019.
[54] Josie Ensor, ''Difficult to see' if Iran breached Syria oil sale agreement, Gibraltar chief minister says', *The Telegraph* (London, 13 September 2019) <www.telegraph.co.uk/news/2019/09/13/difficult-see-iran-breached-syria-oil-sale-agreement-gibraltar/> accessed 17 November 2019.
[55] Andrew England, David Sheppard and Najmeh Bozorgmehr, 'UK claims Iran tanker broke promises with Syria delivery', *Financial times* (London, 10 September 2019) <https://www.ft.com/content/bd00e646-d3e7-11e9-8367-807ebd53ab77> accessed 17 November 2019.
[56] Josie Ensor, ''Difficult to see' if Iran breached Syria oil sale agreement, Gibraltar chief minister says', *The Telegraph* (London, 13 September 2019) <www.telegraph.co.uk/news/2019/09/13/difficult-see-iran-breached-syria-oil-sale-agreement-gibraltar/> accessed 17 November 2019.

simply had sold the oil to a private company that was not part of the EU-sanctions.[57] As reported by Iran's state media IRNA, the Iranian ambassador Hamid Baeidinejad explained that the west had misunderstood the assurance, quoting Gibraltar's Chief Minister to support this view. The assurance was never about Iran promising that the oil wouldn't end up in Syria, he explained. No commitment had actually been made to secure the destination of the oil, only what parties Iran couldn't transfer or sell the oil to.[58]

The Stena Impero was released the 27th September, over a month after the release of the Grace 1.[59]

1.1.3.7 Effects on the shipping industry

There has been some worry that the development surrounding the Grace 1 incident would damage the shipping industry. The worry has mostly surrounded shipping in the Strait of Hormuz, and there's been speculation that both traffic would decrease, and costs of insurances would increase.[60] Since the situation in the Strait of Hormuz already were precarious, the fears were that this would escalate the conflict. So far though there has been no worry that the trade through the strait would completely come to a halt: Just that there would be a decrease of willing companies and ships.[61] No major effect on the industry has although been seen as of yet.

1.2 Scope and purpose

1.2.1 Purpose

The purpose of the thesis is to examine how international law would develop and how this would affect the right of innocent passage, if the use of unilateral economic sanctions to hinder the passage of ships became standard practice for Gibraltar. Its purpose is also to evaluate Gibraltar's use of these sanctions to hinder the passage of ships in comparison to other viable alternatives.

1.2.2 Research questions

- Was the detention of the Grace 1 to be considered legal under international law?
- If the conduct in the case of the Grace 1 became standard practice for Gibraltar, how would it affect the right of innocent passage and what consequences could that have?

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[57] 'Envoy says Adrian Darya's oil belongs to private firm' (*IRNA*, 11 September 2019) <https://en.irna.ir/news/83472272/Envoy-says-Adrian-Darya-s-oil-belongs-to-private-firm> accessed 17 November 2019.

[58] 'Enemies misinterpret Iran's commitment on Adrian Darya super tanker' (*IRNA*, 14 September 2019) <https://en.irna.ir/news/83475208/Enemies-misinterpret-Iran-s-commitment-on-Adrian-Darya-super> accessed 17 November 2019.

[59] 'Stena Impero: Seized British tanker leaves Iran's waters', (*BBC*, 27 September 2019) <www.bbc.com/news/world-middle-east-49849718> accessed 17 November 2019.

[60] David Koenig, Frank Bajak, 'Gulf tanker incidents may raise shippers' costs, cut traffic' (*AP*, 21 July 2019) <https://apnews.com/d7795eaf6ff343bbba9e40c1f6ec34de> Accessed 30 November 2019.

[61] David Sheppard, Anjil Raval, 'Oil tanker companies spooked by Gulf attacks' *Financial Times* (London, 14 June 2019) <https://www.ft.com/content/7a3f6a50-8def-11e9-a1c1-51bf8f989972> Accessed 21 November 2019.

1.2.3 Method and material

1.2.3.1 Legal dogmatic method

To achieve the thesis purpose, the thesis will use the Grace 1 incident as an object of study. It will do so via two legal methods. The main method that will be used to study the Grace 1 incident and its surrounding questions is the legal dogmatic method. The reason for this is because of the incident's legal complexity, as well as the thesis being legal in nature. The thesis puts the conduct of Gibraltar into the perspective of the abstract question of the conduct's legality, by examining the legal rules governing the conduct as well as the legal principles surrounding it. Even though intent is one of the main questions of the Grace 1 incident, the analysis of the legality itself as part of the first research question can be attributed as a form of legal positivism, with the UN and the ICJ as recognized centrepieces of the conduct's legality. The method has also been part of sorting out the hierarchy of norms in different legal regimes and in international law. With the focus on standard practice, state practice, and economic sanctions as a legal tool rather than a political one, the legal dogmatic method is the one most suitable for the task of fulfilling the purpose of the thesis. Another method would lack the capacity to answer these questions.

1.2.3.2 Legal comparative method

The secondary method that will be used is the legal comparative method. The legal comparative method will act as a supplement to the legal dogmatic method to be able to fully explore the subject. It will be used to compare economic sanctions as a legal tool to other legal tools in the perspective of standard practice. It will also be used to compare national legislation, specifically US legislation and UK legislation with each other. Without the perspective that the legal comparative method brings to the question the legal dogmatic method would be unable to fulfil the purpose of the thesis in a satisfactory way.

1.2.3.3 Material

The thesis is written in the referencing style 'Oxford University Standard for the Citation of Legal Authorities' (OSCOLA, 4th edn). Due to the specific legal questions being examined are relatively new and thus largely unexplored, cohesive research on the subject matter is missing. The material used therefore covers a range of different legal topics and will consequently not always have a direct connection to the subject matter. The legal area of sovereignty and jurisdiction is based on the works of Professor Martin Dixon and Professor Vaughan Lowe, and the foundation for the law of the sea is based on the works of Professor Donald Rothwell, Professor Tim Stephens and Professor Yoshifumi Tanaka. The thesis builds upon the work of Dr. Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (2006), which analyses the right of innocent passage in the territorial sea and puts it in the perspective of state jurisdiction. This has allowed the thesis to focus on the topics of economic sanctions, interdiction and the specific circumstances surrounding the Grace 1, which has benefitted the thesis as a whole.

1.2.4 Scope

Since the thesis is of legal nature it will not speculate in questions that are purely political. It will not comment on any dispute regarding Gibraltar as a crown state more than acknowledging its existence as a crown state. It will not comment on the potential effects of the UK leaving

the EU (also called ‘Brexit’), due to its uncertain nature. It is not clear what effects it could potentially have on the application of economic sanctions by Gibraltar or its conduct, but it does not change the circumstances of the Grace 1 incident itself. When it comes to the question of jurisdiction it will only deal with jurisdiction in the territorial sea, and only of vessels that travels the sea, not air or land. It will not question the definition of such a vessel, and only deal with the right of ‘merchant vessels’ and not warships, since that is a topic of its own. The thesis will not go into any speculation of state-terrorism or an alternative view on piracy other than what has already been established by legal scholars. Even though the thesis is a legal analysis, it will not critique national regulations and law, as the analysis is about the application of those laws, not the laws themselves. When it comes to the law of conflict, the thesis does not seek to question the conclusions made by legal scholars in this area. Lastly, it has to be established that the thesis will not question the recognition of the UN, UNCLOS as customary law or the judgements and opinions of the ICJ; as any other position would make the work entirely speculative.

1.2.5 Synopsis

The thesis is divided into 6 chapters. The first chapter is of a non-legal nature and introduces the reader to the topic with needed background-information, as well as the scope and purpose of the thesis. The second chapter is the beginning of the main body of the thesis, named ‘Sovereignty and jurisdiction’. It is written to give a basic understanding of the legal concepts and principles that the thesis is dealing with, beginning with principles in general international law, and ending with principles and rules specific to the law of the sea. The third chapter, ‘Economic sanctions and interdiction’ is about the law and actions used to detain the Grace 1. It is more focused on the actual questions surrounding the Grace 1 incident than chapter two and deals with economic sanctions as a tool as well as maritime actions related to force. It also explores the general legality of the use of force in accordance to the UN Charter. The fourth chapter is named ‘The detention of the Grace 1’, and puts the findings of the second and third chapter in the perspective of the actual the Grace 1 incident together with new findings, examining Gibraltar’s conduct and goes into detail on the law relevant to the incident. Chapter five is called ‘The Grace 1 and interdiction based on economic sanctions’ and discusses and analyses the findings of the previous chapters. It does so by dividing chapter five into two separate sections, each section operating under its own research question. The first research question discusses the more basic question of the Grace 1 incidents legality, while the other is more focused on the concepts surrounding it and the potential consequences of Gibraltar’s conduct, as well as discussing alternative actions that Gibraltar could have taken. Both sections of chapter five ends with the answer to the research question. The sixth chapter is the conclusion, which summarizes and comments on what was discussed, an ends with a statement regarding the findings of the thesis as a whole. Every chapter except the first and the last chapter starts with an introduction detailing how the chapter is structured and why it is structured in this way, so that the reader easier can follow and understand the thesis. All of these chapters also have a summary of the end of the chapter, except chapter five where the summary instead is replaced by the conclusion of the thesis.

2 Sovereignty and jurisdiction

To be able to fully understand the Grace 1 incident in the context of maritime law, the legal questions surrounding the incident needs to be deconstructed. The first concept to examine is what could be interpreted as the core question of the Grace 1 incident, namely the question of Gibraltar's sovereignty and jurisdiction. This chapter will start with an overview of state jurisdiction in international law, the *Lotus Case* (1927) and the general principles of jurisdiction. The next part of chapter two concerns the law of the sea, first introducing it as a legal area and then moving on to the main question of jurisdiction, specifically jurisdiction in the territorial sea which is where the Grace 1 incident took place. After this comes a section dedicated to the right of innocent passage, which is the relevant exception to a coastal state's sovereignty and jurisdiction in the territorial sea. On the last pages of the chapter, it examines the limits of innocent passage and the potential erosion of the freedom of navigation.

2.1 A State's jurisdiction

2.1.1 Definition of jurisdiction

International jurisdiction is one of the very foundations of international law, and is a multifaceted term with a collection of different kinds of international jurisdictions covering different areas of international law, and not a term that is used in uniform by scholars.[62] The discussion and usage of 'jurisdiction' in this thesis will generally refer to specifically a state's jurisdiction, if not specified otherwise. In his book about jurisdiction of a coastal state, Yang asserts that the terms 'sovereignty' and 'jurisdiction' needs to be separated, where sovereignty generally refers to a state's personality and statehood as well as a state's rights, while jurisdiction is the legal competence of aforementioned state, and that sovereignty is what creates jurisdiction in the first place.[63] In other words, jurisdiction is a result of sovereignty, but can reach places where a state is not sovereign.

2.1.2 Definition of territory

Before going into detail on the principles of jurisdiction, it is vital to define what is to be considered territory. The term 'territory' commonly refers to a specific land mass, an area of land so to speak, but could also be interpreted as simply a general area in which a state has control.[64] These two should not however be confused with each other: While a state may have jurisdiction in an area outside its land-borders, such jurisdiction is not what could be called 'territorial jurisdiction', which only concerns land territory.[65] Tanaka goes so far as to use the

[62] Martin Dixon, *Textbook on International law* (7th edn, Oxford University Press 2013) 148 (Henceforth 'Dixon'); Haijiang Yang, *Jurisdiction of the coastal state over Foreign Merchant Ships in internal waters and the territorial sea* (Springer Berlin and Heidelberg 2006) 30 (Henceforth 'Yang').
[63] Yang 30 – 31.
[64] Albert S. Hornby, 'Territory', *Oxford Advanced Learner's Dictionary* (8th edn, Joanna Turnbull (ed) and others, Oxford University Press, 2010); 'Territory'(*Cambridge Dictionary*) <https://dictionary.cambridge.org/dictionary/english/territory> accessed 17 November 2019; 'Territory' (*Merriam-Webster*) <www.merriam-webster.co m/dictionary/territory> accessed 17 November 2019.
[65] Yang 32; Dixon, 148; Vaughan Lowe, *International Law* (Oxford University Press 2007) 172 – 173 (Henceforth 'Lowe').

term ‘spatial jurisdiction’ as to not confuse the two.[66] Hence, when the word ‘territory’ is used in this thesis it will specifically be about territory as a concept that does not by default include territory outside its land-borders (but that possibly can be extended to include it). When there is a need to separate land and sea area, the terms ‘sea territory’ and ‘land territory’ will be used, as seen in UNCLOS.[67]

2.1.3 The *Lotus Case*

To best elucidate the basic concept of state jurisdiction, perhaps the most significant as well as relevant case to look at is *the Lotus Case* (1927), which is often used as the basis of explaining jurisdiction.[68] Dixon describes this case as laying out ‘two competing general rules of jurisdiction’.[69] The first rule is the rule that one state is not allowed to exercise its authority in another states territory.[70] However, the other general rule, that is competing with the first, is that a state may exercise its authority outside its own territory if not a rule in international law states otherwise.[71] This translates to two different kinds of jurisdiction: The jurisdiction to prescribe, and the jurisdiction to enforce. A state is free to make rules of what entities are allowed and not allowed to do, but is only able to enforce those rules in the state’s own territory.[72] This brings forth a third rule of jurisdiction, the rule that a state has full authority and sovereignty over its own independent territory. Dixon describes this as the state having ‘power and authority over all persons, property and events occurring within its territory’.[73]

2.1.4 Types of jurisdiction

2.1.4.1 Legislative jurisdiction

As described above, there are different types of jurisdiction. First is the jurisdiction to prescribe; one of the general rules found in the *Lotus Case*.[74] Yang calls this ‘legislative jurisdiction’ and includes ratification and accession to international conventions as part of it.[75] The jurisdiction to prescribe is unhindered by other rules, and a state can virtually make any kind of legislation covering any area. Dixon’s example of this is the United Kingdom’s Broadcasting Act 1990, which forbids broadcasting from the high seas in such a way that would

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[66] Yoshifumi Tanaka, *The international Law of the Sea* (2nd edn, Cambridge University Press 2015) 6 (Henceforth ‘Tanaka’).
[67] United Nations Convention on the Law of the Sea (UNCLOS), 10 December 1982, entered into force 1 November 1994. United Nations, Treaty Series, vol 1833 (Henceforth ‘UNCLOS’).
[68] Dixon 148; Guilfoyle 8; ‘The Lotus Case’ (France v Turkey)’ Série A No. 10 PCIJ (1927). The *Lotus Case* was described as important only a year after the decision in 1928, as a case important not only because of the substance matter, but because it was the first case were the Permanent Court of International Justice decided on something other than a ruling or interpretation of a convention: The issue at hand was a customary one. The case dealt with a collision between a French Mail steamer and a Turkish collier, named Lotus and Boz-Kourt respectively. The collision resulted in the Boz-Kourt sinking and eight Turkish crewmembers lost their lives. The Lotus arrived in Constantinople and the responsible officer for the Lotus and the captain for Boz-Kourt was tried in court. The officer of Lotus claimed that the Turkish court lacked jurisdiction, a claim that prompted France and Turkey to send the question to the PCIJ, if the Turkish court had authority to judge the French officer.
[69] Dixon 148.
[70] Ibid.
[71] Ibid.
[72] Dixon 149.
[73] Ibid.
[74] Ibid.
[75] Yang 35.

disrupt internal broadcasts in the UK.[76] While the UK might not have jurisdiction on the high seas, it can still forbid people to do so on the high sea.

2.1.4.2 Enforcement jurisdiction

Even if a state can decide to adopt any kind of rule, these rules can only be enforced in its own territory. This is called 'enforcement jurisdiction'.[77] It could be argued that enforcement jurisdiction can be divided into two separate jurisdictions, 'judicial jurisdiction and administrative or executive jurisdiction'[78], but the general consensus among scholars is to combine it into one kind of jurisdiction.[79] Enforcement jurisdiction is dependent on the legislative jurisdiction, and it is further limited by a state's sovereignty. As described before, enforcement jurisdiction therefore cannot exist outside a state's territory or in another state's territory, unless given permission by a bilateral or multilateral agreement.[80]

2.1.5 Principles of jurisdiction

2.1.5.1 The territorial principle

The territorial principle is the bedrock of jurisdiction.[81] Already mentioned as Dixon's third rule of jurisdiction above, Yang describes it as 'the most fundamental of all principles governing jurisdiction'.[82] Lowe seems to share this sentiment, and both Lowe and Dixon ties other jurisdictions as an extension of a state's jurisdiction over its territory.[83] The territorial principle can in itself be divided into two parts: Objective territorial principle, and subjective territorial principle. The objective principle is that a state has the full right to decide over its own territory and the actors inside of it. The subjective principle is that acts that started outside its territory but enters/has an effect inside of its territory will also be included: For example, a lorry-driver's hour is not reset just because it crosses a nation's border.[84] There are also arguments for the reverse use of the subjective principle; when a crime has been prepared inside the state's territory but is to be executed outside its territory, the state could still claim jurisdiction. [85]

2.1.5.2 The nationality principle

The nationality principle is the principle that 'a state may exercise jurisdiction over the exterritorial conducts of its nationals'.[86] Its origin is the idea of a ruler's authority over its subjects, and is a principle that precedes the territorial principle.[87] It does not mean that a state is obliged to do so, only that it has the right to do so.[88] In practice this principle is rarely used on single individuals unless the crime is severe, but it is an important principle for such things

[76] Dixon 149.
[77] Ibid.
[78] Yang 35.
[79] Ibid 35 – 36.
[80] Dixon 149.
[81] Ibid 152.
[82] Yang 31 – 32.
[83] Lowe 172; Dixon 152.
[84] Lowe 172.
[85] Dixon 152 – 153.
[86] Yang 32.
[87] Lowe 174.
[88] Dixon 153 – 154.

as flag-state jurisdiction, from where the rules of flag-state jurisdiction derives.[89] There are some states who advocate for a 'passive personality' principle, where a state will apply its jurisdiction on another states' national through this principle, if that national injured or killed the state's own national, but is not a generally accepted use of the nationality principle.[90]

2.1.5.3 The protective principle

The idea of the protective principle is that when a state's security is under threat or will have a harmful effect on the state, a state may act to protect itself, wherever this act is committed.[91] It was a principle that in the beginning of the 20th century was used in a limited fashion, but has since the 1980s been applied increasingly liberally to matters that does not pose any immediate threat to state itself.[92] It is used almost exclusively on non-nationals, acting outside a state's territory.[93] The USA is especially known for using this principle, and not only for security reasons but also for economic reasons and, according to Dixon, political reasons. Dixon makes the conclusion that the adoption of the Cuban Liberty and Democratic Solidarity act (1996) and the Iran-Lybia Sanctions act (1996), which were based on the protective principle, were 'designed more to further US foreign policy than to protect the USA per se'.[94] Such broad applications has been protested by the rest of the international community.[95]

2.1.5.4 The universal principle

There are some crimes that are so universally abhorrent and detested that any state has the jurisdiction to stop it. This is such things as piracy, slavery, torture and crimes against humanity.[96] An example of the use of this principle is in *Israel v Eichmann* (1961), where it was said that what has occurred was not only against Israeli law. 'These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ('delicta juris gentium').'[97] The reasons behind universal jurisdiction is because of the lack of jurisdiction and even existence of international courts and other legal bodies, and universal jurisdiction is the alternative to this.[98]

2.2 Law of the sea and jurisdiction on the sea

Before examining a state's jurisdiction on the sea specifically, it is imperative to first examine the source of this jurisdiction; namely the legal paradigm often called 'the law of the sea'.[99] This chapter of the thesis will therefore start with an overview of the law of the sea and the principles behind it before moving on to the details of passage and jurisdiction in the territorial sea according to the law of the sea paradigm.

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[89] Lowe 175.
[90] Ibid 175 – 176.
[91] Ibid 176; Dixon 156.
[92] Lowe 176.
[93] Dixon 156.
[94] Ibid 158.
[95] Ibid.
[96] Ibid 154; Lowe 176.
[97] Israel v Eichmann (1961) District Court of Jerusalem, Criminal Case No 40/61, section 12; Dixon 154.
[98] Dixon 155.
[99] Donald R Rothwell, Tim Stephens, *The international law of the sea* (2nd edn, Hart Publishing 2016) 1 – 2 (Henceforth 'Rowell, Stephens'); Dixon 217; Tanaka 3.

2.2.1 Overview of the law of the sea

2.2.1.1 Historic overview

Before the 20th century, there were little to none written law that governed the sea; instead it existed only as customary law.[100] The main focus of customary law between the 17th century and the 19th century was the principle of freedom on the seas, with some disputes over sea territory.[101] In the beginning of the 20th century it became clear that there was a need to codify the customary rules, and it was part of the 1930 Hague Codification Conference, but it was unsuccessful in codifying the customary rules on the sea. There were several more attempts to codify these customary rules, but the most successful try was in 1982 on the third UN Conference on the Law of the Sea, with the *1982 Convention on the Law of the Sea* (UNCLOS).[102] It has to be mentioned that there was some success with the 1958 Geneva Convention before UNCLOS. In the area of jurisdiction and sea territory particularly the *1958 Geneva Convention on the Territorial Sea and Contiguous zone* (TSC).[103] This convention is still important since while UNCLOS have replaced most (but not all) of this convention not all signatories of this convention have signed UNCLOS, most notably the USA.[104] Despite this, it is generally accepted that most of UNCLOS now is to be regarded as customary law.[105]

2.2.1.2 UNCLOS

UNCLOS is 'one of the most comprehensive and complex multilateral treaties ever concluded'[106], which both codified already existing law and expanded upon it, and created entirely new law.[107] It is often called the 'constitutions for the oceans'[108], and codified parts of customary law that for many years had been disputed, such as how to decide and measure a coastal state's sea territory.[109] It also codified less disputed customary rules, such as innocent passage and transit passage, as the freedom of navigation as part of the freedom of the seas already were, as mentioned, generally accepted among the international community since the 17th century.[110] UNCLOS also had compulsory rules for dispute settlement, even though with some restraints.[111] Lastly, UNCLOS 'birthed' three different institutions: The international Tribunal for the Law of the Sea, The Commission on the Limits of the Continental Shelf, and The international Seabed Authority.[112] Another thing to mention that concerns jurisdiction,

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[100] Tanaka 20.
[101] Rothwell, Stephens 4.
[102] Tanaka 24 – 25.
[103] Dixon 218.
[104] Ibid; 'United Nations Treaty Collection' Convention on the Territorial Sea and the Contiguous Zone (*United Nations Office of Legal affairs*) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-1&chapter=21&clang=_en> accessed 17 November 2019; 'United Nations Treaty Collection' United Nations Convention on The Law of the Sea (*United Nations Office of Legal affairs*) <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en> accessed 1 December 2019.
[105] Dixon 219.
[106] Dixon 218.
[107] Rothwell, Stephens 14 – 15.
[108] Tanaka 30; William K. Agyebeng,'Theory in Search of Practice: The Right of Innocent Passage in the Territorial Sea' (2006) 39(2) Cornell International Law Journal 371, 380 (Henceforth Agyebeng).
[109] Tanaka 20, 30.
[110] Ibid; Rothwell, Stephens 4.
[111] Tanaka 30.
[112] Ibid 31.

albeit not directly related to the thesis topic, is the 1994 Agreement in the Deep Sea Bed, which added to the already comprehensive convention and with its modifications increased the number of ratifications by states, making it into the important convention it is regarded as today.[113]

2.2.1.3 The three principles of the law of the sea

There are three universally accepted principles in the law of the sea.[114] These have been codified in UNCLOS, but it is of interest to examine them as both customary law and as codified law.

2.2.1.3.1 The principle of freedom

The freedom of the seas is not a complicated principle; it is essentially the freedom to use the seas as you wish.[115] It stems from when Spain and Portugal in the 15th century tried to divide the seas between each other, a highly protested action.[116] Instead, the seas became a place where state could do what they wished, with especially the freedom of navigation being helpful for the UK, who were free to extend its naval influence.[117] In UNCLOS, this principle can be found throughout the convention. Regarding the freedom on the high seas specifically, article 87, called 'The freedoms of the high seas', have a non-exhaustive list of freedoms with the freedom of navigation, overflight, laying of cables, fishing and scientific research.[118] This, together with article 89, invalidates any claim of jurisdiction on the high seas.[119]

2.2.1.3.2 The principle of sovereignty

The principle of sovereignty is what could be called the counterforce to the freedom of the seas, that instead 'seeks to safeguard interests of coastal States'[120] As a counterforce, the idea is to divide the sea into the high seas (without state jurisdiction) and sea territory (with state jurisdiction).[121] The amount of what is to be considered as sea territory has been increasing over the years, a process called 'creeping jurisdiction' by scholars, as more and more territory falls to coastal states.[122] Most of the first parts of UNCLOS deal exclusively with delimiting as well as right and restrictions of state's within these limits.[123]

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[113] Dixon 218 - 219.
[114] Tanaka 16.
[115] Ibid.
[116] Ibid 17.
[117] Ibid.
[118] UNCLOS article 87; David Anderson, 'Freedoms of the High Seas in the Modern Law of the Sea' in *The Law of the Sea* in David Freestone, Richard Barnes, David Ong (eds) (Oxford University Press 2006) chapter 17, 329 – 330 (Henceforth 'Anderson').
[119] Anderson 331; UNCLOS article 89.
[120] Tanaka 18.
[121] Ibid.
[122] Stuart Kaye, 'Freedom of Navigation in a Post 9/11 World: Security and Creeping Jurisdiction' in David Freestone, Richard Barnes, David Ong (eds) *The Law of the Sea: Progress and Prospects* (Oxford University Press 2006) chapter 18, 347 (Henceforth 'Kaye').
[123] UNCLOS, article 2 – 85.

2.2.1.3.3 The principle of the common heritage

The principle of the common heritage is there to 'promote the common interest of mankind as a whole'.[124] In UNCLOS, this has taken the form protecting the Area[125] and the International Seabed Authority.[126]

2.2.2 Jurisdiction in the territorial sea

2.2.2.1 Sovereignty

2.2.2.1.1 A state's territory

A state's territorial sea stretches outwards from a state's baselines[127] up to 12 nautical miles.[128] Both the TSC and UNCLOS recognizes a coastal state's sovereignty in the territorial sea and includes the airspace above it as well as the subsoil.[129] Dixon comments that the territorial sea has many of the same functions as land territory has, and is 'not merely functional'[130] in the way other areas such as the EEZ and the CS-areas are.[131] The state has the right to a range of different actions, such as building everything from bridges, lighthouses, and artificial islands.[132] When it comes to the nature of the territorial sea, even before codification it was suggested that the 'ownership' of this sea territory is non-optional. In 1909 with the *Grisbådarna case*[133], the right to the territorial sea is said to be just that: Non-optional. The state have sovereignty over this territory whether it wants it or not.[134] When describing a state's jurisdiction over the territorial sea, Tanaka uses the term 'territorial sovereignty' to describe a state's ownership over it, and concludes that 'Accordingly, the costal State can exercise complete legislative and enforcement jurisdiction over all matters and all people on an exclusive manner unless international law provides otherwise.'[135] (Why Tanaka claims complete legislative and enforcement jurisdiction whilst concluding that it does not have that is unclear.) Dixon however states that there is full legislative jurisdiction, but that its enforcement jurisdiction is severely limited, both civil and criminal.[136]

2.2.2.1.2 Land and sea

The distinction between land and sea is an important concept. The existence of a 'land mass' for a state in turn to be able to exist is paramount.[137] As an example, when discussing the definitions of a state, Professor Sir Percy Winfield in 1927 made the statement that territorial

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[124] Tanaka 19.
[125] The seabed in the high seas.
[126] UNCLOS, part XI; Tanaka 19.
[127] Which is used as a base for a state's sea territory, see UNCLOS, article 5, 7.
[128] UNCLOS, article 2, 3.
[129] Dixon 220; Tanaka 84.
[130] Dixon 220.
[131] Ibid.
[132] Rothwell, Stephens 75. It has to be commented that these actions despite the state's rights are not always accepted by other states, and that conflict arises when these freedoms are deemed by other states to have been taken too far, see Rothwell, Stephens 76 as an example.
[133] It shall be noted that Tanaka by mistake called it 'Grisbadara', Tanaka 85.
[134] The *Grisbådarna* Case *(Norway v Sweden)* (1909) PCA, 4 – 5; Tanaka 85.
[135] Tanaka 85 - 86.
[136] Dixon 220 – 221.
[137] Derek Wong, 'Sovereignty sunk? The position of 'sinking states' at international law' (2013) 14(2) Melbourne Journal of International Law 346, 353 (Henceforth 'Wong').

sovereignty was bound to 'a portion of the earth's surface'.[138] The idea of a state bound to the earth's surface is also expressed in the Montevideo Convention, and while not signed by many states, its definition and boundaries of state is almost universally accepted.[139] Such a distinction between land and sea is not however so obvious when it comes to sovereignty. When talking about what the territorial sea truly is, William K. Agyebeng describes it as an 'extension of the territorial land mass', a form of 'natural prolongation of the land subsumed under the superjacent waters'.[140] Agyebeng argues that the reason the territorial sea hasn't been treated as such is due to the modern view on territory and jurisdiction (which does not have the same need for strict nation borders), but that the increasing regulations and enforcement by coastal states due to various reasons is proof of this link.[141]

2.2.3 Sovereignty in UNCLOS

Looking at UNCLOS itself and the formulation of sovereignty over the territorial sea, article 2 says:

> Article 2
>
> *Legal status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil*
>
> 1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
>
> 2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
>
> 3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.[142]

As can be seen in paragraph 1, UNCLOS describes the territorial sea as a form of extension of land territory. It needs to be noticed that while Agyebeng and article 2 both use the word 'extension' when describing it, the term 'extension' does not carry the same exact meaning in UNCLOS. This is because Agyebang talks about the concept of sovereignty of land continuing as it hits the waterline but article 2 describes an extension of sovereignty, which does not carry the same broad implications. When it comes to paragraph 3, it is clear that while the article gives sovereignty to the coastal state, it puts several restrictions on it: Restriction in relation to other rules in UNCLOS, and restriction in relation to other rules in international law.

2.2.3.1 The obligations of seafaring vessels

Since the territorial sea is part of a state's territory, a ship which enters said territory logically submits to that state's jurisdiction. When it comes to legislative jurisdiction, it is without doubt

[138] Thomas Joseph Lawrence, *The Principles of International Law* (7th revised edition, MacMillan Publishing 1927) 50–51.
[139] Wong 353.
[140] Agyebeng 377.
[141] Ibid 377 – 378. The specifics of increased use and need of jurisdiction will be explored further in section 2.3.4, 'Security jurisdiction'.
[142] UNCLOS, article 2.

that as long as a law does not go against international law, a state is allowed to make that rule.[143] The state is also free to force its own nationals, civilian ships belonging to that state, and state vessels to follow those rules.[144] However, when trying to enforce those rules on a vessel belonging to another state the coastal state is severely limited in its enforcement jurisdiction. For while it may have rules that ships should follow a certain regime or abide certain rules, to enforce those rules, the state would have to interdict such a vessel.[145]

2.2.3.2 Civil and criminal limits

Both TSC and UNCLOS has puts limits on a state's ability to interdict commercial vessels both due to civil and criminal reasons.[146] When it comes to the criminal jurisdiction, UNCLOS article 27 says that a state should not intervene unless the criminal act done by an individual is related to the coastal state, disturbs the coastal state, the ship asks for assistance or if it is 'necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances'.[147] When it comes to civil jurisdiction in UNCLOS, it says the coastal state should not act due to civil proceedings against the ship or any civil matter against an individual on the ship.[148] Dixon describes both of these limits that a state is that while a state 'legally [is] entitled to exercise such jurisdiction (…) it should not do so for reasons of international comity'.[149] The wording used in both articles however, 'should not', does not actually express a rule that forbids it.[150] This is the result of an unwillingness of saying 'should not', but has by most states been interpreted as a general rule as forbidding it.[151]

2.2.4 Ship-jurisdiction

Jurisdiction over a ship is based on the idea of Flag-states. Unless in some way given enforcement jurisdiction over a ship, either through convention law, customary rules, or submitting to those rules by for example entering a port, the ship is under the exclusive enforcement jurisdiction of its flag state.[152] In turn, the flag-state has to follow a certain set of rules, and have to investigate the matter if needed, such as if a causality would happen onboard or at the request of another state.[153]

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[143] Yang 186 – 187.
[144] Rothwell, Stephens 77.
[145] Ibid 76.
[146] TSC, article 19, 20; UNCLOS, article 27, 28.
[147] UNCLOS, article 27.
[148] Ibid, article 28.
[149] Dixon 221.
[150] Douglas Guilfoyle, *Shipping interdiction and the law of the Sea* (Cambridge University Press 2011) 12. (Henceforth 'Guilfoyle').
[151] Guilfoyle 11 – 12.
[152] UNCLOS article 91, 92; Arron N Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States' (2016) Vol 31(3) The International Journal of Marine and Coastal Law 499, 501 – 505; Rothwell, Stephens 168 – 169; Yang 27 – 28.
[153] Yang 27; Rothwell, Stephens 169.

2.3 The right of innocent passage

While there might be some limits to a costal state's enforcement jurisdiction, what truly limits it is foreign ships right of innocent passage.[154]

2.3.1 Innocent passage in customary law

2.3.1.1 Origins

The right of innocent passage is part of the principle of the freedom of the seas, specifically the freedom of navigation.[155] The idea of innocent passage is that a foreign vessel should be able to use a state's sea territory as part of an 'innocent' journey.[156] The concept of innocent passage can be traced as far back as the Roman empire, however the idea of transferring this concept of innocent passage to the sea for foreign actors might not be as old as some might assume.[157] It wasn't until the 17th century with the arguments of Hugo Grotius, when this idea fully took root.[158] He argued that ownership of sea territory should not result in that territory no longer should be able to be traversed:

> It is also certain that he, who is in Possession of any Part of the Sea, cannot lawfully hinder Ships that are unarmed, and give no Room to apprehend Danger, from Sailing there: Since such a Passage, even through another's Country, cannot justly be hindered, tho' it be commonly less necessary, and more dangerous.[159]

Why should the area be prohibited to travel if the travel in a way that leaves no damages and is entirely inconsequential to the owner of said area?

2.3.1.2 In modern times

A modern version of innocent passage can perhaps first be seen in English law in the beginning of the 19th century. A notable case is The *Twee Gebroaders* 1801, where Lord Stowell stated that ships just passing through didn't do any damage, and a neutral state should be able to in most cases pass through without asking for permission.[160] The first real consideration however was in *Regina v Keyn* (1876), where the court deemed itself to not have jurisdiction over a foreign vessel due to the idea of innocent passage. While this lack off jurisdiction was protested in the English Parliament, it did also have some support.[161] After this, there came many attempts to fully codify innocent passage, with successful codifications in both the TSC and UNCLOS. [162]

2.3.2 Innocent passage in UNCLOS

Innocent passage is detailed in part II section 3 in UNCLOS and is covered by article 17 – 28. Article 17 states:

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[154] Dixon 221; Tanaka, 86; Rothwell, Stephens 78; Yang, 85; Guilfoyle 11.
[155] Tanaka 86.
[156] Ibid.
[157] D. P. O'Connell, *The International Law of the Sea* Vol 1 (I. A. Shearer ed, Clarendon Press Oxford 1982) 260 (Henceforth 'O'Connell').
[158] Ibid 260 – 263.
[159] Hugo Grotius, *The Right of War and Peace* vol 2 (Knud Haakonssen ed, from the edition by Jean Barbeyrac, with an introduction by Richard Tuck, Liberty Fund Indianapolis 2005) 466.
[160] O'Connell 263 – 264.
[161] Ibid 265.
[162] Tanaka 86 – 87.

Article 17

Right of innocent passage

> Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.[163]

Article 18 continues with a definition of passage, stating that the ship actually needs to have the intention of passing through and not to enter the coastal state's internal waters. In addition to that, the vessels speed has to also be acceptable. The passage do however include 'stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress'.[164] Next, article 19 defines the meaning of innocence:

Article 19

Meaning of innocent passage

> 1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.[165]

Article 19 then continues with a list of activities that is to be considered non-innocent, mentioning several illicit acts which does not relate to an innocent passage, such as sabotage, military actions, etc.[166] The list is however considered by most legal scholars to be non-exhaustive.[167] What is relevant to take note of in article 19, is that 19(2)a directly mentions the UN charter as part of the assessment, bringing additional treaty law into relevance.[168] Article 20 relates to underwater vessels, which are required to make their passage on the seas surface, or be considered non-innocent.[169] Article 21 is about laws and regulations that a coastal state may impose on the ship despite of innocent passage, with a list of different areas a state can institute laws and regulations in.[170] They need however to be in accordance to paragraph 21(2): 2. 'Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.'[171] Breaching article 21 does not mean that a ship no longer is to be considered innocent, in comparison to article 19.[172] Instead, one of article 21's functions are to further clarify the meaning of article 19(2). With regards to ship regulations, Yang comments that paragraph 2 in essence makes any law or regulation regarding this obsolete, as long as the ship

[163] UNCLOS, article 17.
[164] Ibid, article 18.
[165] Ibid, article 19.
[166] Ibid; Tanaka 87 – 88.
[167] Yang 167.
[168] UNCLOS article 19(2)a.
[169] Ibid, article 20; Tanaka 88.
[170] UNCLOS, article 21.
[171] Ibid, article 21(2).
[172] Yang 189.

follows state practice, which 'basically imply those established in the conventions of the IMO, notably SOLAS 1974 and STCW 1978'.[173]

Article 22 – 26 shall at the time not be commented on, since these are not in direct relation to making a ship non-innocent.[174] Article 27 and 28 has already been commented on.

2.3.3 Passage in international straits

The usage of an international strait is part of the freedom of navigation, and as commerce on the sea has grown, straits have become increasingly important.[175] The right of passage through straits between two high seas, and if vessels enjoy innocent passage in these straits, was answered in the *Corfu Channel case* (1949), a case which later codification of the right of transit passage heavily rely on.[176]

2.3.3.1 The *Corfu Channel Case*

The *Corfu Channel Case* resolved a conflict between The UK and Albania in 1946 and was decided in 1949 by the international court of justice (ICJ).[177] The ICJ concluded that there was a right of innocent passage in international straits, that this right was non-suspendable, and that it included warships.[178] This results in that the right of innocent passage in an international strait could be considered 'stronger' than the right of innocent passage in territorial waters.[179]

2.3.3.2 UNCLOS

The views expressed by the court in The *Corfu Channel Case* was adopted and codified in UNCLOS.[180] Transit passage is codified in Part 3 of UNCLOS, with the specifics in section 2.[181] Article 37 says:

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[173] Ibid 190.
[174] Ibid 191; UNCLOS article 24 – 26.
[175] Rothwell, Stephens 245.
[176] Ibid 246; Tanaka 97 – 98.
[177] 'The Corfu Channel Case' (United Kingdom of Great Britain and Northern Ireland V People's Republic of Albania) Merits, Judgement of 9th of April 1949, ICJ; Bujar Ahmedi, Shefik Shehu, 'Resolution Of International Conflicts Through The United Nations: The Corfu Channel Case' (2016) May edition, Vol 12(13) European Scientific Journal 105, 106 (Henceforth 'Ahmedi, Shefik') <https://eujournal.org/index.php/esj/issue/view/230> accessed 1 December 2019; D. H. N. Johnson, 'Military and Paramilitary Activities in and against Nicaragua' (1985) 10 Sydney Law Review 485, 498. The circumstances surrounding the Corfu Channel Case is quite complicated, and with such an important role it is of some interest to explain it. It was not just one incident, but several, were the British tested and, according to Albania, tried to provoke Albania. One of these 'provocations' resulted in two British ships accidently going into sea mines, and 44 people were killed. It was unclear whether Albania was responsible for these mines (they claimed to neither possess the right tools for minelaying nor the right tools for removal of mines). The British then went and cleared the area of mines. The ICJ was asked two questions: (1) Was Albania responsible for the mines, and (2) did the British navy violate Albanian territory? ICJ answered yes on the first question, since Albania had knowledge of them. On the second question, they answered that warships had the right to use the strait, due to the right of innocent passage and the importance of straits, and the British did therefore not violate Albanian territory when being there. However, by removing the mines without asking Albania, that was in fact a violation, since that was not part of the innocent passage (for further details, see Ahmedi, Shefik 106 -116).
[178] Tanaka 98.
[179] Ibid.
[180] See for example Tanaka 97 – 98.
[181] UNCLOS, PART III.

Article 37

Scope of this section

> This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

As can be seen, and also pointed out by Tanaka, is that article 37 does not only cover high seas to high seas, as The *Corfu Channel case* did, but also between EEZ's.[182] When it comes to the difference between innocent passage in the territorial sea, and innocent passage in international straits, Tanaka lists four major differences. Firstly, that all ships have a right to passage, including warships. Secondly, that it includes aircrafts. Thirdly, that it can only stop due to 'force majeure and distress'[183] in accordance to article 39, and lastly that 'There shall be no suspension of transit passage'.[184] The importance of transit passage and the right for other states to enjoy transit passage goes so far as to potentially hinder the sovereign state from enjoying its rights to construct bridges that could possibly hinder ships.[185] This problem was presented in the *Great belt case* (1991), where the question wasn't whether all ships were blocked from passage, only if some, very large ships would be.[186]

2.3.3.3 Passage in interoceanic canals

It has to be mentioned that interoceanic canals are not part of the right of innocent passage, since it is not a part of the law of the sea. These canals, such as the Suez Canal which is relevant to this case, is man-made and part of the state's land territory.[187]

2.3.4 Security jurisdiction

2.3.4.1 UNCLOS and the limits of innocent passage

2.3.4.1.1 The consequences of 9/11

The terror-attacks on the 11th of September 2001 had a massive impact on the world. It changed the international political landscape, and started what is generally known as 'the war on terror'.[188] It is been theorized that many deeds that has been motivated by the events of 9/11, would not have been considered 'lawful' would the incident never have happened.[189] The development in international law due to the events of 9/11 has not escaped maritime law, and it is clear that it has had impact both on the approach of innocent passage and sea jurisdiction in general.[190]

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[182] Tanaka 98.
[183] UNCLOS, article 39 paragraph 1(c).
[184] Ibid, article 44; Tanaka 104 - 105.
[185] Tanaka 110.
[186] Ibid. The case ended in a settlement and was thus never decided upon (Tanaka 110;
[187] Luke T. Lee, 'The Law of the Sea Convention and Third States' (1983) Vol 77(3) American Journal of International Law 541, 546.
[188] Javaid Rehman, Saptarshi Ghosh, 'International Law, US Foreign Policy and Post-9/11 Islamic Fundamentalism: The Legal Status of the War on Terror' (2008) Vol 77 Nordic Journal of International Law 87, 87 - 88.
[189] John Cerone, 'The Legality of the Killing of Osama Bin Laden' (2013) Vol 107 American Society of International Law Proceedings 47, 47 - 49.
[190] See for example Rothwell, Stephens 76; Stuart Kaye 348 - 351.

2.3.4.1.2 Increasing need for security jurisdiction

Innocent passage in article 19(2) is as mentioned, a non-exhaustive list, detailing the right of innocent passage as long as it is not 'prejudicial to the peace, good order or security of the coastal State'.[191] Among other things, Rothwell and Stephens connects the terrorist attack in 2001 with an increase of interdiction rights in the territorial sea, with states requiring further warning/notification before entering their territorial sea.[192] Such security concerns can be seen as part of article 19 in UNCLOS. Even though such security might seem as a rather strict requirement, Professor Stuart Kaye explains that the security referred to in article 19 is a term that is much more extensive than it may suggest. Not only does it refer to some sort of military security, but can include other threats, such as environmental threat, or transmissions from the sea that seeks to undermine the state.[193] The environmental threat is especially noteworthy, and is a concern that has been growing among a large number of coastal states, and that has in turn had an impact on those state's requirements of passing vessels.[194]

2.3.4.1.3 The potential erosion of the freedom of navigation

While this might be a natural development due to environmental issues and the like, Kaye is concerned over recent development such as with the Proliferation Security Initiative (PSI) as a main concern.[195] The PSI, endorsed by a sizable amount of states, is a danger to the freedom of navigation according to Kaye even though it is not *per se* a binding treaty.[196]

> While such a proportion would not reach the level of support indicated by the International Court of Justice in the *North Sea Continental Shelf Cases* to indicate the presence of customary international law, it still represents a sizeable body which does not accept that the LOSC does not restrict freedom of navigation for security reasons, beyond the limited exception in Article 25(3) a concern over the creeping jurisdiction in innocent passage and the freedom of navigation in general.[197]

As such, Kaye is worried that the same 'creeping jurisdiction' that can be seen under the 20th century where state's took control of more and more sea territory, will endanger the principles of freedom of navigation.[198]

[191] UNCLOS, article 19; Yang 175.
[192] Rothwell, Stephens 76.
[193] Kaye 349.
[194] Rothwell, Stephens 76 - 77.
[195] Kaye 356 - 357, 363 - 364. The Proliferation Security Initiative started as a 'cooperative venture' but has evolved into a form of non-binding agreement between states to hinder 'the proliferation of Weapons of Mass destruction (WMD) by sea, land, and air' (Kaye 556 – 357). The PSI has a number of different interdiction principles that should be followed, to limit the transportation of WMD's ('Proliferation Security Initiative: Statement of Interdiction Principles' (*Proliferation Security Initiative,* 14 May 2018) <https://www.psi-online.info/psi-info-en/botschaft/-/2077920> accessed 1 December 2019).
[196] Kaye 357, 363.
[197] Ibid 363. It shall be commented on that since 2006 the PSI has been endorsed by an increased number of states, see for reference: 'Endorsing State Lists' (*Proliferation Security Initiative*, 2 April 2019) <https://www.psi-online.info/psi-info-en/botschaft/-/2205942> accessed 15 December 2019.
[198] Kaye 347, 364.

2.4 Summary

It is important to not confuse sovereignty and jurisdiction with each other, as the first is what creates the other. The modern interpretation of jurisdiction is based on *the Lotus Case* (1927), which makes a clear distinction between what is called legislative jurisdiction and enforcement jurisdiction. Legislative jurisdiction can be applied on everything and everywhere, but it is enforcement jurisdiction that stops a state from applying said legislative powers. When it comes to the jurisdiction in the territorial sea, it is mainly regulated by UNCLOS, which is to be recognized as customary law. It can be seen that even though jurisdiction in land and water is similar, they are of a different nature based on the idea of land and sea. Where it on land has no restrictions, jurisdiction on the sea carries with it certain limitations. The reason for this is because sea jurisdiction exists between the two opposite principles of freedom and sovereignty, which both vie for more power over the other. The central figure of this strife in the territorial sea is the right of innocent passage, a right that lets ships that are harmless to the coastal state pass through. Due to recent developments however, such as the events of 9/11 and increasing environmental concerns to name a few, the principle of the freedom of the seas have been slowly eroding in favour of the principle of sovereignty.

3 Economic sanctions and interdiction

This chapter deals with two concepts: Economic sanctions, and the legal use of force in a maritime setting. It is important to make it clear for an analysis of the Grace 1 incident the nature of the tool that Gibraltar used to detain the vessel, as well as its legality and acceptance of it in international law. It is also important to put this tool into the context of the use of force, a use of force aimed at trying to enforce these economic sanctions. The first two sections of the chapter therefore deals with economic sanctions as a tool, as well as its use and legality in accordance with international law. The third and largest section examines the nature of the action taken on the Grace 1, to then move on to the subject of force itself, and legal ways to use it.

3.1 Economic sanctions as a tool

3.1.1 Definition of an economic sanction

What must first be commented on is that ‘sanction’ itself is a disputed word. An example of an action may often be described as a sanction in accordance to the UN Charter, but the UN Charter does not in fact even contain the word ‘sanction’. Instead, the word that is used to describe it is ‘measures’.[199] The EU does also not use the word in a strict sense, and instead describes it as ‘restrictive measures’.[200] Regardless, the word that will be used in this thesis is ‘sanction’, since ‘measure’ can indicate other actions that is not directly related to the discussion. The word ‘measure’ is by nature, vague. While ‘measure’ could very well be used

[199] Natalino Ronzitti, ‘Sanctions as Instrument of Coercive Diplomacy: An International Law Perspective’ in Natalino Ronzitti (ed) *Coercive Diplomacy, sanctions and international law* (Brill Nijhoff 2016) 9 (Henceforth ‘Ronzitti’) ; UN Charter, article 41.
[200] Ronzitti 11.

as a synonym, it does risk indicate a broader spectrum of actions than it is meant to. When it comes to the term 'economic sanction', it is in actuality a generic term for three different kinds of actions that one a state can take towards another state, legal body or individual.[201] These three actions are (1) limiting exports, (2) restricting imports and (3) disrupting finance. These different actions are often combined.[202] An economic sanction can be done by one state, or together by several states. Sanction actions can be done unilateral, as in an action only taken by one state, bilateral, an action taken by several states, or multilateral, a multitude of states.[203] EU sanctions can therefore be considered multilateral, due to the large number of states involved. Sanctions based on directions from the UN Security Council (SC) are also multilateral, but on a different level then EU sanctions.[204] This multilateral nature of the application is not to be confused with the sanctions in practice; two states deciding not to trade with a third is certainly an agreement between the two and therefore bilateral, but the third party has nothing to do with it.[205] If a sanction can be regarded as more than an internal action, it is by definition unilateral unless the entity is part of it or the action is taken via the SC, which then becomes multilateral in both application and practice.[206]

3.1.2 The purpose of economic sanctions

Economic sanctions are a tool that is deployed for a variety of different reasons, sometimes as a form of punishment, other times as a tool for foreign influence, or a way to make certain actions by a state so expensive that it would be discouraged from taking that action.[207] It can also be used as an offensive tool, such as the US v Cuba-sanctions in 1960, where the goal was to actually destabilize the government.[208] Economic sanctions are often described as 'the most obvious of the alternatives to military intervention'.[209] The use of economic sanctions can be traced back to Ancient Greece, 'including the use of blockades to cut off trade and supplies to an adversary through the centuries'.[210]

3.1.3 Economic disruption

As explained, there are three different kinds of actions. Restrictions in import and exports could be named as pure trade restrictions and are fairly easy to comprehend and can include

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[201] Gary Clyde Hufbauer, Jeffrey J. Schott, Kimberley Ann Elliott, *Economic Sanctions Reconsidered*, Vol 1 (2nd edn, Institute for International Economics, 1990) 36 (Henceforth Hufbauer, Schott, Elliot); Terrance Guay, 'Economic Sanctions' in Robert Kolb (ed) *The SAGE encyclopedia of business ethics and society* Vol 1 (SAGE Publications, 2018) 1026 – 1028 (Henceforth 'Guay').

[202] Hufbauer Schott, Elliot 36.

[203] James Pattison, *The Alternatives to War: From Sanctions to Nonviolence* (Oxford University Press 2018) 41 (Henceforth 'Pattison').

[204] Ibid.

[205] Dixon 28.

[206] As in a one-sided action, see for example Albert S. Hornby, 'Unilateral', *Oxford Advanced Learner's Dictionary* (8th edn, Joanna Turnbull (ed) and others, Oxford University Press, 2010); See also Dixon 7 – 8 on the relation between the SC's decisions and other states. It could be argued that EU's sanctions are unilateral in both application and practice, since the EU is a single (though large) organization, but such a discussion is irrelevant for the fact of the matter that an EU sanction against a state not part of the EU is an unilateral sanction in practice.

[207] Guay.

[208] Hufbauer, Schott, Elliot 38.

[209] Pattison 39.

[210] Guay, section 2.

forbidding certain goods or material to be traded.[211] This means that a state can be forbidden to trade with that country, but it does not hinder trade with another country, something that also often is the pitfall of unilateral sanctions by minor powers.[212] Disrupting finance however can include the freezing of certain bank-accounts or other assets abroad, or even withhold aid.[213]

3.2 Economic sanctions in the modern world

3.2.1 The use of sanctions

Today, the use of economic sanctions is standard to foreign policy and 'economic warfare'[214], as Matthew Happold describes some of these measures, both in a more multilateral context as well as unilateral.[215] Its popularity is easy to understand: When a state finds themselves in a 'international crisis'[216] they usually only have three options available. Either they take military action, take economic action, or they do not respond at all. When faced with only those three possibilities it is understandable why economic sanctions are chosen. As the established tool for taking economic action, to take an action is seen as better than not taking one at all, and it does not carry the same risks as a military action would.[217] It is however not an option that carries no risk, despite what it may suggest Economic sanctions can often have negative effects on the state that imposes them. Lawmakers also seem to tend to overvalue how effective a specific sanction-regime will be.[218] The two entities in the international community today that relies the most on economic sanctions are the UN and the EU.[219]

3.2.2 The legality of economic sanctions

3.2.2.1 The legality based on the UN Charter

When discussing the legality of sanctions, it is of importance to divide sanctions into two types of sanctions: UN sanctions, and non-UN sanctions. UN sanctions are based on the decisions of the SC and is backed up by the UN Charter, article 25, 39 and 41.[220] The UN Charter gives these sanctions legitimacy and the Council can do so by both recommendation and as a decision, a decision that is binding to the member states in accordance to article 25.[221] This is seen as one of the main ways of penalizing a behaviour by a state that has not acted in accordance to international law, even though it is seldom used, a major factor of this being the veto power of the five permanent members.[222]

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[211] Ibid.
[212] Ibid.
[213] Ibid; Hufbauer, Schott, Elliot, 36.
[214] Happold 1.
[215] Ibid.
[216] Robin Renwick, *Economic Sanctions* (Hamilton Printing Company, 1981) 1 (Henceforth 'Renwick').
[217] Ibid.
[218] Bryan Early, 'Confronting the Implementation and Enforcement Challenges Involved in Imposing Economic Sanctions' in Natalino Ronzitti (ed) *Coercive Diplomacy, sanctions and international law* (Brill Nijhoff 2016) 44 (Henceforth 'Early').
[219] Ibid.
[220] Michael Bothe, 'Compatibility and Legitimacy of Sanctions Regimes' in Natalino Ronzitti (ed) *Coercive Diplomacy, sanctions and international law* (Brill Nijhoff 2016) 34.
[221] Ronzitti 31; UN Charter article 25, 41.
[222] Dixon 8.

3.2.2.2 The legality of sanctions outside the scope of the UN

3.2.2.2.1 The Lotus principle and coercion

Daniel H. Joyner describes in his text about the legal limits of sanctions, as 'a complex one'.[223] On the basis of the Lotus principle, a state can choose whoever it wants, or do not want to trade with, and it has no obligation to let its nationals trade with any other state they want to. The question of legality does therefore not arise in the context of the decision taken by the state, but rather the intention of such an action. If an action taken is meant as a form of coercion towards the other state, it could be argued that that action is unlawful.[224] This is derived from principles firmly established in customary law, which makes it unlawful for another state to try to influence another state's sovereignty, the principle of non-intervention. This principle can for example be found in the United Nations General Assembly resolution 3281.[225] Article 32 specifically states:

Article 32

> No state may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.[226]

Joyner and other scholars argue that a breach of such a general and established principle in international law would make the principles found in what is called 'the law of armed conflict' (*jus in bello*) applicable. The principles of *jus in bello* puts certain restrictions on actions in an armed conflict, and a breach of it would automatically make that action unlawful.[227]

3.2.2.2.2 Economic warfare

The reasons for Joyner's insistence on applicability of these principles on a measure that is not a direct armed conflict is because of the idea of economic warfare. Attempts of coercion through economic means cannot reach the level of an armed attack since it technically isn't a use of force, but it can potentially be as destructive as a military attack (especially since it is usually larger states that implement sanctions on smaller states).[228] Joyner derives the definition of 'economic warfare' from the comments of Lowe and Antonios Tzanakopoulos on the subject matter, who made their own definition of 'economic warfare' due to the lack of a real one established in international law.[229] Lowe and Tzanakopoulos remarks that it is to be remembered that economic warfare is often as large a part of a war as 'normal' warfare, and has existed as long as the concept of war itself has existed.[230] Economic warfare can in turn be

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[223] Daniel Joyner, 'International Legal Limits on the Ability of States to Lawfully Impose International Economic/Financial Sanctions' in Natalino Ronzitti (ed) *Coercive Diplomacy, sanctions and international law* (Brill Nijhoff 2016) 193 (Henceforth Joyner).
[224] Joyner 193 - 194.
[225] Ibid 197.
[226] United Nations General Assembly resolution 3281, article 32.
[227] Joyner 195.
[228] Ronzitti 14; Joyner 194 - 195.
[229] Joyner 194; Vaughan Lowe and Antonios Tzanakopoulos, 'Economic Warfare' in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, article updated March 2013) section 1 (Henceforth 'Lowe, Tzanakopoulos') <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e292> accessed 14 December 2019.
[230] Lowe, Tzanakopoulos, section 3 - 6.

split into two: (1) Economic warfare via the use of force such as blockades, and (2) non-use of force such as trade restrictions.[231] What is truly of interest though is economic warfare during peacetime. Lowe and Tzanakopoulos states that, due to development in the area of conflict and the effects of the UN Charter, 'economic warfare, in the form of economic coercion, is also [now] an alternative to—and not simply a complement of—armed conflict'.[232] Economic warfare (during peacetime)[233] can be defined as unilateral economic actions to 'bring about a change in the conduct of the target'.[234] This includes all kinds of action, even such things as withdrawing or limiting economic aid that was previously given, as long as the intent was to coerce the target into changing. This has been established in the *Nicaragua case* (1986).[235] For the intent of change to be defined as economic warfare, there must also exist an actual pressure or danger of pressure on the target state, since it otherwise would be comparable to armed warfare.[236]

3.2.2.2.3 Economic warfare and *jus in bello*

Joyner asserts that the use of economic sanctions by larger states against smaller states has become 'so commonplace'[237] that its destructive power and the danger of allowing this economic warfare has resulted in many legal scholars arguing that sanctions even mandated by the SC in peacetime should be included in the principles of *jus in bello*.[238] Joyner therefore argues that economic sanctions that are coercive in nature[239] (even those endorsed by the SC) needs to follow the principles of *jus in bello*, those principles being the principles of necessity and proportionality, discrimination, and review.[240] While this reasoning could be criticized, Joyner states that the application of these principles is firmly established in legal doctrine and customary law. Joyner derives this from several sources, most notable the United Nations General Assembly resolution 3281, the conclusions made by Lowe and Tzanakopoulos, and the analysis of W. Michael Reisman in his text: *The Applicability of International Law Standards to United Nations Economic Sanctions Programmes*.[241] In this text Reisman analyses the question if economic sanctions are to be included in the principles of armed conflict, and concludes that 'Future non-retorsive uses of the economic strategy, whether by the international community or on a unilateral basis, should be examined prospectively in terms of the requirements of the law of armed conflict.'[242] His solution is that any future sanction

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[231] Ibid, section 8, 17.
[232] Ibid, section 28.
[233] 'Economic warfare' will henceforth refer specifically to economic warfare during peacetime unless specified otherwise.
[234] Lowe, Tzanakopoulos, section 36.
[235] Ibid, section 36 – 37; 'The Nicaragua Case' (Nicaragua v. US), Merits, Judgment of 27 June 1986, ICJ
[236] Lowe, Tzanakopoulos, section 28, 36; Joyner 194.
[237] Joyner 195.
[238] Joyner 195.
[239] Joyner does not explicitly endorse the definition set out by Lowe and Tzanakopoulos, but 'economic warfare' as defined by Lowe and Tzanakopoulos is essentially what Joyner is discussing. The problem of not using by Lowe and Tzanakopoulos definition in relation to what can be defined as coercive economic sanctions will be dealt with in section 5.2.2.1.2.3, 'The question of intent and effect'.
[240] Ibid 195 – 196.
[241] Ibid 195 – 197; Lowe, Tzanakopoulos, section 43 – 44.
[242] W. Michael Reisman and Douglas Stevick, 'The Applicability of International Law Standards to United Nations Economic Sanctions Programmes' (1998) Vol 9(1) European Journal of International Law 86, 140. (Henceforth 'Reisman, Stevick')

regime must be designed much more carefully and specifically as to not be under these requirements.[243] Joyner therefore in turn concludes that the legal use of sanctions is limited, and that 'It is almost certain that no application of unilateral counterproliferation sanctions to date'[244] would be considered legal in consideration of these rules.[245]

3.2.2.3 Human rights violation

Due to the nature of economic sanctions, the application of them outside an active conflict risks constitute one or several human rights violations, such as 'the rights to life; health; an adequate standard of living (…); and freedom from hunger'.[246] Since UN sanctions are obliged to still follow customary international law in accordance to article 1 in the UN Charter, even sanctions that are done at the direction of the SC is of risk of being a serious human rights violation.[247]

3.2.3 Critique against economic sanctions as a whole

While this thesis mainly deals with the legality and enforcement of sanctions rather than the sanctions themselves, economic sanctions as a tool are so widely criticized, that it needs to be mentioned. It is a tool that risks being either ineffective, or too effective, with the second option resulting in damage to an innocent population.[248] Often the target state just finds another state do trade with.[249] Sanctions have historically at times been effective, but not as a tool for some sort of 'economic warfare', but to pressure countries that the state already have a good relation with, such as close trade-partners or allies.[250] Its potential destructive effects can, and have resulted in major humanitarian crises. A modern notable example of this is what Simmons describes as the 'Iraqi apocalypse', when the USA was the state mainly responsible for designing and enacting UN decided sanctions on Iraq after Iraq invaded Kuwait 1990. The sanctions ultimately ended up being one of the main factors of the estimated death of 500 000 Iraqi children.[251] Finally, notwithstanding the risk of being illegal under international law, the use of them paints a dangerous narrative that an economic tool by itself would be an effective political catalyst.[252]

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[243] Reisman, Stevick 140 – 141.
[244] Joyner 206.
[245] Ibid.
[246] Ibid 202.
[247] Ibid 203 – 204.
[248] Geoff Simons, *Imposing economic sanctions Legal Remedy or Genocidal Tool?* (Pluto Press, 1999) 39 – 40 (Henceforth 'Simons').
[249] Hufbauer, Schott, Elliot 12.
[250] Hufbauer, Schott, Elliot 92 - 93, 99. To judge if a sanction has been effective is hard to do objectively, however according to the study made by Hufbauer, Schott and Elliot, the sanctions they have studied have been effective 34 % of the time. This result seems to be generally considered a poor outcome (Early 46, Hufbauer, Schott, Elliot 93).
[251] Simmons 169 – 180.
[252] Renwick 3.

3.3 Maritime actions to enforce economic sanctions

3.3.1 Blockade and interdiction

There are generally two accepted ways to physically hinder vessels to transport its goods to a target of a sanction. The first one is via blockade, and the other is via interdiction.[253]

3.3.1.1 Blockade and 'the law of blockade'

3.3.1.1.1 Definition of blockade

The term 'blockade' is one that has evolved through time. As already described, the use of a blockade to enforce some sort of economic sanction has been recorded as far back as ancient Greece.[254] The more modern definition stems from the Declaration of Paris (1856) and the Declaration of London (1909), which lays out the basic accepted concepts of a blockade.[255] The 'classic' naval blockade, as Fielding describes it, is referring to a specific coastline being physically blocked off.[256]

3.3.1.1.2 Long distance blockade

Due to development of technology the existence of the so called 'long distance blockade'[257] emerged during the first and second world war. The UK set up such a blockade against Germany in both wars, by having vessels patrol large swathes of sea.[258] Such a blockade, since it does not follow the 'law of blockade', is considered unlawful.[259] It can though be argued if a long distance blockade even can be categorized as a blockade. Heinegg specifies in his explanation of a blockade that it 'by its very nature'[260] has to be blocking off the affected states coastline in some way; if it is something done for example in another state's territorial sea, it is not to be considered a blockade, simply because of the physical nature of a blockade.[261]

3.3.1.1.3 Blockade v interdiction

It is important to differentiate a blockade from a interdiction, and while there are several reasons, the most obvious one is that a blockade done without the support of the UN, is specifically mentioned in the United Nations General Assembly Resolution 3314 (XXIX), article 3(c) (often referred to as the definition of aggression resolution) as an act of aggression.[262]An interdiction, while it (obviously) still can be deemed unlawful in the context

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[253] Lois E. Fielding, 'Maritime Interception: Counterpiece of Economic sanction in the New world order' (1993) Vol 53(4) Louisiana Law Review 1191, 1204 (Henceforth 'Fielding') ; Heintschel von Heinegg, 'Blockades and Interdictions' in Marc Weller's (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press , 2015) 927, 934.

[254] Guay, section 2.

[255] Fielding 1195 – 1196. It is based on four rules:
1. It 'must be established by the government of the belligerent nation', together with a declaration which have the minimum requirement of 'the date the blockade is to begin, its geographical limits, and the grace period granted neutral vessels and aircraft to leave the area'. 2. The state must 'notify all affected nations of its imposition.' 3. The blockade 'must be effective.' 4. It 'must not bar access to or departure from neutral ports and coasts.' (Fielding 1196).

[256] See for example, Fielding 1207.

[257] Ibid 1206.

[258] Ibid 1205 – 1206.

[259] Ibid 1205 – 1207.

[260] Heinegg 927.

[261] As can be seen, there is some discussion on what exactly constitutes a blockade, particularly because of the technological advancements made in the 20th century and leading into the 21st century, but that is outside the scope of this discussion.

[262] United Nations General Assembly Resolution 3314, XXIX, article 3(c); Fielding 1198 – 1199.

of international law, does not risk falling under that resolution. Such an act would if not supported rather be recognized as an unlawful intervention, not an act of aggression.[263] The term 'blockade', or 'naval blockade', are also words that carries a heavier meaning to the public. It was theorized that the USA in *the North Vietnamese mining interdiction* (1972) avoided using any terminology that would even imply that the operation actually was a blockade, since that could have resulted in a more negative view of the operation.[264]

3.3.1.2 Interdiction

3.3.1.2.1 Definition of interdiction

While presented as one thing, an interdiction operation is referring to a multitude of different things. The legal action stays the same, but the way to do such an action can be wildly different.[265] It could be 'stopping, boarding, inspecting, searching, and potentially seizing the cargo or the vessel'.[266] It could also be setting up zones that a vessel is forbidden to enter, making a plane land at an airport for inspection, or regulate these vessels.[267] What those different methods share are 'that they have an impact on the freedom of navigation and/or overflight enjoyed by foreign aircraft and vessels'.[268] Heinegg describes the different methods as having different 'legal bases', and that all of these 'constitutes an infringement of the sovereignty of the flag state or the state of registry'.[269] The interdiction is a legal action, but the legality depends not on the interdiction. As a legal action that includes force, it is the use of force that must be legal.[270]

3.3.1.2.2 Legal basis of interdiction

3.3.1.2.2.1 UNCLOS

As already mentioned can article 27 in UNCLOS give a state criminal enforcement jurisdiction on foreign vessels traveling in the territorial sea. Article 27, together with article 25 gives can therefore be used to interdict the vessel.[271] If the crime is against the state's own domestic law however, it can only interdict it in the territorial sea if the vessel was coming from the state's internal waters, after having stayed in a coastal port for example. If the vessel has breached its

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[263] Fielding 1199.
[264] Bruce A. Clark, 'Recent Evolutionary Trends concerning Naval Interdiction of Seaborne Commerce as a Viable Sanctioning Device' (1973) Vol 27 The Judge Advocate General's Journal 160, 167 – 168. Clark derived this from the comments of Professor John Norton Moore and Lawrence W. Martin.
[265] Heinegg 934 – 935.
[266] Ibid 935 – 936.
[267] Ibid. The term 'interdiction' is not one that is used uniform across legal scholars, since 'interdiction' can refer to both the act of stopping/hindering something, as well as its more legal definition, to 'interdict' something. Even Fielding's text uses the term 'interdiction' as both a physical act (as in using interdiction instead of interception, interception being the act she argues for, see Fielding 1999), and as a description of the legal act in which a vessels cargo is confiscated due to prohibition of contraband (Fielding 1204). This has resulted in that any references to interdiction regarding Fielding's text has to be understood in this context, since Fielding does not use the term in the exact same way as it is used in this thesis. This does not necessarily mean that Fielding uses the term wrong, rather what it seems to indicate is that the terminology surrounding this subject is fractured. Thus, when using the term 'interdiction' in this thesis, it refers to its legal meaning as described by Heinegg (as seen above), even though the term technically also could be used to describe something else.
[268] Heinegg 936 - 938.
[269] Heinegg 936 – 938.
[270] Ibid.
[271] Ibid 936; UNCLOS, article 25, 27.

flag-state's regulation, a flag-state can allow a ship to be interdicted (due to their right of enforcement jurisdiction on the ship).[272] The only way to then enforce criminal jurisdiction is if the passage no longer is innocent in accordance to article 19.[273] On the high seas, interdiction is only available via article 110, if a ship is engaged in piracy, slave trade, unauthorized broadcasting in breach of article 109, the ship is missing nationality, or the same nationality as the state's (war)ship.[274] Safety zones in accordance to article 60(4) may also as a reason for limited interdiction, to protect the artificial construction.[275] Lastly, under article 98 a state can potentially have the right to stop a ship as to not enter a zone where a rescue operation is ongoing, for the safety of the one's in need.[276]

3.3.1.2.2.2 Treaties with flag state such as the SUA convention

A flag state can via a treaty allow for interdiction. Such a treaty is, as a notable example, the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention).[277] The SUA Convention gives the right for interdiction on the high seas, if the flag state is part of the convention based on article 3 of the convention.[278] Article 3 lists several different actions that are done by a person 'unlawfully an intentionally'[279], and which all are some form of malicious violence, damage or sabotage.[280] Both Iran and the UK are parties to the SUA convention, but due to its nature it is not applicable in the Grace 1 incident.[281]

3.3.1.2.2.3 Master's consent

There is some disagreement whether the master's consent is a legal basis for interdiction.[282] States such as the USA has interpreted it as being able to visit the ship and then afterwards ask the flag state if it has jurisdiction to enforce.[283] However, if a state for example boards a ship due to its interpretation of the master's consent as a valid legal base of interdiction, since the master gives approval, the question then becomes if the master's consent is to be considered as an exception to flag-state jurisdiction. Heinegg, citing David G. Wilson, says that 'Although the "voluntary consent of the master permits the boarding,…it does not allow the assertion of law enforcement authority. A consensual boarding is not, therefore, an exercise of maritime law enforcement jurisdiction *per se*."'[284] Logically with that approach, the master also has the right to withdraw his consent. Heinegg's opinion is therefore consistent with the USA's view on the matter, with boarding due to master's consent being a separate action from enforcement

[272] Section 2.2.4, 'Ship-jurisdiction', as well as UNCLOS article 27 (1)(c) and article 217.
[273] Heinegg 937; UNCLOS, article 19, 25, 27.
[274] Guilfoyle, 23 – 24; UNCLOS, article 109 – 110.
[275] Heinegg 938.
[276] Ibid 937 - 938 And UNCLOS, article 91.
[277] Heinegg 938.
[278] Ibid 938 - 939.
[279] SUA Convention, article 3.
[280] Ibid.
[281] 'Status of IMO treaties' (*IMO*, 25 November 2019) 438 – 439. Found at: <http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202019.pdf > accessed 14 December 2019.
[282] Heinegg 941 – 942.
[283] Guilfoyle 188.
[284] Heinegg 942.

of such a ship. The master's consent is only a tool for information if consent for enforcement should be requested.[285]

3.3.1.2.2.4 Self-defence and countermeasures

Heinegg mentions two additional 'bases' for interdiction: Collective- and individual self-defence, and countermeasures following resolutions enacted by the SC. In regard to self-defence, Heinegg comments that the legal ground for interdiction based on self-defence is 'unclear'[286], other than in the risk of an attack on the state, which would be the obvious grounds for self-defence.[287] The right of self-defence is laid out in the UN charter, article 51.[288] When it comes to countermeasures, Heinegg expresses that there is some right to use countermeasures based on the decisions of the UN, but does not elaborate.[289] Both are something that has to be examined further.

3.3.2 The UN and the use of force

3.3.2.1 The UN Charter

The UN as an organization is a complicated one. It is essentially a peace project that has both earned recognition as well as ridicule among its own member states.[290] Albeit the effectiveness of the organization itself can be questioned, the status of the UN charter as recognized universal international law cannot.[291] The UN charter, written after World War II, is heavily influenced by the war and is thus the basis of the modern interpretation of the *jus ad bellum.*[292] In the context of the legality surrounding the Grace 1 incident, it is especially the rules of use of force that is of interest, as well as the charters connection with innocent passage, as is listed in article 19(2)a of UNCLOS.

3.3.2.2 Use of force in accordance to the UN Charter

It must be recognized that to stop a vessel that has no intention of stopping, some kind of force is needed. The UN Charter, article 2(4) is of special interest: 'All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'[293] Professor Nico Schrijver describes this article as a general ban on the use of force

[285] Ibid.
[286] Ibid.
[287] Ibid.
[288] UN Charter, article 51.
[289] Heinegg 944 - 945.
[290] Simon Chesterman, Ian Johnstone, David M. Malone, 'The UN Charter', in *Law and Practice of the United Nations* (Oxford University Press, 2016) 3 – 4 (Henceforth 'Chesterman, Johnstone, Malone') ; Stephen Ryan uses in his book *The united Nations and International Politics* (ST. Martins Press 2000) 87, a vivid description from David Halberstam's *The Best and the Brightest* (1992) to show how little respect US president Lyndon Johnson and his allies had for the UN, describing how Johnson made his chiefs laugh by ridiculing ADA (Americans for Democratic action), a liberal civil rights organizations, for asking why the US hadn't asked the UN for help with the Vietnam conflict.
[291] Geoffrey S. Corn, 'The *Jus ad Bellum*' in Geoffrey S. Corn, Rachel E. VanLandingham and Shane R. Reeves (eds) *U.S. Military Operations: Law, Policy, and Practice* (Oxford University Press 2015) 92 – 93 (Henceforth 'Corn') ; Chesterman, Johnstone, Malone 3 – 4; Dixon 324 – 325.
[292] Corn 93 – 94. The rules of 'just' war.
[293] UN Charter, article 2(4).

in international relations, with very specific exceptions to it.[294] The exceptions to the ban on the use of force can be divided into 3 categories: (1) charter exceptions, (2) implicit charter exceptions and (3) customary exceptions.[295]

3.3.2.3 Charter exceptions

The first one of the charter exceptions are 'measures against former enemy states from the Second World War', based on article 53(1), 77 and 107. This exception has (for obvious reasons) become obsolete.[296] The second one is based on article 24, which give power to the SC, and can via article 39 or 42 authorize a use of force.[297] Article 39 states:

> Article 39
>
> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.[298]

This gives the SC the power to decide that the use of force is allowed for its member states.[299] The third and last exception is article 51, also known as the right of self-defence.[300] This gives the states the right to both individual and collective self-defence.[301]

3.3.2.4 Implicit charter exceptions

There are two implicit charter exceptions. The first one is the 'Uniting for peace' resolution, United Nations General Assembly Resolution 377. This gives the power for the UN General Assembly to make the same recommendation as the SC in article 39, should the council fail in its objective.[302] The second exception is based on the United Nations General Assembly Resolution 3070 and is, as Schrijver explains it, 'the right of National Liberation Movements to employ all necessary means and seek international assistance in their legitimate struggle against colonialism, racist regimes, or alien occupation'.[303] The potential of this exception is unclear, and the resolution is not regarded as having any real impact at this point of time.[304]

3.3.2.5 Customary exceptions

Schrijver mentions two exceptions based on customary law, both based on the protection of life, but the first regarding a state's own nationals, and the second, in protection of non-nationals. A state has the right to use military force to rescue their own nationals from life-threatening situations, such as hostage situations, or nationals stuck in an armed conflict in

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[294] Nico Schrijver, 'The Ban on the Use of Force in the UN Charter' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law* (Oxford university press 2015) 465 – 470 (Henceforth 'Schrijver').
[295] Ibid 472 – 476.
[296] Ibid 473.
[297] Ibid; UN Charter, article 24, 39, 42.
[298] UN charter, article 39.
[299] Schrijver 473.
[300] Ibid; Fielding 1198.
[301] Schrijver 473; UN charter, article 51.
[302] Schrijver 474; United Nations General Assembly Resolution 377. It can be mentioned that this exception has in actuality not been used as of yet (Schrijver 474).
[303] Ibid.
[304] Ibid.

another country.[305] Such actions has gained recognition and acceptance amongst the international community, which otherwise would go against article 2(4).[306] The second customary exception is not as widely accepted. Schrijver describes it as a right to use force in another state's territory 'In the event of flagrant and mass violations of human rights'.[307] A notable example is Operation Allied Force by the North Atlantic Treaty Organization (NATO), a military action based on this exception with the aim to stop the ethnic cleansing in Kosovo. Schrijver have the opinion though that without accepted *opinio juris*, it cannot be regarded as an exception. He therefore dismisses the exception as invalid.[308] Walter G. Sharp, whose paper reviewed the lawfulness of the operation, is on the other side of the spectrum. Sharp almost scolds NATO and the rest of the world for not going in with its full military might as soon as possible.[309] This is a stark contrast to Schrijver's opinion on the matter. It does however need to be pointed out, that it is clear that if you follow Sharp's arguments that Sharp in his judgement seems to be heavily influenced by the incidents of the Kosovo war. The argument he makes is based on the action's morality more than anything else. While this might be seen as a shortcoming, it does highlight what a non-acceptance of such a legal rule could result in in the future which, in itself, might be the strongest argument for an exception.

3.3.3 Self-defence

3.3.3.1 Individual, collective and countermeasures

A state has, even without relying on article 51, a natural right to defend itself from an attack.[310] What is disputed when it comes to the question is not if the right of self-defence exist, but to what extent it can be applied.[311] Article 51 includes two types of self-defence: Individual and collective.[312] In the eyes of the ICJ, the collective right 'is accessory to the right of individual self-defence and subject to certain additional conditions'.[313] Individual self-defence is the state's own right to defend itself, while collective self-defence is the right to protect another state.[314] An alternative to collective self-defence is a countermeasure. A countermeasure is a debated right; the use of a countermeasure by a state in a way that does not use force, but is done out of 'economic, financial or other peaceful means'[315] has been accepted by the UN, but

[305] Ibid 474 – 475.
[306] Ibid 475.
[307] Ibid.
[308] Walter G. Sharp, 'Operation Allied Force: reviewing the lawfulness of NATO's use of military force to defend Kosovo' (1999) Vol 23(1) Maryland Journal of International Law and Trade 295, 296–304 (Henceforth 'Sharp'; Schrijver 475 – 476.
[309] Sharp 324 – 329.
[310] Terry Gill, 'When Does Self-Defence End?' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law*, (Oxford university press 2015) 738 – 739 (Henceforth 'Gill').
[311] Ibid.
[312] UN Charter, article 51.
[313] Clause Kreß, 'The International Court of Justice and the 'Principle of Non-Use of Force'' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law*, (Oxford university press 2015) 579 (Henceforth 'Kreß').
[314] Kreß 579, 592. There exist two different conflicting views, the first the one already mentioned, and the other the view that 'there exists an agreement between the participating states to exercise their rights collectively'. (Derek Bowett, *Self defence in international law* (Manchester University Press, 1958) 207). See also Kreß 592. The ICJ only supports the first view.
[315] Shane Darcy, 'Retaliation and Reprisal' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law*, (Oxford university press 2015) 889 (Henceforth 'Darcy').

a countermeasure as a tool of force has not been accepted in the same way.[316] Such a countermeasure can be taken when a state has breached a rule of *jus cogens*[317], and some state practice support that it can be done due to a breach of an *erga omnes* obligation[318].[319] The difference between a sanction and a countermeasure in this context is that a countermeasure is always a response to some form of, as Professor Natalino Ronzitti puts it, an 'internationally wrongful act'[320] and that the countermeasure as response often consists of the same kind of act against the state that has done wrong.[321] While the restriction on countermeasures has been criticized, one of the complaints being that without it there's no good response to attacks that does not rise to the level of an armed attack, it has been dismissed due to the ban on the use of force in accordance the article 2(4) in the UN Charter.[322]

3.3.3.2 Definition of self-defence

The most 'classic' form of self-defence is the one already mentioned, the defence against an armed attack, and it is a right that has been clearly established in international law ever since the *Nicaragua case*.[323] The other type of self-defence is in case of an imminent attack, or 'anticipatory' defence. Professor Claus Kreß comments that while the ICJ has refrained from taking an explicit decision regarding this question, the court's view has been that an anticipatory defence is not line with the UN Charter, and only an actual (armed) imminent attack gives the right to the state to defend itself; not in the protection of 'perceived security interests'.[324]

3.3.3.3 Self-defence and the war against terror

It needs to be remembered that the act of self-defence in 51 is the right to defend oneself even if the SC has acted or not. The endorsement of the SC can therefore allow actions of self-defence that otherwise would not be allowed. This can especially be seen in 'the war of terror', which started after the 9/11 attacks.[325] Professor Terry Gill writes that the SC when it came to the invasion of Afghanistan was in favour of the invasion:

> [T]he Council implicitly endorsed the (continued) exercise of (collective) self-defence by the US and a number of its allies in response to the 9/11 attacks. (…) At no time (…) did the Council indicate or decide that the exercise of self-defence was no longer necessary, much less order the state(s) concerned to stand down.[326]

Gill remarks that this does not mean that the SC supports the act of anticipatory self-defence against terrorism, and that while an actor such as the USA is part of the SC and could

[316] Darcy 887 – 889.
[317] Peremptory norm.
[318] Obligation towards all.
[319] Paolo Palchetti, 'Consequences for Third States as a Result of an Unlawful Use of Force' in Marc Weller (ed) *The Oxford Handbook of the Use of Force in International Law*, (Oxford university press 2015) 1230; Happold 7.
[320] Ronzitti 11.
[321] Ibid.
[322] Darcy 891 – 893.
[323] Kreß 579; Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US), Merits, Judgment of 27 June 1986, ICJ Rep 1986, paragraph 195.
[324] Kreß 581.
[325] Gill 746 - 747.
[326] Ibid 747 – 748. Brackets around letters and words is part of the quoted text.

technically use its veto to stop some of the SC's actions, that is not why the SC hasn't acted on these questions. Rather, it seems that the SC has left the question to the members themselves if the action of self-defence is needed due to counter-terrorism.[327] That means that until the day the SC acts on this subject, anticipatory and otherwise preventive self-defence is allowed in the fight against terrorism.[328]

3.4 Summary

Economic sanctions, or 'measures', as the EU describes its own economic sanctions, is a tool with a number of different purposes. It can be used offensively, politically, or as a form of economic disruption. Sanctions themselves are built upon the Lotus principle, which gives a state the right to decide who or who not to trade with, including the state's subjects. While sanctions are said to be applied to different entities, the action itself is an internal one, and not external as its terminology might suggest. Why then economic sanctions can be considered illegal, is due to coercion. There exists a general principle of non-coercion in international law, both established by the UN and seen in customary law. Would an internal sanction action actually be part of an attempt of coercion, it can be argued that that sanction would be unlawful under international law. Depending on the intent and capacity, an economic action can be seen as a form of economic warfare as defined by Lowe and Tzanakopoulos, and can with more certainty be seen as unlawful under international law, since falling under that definition can likely be seen trying to coerce the other state. What would then make it illegal is the principles of *jus in bello*, which is normally applied in armed warfare, but which according to scholars can be applied to certain actions of coercion. Economic sanctions are under large critique from a number of scholars, as they often are discriminating and cause suffering to an innocent population. When it comes to Maritime actions against vessels, they can be divided into two types of actions: Blockades and interdictions. Blockades are more encompassing in nature and used in war, while interdiction is a limited legal action that can involve a large number of different actions. There are also many ways in which an interdiction can be legal, but most of those include some form of consent from the state which has enforcement jurisdiction over it. The only other way would be an exception of the ban on the use of force in the UN Charter, but very few of those exceptions would be considered applicable in the case of an interdiction. The only ones that are relevant are the exceptions in the SC decisions based on article 41 and 42 via article 39, self-defence on the basis of article 51, and the customary exception that has not reached *opinio juris* regarding intervention due to human rights violations.

4 The detention of the Grace 1

This chapter deals with the specific legal circumstances surrounding the Grace 1 incident and the specific questions of innocent passage that is relevant to the incident. It combines the findings of chapter two and three, together with new findings to paint a coherent picture of the

[327] Ibid 748.
[328] Ibid 751.

Grace 1 incident and the law surrounding it. The chapter starts with the legal basis of the detention from Gibraltar's point of view, to then continue with the right of innocent passage in the relevant areas relating to the incident. The exploration of innocent passage starts with its relation with economic sanctions to then move on to enforcement jurisdiction, and finishes with the findings of Yang's conclusion on the subject of the interpretation of innocent passage in the territorial sea. The end of the chapter is dedicated to examining and clarifying some of the claims made by different states during the incident, which is related to the incident but not necessarily to the questions of economic sanctions and innocent passage.

4.1 The Grace 1 and Gibraltar

4.1.1 EU Sanctions and Gibraltar

4.1.1.1 Sovereignty over Gibraltar

Gibraltar is a unique place, both due to its location and the legal dispute over it; a dispute that has existed since the year 1713 with the treaty of Utrecht.[329] Gibraltar is of great strategic importance, as it gives control over the Strait of Gibraltar, the only path to the Mediterranean sea other than the Bosporus and the Suez Canal.[330] The treaty of Utrecht is a treaty between the UK and Spain, which legitimized the control over Gibraltar for the UK, and Gibraltar has since the 19th century been a designated 'Crown colony' for the UK. In the 20th century, citizens of Gibraltar were given full British citizenship.[331] Gibraltar as a crown colony has its own judicial system with its own supreme court, as well as its own head of government; 'Chief minister of Gibraltar'.[332] The UK and Spain have long been in dispute over the contents of the treaty of Utrecht, the UK's sovereignty over Gibraltar and recently, dispute over its territorial waters.[333] Spain have argued 'that Gibraltar is not legally entitled to any waters beyond the internal waters of its port because none were ceded in the Treaty of Utrecht'.[334] Such an argument does not however have any legal basis, as Gibraltar's territorial water-claims are supported both by

[329] A.J.R. Groom, 'Gibraltar: A pebble in the EU's shoe' (1997) Vol 2(3) Mediterranean Politics 20, 20 – 21.
[330] Lino Camprubí, Sam Robinson, 'A Gateway to Ocean Circulation. Surveillance and Sovereignty at Gibraltar' (2016) Vol 46(4) Historical Studies in the Natural Sciences 429, 433 – 435; John Lyman, Harry Bryden, 'Mediterranean Sea' in *AccessScience* (McGraw-Hill Education, 2014) <https://www-accessscience-com.ezproxy.ub.gu.se/content/413200#> accessed 14 December 2019; Anne Kerr, Edmund Wright (eds), 'Suez Canal' *A Dictionary of World History* (Oxford University Press, 2015). The Bosporus connects to the Black sea and is therefore not a gateway to the rest of the seas, which the strait of Gibraltar and the Suez Canal does.
[331] Gerry O'Reilly, 'Gibraltar: Sovereignty disputes and territorial waters' (1999) Vol 7(1) Boundary & Security Bulletin, International Boundaries Research Unit 67, 71 (Henceforth 'O'Reilly')
[332] Stephen V. Catania 'Gibraltar' in Damian Taylor's (ed) *The Dispute Resolution Review* (9th Edn, Law Business Research, 2017) 187 – 188;'The constitution of Gibraltar', available at <https://www.gibraltarlaws.gov.gi/constitution/Gibraltar_Constitution_Order_2006.pdf> accessed 14 December 2019; 'Minister Portfolios' (*Her Majesty's Government of Gibraltar*) <https://www.gibraltar.gov.gi/ministers/> accessed 14 December 2019.
[333] Jamie Trinidad, 'The Disputed Waters Around Gibraltar' (2017) Vol 86 British Yearbook of International Law 101, 102.
[334] Ibid.

treaty law and customary international law; the result is that the sea territory is consequently to be seen as part of the UK's territorial waters. [335]

4.1.1.2 The EU as an organization

4.1.1.2.1 Supranational character

The EU is a peculiar organization, and the prime example of a supranational organization.[336] As such, the EU is a union with exclusive and shared competence in certain matters over its member states, and rather than a cooperative organization, it could be described as a constitutional one.[337] As a supranational organization, its member has transferred some of their power and sovereignty to the EU, in order for the EU as an organization to be able to work. This means that the EU's competence is based on what competence its member states have given it.[338] These competences are listed in the Treaty on the Functioning of the European Union (TFEU).[339]

4.1.1.2.2 Acceptance of international law

The EU is an organization that has a 'long-standing basic principle that international treaties are an integral part of EU law'.[340] This is reflected both in the TFEU and the Consolidated Version of the Treaty on European Union (TEU), with the EU having several principles of respecting, conforming and upholding international law.[341] This means that if all member states are parties to a convention, even though the EU is not technically bound by it, it still has to take the convention into consideration.[342]

4.1.1.3 Gibraltar and the EU

The UK joined the EU/EEC in 1973, and as a crown colony Gibraltar joined the EU as well, under article 227(4) in the Treaty of Rome (1957), and as such is categorized as one of the 'European territories for whose external relations a Member State is responsible'.[343] As such a territory, it is part of EU's freedom of movement, and bound to implement EU law, as well as the UK being responsible that Gibraltar actually does that.[344]

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[335] O'Reilly 80. As already mentioned in section 1.2.4, 'Scope', there is a recognized conflict surrounding Gibraltar's future, but at the time of the Grace 1 incident the UK's sovereignty is established and recognized, and any speculation beyond that is outside the scope of the thesis.

[336] Peter L. Lindseth, 'Supranational Organizations' in Jacob Katz Cogan Ian Hurd and Ian Johnstone (eds) *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 152.

[337] Nigel Foster, *EU Law, Directions* (3rd edn, Oxford University Press 2012) 71, 152 – 153.

[338] Ibid 70 – 71.

[339] Treaty on the Functioning of the European Union (TFEU) (2016) OJ C202/1. See as example TFEU, article 3 – 6.

[340] Esa Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' (2015) Vol 38(4) Fordham International Law Journal 1045, 1062 (Henceforth 'Paasivirta').

[341] Consolidated Version of the Treaty on European Union (TEU) (2008) OJ C115/13; Paasivirta 1062. Examples of these principle can be found in TEU, article 3(5), which mentions the principles of the United Nations charter as recognized international law, TEU, article 21 and TFEU, article 216(2).

[342] Passivirta 1062 – 1063; *Mattia Manzi and Compagnia Naviera Orchestra v Capitaneria di Porto di Genova* [2014] CJEU Case C-537/11, section 45.

[343] Treaty establishing the European Economic Community (The treaty of Rome) (1957) article 227(4); O'Reilly 79.

[344] O'Reilly 79; 'Partnership for Progress and Prosperity, Britain and the Overseas Territories' (*Government of the United Kingdom The Foreign and Commonwealth Office*, 1999) 59.

4.1.2 EU sanctions

4.1.2.1 Legal basis of EU sanction

While not directly mentioned in TFEU article 3 as an exclusive competence by the EU, sanctions, or 'restrictive measures' as the EU calls it, is based on its community competence based on TEU article 24 via article 21.[345] Article 24 states:

> Article 24
>
> (ex article 11 TEU)
>
> 1. The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.[346]

Article 24 also says that all member states 'shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations'.[347] The European Council can then exclusively decide, based on suggestion from the European Commission, to implement restrictive measures as a common foreign policy among its member states.[348] When it comes to the power to implement a specific restrictive measure, that can be found in TFEU article 215, where it says that 'the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities'.[349]

4.1.2.2 EU sanctions against Syria

4.1.2.2.1 Council Regulation (EU) No 36/2012

While sanctions against Iran has been done in accordance with the UN charter, the UN has not put any such recommendation on Syria. The EU has instead decided to do so unilaterally.[350] The EU decided on some sanctions 2011, but the current, more extensive sanctions are from 2012, with the Council Regulation (EU) No 36/2012 of 18 January 2012. Who the restrictive measures apply to is specified in article 35:

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[345] 'European Commission – Restrictive measures' (*European External Action Service* (EEAS) 2008) 7 - 8 <https://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf> accessed 14 December 2019; Alexander Orakhelashvili, 'Sanctions and Fundamental Rights of States' in Matthew Happold and Paul Eden's (eds) *Economic Sanctions and International Law* (Hart Publishing, 2016) 33 (Henceforth 'Orakhelashvili') ; see also 'FAQ on the EU competences and the European Commission powers' (*European Commission*, last updated 4 December 2019) <https://ec.europa.eu/citizens-initiative/public/competences/faq> accessed 14 December 2019.

[346] TEU article 24(1).

[347] Ibid, article 24(3).

[348] 'European Commission – Restrictive measures' (*European External Action Service* (EEAS) 2008) 9 - 10 <https://eeas.europa.eu/archives/docs/cfsp/sanctions/docs/index_en.pdf> accessed 14 December 2019.

[349] TFEU, Article 215; see also 'EUR-Lex - 32012R0036 – EN' (*Eur-Lex*), referencing article 215 in 'relationship between documents' <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32012R0036 and <https://eur-lex.europa.eu/legal content/EN/TXT/?uri=CELEX:12010E215> accessed 14 December 2019.

[350] Orakhelashvili 13; 'Restrictive measures against Syria' (*EU Sanctions Map*, 11 September 2019) <https://www.sanctionsmap.eu/#/main/details/32/?checked=&search=%7B%22value%22:%22syria%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D> accessed 9 December 2019.

Article 35

This Regulation shall apply:
(a) within the territory of the Union, including its airspace;
(b) on board any aircraft or any vessel under the jurisdiction of a Member State;
(c) to any person inside or outside the territory of the Union who is a national of a Member State;
(d) to any legal person, entity or body which is incorporated or constituted under the law of a Member State;
(e) to any legal person, entity or body in respect of any business done in whole or in part within the Union.[351]

The restrictive measures therefore apply, according to article 35(a), within the territory of the Union.[352]

4.1.2.2.2 The reason for EU's sanctions against Syria

Neither the EU or any of its members are at war with Syria (specifically the Assad-government) the sanctions against them is not to be categorized as part of any military effort. Whilst it could be argued that some EU members allies are involved in the civil war, the reason for EU sanctions is not to help these allies. The answer can instead be found in the European Councils conclusion on Syria as of 27th of Maj 2013, which condemns the Assad-government for their 'continued widespread and systematic gross violations of human rights in Syria'.[353] The council's conclusion also disagrees with the Assad-governments military actions, and wants the conflict solved via a 'political solution (…) based on the principles included in the Geneva communiqué of 30 June 2012'.[354] EU want this solution to be democratic. The EU also brings up the increase of religious and ethnical motives for violence, which they want to stop.[355]

4.1.3 Legal basis of the detention

4.1.3.1 Legal basis of Gibraltar's detention via EU and national law

As per regulation, the government of Gibraltar put out a legal notice both when the Grace 1 was detained, and one when it was released, with the second one detailing the legal basis behind the detention as well as the release.[356] It is of some interest to examine Gibraltar's reasoning

[351] Council Regulation (EU) No 36/2012 of 18 January 2012, article 35.
[352] The commission has also released a commission notice, detailing frequent questions surrounding the council regulation. In it, they quote article 35 and says: 'Therefore, the Regulation applies in the territory of the Union.' ('Commission Frequently Asked Questions on EU restrictive measures in Syria' (*European commission, commission notice*, 2017) < https://eksportkontrol.erhvervsstyrelsen.dk/sites/default/files/2017-09-18_faq_syria_fra_kom.pdf> accessed 14 December 2019.) As such, neither the regulation itself nor the commissions notice about it names any specific requirement other than being within the territory of the union for it to apply.
[353] 'Council Conclusions on Syria 3241st Foreign Affairs council meeting' (*Council of the European Union*, 2013) section 1 (Henceforth 'Council's Conclusion'); 'Restrictive measures against Syria' (*EU Sanctions Map*, 11 September 2019) <https://www.sanctionsmap.eu/#/main/details/32/?checked=&search=%7B%22value%22:%22syria%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D> accessed 17 November 2019.
[354] Council's Conclusion, section 2.
[355] Ibid, section 1, 2.
[356] Specified ship notice (LN. 2019/132); Specified ship notice (LN. 2019/164) section 1.

further, given in the second ship notice. The ship was designated as a 'specified ship' 'by the Chief Minister by Notice under regulation 5'[357] and detained under regulation 6(1)a of the Sanction regulation 2019, which is subsidiary to and decided in accordance to the Sanctions Act 2019. The Sanctions regulation 2019 was incidentally enacted the 3rd of July, the day before the detention.[358] According to the Sanctions regulation 2019, such a ship 'must be detained if it is in BGTW'[359], and cannot be released unless the Chief minister or the court of Gibraltar releases it according to regulation 6(1)b.[360] Such a designation by the Chief minister shall be made in accordance to section 25, section 30 and schedule 5 in the Sanctions Act 2019.[361] A regulation to designate a specified ship can be done only if the vessel fulfils the requirements laid out in section 16 in the Sanctions Act 2019:

> 16.(1) Where the Chief Minister has reasonable grounds to do so, he, with the consent of the Governor, may make sanctions regulations—
>
> (a) for a purpose within subsection (2); or
>
> (b) for the purposes of compliance with any international obligation.[362]

In the second ship notice, it is specified that the reason for the detention was because it 'was required for the purposes of complying with Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria'.[363] The sanctions regulation was therefore made in compliance with the international obligation mentioned in 16(1)b. The specific article in Regulation No 36/2012 is article 14(2), which states that 'No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annex II and IIa'.[364] The oil transported by the Grace 1 is one of such goods listed in the EU regulation and was therefore the target of Gibraltar's actions.[365]

4.1.3.2 Innocent passage of the Grace 1

4.1.3.2.1 Application of UNCLOS

Both the EU and the UK are parties to UNCLOS, while Iran, USA and Syria is not parties to the convention.[366] The UK's relation to the treaty is a standard one, but the EU as an

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[357] Gibraltar Sanctions regulation 2019, regulation 4.
[358] Even though it is not important to the detention itself, it is of some interest since it is most likely that the enactment was done specifically for Grace 1, see commentary from Maya Lester: (Maya Lester, 'Gibraltar sanctions laws & Grace 1 designation' (*EU Sanctions*, 8 July 2019) < https://www.europeansanctions.com/2019/07/gibraltar-sanctions-laws-grace-1-designation/ > accessed 15 December 2019.
[359] Gibraltar Sanctions regulation 2019, regulation 6(1)a.
[360] Ibid, regulation 6(1)b.
[361] Ibid, regulation 7(1).
[362] Gibraltar Sanctions Act 2019, section 16(1).
[363] Specified ship notice (LN. 2019/164), section 2.
[364] Council Regulation (EU) No 36/2012 of 18 January 2012, article 14(2); Specified ship notice (LN. 2019/164), section 3. Annex II and IIa refers to an exhaustive list of natural or legal entities that is included in the restrictive measures.
[365] Council Regulation (EU) No 36/2012 of 18 January 2012, Annex IV via article 1(e); Specified ship notice (LN. 2019/164), section 4.
[366] The EU is a party to UNLOS via Article 305(1)(f), in accordance to annex IX. The UK is a party to UNCLOS via accession, and as of 2005, all EU members are parties to UNCLOS. Iran has signed it but not

international organization was not at first a party that was supposed to be included in the treaty. Professor Esa Paasivirta comments that the EU (the EEC at the time), while only a participant as an observer to the UNCLOS negotiations, still managed to lobby for an '"EEC clause" which permitted the Community to become a contracting party'.[367] This results in a situation where the EU's members are parties to the convention separately as well as parties to the convention via the EU, which has led to a need for the EU and its members to cooperate with each other in matters relating to UNCLOS.[368] EU as a party to UNCLOS has so far been accepted by the international community, and regarded as fully competent as an actor in proceedings related to UNCLOS.[369] With both the UK and the EU part of UNCLOS, it is clear that the Grace 1 potentially has the right of innocent passage through the BGTW, in accordance to UNCLOS article 17.

4.1.3.2.2 Meaning of passage and traffic regulations

Article 18 in UNCLOS becomes relevant in this instance, since an assessment whether the Grace 1 is to enjoy innocent passage in article 17 is dependent on if it was a passage in accordance to the convention in the first place. The Grace 1 went from the strait, into BGTW, where it seems to have stopped or anchored, or at least left the usual shipping routes due to the need of supplies/repairs.[370] It was not done out of any distress or due to *force majeure*, rather it was a planned stop, and the vessel did not enter internal waters, or just shy of internal waters. The question then becomes if this irregularity was within the limits of 'incidental to ordinary navigation'[371] Eric Jaap Molenaar comments that in accordance to article 21 and 24 of UNCLOS, a state has the right to regulate maritime traffic, as long as innocent passage is not 'unreasonably hampered'[372] by those regulations. Just because a ship has innocent passage through another state's territory, does not mean that it is free to disregard any form of traffic regulations.[373] Such regulations are necessary for vessels to follow when entering a state's territorial waters, as to not endanger other ships, the environment, or the coastal state's own security.[374] The UK is especially concerned with the anchoring of tankers, and to not follow the rules subject to the (1995) Merchant shipping act when in UK's territorial waters would potentially make a ships passage non-innocent.[375] When a ship is 'parked' in the wrong place, the merchant shipping act would then allow the ship to be forcibly moved.[376] This does not

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ratified/implemented it. The United States and Syria has not signed it. UNCLOS current status can be found at: 'United Nations Treaty Collection' (*United Nations convention on the Law of the Sea*) < https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en > accessed 17 November 2019.

[367] Paasivirta 1048.

[368] Ibid 1050.

[369] Ibid 1060.

[370] Section 1.1.3.1, 'The detention'. It is unclear whether the Grace 1 had anchored at this point or not.

[371] UNCLOS, article 18(2).

[372] Erik Jaap Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in Donald R. Rothwell and Sam Bateman's (eds) *Navigational Rights and Freedoms and the New Law of the Sea* (Martinus Nijhoff Publishers, 2000) 26 (Henceforth Molenaar).

[373] Yang 175 – 176.

[374] Molenaar 26.

[375] Ibid.

[376] Merchant Shipping Act (UK) 1995, article 100C. For the purpose of clarification it need to be pointed out that the (1995) Merchant shipping act, 100C does not have the power in itself to forcibly move a ship; it is the

mean that not following all traffic regulation would at an instant make the passage non-innocent: only if the infraction was serious it would led to non-innocence. Yang however points out that ships that are a larger risk to the coastal state, such as nuclear-powered ship or tankers have a much smaller margin of error, since those pose a larger risk to the coastal state if not following its regulations. When it comes the Grace 1, while it has been unclear of its exact actions, the ship notice by the government of Gibraltar regarding its release does contain information on the ships journey into BGTW. It states that the ship entered the BGTW 'by prior arrangement with a Gibraltar ship agent'[377]. This would indicate that the Grace 1 did not enter or act in the BGTW in a way that was against traffic regulations.

4.1.3.2.3 The Interpretation of UNCLOS article 19

As already stated, the list in UNCLOS article 19(2) Is considered by most scholars as non-exhaustive. The reason for this is, as Yang explains, that 19(2) simply is a list of what can constitute something that is considered 'prejudicial to the peace, good order or security of the coastal State'.[378] The list in 19(2) is in other words a way of highlighting important parts of how such a breach may occur. Yang shows concern that states takes the interpretation of 19(2) too far, without considering 19(1), as the focus always should be if a breach has been made in accordance to the formulation of 19(1), otherwise 'the judgment on innocence would, in some cases, go far beyond the intention of the drafters'.[379] However, Yang's interpretation is not the only interpretation. In the US – USSR joint statement on the interpretation of innocent passage, this list is presented as the only way a state's ship can lose its innocence: 'Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.'[380] This shows that the interpretation of article 19 can be vastly different. Yang describes that some even has the opposite view: That a breach of 19(2) is not a breach at all, if it wasn't done in the intent to breach 19(1).[381] It all becomes quite difficult to discern, and even if you saw 19(2) as an exhaustive list, there is no uniform way of determining when any of the things listed in 19(2) has been breached, since UNCLOS does not contain that kind of evaluation.[382] Yang does conclude that even though there are divergent views, it is first and foremost 19(1) that is to be breached, not 19(2), for non-innocence.[383] Yang does also comment that 'under present international law and practice, the discretionary latitude of the coastal State to label passage of foreign ships as non-innocent is far-reaching'[384], which can result in 'inappropriate and substantial limitation to the right of innocent passage'.[385]

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power to move the ship when passage is already deemed not be innocent (due for example a breach in traffic regulations as mentioned above).

[377] Specified ship notice (LN. 2019/164) section 1.

[378] UNCLOS, article 19(1); Yang 167 – 169.

[379] Yang 168.

[380] US-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage (1989), section 3.

[381] Yang 168.

[382] Ibid 169. Yang uses the example of ship-borne transmitters, which are used for navigation, but they also have the capacity to be used as a tool in research or surveying. How do you then judge whether a ship is 'carrying out (…) research or survey activities' (UNCLOS article 19(2)(j)).

[383] Yang 168.

[384] Ibid 170.

[385] Yang 170.

All in all, an assessment of the Grace 1's innocence can be done both in relation to the list in 19(2) as well as a general assessment of the wording in 19(1), but with the focus on 19(1).

4.1.3.2.4 The requirement of causality

Even though an action would be deemed as non-innocent, that action must have occurred in the territorial sea for the vessel to lose its innocence. An action taken outside the territorial sea cannot result in a breach of article 19.[386] This requirement is spelled out in 19(2): 'Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if *in the territorial sea it engages* in any of the following activities'.[387]

4.1.4 Innocent passage and unilateral economic sanctions

4.1.4.1 Article 19 and economic sanction

The next thing to examine is the relation between unilateral economic sanctions and innocent passage, the question being what kind of breach not following an economic sanction would result in a vessel being considered non-innocent. The first requirement is that the breach is done inside the territorial sea, in accordance to article 19(2) as mentioned above.[388] For economic sanctions, this means that it is the act itself of passing through the territorial sea that would be the violation that in turn would be non-innocent. When looking at the list of 19(2), the act of passing through with cargo in a normal way would perhaps only be able to be applied to 19(2)(a), if the cargo would be considered a threat to the coastal state, 'or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations'.[389] Otherwise, the only more general application of 19(1) as earlier mentioned, of 'prejudicial to the peace, good order or security of the coastal State'[390] would be applicable. When it comes to the use of force and economic sanctions, Fielding has expressed that according to the views of the *Nicaragua case*, the only way to interdict a vessel due to unilateral economic sanctions would be in self-defence in accordance to the UN Charter article 51.[391]

4.1.4.2 The question of discrimination in article 24(1)(b)

In the same way that a foreign vessel has a duty to follow certain regulations, a coastal state also has some duties that they need to follow. The duty that is relevant in the Grace 1 incident is the duty of non-discrimination, that exists in article 24(1)(b) in UNCLOS.[392] It reads: '[T]he coastal State shall not (…) discriminate in form or in fact against the ships of any State or against ships carrying cargoes to, from or on behalf of any State'.[393] There are several cases of discrimination that article 24(1)(b) refers to. These are according to Yang discrimination based on a ship's nationality, discrimination based on what state the ship came from, what state the ship has as destination, or what state owns the cargo.[394] Discrimination via sanctions was a point of discussion when drafting the convention, but it was concluded that discrimination due

[386] Ibid 164.
[387] UNCLOS, article 19(2). Emphasis added.
[388] Ibid, article 19(2); Yang 164.
[389] Ibid, article 19(2)(a).
[390] Ibid, article 19(1).
[391] Fielding 1199 – 1200.
[392] Yang 181.
[393] UNCLOS, article 24(1)(b).
[394] Yang 181 – 182.

to sanctions via the UN Charter is not applicable, since the UN Charter has precedence over UNCLOS.[395]

4.1.5 Enforcement jurisdiction over foreign merchant ships due to non-innocence

4.1.5.1 Asking the vessel

Even if a passage is deemed non-innocent, that does not necessarily mean that a state automatically has the right to forcefully make a vessel comply with its national laws and regulations. The way to act expressed in the 'Annotated Supplement to The Commander's Handbook on the Law of Naval operations', is to first inform the vessel why it doubts the vessels innocence, and to then give the vessel time to response.[396] This is also the view expressed in the US-USSR joint statement.[397] While this is merely the opinion of these states, Yang sees it as some proof of State practice, but does not conclude whether it is a prerequisite to non-innocence or not, pointing out that 'coastal States are reluctant to explicitly declare the non-innocent passage of foreign ships'[398], even though there certainly are reasons that it perhaps 'should' be state practice.[399]

4.1.5.2 Enforcement rights

If the logic follows that a state has both legislative and enforcement jurisdiction in its territorial waters, but that its enforcement jurisdiction is limited by certain customary rules, and the rule excluding foreign vessels from enforcement jurisdiction is innocent passage, then logically a state should be able to have enforcement jurisdiction over a vessel that is not innocent. This is the general consensus, and UNCLOS article 25 confirms that a state can take 'necessary steps'[400] to stop the non-innocent conduct.[401] What 'necessary steps' is, Yang points out, is not defined, but while some countries like to avoid to apply full enforcement jurisdiction in such a situation, nothing in international law stops a state from applying it as long as it follows the rules of 'necessity, proportionality and non-discrimination'.[402]

4.1.6 Yang's conclusion and state practice

4.1.6.1 UNCLOS article 19 and state practice

Although Yang agrees that under the current rules governed by UNCLOS, 19(1) can be applied independent of 19(2), he holds that this is not a desirable outcome. For the good of the law of the sea, a (merchant) vessel should only be deemed non-innocent if it has breached 19(2), or a multilateral agreement that extends 19(1).[403] The only way for it to be this way though, is in the continued practice by state to follow these set of rules. State practice has so far limited the

[395] Yang 182.
[396] 'Annotated Supplement to The Commander's Handbook on the Law of Naval operations', (US Department of the Navy, 1997) 2.3.2.1., last paragraph.
[397] US-USSR Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage (1989), section 4.
[398] Yang 216.
[399] Ibid.
[400] UNCLOS article 25(1).
[401] Yang 217.
[402] Ibid.
[403] Ibid 163. Within the scope of the general rule in 19(1), as already pointed out in 4.1.3.2.3, 'the Interpretation of UNCLOS article 19'.

use of 19(1), since states has been careful applying the rules of article 19. With enough state practice, Yang muses, the interpretation of article 19 will change.[404]

4.1.6.2 Yang's conclusion

In the conclusion to Yang's analysis he makes three statements of interest to the topic of innocent passage in territorial waters. The first comment of interest is that that the limits on jurisdiction of coastal states is in general decreasing. The coastal state has more and more to say about its sea territory. This newfound jurisdiction has in turn started to increasingly compete with the right of innocent passage.[405] The second statement he makes is that UNCLOS does not have an adequate system of determining if a coastal state's requirements of ships are obstructing the right to innocent passage, other than protection from the general principles of 'non-discrimination, proportionality and no abuse of right'.[406] Lastly, he concludes that even though the coastal states have this increasing power, and with no real way of stopping them from limiting the right of innocent passage, the right is still being upheld. Innocent passage is a protected principle in international law, and the reason for that is state practice, or as Yang describes it: 'The regime of innocent passage has basically been preserved in the exercise of coastal State jurisdiction.'[407]

4.2 Other claims on the Grace 1

4.2.1 The USA's claims of seizure and the terrorist argument

The USA made claims of seizure towards the Grace 1, due to seeing the ship being part of a terrorist group. Since this is an alternative motivation for detention or seizure, it is of interest in examining whether there is any support for this claim.

4.2.1.1 The definition of terrorism

There is no universal definition of terrorism, which have prompted many countries to try to define it themselves. The problem lies in that the view on someone's violent actions often depend on the intent of that action based on political opinion. This might result in an organization for example both be deemed a terrorist-organization and a freedom-organization by different states.[408] Perhaps the closest that you can get to a universal definition is the one reiterated time and time again by the UN General Assembly's Declaration of 'Measures to Eliminate International Terrorism', the most recent iteration being the 2016 Measures to eliminate international terrorism 71/151: 'Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes'.[409] Outside the General Assembly's declarations, the SC has defined some terrorism-

[404] Yang 163.
[405] Ibid 262, 267 – 268.
[406] Ibid 268, footnote 1246.
[407] Yang 262.
[408] James C. Simeon, 'The Evolving Common Law Jurisprudence Combatting the Threat of Terrorism in the United Kingdom, United States, and Canada' (2019) Vol 8(1) 5 Laws MDPI, 1 – 2 (Henceforth 'Simeon') <http://dx.doi.org/10.3390/laws8010005> accessed 23 November 2019.
[409] UN General Assembly Resolution 71/151, 'Measures to eliminate international terrorism' paragraph 4; 'Human Rights, Terrorism and Counter-terrorism Fact Sheet No. 32' (*UN Office of the High Commissioner for*

actions further, see SC's resolution 1566 (2004), including killing, harming or taking hostages as a means of 'intimidate[ing] a population or compel a Government or an international organization to do or to abstain from doing any act'.[410] Individual state's own definitions are usually not as restrictive as the one's expressed by the UN.[411] As a relevant example is USA's definition of terrorism similar to the one's described above, but is notably wider in its application when it comes to what actions and circumstances constitute terrorism.[412]

4.2.1.2 Confiscation/forfeiture [413]

4.2.1.2.1 American forfeiture Law

In American law, civil- and criminal forfeiture are separated into two separate systems. In civil cases the seizure is done *in rem*, and in criminal cases it is done *in personam*. This means that the property can be seized regardless of the owner in a civil case, since it is an action against the property itself and not against the person, but in a criminal case the property needs to be tied to the one accused of the criminal act.[414] After the events of 9/11, American law developed to better combat terrorism, and thus the Patriot Act was enacted.[415] This allowed forfeiture cases against terrorism/terrorists to be tried either civil or criminal, and towards the assets involved in terrorism or owned by a terrorist, regardless if those assets were part of the crime (specified as 'all assets').[416] This means that all assets can be taken, and it can be specified to be either *in rem* or *in personam*, depending on the situation.

4.2.1.2.2 EU confiscation law

As EU is a supranational organization and not a state, its directives are simply the minimum requirement of its members state legislation, and it is up to member states on how to handle the exact procedures. The freezing and confiscation due to crime can be found in Directive 2014/42/EU, which specifically lists terrorism as part of its scope, see article 3(e).[417]

4.2.1.2.3 UK forfeiture law

Since the UK is a dualistic state, it cannot directly apply EU law but has to do so via its own legislation.[418] UK forfeiture law for terrorism assets are based on the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), later amended by the Criminal Finances Act 2017. For property/assets to be forfeited, the forfeiture must be based on a conviction of section 15 - 18

Human Rights, 2008) 5 – 6, available at: <https://www.refworld.org/docid/48733ebc2.html> accessed 15 December 2019.

[410] United Nations Security Council resolution 1566 (2004), 'Threats to international peace and security caused by terrorist acts', paragraph 3.

[411] Simeon 2.

[412] The US definition of terrorism in this context can be found in U.S. Code Title 18 Crimes and criminal Procedures, paragraph 2331, and also paragraph 2332b(g)(5) to some extent; See also Simeon 11.

[413] Confiscation and forfeiture are in essence the same kind of action and can be used interchangeably. The word 'forfeiture' will therefore be used unless specifically talking about EU law, were 'confiscation' is the correct term.

[414] Stefan Casella, 'Provisions of the USA Patriot Act relating to asset forfeiture in transnational cases' (2003) Vol 10(4) Journal of Financial Crime 303, 303. (Henceforth 'Casella').

[415] Ibid 306.

[416] Ibid 306 – 307. As Casella describes it, 'right down to their socks and underwear'. (Casella 307).

[417] European Parliament and Council Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

[418] European Communities Act 1972, section 2(1).

of the Terrorism Act 2000.[419] Section 15 to 18 lists fund raising for terrorism, use and possession of property/assets that is going to be used to fund terrorism, funding arrangements to fund terrorism and money laundering to fund terrorism.[420] The amendment by the Criminal Finances Act however added a way other than based on a conviction of the listed crimes, with an exhaustive list of items that could be seized and potentially forfeited 'if satisfied that the property is a terrorist asset'.[421]

4.2.1.3 Seizure due to terrorism

As mentioned in section 1.1.3.4, 'Claims from the USA and Shurat Hadin' the USA did not only seek to stop the Grace 1 from traveling to Syria, but made claims on the ship and its cargo as well since it was helping the IRGC, an organization USA had classified as a terrorist organization. When the Grace 1 was released, USA sent out a warrant for its seizure.[422] The legal basis of the warrant was the 'International Emergency Economic Powers Act (IEEPA), bank fraud statute, and money laundering statute, as well as separately the terrorism forfeiture statute'[423], which are all US national laws and regulations. If the USA had been the one in Gibraltar's position in relation to the Grace 1, the USA would likely have seized and forfeited the vessel and its cargo, on the basis of the ship being affiliated with an identified terrorist organization.

4.2.2 Claims of piracy

4.2.2.1 Piracy as jus cogens

While not of direct relevance to the Grace 1 incident, the different claims of piracy need to be addressed. The reason for this is twofold. Firstly, if Gibraltar's act is deemed as an act of piracy, any other discussion or claim would become obsolete due to piracy's status as *jus cogens*.[424] Secondly, within the Grace incident (including what happened with the Stena Impero) there were three separate claims of piracy or attempted piracy. Therefore, it is vital to resolve these claims as to not undermine the rest of the thesis.

4.2.2.2 General definition of piracy

Guilfoyle presents three conditions that is set in the High Seas Convention and UNCLOS. It needs to be: '(1) an act of violence, detention or depredation; (2) committed for private ends; (3) on the high seas or outside the jurisdiction of any state; and (4) by the crew or passengers

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[419] 'Explanatory Memorandum to the Magistrates' Courts (Detention and Forfeiture of Terrorist Assets) Rules 2017', (*UK Ministry of Justice,* No. 1296 (L. 26) 2017) section 7.1 (Henceforth 'Explanatory Memorandum') ; Terrorism Act 2000 section 14.

[420] Terrorism act 2000 section 15 – 18.

[421] Explanatory Memorandum, section 7.12. The list of assets can be found in ATSCA Schedule 1 paragraph 10A, and lists '(a) precious metals; (b) precious stones; (c) watches; (d) artistic works; (e) face-value vouchers; (f) postage stamps'.

[422] The warrant specifies: 'Oil Tanker 'Grace 1,' all petroleum aboard it and $995,000.00 are subject to forfeiture ('Unsealed Warrant and Forfeiture Complaint Seek Seizure of Oil Tanker 'Grace 1' for Unlawful Use of U.S. Financial System to Support and Finance IRGC's Sale of Oil Products to Syria' (*The United States Department of Justice, Office of Public Affairs,* 16 August 2019 <https://www.justice.gov/opa/pr/unsealed-warrant-and-forfeiture-complaint-seek-seizure-oil-tanker-grace-1-unlawful-use-us> accessed 22 November 2019).

[423] Ibid; International Emergency Economic Powers Act (IEEPA) (1977).

[424] Guilfoyle 26 – 29.

of a private ship or aircraft, against another vessel or persons or property aboard'.[425] Even though some of these requirements have been questioned over the years, such as the requirement for it be outside the jurisdiction of any state, the fact remains that it is an act of piracy only if it is a private endeavour, with a need for the act of piracy to be for some kind of private economic benefit.[426] All three actors accused are states in this instance and such private economic interests simply does not exist. What happened to the Grace 1 or the Stena Impero was not piracy.

4.3 Summary

Gibraltar's location has a large significance, since it gives control over the Strait of Gibraltar. There are some who dispute Gibraltar's status as a crown colony the UK, but at this point of time Gibraltar is to be recognized as part of the UK, something also recognized by the EU. The EU is an organization that could be described as supranational, and therefore works very differently from other international organizations. Its member states have willingly given some of its sovereignty over to it for the organization to be able to effectively function. The EU is also known for always trying to follow and consider international law in its decisions. The sanctions which Gibraltar used to interdict the Grace 1 comes from the EU, and the reason for those sanctions is to stop the Assad-government in Syria's human right violations, and to bring political change to the region. Gibraltar's legal reasoning behind its detention was to apply those EU sanctions, which was based on Gibraltar's Sanction regulation 2019, a regulation enacted just the day before the detention. When it comes to the question of the Grace 1's innocent passage, it is clear that UNCLOS article 17 and the articles relevant to article 17 are applicable. According to article 18, a vessels innocent passage must be part of a mostly uninterrupted passage. This passage must also, in accordance to article 21 and 24, follow certain traffic regulations decided by the state or it could risk becoming non-innocent, or at least forcibly moved. It seems that the Grace 1 did not breach any traffic regulations, based on the ship notice released by Gibraltar. When it comes to the interpretation of article 19 and what makes a vessel non-innocent, 19(2) can be seen as guidelines, but the main reason comes from a subjective point of view of what is to be seen as 'prejudicial to the peace, good order or security of the coastal State'.[427] If a vessel is deemed non-innocent a state have full enforcement jurisdiction over it, as long as it follows the general principles of necessity, proportionality and non-discrimination in international law. The only thing that therefore protects the vessels from a state's subjective decision on non-innocent is state practice, since states so far has been careful in their application, in order to protect the right of innocent passage. When it comes to the claims on the Grace 1 it is evident that the USA would have wanted to deal with the Grace 1 in a different way and that the USA national legislation would be very effective in seizing the ship, since it had branded it a terrorist target. The UK legislation does not allow for the

[425] Ibid 27; UNCLOS; Convention on the High Seas, 29 April 1958, entered into force 30 September 1962. United Nations, Treaty Series No 6465, vol. 450.
[426] Guilfoyle 26 – 45.
[427] UNCLOS, article 19(1).

same actions that USA's does. Lastly, it is clear thar both the UK's and Iran's claims of piracy are unfounded.

5 The Grace 1 and interdiction based on economic sanctions

This chapter brings all the previous chapters together, to analyse the findings of the thesis. As explained in the synopsis, to best do this the chapter has been divided into two separate sections, each operating under its own research question. The first research question explores the legality of the Grace 1 incident itself and starts with Gibraltar as a state and its jurisdiction. It then moves on to a more general discussion surrounding innocent passage for a better understanding under what rules Gibraltar operates under. It then analyses the potential interdiction. Right before the last part of this section, the thesis makes a short comment on state practice and Yang's interpretation of it, which is needed in order to accurately answer the first research question, an answer which is presented as the last part of this section. The second part of the chapter explores the second research question, and is less concerned with the incident itself, instead focusing on the reasons behind the incident and what consequences standard practice by Gibraltar could lead to. It starts with a discussion on the circumstances of the Grace 1 incident, to then continue onto Gibraltar's chosen tool economic sanctions. It then connects innocent passage and state practice in relation to economic sanctions together with further analysis of Yang's conclusion. The last part before answering the second research question, the thesis discusses the discovered alternatives other than sanctions that Gibraltar could have used as tools for the potential interdiction. This part is last since it does not tie directly into the answer to the research question itself but is needed for the conclusion. At the end of the chapter, the second research question is answered.

5.1 Was the detention of the Grace 1 to be considered legal under international law?

5.1.1 Applicable law

5.1.1.1 The status of Gibraltar

To be able to answer the question of the legality of the detention, it must first be established what legal norms are applicable, as well as who is responsible for upholding them. The vessel was detained on the basis of a regulation under Gibraltar law, done primarily by Gibraltar, ordered via a designation by Gibraltar's Chief minister. However, Gibraltar is a crown state of the UK, and is recognized as such. Even though the waters where the vessel was stopped is designated as BGTW does not stop it from being part of the UK's claimed territory. In turn, Gibraltar needs to uphold relevant EU law, as a part of the EU via the UK.[428] Thus, as part of the UK and subsequently the EU, it is clear that Gibraltar is responsible for upholding the legal norms of the UK and the EU.

5.1.1.2 The acceptance of the UN and UNCLOS

It is important to give recognition to the UN and its institutions. The UN is an organization that, despite the ridicule it gets, is a centrepiece of international law. The UK as part of the UN

[428] Treaty of Rome, article 227(4).

Charter as well as other treaties which give recognition to the UN has an obligation to abide to its internationally set rules. It is the same for UNCLOS, as it is both treaty law that binds the UK and the EU as well as customary international law. An evaluation of the legality of the detention of the Grace 1 therefore needs to be made with UNCLOS as the applicable norm. This is only further strengthened by the EU's principles to follow its international obligation and to comply with international law, a principle part of its own legislation.[429]

5.1.2 Gibraltar's jurisdiction

5.1.2.1 Jurisdiction in accordance to UNCLOS article 2

UNCLOS article 2 establishes two things: It establishes the sovereignty that a coastal state has over its sea territory, and it establishes this sovereignty as 'subject' to UNCLOS. What is interesting about the sovereignty being 'subject' to these regulations is that while article 2 in UNCLOS described a form of conditional sovereignty, what it actually ends up being, using the terminology of Dixon and Lowe, is sovereignty with restriction on jurisdiction. This in turn could perhaps be argued to be the very definition of conditional sovereignty, but that would imply not having control or the rights of the territorial sea based on certain conditions, and therefore not be a territory that is sovereign to that state. The terminology seems flawed in this aspect. In any case, when a foreign vessel is passing through a coastal state's waters it has entered that state's sovereign territory, and what keeps the coastal state from applying its national laws and regulations unhindered on the vessel is that it lacks enforcement jurisdiction, not sovereignty.

5.1.2.2 Jurisdiction over the Grace 1

When the Grace 1 made its passage through the Strait of Gibraltar, it was stopped and detained in BGTW. As mentioned, due to the passage Gibraltar therefore has legislative jurisdiction but not enforcement jurisdiction over the vessel unless the vessel is non-innocent. It could be argued that Gibraltar's regulations forced the detention to happen since the ship 'must be detained if it is in BGTW'[430], but that regulation is part of Gibraltar's enforcement jurisdiction, enforcement jurisdiction which the regulation itself has no power over. Other national legislation can be enforced though, such as traffic regulations, but those could be described as a part of the innocent passage.[431]

5.1.3 Innocent passage

5.1.3.1 Strait passage or passage in the territorial sea

The Grace 1 was traveling the Strait of Gibraltar, as part of an (alleged) journey to the coast of Syria. Since the right of innocent passage as part of a passage in an international strait is 'stronger' than a passage in territorial waters, it needs to be made clear what kind of passage it was. It is without doubt that the Strait of Gibraltar is among the straits categorized as an international strait, and it is the only way for such a ship except the Suez Canal to gain access to the Mediterranean Sea from the rest of the seas. When the Grace 1 travelled the strait, it did so under the rights of UNCLOS article 37. Since the ship had travelled far it was in need of maintenance and/or repairs, and so it interrupted its strait passage. Although the stop was

[429] Section 4.1.1.2.2, 'Acceptance of international law'.
[430] Sanctions regulation 2019, regulation 6(1)a.
[431] Section 4.1.5.2, 'Enforcement rights'.

needed, it was not as part of any form of emergency. Such an interruption is not one of the reasons a ship is allowed to interrupt its passage and still be considered part of the right of strait passage, which only includes 'force majeure and distress'.[432] For this reason, the Grace 1's passage through BGTW was part of innocent passage detailed in article 17 in UNCLOS, not article 37.

5.1.3.2 Article 18 and the definition of passage

For the Grace 1 to enjoy innocent passage, its traversal of the territorial waters needs to be considered a 'passage' in accordance to article 18 in UNCLOS. There is no indication that the ship travelled at an unreasonable pace, and as already established in section 4.1.3.2.2, 'Meaning of passage and traffic regulations', it was a planned stop. The question is then if this stop was within the limits of 'incidental to ordinary navigation'[433] in article 18(2). The Grace 1 is a tanker which carries a large amount of crude oil, and as such is especially dangerous to the local environment should an accident or similar occur, and the UK have stricter regulations of tankers traveling the territorial sea. These regulations are an accepted part of the restrictions on innocent passage. However, no traffic regulation or similar seems to have been broken; quite the opposite seems to be the case, since Gibraltar themselves confirms in the specified ship notice that the ship entered the BGTW 'by prior arrangement with a Gibraltar ship agent'.[434] The stop in Gibraltar territorial waters was abiding the local regulations, and the stop itself was not out of the ordinary and part of a normal passage. It was part of an ordinary navigation.

5.1.3.3 Article 19 and the Grace 1's innocence

5.1.3.3.1 The importance of 19(2)

Whilst some may argue that 19(2) is exhaustive, the commonly accepted view is that it is not. The list in 19(2) are actions not in line with innocent passage, but that does not mean that those are the only acts that results in non-innocence. 19(2)(l) further cement this due to its non-specific formulation.[435] 19(2)(l) also showcases in some way the essence of article 19(2), namely an 'activity not having a direct bearing on passage'.[436] Additionally, even in the case a vessel would be in breach of 19(2), without proof of intent it would be hard to argue its loss of innocence without referencing 19(1). With that said, if the Grace 1 is deemed to have breached 19(2) it would be a strong case for Gibraltar's position due to the coastal state's subjective interpretation being a large part of the assessment of non-innocence. In the end, Gibraltar could probably not be faulted for its actions in such circumstances.[437]

5.1.3.3.2 Have the actions of the Grace 1 breached 19(2)?

It shall first be said that there is no need to go through the whole list, as most actions described are irrelevant to the Grace 1 incident. The relevant subparagraphs are mainly 'a'[438] and 'l'[439].

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[432] UNCLOS, article 39 paragraph 1(c).
[433] UNCLOS, article 18(2).
[434] Specified ship notice (LN. 2019/164), section 1.
[435] This is an opinion also shared by Yang (Yang 160).
[436] UNCLOS 19(2)(l).
[437] Section 4.1.3.2.3, 'the Interpretation of UNCLOS article 19'.
[438] '[A]ny threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations' (UNCLOS article 19(2)(a)).
[439] '[A]ny other activity not having a direct bearing on passage'. (UNCLOS article 19(2)(l)).

The requirements are that it needs to be an action, or 'activity' as expressed in 19(2), and this action/activity must have been made inside BGTW. The only thing that Gibraltar has commented on not being in line with its laws or regulations, are the carrying of goods that are meant for an EU-sanctioned state, and due to the carrying of these goods, it was detained (and therefore presumably deemed non-innocent). Nothing else in the behaviour or actions of the Grace 1 seems to have triggered Gibraltar's response. This means that the activity of carrying goods to a specific state is the activity that needs to be considered a breach of 19(2). When it comes to 19(2)(l), the answer is simple: The reason for carrying the goods was to transport it during a passage of BGTW. It is the opposite of the breach of 19(2)(l), the activity had a direct bearing on passage. 19(2)(a) is a bit more complex, but the carrying of crude oil does not constitute as an act of force, or threat of use of any force. When it comes to rest of the principles of the UN Charter the case is not as clear, but the act of carrying of such goods does not by itself breach any other principle of the UN Charter. If so, it is not the act itself but the reason for carrying it that would be the violation, and while it can be argued that some principles may be able to apply, such an assertion is better suited for the general rule in 19(1) than the specific activities presented in 19(2).

5.1.3.4 Article 19(1) and economic sanctions

5.1.3.4.1 The reason behind the detention

To know what is 'prejudicial to the peace, good order or security of the coastal State'[440] is something that could be interpreted very differently depending on the coastal state. As mentioned, it is not the goods that are the fault but the reason for carrying them. The reason presented by Gibraltar was, as quoted, 'the detention of the Vessel was required for the purposes of complying with Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria'[441]. While motives could be questioned, this is the argument that has been repeatedly used and as such will be the argument that shall be examined. There are two different approaches to this statement: Either, the ship was stopped because of its destination, or it was stopped because of the EU's economic sanctions targeting Syria. The first viewpoint is troubling, since to stop a neutral ship due to regulations regarding a specific destination is a breach of UNCLOS article 24(1)(b) as a form of discrimination. The same would be true if Gibraltar would argue that the reason for the detention was due to Iran's involvement/ownership. Even though this line of reasoning fits the description of the actions taken, it holds little water. This is because it simplifies the action taken by Gibraltar, and whilst Gibraltar's goal is to stop the ship from traveling to Syria, that is not the reasoning behind its actions: The detention was done because of EU's restrictive measures/economic sanctions.[442]

5.1.3.4.2 Sanctions as a means of peace, good order or security

The usage of Council Regulation (EU) No 36/2012 to justify the non-innocence of the Grace 1 in relation to article 19(1) has several problems. Firstly, neither the EU nor the UK is directly involved in the war in Syria. It is therefore hard to argue that there is a connection between the action to stop the vessel, and the safety of the UK or the rest of the EU. Secondly, the specific

[440] UNCLOS article 19(1).
[441] Specified ship notice (LN. 2019/164), section 2.
[442] This might seem like a purely semantic reasoning, but it is of some value to the question of discrimination.

sanctions themselves are not directly related to any form of security question or similar in the UK nor the EU; these economic sanctions seems rather to be a form of economic and political pressure on the Assad-government, to stop its acts of violence against the population. Thirdly, it is still an action to stop a neutral ship due to regulations regarding a specific destination, which potentially is a form of discrimination forbidden in UNCLOS 24(1)(b). That sanctions would potentially categorize as a form of discrimination was after all discussed when drafting UNCLOS, even though it was discarded since the UN charter has precedence over UNCLOS. On the other hand, while these three circumstances might be compelling arguments against an economic sanction being part of making a vessel non-innocent via 19(1), it also needs to be considered that such an assessment is as mentioned largely subjective. If the state considers it being for the peace, good order or security of the state, without an adequate way of determining if it is, it seems to be up to the state to make such a judgement. When it comes to the question of discrimination, the decision to stop all ships on their way to a specific state because of economic sanctions does not share the same correlation with the principle of discrimination as simply being barred from a certain destination would be. With an intricate tool such as sanctions, with its specific entities and persons and specific measures, the question of discrimination becomes increasingly blurred. Also, if a vessel is deemed non-innocent due the peace, good order or security of the coastal state, the argument that an action against that vessel is discriminatory would, in some sense, become obsolete.

With such inconclusive answers, there exists a need to analyse the Grace 1 incident from the perspective of the action itself and the legitimization of the use of force outside of innocent passage.

5.1.4 The use of force and the Grace 1

5.1.4.1 Blockade or interdiction

It must be determined whether the detention of the Grace 1 was part of a blockade or an interdiction. The actions by Gibraltar has been limited, and Syria's coast has not, in fact, been blocked off by Gibraltar. It could be argued that this is the debated long-distance blockade, but with such specific, limited actions does not fit the description of such a blockade either. To this can be added that the very nature of economic sanctions, with very specific entities and very specific goods, etc, is a concept which is directly opposed to the idea of a blockade (to block everyone's access to a specific area). It is therefore certain that what Gibraltar did is not to be considered an action to uphold, or an action to institute, a blockade. It is an action that can described as an interdiction.[443]

[443] This distinction is of great importance. Would the Grace 1 incident potentially be able to be categorized as the EU setting up an actual blockade against Syria, it would have been an act of aggression. This in turn, could be deemed as an act of war, and an act of war not done correctly can potentially be seen as a war crime. Since the EU for example never announced such a blockade or took any other necessary step for a blockade in accordance to the law of blockade, while perhaps not likely, it would be within the realms of possibility that individuals involved in such a decision would risk committing a war crime. Because the Grace 1 incident with most certainty is not to be categorized as a blockade but an interdiction, this 'danger' is not directly related to the subject matter. Would the definition however change in the future or if Gibraltar in a much higher capacity would start to stop ships from going to Syria, it could perhaps become a potential issue (with high emphasis on 'perhaps' and 'potential'). Thus, while not relevant in this case, it is certainly a topic for future research.

5.1.4.2 Interdiction due to consent

There has been some confusion regarding The Grace 1's flag state. It was first believed to have been Panama due to the ship carrying the state's flag. Since Panama is in support of the economic sanctions against Syria, it could be argued that Gibraltar believed they had consent to board the vessel. When asked however, Panama refuted this claim, saying it had been removed from Panamas international registry.[444] It could be argued that the Grace 1 because of this did not have a flag state, and could therefore be safely considered part of Gibraltar's jurisdiction in that case. This is a good reason for the start of the interdiction and allows an investigation into the ship. Iran was although swift claiming ownership, and any form of prosecution would then be impossible. The vessel should have been released after Iran didn't give consent to the interdiction. This is in line with the reasoning behind the legality of the master's consent,[445] that just because an interdiction has started, does not mean that it is allowed to continue, and that there's a difference between the acts of investigation and potential seizure/detention. There is also no indirect consent given in relevant convention law.

5.1.4.3 Interdiction based on the UN Charter

5.1.4.3.1 UN and the prohibition on the use of force

As established in section 3.3.2, 'The UN and the use of force', the use of force is essentially banned via article 2(4) in the UN Charter unless the action can be motivated by one of the few existing exceptions that would allow it. To interdict a vessel also entails the use of force on this vessel and needs to be allowed in accordance to one of these exceptions. Most of these exceptions can be discarded in relation to the Grace 1 incident, but some are of interest to analyse. The three relevant are the charter exceptions found in article 41 and 42 via article 39 of the power of the SC, article 51 on self-defence, and the second customary exception mentioned by Schrijver, based on violation of human rights.

5.1.4.3.2 The difference between UN and EU sanctions

When a decision or recommendation is made by the SC regarding sanctions, article 41 and 42 gives legitimacy to those decisions. Sanction actions then taken by other states in tandem with those decisions or recommendations, are doing so legitimately, due to the status of the UN Charter. While UN- and EU sanctions might operate in a similar manner, it is important to remember this legitimacy that EU sanctions lack. EU's sanctions do not themselves have any legal importance to any other state not part of the EU. With the charter taking precedence even over UNCLOS, any claim that EU sanctions would have the same status as UN sanctions is false. EU sanctions is not a valid exception to article 2(4) in the charter, and since the UN has not put any sanctions on the Assad-government, use of force based solely on EU's sanction-regime is not permitted.

5.1.4.3.3 Self-defence

Next is the argument of self-defence. If the interdiction was taken as a measure of self-defence in article 51 of the UN Charter, that would allow it both via 2(4) in the charter and 19(1) in

[444] Anonymous, 'Grace 1 no longer Panama-registered' (*Insurance Marine News*, 8 July 2019) <https://insurancemarinenews.com/insurance-marine-news/grace-1-no-longer-panama-registered/> accessed 17 November 2019.
[445] Section 3.3.1.2.2.3, 'Master's consent'.

UNCLOS, as that would certainly be for the 'peace, good order or security' of the UK. It is true that even if the EU and its members are not directly involved in the Syrian civil war, with such extensive sanctions they are at least to be considered somewhat invested in it. With other allied actors involved in the war, it could be argued to have been a form of collective self-defence. At the other end, Iran's relation with the EU is troubled, and its relation with the rest of the western world is decaying rapidly. An aggressive action taken by Iran could potentially be seen as an attack which the UK would want to defend itself against. Both arguments would be valid, where it not for the fact that anticipatory self-defence is not recognized as part of article 51 and has been dismissed by the ICJ (even if not explicitly stated).[446] The shipping of crude oil, or the consequences of this ship arriving to Syria can in neither case be described as an 'armed attack' or an 'imminent armed attack'. For the classic argument of self-defence, there is altogether no ground for Gibraltar to legally argue that the Grace 1 could be interdicted due to its right of self-defence on the basis of the accepted interpretation of the UN Charter by the ICJ.[447]

5.1.4.3.4 Human rights violations

As presented by Schrijver, there is an exception to the ban on the use force '(i)n the event of flagrant and mass violations of human rights'.[448] This is the exception that NATO used when justifying their intervention in the Kosovo war in 1999, and while the exception has not reached *opinio juris*, has a fair amount of support.[449] In the case of the Grace 1 incident, the argument would be that an interdiction would be justified due to the alleged human rights violations of the Assad-government; hindering a crude oil shipment to such an entity would then be part of hindering more human rights violations. There are though some problems with this approach. It is an exception mainly focused on intervention, which is why Schrijver specifically mentions the exception for the use of force in another state's territory. That the exception (if even one would assume that it is truly to be regarded as an actual exception and not just an opinion of some states) would be applicable in a smaller scale in a non-interventional setting in the state's own territory seems to be stretching the limits of this exception. When comparing it to the events in Kosovo, it is also hard to evaluate what is to be considered 'flagrant and mass violations of human rights'.[450] The ethnic cleansing in Kosovo surely could be argued to be that, but since even that intervention was questioned by the international community, the question becomes what the limit is for such a use of force to be accepted. In addition, even if a hypothetical limit would be reached, a use of force which is not directly part of an intervention into that state's territory to stop the violations is not a use of force that plausibly could be motivated by the use of this exception only, especially with a principle such as the right of innocent passage being on the other end.

[446] Kreß 581.
[447] The possibility of categorizing the passage of Grace 1 as part of a terrorist action will be explored in section 5.2.4.3, 'The terrorism argument'.
[448] Schrijver 475.
[449] Section 3.3.2.5, 'Customary exceptions'.
[450] Schrijver 475.

5.1.5 State practice

The answer of the interpretation of innocent passage and article 19, lies in the question of state practice. As Yang comments, 'interpretation is one thing and application is another'.[451] The use of unilateral economic sanctions is not part of state practice, with most states being careful with the application of article 19. Furthermore, with the recognition by many states as being article 19(2) and not article 19(1) that should be breached for non-innocence, it is difficult to argue that unilateral sanctions that exists for no other reason than for economic and/or political pressure would be part of the usual conduct of application of article 19. Gibraltar's use of EU's economic sanction-regime is perhaps possible in view of the interpretation of 19(1) but not in application of it, as established by state practice.

5.1.6 Answer to the first research question

When considering the question of legality, especially in international law, the answer is seldom simple. There are many circumstances that works in Gibraltar's favour. The limits of innocent passage is unclear and often up to the state itself to determine. There is also room for speculation regarding the use of force in relation to the legal action of interdiction which would have precedence over UNCLOS or, when it comes to self-defence, be in sync with it. However, the limits of these rules and exceptions are not boundless, and in the case of the Grace 1 incident those limits are reached quickly. Even though Gibraltar would claim non-innocence, there is nothing for Gibraltar to argue with. The same could be said for the case of self-defence, since it is the USA, not the EU, that has branded the IRGC as terrorists. Perhaps the most interesting argument would be the (non-accepted) customary exception of human rights violations, since hindering human right violations is one of the main contributing factors of the EU restrictive measures in the first place. Such violations might also be why other international actors are accepting EU's economic sanctions, not because of the legality behind them but because of what they aim to do. Interdiction based on that is certainly above what the (non-accepted) exception is meant for and could not at the moment be considered legal, but it is nevertheless a valid argument. The problem with this line of reasoning is that this is not what Gibraltar and its Chief minister claimed. Gibraltar chose to not argue in the ways of an interdiction. They did not make any extrajudicial claims, nor did they claim to be using or interpreting any principle from the UN charter or its exceptions, or even disputed *jus cogens*. What Gibraltar and the chief minister did was claiming enforcement jurisdiction. It claimed enforcement jurisdiction, because the vessel was in their territorial waters. This leaves two options: Either Gibraltar and subsequently the UK now consider EU law to be above or on the same level as international law, UNCLOS and the UN Charter. This answer is unsatisfactory, both due to the principles of the EU, and because of the Chief minister's statement that their action was a showing of how 'committed to the rules based, international legal order'[452] Gibraltar were by doing this.[453] The more likely option is the second one: That Gibraltar claims that the ship had lost its innocence, a claim that it lacks support for due to state practice.

[451] Yang 163.
[452] Chief Minister's statement.
[453] Section 4.1.1.3, 'Gibraltar and the EU'.

5.2 If Gibraltar's conduct became standard practice, how would it affect the right of innocent passage and what consequence could that have?

5.2.1 The circumstances of Gibraltar's conduct

5.2.1.1 The Difference between the Grace 1 and the Stena Impero

5.2.1.1.1 Iran's detention of the Stena Impero

The difference between the conduct of Gibraltar and Iran, even though they both detained tankers that were registered in the other state, is substantial. Iran's detention was (presumably) done as a form of leverage, or even countermeasure, in reaction to Gibraltar's detention. Iran's action was also taken in Oman territory, presumably while enjoying transit passage. This makes Iran's actions more severe than Gibraltar's. This is also what makes the detention of the Stena Impero of little interest to the legal discussion of innocent passage as well as state practice; if a state such as Iran acts in a way that is clearly unlawful and goes against established customary law with a case as important as *The Corfu Channel case,* the legal impact is small, if not non-existent.

5.2.1.1.2 Countermeasure

The one thing that is of some interest is the question if what Iran did is to be recognized as an accepted countermeasure to Gibraltar's detention. With the legality of Gibraltar's detention being under dispute in the international community, it is not immediate recognizable as a countermeasure since it needs to have been in response to an 'internationally wrongful act'.[454] As concluded in the answer to the first research question of this thesis, Gibraltar's action can very well be regarded as an illegal act, albeit it is difficult to discern if Gibraltar's action were serious enough to validate a countermeasure. However, due to the clear use of illegal force breaching the UN Charter 2(4), this potential countermeasure was against international law.

5.2.1.1.3 Risk to the shipping industry

One of the more curios observations surrounding the Grace 1 incident is that it was not Gibraltar's actions that worried the shipping industry, but Iran's. It is the situation in the Strait of Hormuz that has analysts worried, not the Strait of Gibraltar. This can be attributed to a number of different things. To start with is that Gibraltar's action was a detriment to the Assad-government; an entity with comparably a small amount of economic power. Another relevant circumstance is that the Strait of Hormuz already was under some stress after other incidents. It can also be attributed to the unlawfulness of the detention of the Stena Impero being more obvious than what happened to the Grace 1. Yet, what truly sets these actions apart are the state's themselves. The UK, as well as the EU, carries considerably larger respect in the international community, both as accepted and respected actors in the world, and especially in regard to maritime law. The international community recognizes the intent of the detention (an intent a large part of the international community endorses, or at least accepts), to not give any resources to the Assad-government, and the shipping industry sees no danger in Gibraltar's conduct which was done in a seemingly legal manner. This behaviour by Gibraltar continued throughout the process, shown by the court's release after it got a confirmation that Iran wouldn't ship the crude oil to Syria. The UK is respected, the action was limited, and the cause was in the view of a large part of the international community, admirable. It is understandable

[454] Ronzitti 11.

that the industry did not see Gibraltar's actions as a danger to shipping, but that Iran's actions were seen as that.

5.2.1.2 The reason behind Gibraltar's interdiction

5.2.1.2.1 Legal duty

If asked, Gibraltar would perhaps claim that they had a legal duty to interdict the Grace 1 based on Gibraltar's Sanction regulation 2019. Such a claim would however be dishonest, since it is nearly indisputable that Gibraltar's Sanction Regulation 2019 was drafted specifically to interdict the Grace 1. What has also become apparent in this discussion is that legislation based on national regulation have no merit in giving a coastal state enforcement jurisdiction over a vessel; there was never a legal duty for Gibraltar to interdict the ship.

5.2.1.2.2 The USA's involvement

The Spanish foreign minister claimed that the action was taken in accordance to the direction of the USA, an allegation which Gibraltar has disputed. To the defence of this argument, it can be said that one of the main things that makes the Grace 1 incident so notable is due to the uncharacteristic behaviour of the EU and use of EU sanctions. Would the same incident happened in territorial waters controlled by the USA, the legal question wouldn't have been of such a large interest.[455] Although, even if the incident was orchestrated by the USA, a claim that can only be left to speculation, it was not conducted in a way that was in the interest of the USA. The ship was detained and tried on the basis of EU economic sanctions and released on the basis of Iran promising to adhere to those economic sanctions. The USA did also not manage to hinder the ship from being released, the release going directly against the USA's interests and wishes. This is not proof that the claims of the Spanish foreign minister is unfounded, it does show though that even if the Grace 1 was interdicted on the direction of the USA, the USA's eventual involvement in that case had very little impact on both the legal reason for the interdiction, the process itself and the decision of the court. It could reasonably be disregarded as simply a recommendation to its ally to interdict a vessel that was acting against both of their international interests. In any case, the EU must in the end stand for its own actions, regardless of possible underlying reasons for them.

5.2.1.2.3 Iran as an adversary

Another reason that would explain the reason behind the interdiction, would be if the EU took the action due to Iran being seen as an adversary. The action would then have been taken not because of its destination, but because of Iran being the owner of the cargo. This claim has some merit looking at the increasing tensions between Iran and the west, but in the light of the Grace 1 incident it is a claim that has minimal support. All of Gibraltar's reasons and arguments are directed at Syria and EU's sanction regime against the Assad-government. The tensions between the two entities perhaps made the decision to interdict the Grace 1 an easier decision to make due to the previous behaviour of Iran in the Strait of Hormuz as well as its relatively non-favourable status amongst the international community, but that was not the main reason for the interdiction itself.

[455] As Carl Bildt stated: 'EU as a principle doesn't impose its sanctions on others. That's what the US does' (David Uren, 'Sanctions: the new economic battlefield' (*The Strategist*, 6 august 2019) <https://www.aspistrategist.org.au/sanctions-the-new-economic-battlefield/> Accessed 19 November 2019).

5.2.1.2.4 Enforcement of sanctions and human rights violations

Even though other factors such as the relation with Iran and USA might have had an impact on why the decision was taken, the core reason comes back to wanting to hinder any form of military aid to the Assad-government. Denying the Assad-government its aid from Iran stops it from enacting future (alleged) human rights violations as well as forcing it to accept the EU's demands. That the EU had support from the USA and that Iran was a safe target certainly influenced the decision; but neither were the main reason behind it.[456]

5.2.2 Economic Sanctions as a tool

5.2.2.1 The legal nature of economic sanctions

5.2.2.1.1 Sanctions based on the UN charter

Before addressing EU's sanctions, or 'restrictive measures' against the Assad-government, the legal nature of such sanctions needs to be commented on. As already discussed in section 5.1.4.3.2, 'The difference between UN and EU sanctions', there needs to be established a clear line between sanctions based on the UN Charter and sanctions that act outside the limits set by the UN Charter and the SC: Those economic sanctions have precedence over most established international law. It is hence unilateral (economic) sanctions that are of interest when discussing the legality of them.

5.2.2.1.2 The legality of a state's unilateral economic sanctions

5.2.2.1.2.1 A states sovereignty

When acknowledging a state's sovereignty and the principles of the Lotus case, it has to be acknowledged that a state can trade, or not trade, with whoever it wants to. As Joyner formulates it:

> [I]n the absence of positive legal obligations to the contrary, it is certainly correct that a State has the legal discretion to choose with which other States it pleases to have, and to allow the legal and natural persons subject to its jurisdiction to have, economic/financial dealings.[457]

At face value, an economic sanction could be regarded as an internal decision by the state, even though the actions are meant to have an effect externally. When questioning the legality of an economic sanction, it is not the state's own sovereignty that is being questioned, but rather attempts by that state to influence another state's sovereignty through the first state's sovereign actions, or 'coercion', as it is called.

5.2.2.1.2.2 Coercion as *jus in bello*

As established by Reisman, together with the findings of Joyner, for economic sanctions to be examined in the context of the principles of *jus in bello* is a legal consequence of the potential results these sanctions could have. Economic coercion, especially in the modern setting, cannot be separated from the concept of a conflict between states, even in peacetime.[458]

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[456] It can as well have been seen as an opportunity to make a statement, in the context of Iran's increasing hostilities and thus hitting two birds with one stone, but that reason is purely speculative.

[457] Joyner 193.

[458] As commented in section 1.2.4 'Scope', it is not within the scope of this thesis to question the findings on the legal area of the law of conflict. Such an analysis would potentially require a separate thesis. Additionally, there

5.2.2.1.2.3 The question of intent and effect

It could be argued that the legality of sanctions from this point of view stems from their intent; the intent to coerce another state. Coercion would then, as Joyner explains, lead to a situation where that sanction is of a similar value to an actual attack on that state, especially since the effects of those sanctions could be just as destructive as a use of force by the state. The argument against this is that just because there exists intent does not automatically result in a coercion, which subsequently is the action that would be equal to an armed attack. That raises the question of the relation between the idea of intent and effect in this situation. Joyner's logic is that economic sanctions can be equal to an attack, due to their potential destructive capability. Since larger states are the one's often implementing said sanctions, that has shown to be true. If one would assume that a certain action is to be of equal value as an armed attack against a state, one would also have to assume that the intent, or 'attempt' of such an action should be regarded in the same light as an attempted attack. An attempted attack is without a doubt to be part of the law of conflict: Just because an attack fails does not mean that the attack wasn't unlawful. What must be remembered in this case however is that while economic sanctions have the possibility of inflicting such damage, it is still ultimately an internal decision which originates from the state's sovereignty. If a smaller state would not wish to trade with a larger state due to that larger state's political or religious beliefs, would then that be seen as an attempt of coercion and automatically be disqualified, even though the larger state wasn't harmed by the decision in any major way? Such logic would potentially disqualify any decision not directly related to free trade between states. This highlights the trouble of equating economic sanctions and the use of force and shows the need for a real legal definition for 'Economic warfare', such as the one as presented by Lowe and Tzanakopoulos. Joyner argues based on coercive economic sanctions with 'economic warfare' as an argument, but should have done so on the basis of the definition of economic warfare by Lowe and Tzanakopoulos. This does not invalidate Joyner's argument, since the definition of economic warfare as defined by Lowe and Tzanakopoulos is in essence what Joyner is referring to when discussing coercive economic sanctions; it could even be argued being what a coercive economic sanction is, since a claim of intent can be viewed to include a capability for it. That this is Joyner's viewpoint becomes especially obvious with the focus on the premise being destruction due to larger states putting pressure on smaller states. Even so, without using the definition of 'economic warfare' which makes the distinction of needing both intent and effect (or 'pressure' as Lowe and Tzanakopoulos calls it), the argument for the application of the principles of *jus in bello* is undermined by the Lotus principle in a way that it otherwise wouldn't have been. To therefore effectively argue that economic sanctions should be applied in the perspective of the rules of *jus in bello*, there needs to exist both intent, and effect or risk of effect; in other words, to be a form of economic warfare as defined by Lowe and Tzanakopoulos.

5.2.2.2 Economic warfare and the principles of jus in bello

5.2.2.2.1 General application

With the identified application of the principles of necessity and proportionality, discrimination, and review on economic sanctions, there exists some need to comment on them

has been no reason at this moment to question the findings of Joyner, Reisman and Lowe and Tzanakopoulos, as they have operated within the confines of established international law.

in relation to economic sanction. It is clear that all three principles would limit the application of sanctions: The Principles of necessity and proportionality puts a cap on an otherwise sovereign decision based on the need for such a sanction. The principle of review would also put greater emphasis on monitoring the sanctions direct effect, and not just the effect it has on their politically or economically motivated goals. The principle of discrimination however is the largest hurdle. Economic sanctions applied by a larger entity is by nature discriminatory; especially more broad sanctions that directly or indirectly would include an otherwise innocent population as a target. Joyner's conclusion on the illegality of most modern sanctions is in this light the obvious outcome.

5.2.2.2.2 The EU's sanctions against Syria

EU's sanctions are not justified by the UN, but are sanctions applied unilaterally. The sanctions are extensive, as seen by the EU's own list.[459] They are without a doubt to be defined as broad, and contains a large number of sectors, including sectors such as the industrial sector, energy sector and financial sector. The sanctions also include specific attempts of counter-proliferation. When it comes to the intent of the sanctions, the European Council is clear in their formulation: They want several political changes, the conduct of the Assad-government inside its borders to change, democratic change based on a proposed solution and some religious and ethnical conducts concerning violence to stop. With such strong condemnation it is also clear that this is the EU's option to an armed action. The sanctions can therefore be classified as 'economic warfare' as Lowe and Tzanakopoulos defines it. Outside that definition, Joyner's and Reisman's ideas of coercion are also applicable in this instance. The principles in *jus in bello* is therefore to be applicable to EU's sanctions. With that said, it is difficult to judge the necessity and proportionality of such sanctions. To do so an in-depth investigation and analysis of the Syrian civil war's political and humanitarian consequences would be needed, that were in tandem with the principles of *jus in bello* in the perspective of economic warfare. What is certain though, is that the sanctions on Syria is discriminatory and with most probability lacks the requirements of the principle of review, since that would require the sanctions to be applied in accordance to the principles of *jus in bello* in the first place. The sanctions are not designed within the standards that Reisman concludes that economic sanctions of this kind needs to be to be considered lawful; sanctions that are more precise and specific, with goals and combined with 'rigorously contextual and honest assessments of the collateral damage'[460] the sanctions will have.

5.2.2.3 Acceptance of economic sanctions

The use of economic sanctions in the modern world seems to be increasing. It is a well-known, almost 'popular' measure, deployed by a number of different states for different purposes. Despite its possible legal and (perhaps more concerning) moral implications, as well as discriminatory nature, it is still a widely used tool. There are of course a multitude of reasons for this all depending on specific circumstances, but at the heart of the question lies a singular

[459] 'Restrictive measures against Syria' (*EU Sanctions Map*, 11 September 2019) <https://www.sanctionsmap.eu/#/main/details/32/?checked=&search=%7B%22value%22:%22syria%22,%22searchType%22:%7B%22id%22:1,%22title%22:%22regimes,%20persons,%20entities%22%7D%7D> accessed 9 December 2019.
[460] Reisman 141.

answer: It is better than no action at all. As perhaps best summarized by former diplomat, (now) Lord Renwick: 'A decision to impose sanctions may be taken less on its intrinsic merits than because of its attractions in relation to the alternatives.'[461] Faced with the alternative of no action at all or military action, the alternative of economic action looks all the more alluring. Does this mean that economic sanctions are to be regarded as accepted state practice? Not necessarily, as widespread use does not always indicate acceptance. What the economic sanctions against the Assad-government shows is that a large part of the acceptance of economic sanctions come from the intention of those sanctions. There are few states that are in support of the actions of the Assad-government and its alleged human rights violations. This, combined with the status of entities such as the EU and/or the UK, both carrying respect and influence in the international community, it is easy to see why the interdiction would be accepted. Sanctions against an entity such as the Assad-government who has had UN investigation of war-crimes towards it is not a side many states would take. This acceptance is not a dismissal of the argument that the sanctions are most likely to be considered unlawful, and some states such as Russia which is in support of the Assad-government are quite obviously not in support of interdicting a vessel with supplies to Syria based on the EU's economic sanctions. What it does show however is the increasing acceptance of economic sanctions as a tool, as well as an accepted development of that tool to hinder other states access to the target state. With increased use and continued acceptance, it might develop enough to be considered state practice in the future.

5.2.3 Innocent passage and state practice

5.2.3.1 The interpretation of innocent passage

5.2.3.1.1 UNCLOS and innocent passage

It could be suggested that the success of UNCLOS is also the reason for lack of delimitation found in rules such as when it comes to innocent passage: The more inclusive a treaty seeks to be, the less specific it has the capacity to be. That does not mean that the right of innocent passage is not represented in UNCLOS, but it does mean that the answer can't simply be derived from the articles of innocent passage without context. While 19(2) presents guidelines that some states see as *de facto* rules, and even if a scholar such as Yang has the opinion that this is how it 'should be' interpreted for the protection of the right of innocent passage and the freedom of the seas in general, that is not how it actually 'is' interpreted.

5.2.3.1.2 Customary law

Some answers can perhaps be found when looking back at how customary law has developed and the recognition of innocent passage in the freedom of navigation. It is to be remembered though that this incarnation of innocent passage is relatively new, and as part of the freedom of navigation which is part of the freedom of the seas, is in constant battle with the principle of sovereignty.[462] As such, and with UNCLOS being an accepted codification of innocent passage, an interpretation based on UNCLOS would not meet resistance from customary law, as it in essence is customary law.

[461] Renwick 1.
[462] Section 2.2.1.3, 'The three principles of the law of the sea'.

5.2.3.2 Transit passage and passage in territorial waters

5.2.3.2.1 The difference between territorial passage and strait passage

Even though the subject matter is about innocent passage in the territorial sea, the right to transit passage between the high seas and/or EEZ's needs to be commented on in this context. Would the interdiction have been part of transit passage rather than passage through territorial waters, the answer of its legality as part of UNCLOS and customary law would have been different. International straits enjoy better protection and a 'stronger' right of innocent passage than the territorial sea has, and even though the interdiction in this thesis still was deemed as unlawful, the legality of the situation would not be as precarious.[463] The *Corfu Channel case* is also prominent case law which is accepted customary law, and shows how important transit passage in international straits are.

5.2.3.2.2 Transit passage and the Grace 1 incident

Even if the Grace 1 had enjoyed strait passage, it is doubtful if Gibraltar's actions would have been different. The action was after all not done in protection of the EU or the UK, but as Gibraltar's Chief minister himself formulated it: 'Gibraltar can be proud of the role it has discharged in guarding the entrance to the Mediterranean.'[464] It is also doubtful if the reaction from the international community would have been different, since the focus has not been on innocent passage, but rather the enforcement of economic sanctions on a neutral state. The hypothetical scenario of the Grace 1 enjoying transit passage is not of importance to the incident itself, but it does carry some importance for the larger picture. It also suggests that if Gibraltar's conduct affects innocent passage in territorial waters, it could also affect the right of transit passage.

5.2.3.3 Yang's conclusion on the right of innocent passage in territorial waters

As already mentioned, Yang makes three statements of interest to the topic of innocent passage in territorial waters: The jurisdiction of coastal states are increasing, UNCLOS has no adequate system of determining if a state's requirements are obstructing innocent passage, and the only thing protecting the right of innocent passage is state practice.[465]

5.2.3.3.1 Increasing jurisdiction

That coastal state's jurisdiction is increasing is not because of a single factor, but rather a combination of many. Environmental concerns have led to that coastal state's simply can't let any ship cross its waters without fulfilling their environmental requirements, as the passage not adhering to these rules could potentially harm the coastal state. It is also a question of increased traffic, as traffic control becomes more and more necessary. The largest increase in jurisdiction has although probably originated from the need of security jurisdiction. This increase, as Kaye has presented, is not an isolated incident and can be tracked to the events of 9/11. It has had a significant impact in other areas of the law as well, most notably concerning the action of self-defence.[466] When it comes to the question of interdiction, Rothwell and Stephens confirmed that increased interdiction could be traced to the events of 9/11.[467] Whilst security jurisdiction

[463] Section 5.1.6, 'Answer to the first research question'.
[464] Chief minister's statement.
[465] Section 4.1.6.2, 'Yang's conclusion'.
[466] Section 3.3.3.3, 'Self-defence and the war against terror'.
[467] Section 2.3.4.1.2, 'Increasing need for security jurisdiction'.

is not directly correlated to the issue of economic sanctions and innocent passage, the Grace 1 incident could be seen as part of the 'creeping jurisdiction' which is undermining the freedom of navigation. Without the already existing development in this area, it is likely that the interdiction would have been a larger issue. It also increases the likelihood of that the conduct of the Grace 1 becomes state practice.

5.2.3.3.2 Obstruction of innocent passage

As Yang noted, there is no real test to whether a state's restrictions are to count as obstruction other than general principles in international law, and even in the light of these general principles it is deceptively difficult to discern what conduct would go against it. There is although the question of discrimination, which as earlier commented is a specific concern for such an interdiction.[468] This is especially true if it would become standard practice. Without relating it to an immediate security concern or any form of danger to the coastal state, a standard practice of this conduct built on a sanction-regime could be regarded as the very definition of the discrimination found in UNCLOS 24 (1)(b).

5.2.3.3.3 State Practice

The third, and arguably the most important conclusion Yang makes about the right of innocent passage in the territorial sea, is that the subjective interpretation of what makes a passage non-innocent is not being limited not by treaty law, but by state practice. Coastal states have a reason to keep the right of innocent passage intact, and as such are careful in their assessment of any breach. Even when regulations are not followed, enforcing national jurisdiction on the ship is going a step further. An encroachment of the right of innocent passage would lead to the coastal states themselves having to deal with the consequences of their own actions and potential effect to their own economy and shipping industry.

5.2.4 The alternative

In the question regarding the legality of Gibraltar's conducts and the potential consequences of such conduct, it is of importance to determine if it was the only recourse other than inaction. Furthermore, to dismiss or endorse an action based on its lawfulness and its eventual outcome is of little interest unless evaluated adjacent to a viable alternative. What will be discussed next is therefore if there was another way to interdict the Grace 1, that would in fact have been considered legal under international law.

5.2.4.1 Accepted actions

With the ban on the use of force in the UN Charter there are only a limited number of ways an interdiction action can be taken and still be lawful under international law. It would be for the vessel to lose innocence and the state thereby gain enforcement jurisdiction (and even then the action has to be proportionate), or it would be an action that would be in accordance to the UN Charter and have precedence over the rules in UNCLOS. In addition to the loss of innocence through 'normal' means, there have been two exceptions to the UN Charter that has been of interest: The customary exception based on stopping human rights violations, and anticipatory self-defence from terrorism.

[468] Section 5.1.3.4.2, 'Sanctions as a means of peace, good order or security'.

5.2.4.2 Protection of human rights

As already discussed, the customary exception regarding the protection of human rights is an exception that can both be questioned in regard to its applicability in these specific circumstances, as well as validity of the exception itself.[469] Since it has already been examined in detail, no further comment will be made of its nature or applicability. Despite its dismissal surrounding the question of the legality of the Grace 1 incident the exception is although nevertheless still worth mentioning. The reason for this is because of the close relation the exception has with the reason behind Gibraltar's interdiction. The thesis has concluded that the customary exception regarding human rights was not the legal argument that Gibraltar used, and with little supporting such an argument it could not be used to justify Gibraltar's actions. If Gibraltar would however have argued from the standpoint of this exception and supported its interdiction not directly on EU's economic sanctions, but rather enacted the sanctions unilaterally on the basis of the UN inspectors reports on Syria and from secretary-General Ban-Ki-moon's statement accusing the Assad-government of war crimes, an entirely different argument could be made. Then Gibraltar's actions would have been made in order to protect the UN's interests. That line of argumentation could have garnered additional support from the international community. This additional support would not have made the action legal, but it would have been more in line with UN law and would not have risked implicating the right of innocent passage, as well as giving the customary exception further recognition. This argument though has several problems, not including the complications already mentioned earlier in the thesis. To take such an action could be seen as an attempt to circumvent the SC, and decide on an action that would normally be done at the direction of the SC. It would also be an action heavily motivated by the intent of the action and its interpretation subjective, reliant on the assessment of singular entities instead of a collective such as the SC. All in all, the consequences of relying on such an argument seems to outweigh the consequences of Gibraltar's original actions.

5.2.4.3 The terrorism argument

5.2.4.3.1 Anticipatory self-defence against terrorism

The other viable exception could be called 'the terrorism argument', and it is the idea that anticipatory self-defence is allowed if the target of a military action can be categorized as terrorists. The endorsement by the SC of such anticipatory self-defence has given states a broad exception to the use of force as long as the use of force is against terrorists. It could be argued that the exception only extends to actions related to the events of 9/11; however, in unison with the view presented by Gill, without an action by the council to express that they do not longer support this kind of preventive or anticipatory self-defence such use of force will continue to be seen as a legal exception to the ban on the use of force in the UN Charter 2(4).[470] With the definition of what a terrorist entity is being fairly subjective, as long as it could be said to be within what the UN General Assembly have defined it as, categorizing certain entities as terrorist organizations is acceptable.

[469] Section 5.1.4.3.4, 'Human rights violations'.
[470] Gill 748 – 751.

5.2.4.3.2 The method of the USA

The reason the terrorism argument is particularly relevant in these circumstances is because this is the exact method the USA used to motivate their conduct toward the Grace 1. By defining the IRGC as a terrorist organization, it has gained access to a legal argument for interdiction, an argument that does not only have precedence over UNCLOS but is in accordance with it. By using the argument, the ship would lose its innocence both due to the specific principle laid out in 19(2)a and the general rule in 19(1). By relying on an entirely different set of rules, the terrorist argument does not risk changing or eroding the right of innocent passage.

5.2.4.3.3 Categorizing of terrorists

To categorize certain entities and/or persons as terrorists do have its limits. To do so against Iran for example would not be feasible, especially for the EU and the UK, both due to the size of Iran and its recognition by the international community. There are also more practical concerns. Since Iran has such a strong position at the Strait of Hormuz, coupled with its share in the oil-industry, too extreme an action would provoke Iran and endanger the interests the EU and the UK have in that area. Iran however, by not wanting to take the blame for its actions, has outsourced parts of the state. IRGC is claimed to be a separate entity in support of Iran (even though it is unofficially recognized as part of the state of Iran). While Iran might have seen it as a good decision at the time, it has left such organizations vulnerable to these kinds of claims. For the UK and the EU to brand an organization such as the IRGC as a terrorist organization in the same way USA has done would not be as risky as doing it to Iran. With the IRGC as a terrorist organization, the interdiction of the Grace 1 would have been against the IRGC, and as an act of self-defence in the fight against terrorism. Such self-defence would be in order to protect the UK, and the ship would then lose its innocence. Doing the same against other organizations or persons that are in support of the Assad-government would also not be outside the realms of possibility. To brand the Assad-government itself would be difficult though, both due to its recognition and support, and particularly because of its support from a permanent member of the SC.[471]

5.2.4.3.4 Differences in forfeiture law

While it would have been possible for the UK to theoretically categorize the IRGC as a terrorist organization and interdict the vessel that way, there are a clear difference between UK and US forfeiture law. US forfeiture law against targets considered terrorists gives the state an almost absolute power to seize and forfeit any asset involved or related to a terrorist or a terrorist organization, and make the seizure as a part of an *in personam*- or *in rem* action depending on the situation. UK law is not that flexible; there are some assets that can be seized without a direct relation to a crime, but those assets are part of an exhaustive list focused primarily on money laundering.[472] It would be difficult, if not impossible for the UK at the moment of the Grace 1's interdiction to actually make a case for the crude oil to be seized, or even detained under the conditions that the oil wouldn't reach Syria. The law would have to be changed,

[471] That member being Russia ('Current Members' (*United Nations Security Council*)) <https://www.un.org/securitycouncil/content/current-members> accessed 12 December 2019.
[472] ATSCA Schedule 1 paragraph 10A.

possibly even at the EU level, to effectively interdict and keep cargo from passing ships to reach an unwanted destination.[473]

5.2.4.3.5 Other problems with the terrorist argument

Other than potential issues concerning implementation, there are other problems with the terrorist argument. What targets to be set as terrorists has to be very specific, and some targets might be impossible to brand as terrorists, either out of principles found in international law or purely on an economic or political level. Also, categorizing a certain target as a terrorist could have major backlash in the international community. It is therefore a tool with limited use. Another problem with it is its dependency on the SC, relying on an exception to another exception, which would make small changes in its interpretation risk changing the legality of the conduct. It also exists a problem regarding the definition of terrorism. The subjective interpretation does make it easier to categorize a target as a terrorist, but that also makes it easier for other states to do the same. With increased use, it could legitimize a conduct which could risk the security on the seas and effectively spell an end to innocent passage as we know it.

5.2.5 Answer to the second research question

Gibraltar is in a position that cannot be described in other words than completely unique; both geographically as well as politically. As part of the UK and subsequently the EU, it is part of an international legal body that is generally well accepted in the international community, and that usually tries to follow international regulation and law best it can. The UK itself is also an influential part of the international community in its own right, and even without the EU would still garner support from the community. Gibraltar's unique position makes it possible for it to both implement a certain regime, and for this regime to more likely be accepted by the international community than if another state acted in the same way. Though the action was condemned by some and in actuality unlawful, it was in general not seen as such. Would Gibraltar continue with its practices, it would likely get a similar response. Another reason for this acceptance, is due to the acknowledgement of EU's economic sanctions against the Assad-government. The intent of the sanctions is admirable, and not many would combat sanctions aimed at stopping human rights violations done by a smaller, non-influential entity. Another reason is the tool itself being used. Economic sanctions as a tool, despite all its flaws and its received criticism, have become a part of modern international politics, as well as a natural part of non-violent conflicts between states. Economic sanctions might in the coming years not be seen in such a favourable light, but at this point of time it must be seen as an accepted form of economic action. The result of Gibraltar then continuing its conduct is clear: The use of an accepted tool by an entity such as Gibraltar, to accomplish something seen as admirable and with good intention, would likely have a direct impact on state practice. Gibraltar's standard practice would change the state practice of what makes a vessel non-innocent, state practice being the only thing according to Yang that so far has been limiting the use of UNCLOS article 19. This would allow other states to implement the same kind of regimes, deciding which states they want and do not want merchant vessels passing through their territorial sea to travel to.

[473] It could be argued that the only change needed would be an exhaustive list like ATSCA Schedule 1 paragraph 10A, or add additional items to the already existing list, but that is a complicated issue concerning UK and EU legislative rules and is a topic for future research.

These merchant vessels would then risk being declared non-innocent and hindered, perhaps even seized as long as there would exist adequate proof of the vessel's destination being the sanctioned entity. That would in turn result in an erosion of the right of innocent passage and have a severe negative impact on the freedom of the seas as well as having a negative impact on the stability of the shipping industry.

6 Conclusion

The multiple questions surrounding the Grace 1's interdiction are complex. It is not in essence a question about legality, but about if standard practice is capable of making the action legal and what the consequences of both the result of this legality and the consequence of the tool that would be used to make it so. The potential erosion of the right of innocent passage is troubling and would risk much of the freedom and opportunity on the seas that states have become accustomed to. There has already been signs of it eroding in favour of the principle of sovereignty, as the world itself becomes more and more complex. This complexity then needs increasingly complex solutions. If Gibraltar would continue to apply economic sanctions to neutral passing vessels, that would surely cement the erosion of the freedom of navigation, at least in the territorial sea. It would also conceivably create an exception to the right of innocent passage, an exception that then could be abused by coastal states, especially the coastal states that have territorial waters that are needed for safe navigation. However, even more troubling is perhaps the tool itself, economic sanctions: A tool used for what could be called economic warfare and which often could be considered discriminatory and damaging to an innocent population. The EU's economic sanctions are no different, they could even arguably be used as a prime example of Lowe and Tzanakopoulos definition of economic warfare. The economic sanctions are there to force change, for the Assad-government to give in and give up. If you are to believe Joyner's and Reisman's assessment, the sanctions are also to be considered unlawful in accordance with international law. In any case, it is a dangerous tool to further legitimize and give further power to.

The counterargument to all of this is that EU's sanctions and Gibraltar's interdiction was done with a good intent, with the intent to stop human rights violations, death, suffering, and institute democracy and freedom. The logic is then that actions that was done with a good intent would gain recognition, while actions that lacked this good intent would not. This is the same argument yet again that can be seen in the customary exception of the use of force to stop human rights violations, and builds upon it to some extent. However, that is a flawed argument. It is ultimately the tool that is legitimized, not the intent. Intents are subjective and can easily be twisted into other shapes that fits the user's needs. Additionally, it is an argument ill-suited for the construction of legal structures. A legal structure where acts gets their legitimacy from their intention and success instead of getting its legitimacy from a foundation built upon legal principles, is a dangerous building to be standing on. Relying on such logic risks destabilizing international law, and it is precisely this logic that Gibraltar's interdiction of the Grace 1 seems to rely on. It will be granted that the argument of intent carries some weight when used to argue

in favour of a military intervention to stop death and suffering, such as in the case of NATO's intervention into Kosovo to stop ethnic cleansing, but not for the kind of action taken towards the Grace 1.

If the UK via Gibraltar truly needed to interdict the Grace 1, it should have done so on the basis of 'the terrorist argument' that the USA operates under. Even if it would require changes to UK or EU law to make the interdiction process operate in an effective manner, it is a way that is legal and that would not erode the right of innocent passage or risk increasing the power of an already misused tool named economic sanctions. The argument as explained contains some risks but faced with the potential legal ramifications of the use of economic sanctions to interdict a vessel in territorial waters, it seems to be the better option; at least in the specific case of the Grace 1. That is however not an endorsement of 'the terrorist argument'. Even if the action would be considered legal and not be as impactful as the use of economic sanctions would, it does not mean that it carries no consequence. Using the SC's exception designed to more effectively combat terrorism to instead interdict vessels benefitting the states own foreign policy is still an abuse of the exception, regardless of how legal it technically is.

What should then Gibraltar have done, when faced with the question if it should interdict the Grace 1, to achieve its intentions of stopping the human rights violations in Syria? The question is complex but the answer is not. Gibraltar should not have interdicted the Grace 1, and in the best interest of the world, it will hopefully not try to do something like this again. This also serves as a warning to other coastal states in a similar situation which are tempted to replicate Gibraltar's actions, as any positive gain would be offset by the consequences it could have on the law of the sea. The road to hell is paved with good intentions.

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