

Clarifying U.S. - Japan Mine Warfare Roles, Missions, and Capabilities in the Persian Gulf: An Examination of International Legal Issues

BY SEAN HENSELER

In August 2012, the Center for Strategic and International Studies released the “Armitage/Nye Report” which offered several policy recommendations intended to bolster the U.S.-Japan alliance “as a force for peace, stability, and prosperity in the Asia-Pacific region and beyond.”¹ The report asserted that one area for potential increased alliance defense cooperation was minesweeping in the Persian Gulf and recommended that, “at the first rhetorical sign or indication of Iran’s intention to close the Strait of Hormuz, Japan should unilaterally send minesweepers to the region to counter this internationally illegal move.”² Additionally, the report noted that both Japan and the U.S. have begun to address anti-access/area denial (A2/AD) challenges and observed that, “while the U.S. Navy and the Japan Maritime Self-Defense Forces (JMSDF) have historically led in bilateral interoperability, the new environment requires significantly greater jointness and interoperability across services in both countries and bilaterally between the United States and Japan.”³ Finally, the report recommends that senior leadership from the U.S. Departments of Defense and State, together with the Japanese Ministries of Defense (MOD) and Foreign Affairs (MOFA), should engage in a roles, missions, and capabilities (RMC) dialogue focusing on this challenge.⁴

While any decision related to the deployment of Japanese minesweepers to the Persian Gulf would undoubtedly be informed by Japan’s interpretation of its constitution, it should also be informed by its interpretation of international law with

respect to mining. Moreover, any U.S.-Japanese dialogue concerning mine warfare RMC in the Persian Gulf, where Iran has the capability to pursue an A2/AD strategy, might be a productive point of departure for an examination of RMC regarding regional A2/AD challenges.

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In an effort to inform these types of discussions, this article offers ten questions and answers pertaining to the most difficult legal issues related to using force to counter mining in the Strait of Hormuz (SOH). A careful examination of these issues, and candid dialogue between U.S. and Japanese officials concerning them, are practical actions that may be undertaken in response to the Armitage/Nye policy recommendations outlined above.

Legal Issues Related to Using Force to Counter Mining in the Strait of Hormuz

Since late 2011, Iran has suggested that it could close the Strait of Hormuz (SOH) in response to economic sanctions or an attack on its nuclear facilities. While Iran possess a range of capabilities that could be employed to block the SOH, it is likely that

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naval mining would be part of an Iranian A2/AD strategy. As a result, policymakers and military commanders in the U.S. and Japan must consider options required to maintain freedom of navigation (FON) through this vital chokepoint. A thorough understanding of the legal issues related to mining is essential to formulating courses of action that will be perceived as legitimate. This article addresses the most significant legal issues and reaches three conclusions for policymakers in Washington and Tokyo to consider.

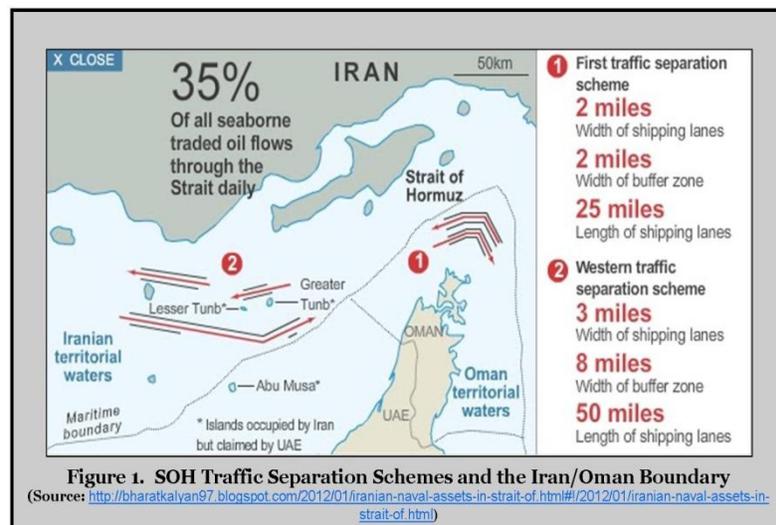
First, nations can lawfully conduct intelligence, surveillance, and reconnaissance (ISR), maintain a “fires” presence, and conduct mine warfare information-gathering activities in the SOH during peacetime. Second, nations may use proportionate force against assets about to mine, or in the act of mining, the SOH either in self-defense or to ensure the freedom of maritime commerce depending on the circumstances. Lastly, nations may use proportionate force in self-defense to protect assets engaged in mine hunting and sweeping, to possibly include attacking targets ashore that represent an imminent threat to the mine countermeasure (MCM) forces.

Ten Questions for U.S. and Japanese Policymakers and Senior Military Commanders to Consider

1. Could a Nation Maintain a Persistent MCM Presence in the SOH?

Yes, as long as transit passage requirements are met. In order to effectively counter threats before mines are emplaced, or “left of splash,” commanders must maintain a persistent ISR and fires presence. However, because the SOH is an international strait, ships and aircraft are restricted in their freedom of action. Units must proceed without delay, refrain from

any threat or use of force against states bordering the strait, and refrain from any activities other than those incident to their normal modes of continuous and expeditious transit.⁵ However, units may take steps to ensure self-defense, to include using off-board sensors (e.g., unmanned systems) to collect indications and warning of hostile intent.⁶ Warships can launch and recover aircraft and submarines can transit submerged. While merchant ships must respect properly designated sea lanes and the two traffic separation schemes in the SOH and its approaches, warships and government auxiliaries are not required to comply with them.⁷ For military vessels and aircraft, the right of transit passage exists “shoreline to shoreline.”



Despite operational restrictions, commanders are privileged under international law to use a combination of transiting manned and unmanned air, surface, and subsurface assets to establish a desired level of presence. Additionally, a coastal nation bordering an international strait, such as Oman, could allow aircraft to loiter indefinitely in its airspace, to include above its territorial seas (TTS) in the SOH, provided they don’t infringe on the transit passage rights of other aircraft. Finally, while assets gathering mine warfare related

environmental information must also transit continuously and expeditiously, they may gather information from shoreline to shoreline.

2. Could Iran Lawfully Mine its Territorial Seas?

Yes, for national security purposes.⁸ Pursuant to the United Nations Convention on the Law of the Sea (UNCLOS), a nation’s TTS may extend 12 nautical miles (nm) from that nation’s baseline, typically the low water line along the coast.⁹ However, Iran has established a “straight baseline” system pursuant to its interpretation of UNCLOS which several nations view as excessive.¹⁰ (See Figure 2) Because Iran’s straight baseline extends its internal waters and TTS, many nations would dispute how far out Iran could lawfully sow mines during peacetime.¹¹ Complicating matters, there are three islands claimed by both Iran and the United Arab Emirates in the vicinity of the Western Traffic Separation Scheme (WTSS) (See Figures 1 and 2). Iran has asserted that each island has a 12nm TTS. The result is an excessive maritime claim where nearly the entire WTSS falls within Iranian-claimed TTS.

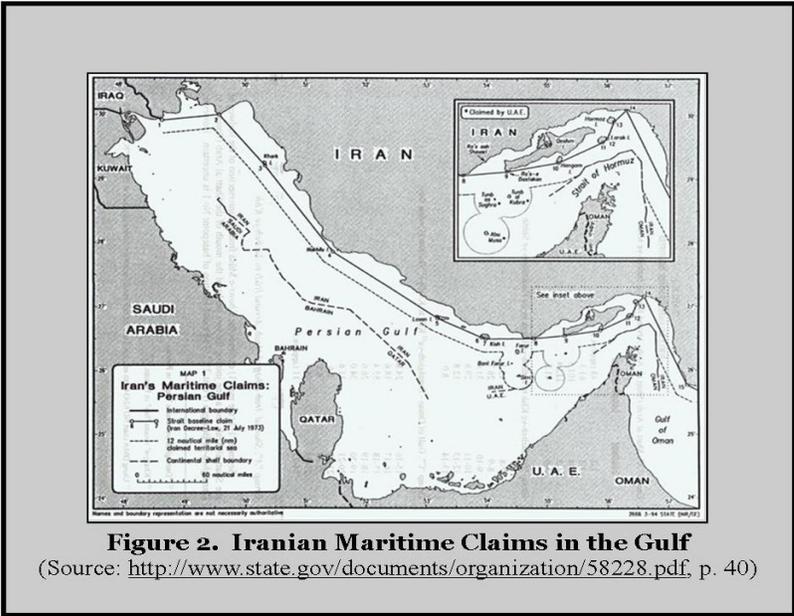


Figure 2. Iranian Maritime Claims in the Gulf

(Source: <http://www.state.gov/documents/organization/58228.pdf>, p. 40)

If Iran were to mine its claimed TTS with *armed* mines, it would be obligated to provide international notification because other nations possess the right of innocent passage through Iranian TTS.¹² Since the right of innocent passage can only be suspended temporarily, Iran would have to remove or render harmless its mines as soon as the security threat which prompted

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their emplacement was terminated.¹³ However, if Iran were to use *controlled mines* (mines not yet armed) it would not be subject to either notification or removal requirements.¹⁴ If Iran were to use floating mines, they must be directed against a military objective and become harmless within an hour over loss of control over them.¹⁵

3. Could Iran Lawfully Mine the SOH?

No, but... During peacetime, coastal nations may not “impede” the right of transit passage and thus may not emplace *armed* mines in an international strait.¹⁶ While some have suggested that a nation could sow *controlled* mines in an international strait during peacetime, because the presence of controlled mines in the SOH would likely be discovered and impede shipping, the stronger position is that Iran could not sow controlled mines either.¹⁷ Once an armed conflict begins, nations can lawfully mine international straits but only if “safe and convenient alternative routes are provided.”¹⁸ However, it is impossible for Iran to meet

this requirement because the SOH is the only way into and out of the Gulf.

4. *Is Iranian Mining “An Act of War?”*

Not always. Because a nation can lawfully mine its TTS during peacetime, assertions that any Iranian mining constitutes an “act of war” are legally inaccurate.¹⁹ Given its excessive claims and the ambiguity of the law, Iran has several options to justify naval mining. As indicated in Figure 1, the WTSS, which must be used by merchant ships, traverses Iranian-claimed TTS. Iran could mine the WTSS and suggest that ships have an alternate route to the south. Iran could also sow controlled mines in its TTS bordering the Eastern TSS asserting that vessels have a “safe and convenient route” on the Omani side, or could mine its claimed TTS near the approaches to the SOH outside the Arabian Gulf. An Iranian justification for each scenario, that its national security trumps the mere impingement of maritime commerce, might be viewed by some as legitimate. As such, U.S. and Japanese military commanders and policymakers must arrive at a mutual understanding of what would constitute *unlawful* Iranian mining before addressing if, when, where, and how force would be used to counter it.

5. *Are There Any Rules Concerning Responses to Unlawful Mining?*

Yes, but they are not “hard and fast.” Nations can use force either in self-defense or in accordance with a United Nations Security Council Resolution (UNSCR). Per Article 51 of the UN Charter, nations possess an inherent right of individual and collective self-defense if an armed attack occurs.²⁰ Included is the right to act in anticipatory self-defense when an attack is imminent and no reasonable choice of peaceful means is available.²¹

The International Court of Justice (ICJ) has, to some extent, addressed the issue of when mining might be considered an “attack” and what types of countermeasures would be lawful in response.²² While ICJ decisions are not binding, policy that would authorize the use of force “left of splash” would likely be influenced by them. Considerations related to naval mining gleaned from ICJ decisions include:

(1) A coastal state has no right to prohibit passage through an international strait in peacetime and the right of “freedom of maritime communication” ought to receive preference over any right that a nation might have to deny passage through an international strait.²³

(2) If the right of access to ports is hindered by mines, freedom of maritime communications is infringed.²⁴

(3) Elementary considerations of humanity are more exacting in peacetime than in war.²⁵

(4) A mine strike that damages a single military or merchant vessel *might* be sufficient to trigger a nation’s right of self-defense.²⁶

(5) For a mine strike to be considered an armed attack a nation must specifically intend to harm another nation’s vessel.²⁷ (Of note, many commentators disagree with this ICJ position).

(6) A nation must be able to attribute responsibility before it can act in self-defense.²⁸

(7) Actions in self-defense must be necessary and proportionate and don’t necessarily have to occur during the attack or in the minutes after the attack.²⁹

(8) In determining what constitutes necessary and proportionate, the nature of the target upon which force is used must be considered (e.g., it must be a legitimate military target).³⁰

(9) For a nation to exercise collective self-defense, a victim state must

declare itself attacked and request assistance.³¹

(10) “Scale” and “effects” are critical elements in determining whether or not an action rises to the level of an armed attack.³²

The ICJ specifically examined the U.S. use of force when it launched attacks in self-defense against Iranian oil platforms, naval vessels, and aircraft four days after the *USS Samuel B. Roberts* struck a mine in the Arabian Gulf in 1988.³³ The court found that the U.S. response was unnecessary because it was not convinced that Iran sowed the mine.³⁴ Since only one ship was hit and there was no loss of life, the court also found the U.S. reaction disproportionate.³⁵ However, the court did not suggest the use of force in self-defense was unlawful because four days had elapsed between the mine strike and the reaction. Despite the court’s ruling in 2003, world reaction in 1988 was favorable.

Another example regarding the use of force against a mine-laying vessel occurred during the Iran-Iraq “Tanker War.” On September 21, 1987, the *Iran Ajr* was observed by U.S. helicopters laying mines at night in a channel used regularly by U.S. ships in the central Gulf. U.S. forces seized the Iranian vessel and subsequently destroyed it so it could no longer threaten U.S. and neutral vessels.³⁶ Nine armed Iranian-made mines were aboard and charts found helped the Navy locate and disarm nine additional mines. In accordance with Article 51 of the Charter, on September 22, the U.S. notified the Security Council that it had acted in self-defense. The U.S. noted that it had previously informed the Iranian government on three occasions that it would take appropriate defensive measures against such provocative actions, which present an immediate risk to all ships, including those of the United States.³⁷ Iran

did not seek a remedy for the sinking of the *Iran Ajar* and the international response at the time was favorable.

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The fact that the international community viewed both U.S. reactions to Iranian mine laying in the Gulf as legitimate is important because if state practice attains a degree of regularity, and is accompanied by the general conviction among nations that behavior in conformity with that practice is obligatory, it then becomes customary international law binding on all nations.³⁸

6. Could a Nation Use Force if Mines Are Emplaced Directly in the Path of a Vessel?

Yes. If a nation were to sow a mine in the path of a military or merchant vessel, then it would be fair to characterize the act as an “armed attack” such that the victim nation would be justified acting in self-defense. The U.S. defines proportionate force as that amount of force which is limited in intensity, duration, and scope reasonably required to counter an attack or threat of attack and to ensure the continued safety of U.S. forces.³⁹ The U.S. would thus be justified using force not only against the mine-laying platform, but possibly also against other military targets after the mine strike. If a mine-laying asset were to sow a mine directly in the path of another nation’s military or merchant vessel and the other nation characterized the act as an

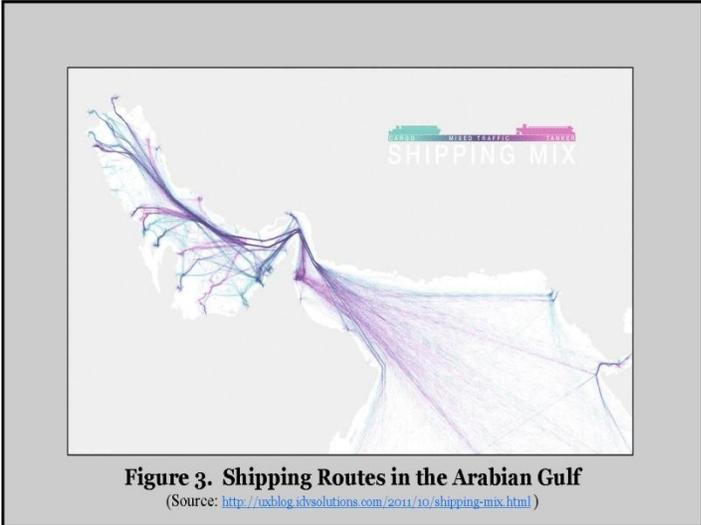
armed attack, then it could request assistance in collective self-defense.

7. Could a Nation Use Force After a Mine Strike When the Mine Was Not Emplaced “Directly in the Path” of a Transiting Vessel?

Yes. If the mine-laying could be attributed to a country, then the nation whose vessel was damaged could assert that an armed attack occurred and would be justified in using necessary proportionate measures in self-defense against a legitimate military target. Moreover, the victim nation could request assistance in collective self-defense.

8. Could a Nation Use Force to Counter Mining in Sea Lanes Leading Toward the SOH and its Approaches?

Not if a safe, alternative route exists. During peacetime a nation can place controlled mines in international waters but only if required by “the most demanding requirements of individual or collective self-defense” and the mines “do not reasonably interfere with other lawful uses of the oceans.”⁴⁰ While some dispute this U.S. position, it nonetheless opens the door to justify mining international waters.⁴¹ Because controlled mines do not constitute a hazard to navigation, international notice of their emplacement is not required.⁴² As such, a nation could not use force to counter an Iranian minelayer about to, or in the act of emplacing, mines in a sea lane where a safe, alternative route exists. U.S. and Japanese commanders and policymakers would be wise to consider if there are any sea lanes in international waters, outside the SOH and its approaches, which, if mined, would fail to leave a safe, alternative route.



9. Could Nations Use Force Against Mine Assets “Left of Splash” or “In the Act of” Mining the SOH or its Approaches?

Yes, but not in self-defense. Given these circumstances, it would be difficult to justify using force in self-defense because the act of mining the SOH, while unlawful, would not constitute a direct attack on any state. However, nations should be able to use force “left of splash” or against assets in the act of unlawfully laying mines in the SOH or its approaches to ensure the freedom of maritime communications for the following reasons:

- 1) Nations cannot prohibit passage through an international strait in time of peace;
- 2) The right of freedom of maritime communications must receive preference over any right of a coastal nation to deny passage through an international strait;
- 3) Mining the SOH would deny warships and merchant ships access to ports in the Gulf, thus infringing on freedom of maritime communications;
- 4) Mining a frequently trafficked international strait would likely cause significant damage and loss of innocent civilian life;

5) There is no other safe or alternative route for shipping into or out of the Gulf; and

6) The significant detrimental “effect” on the world economy that would result by waiting for the unlawful act to be committed before taking action would be too costly.

Using force solely to ensure the freedom of maritime communications would establish a novel precedent. Some would characterize such a use of force as either preemptive or preventive self-defense. Any use of force outside the traditional construct would be heavily scrutinized and nations must be judicious when establishing precedent. Yet, in the wake of the 9/11 terrorist acts, the U.S. established precedent when it declared, in part based on the scale of the effects, that an armed attack occurred. The international response to the U.S. pronouncement was overwhelmingly favorable. Similarly, a proportionate use of force to keep the SOH open in order to prevent the devastating effect on the world economy would likely be well received by the international community, just as U.S. actions against Iranian minelayers were in the 1980s. Even Iran has been prepared to recognize that the uninterrupted flow of maritime commerce is a vital national security interest of the U.S. and presumably other similarly situated nations that rely on Gulf oil such as Japan.⁴³

This proposal is a very narrow exception to the traditional use of force construct. While there are other critical international strait “chokepoints” around the world, there are safe, alternative routes around nearly all of them. As such, it would be exceedingly difficult to meet all six proposed criteria to use force to ensure the freedom of maritime communications. Moreover, a nation could not use force unless there was an imminent threat of

mining. U.S. and Japanese policymakers and commanders would need to carefully consider who in the chain of command should have the authority to make this determination.

10. Could Nations Use Force if Iran Did Mine the SOH or its Approaches?

If forces were unable to act “left of splash” or “in the act” and Iran did mine the SOH, then any nation would be authorized to engage in mine sweeping and hunting.⁴⁴ The U.S. and Japan could also maintain a persistent ISR and fires presence to ensure adequate self-defense of MCM assets for the following reasons. First, the collective right to ensure the freedom of communications would trump the requirement that MCM assets proceed continuously and expeditiously. Second,

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minesweeping and hunting are the types of proportionate countermeasures envisioned by the ICJ to redress a knowing violation of international law that directly interferes with other nation’s right to engage in maritime communications.⁴⁵ Lastly, if the right of inherent self-defense is to have any meaning in the narrow confines of the SOH, where MCM assets would be vulnerable to short or no-notice attacks, then nations ought to have the right to operate as required to provide adequate self-defense.



Figure 4. Japanese Yaeyama-class Minesweeper
(Source: http://en.wikipedia.org/wiki/Yaeyama-class_minesweeper)

Commanders prefer to establish maritime and air superiority to protect relatively defenseless MCM assets. While the law allows forces to operate in the SOH as indicated above, it does not allow a nation to attack targets at sea and ashore before they represent an imminent threat. Determining what constitutes an imminent threat requires consideration all of relevant facts and circumstances at the time. For example, some might argue coastal defense cruise missile sites which can fire without warning are by their very nature and location imminent threats. U.S. and Japanese commanders would be wise to discuss what might constitute an imminent threat as well as who in their respective chains of command would be authorized to make such a determination.

Conclusion

The “Armitage/Nye Report” suggests that one area for potential increased alliance defense cooperation is minesweeping in the Persian Gulf. There is no question that Japan has the capability to deploy minesweepers to the Gulf and that doing so might have a deterrent effect were Iran to announce once again that it was planning to close the SOH. The real question for policymakers revolves around Japanese willingness to do so. Furthermore, if Japan were willing to deploy minesweepers to the Gulf, what would officials in Tokyo

authorize those vessels to do, and under what circumstances? For example, if Iran actually sowed mines in the SOH and the U.S. postulated that it wanted to attack certain targets ashore capable of attacking minesweepers with little or no warning prior to conducting sweeping operations, would Japan be willing to allow its sweepers to operate? Candid dialogue

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between Japanese and U.S. officials regarding the ten questions and answers posed above would help increase naval interoperability, clarify U.S. and Japanese RMC with respect to mine warfare in the Gulf, and possibly provide a point of departure for further discussions between Washington and Tokyo related to RMC in the face of increasing regional A2AD challenges. Without such practical dialogue across the range of military operations it is hard to imagine that U.S. - Japanese naval interoperability will improve in any meaningful way.

Notes

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- ¹ Richard Armitage and Joseph Nye, “The U.S.-Japan Alliance: Anchoring Stability in Asia,” *Center for Strategic and International Studies*, August 2012, at http://project2049.net/documents/120810_armitage_usjapanalliance_web.pdf.
- ² *Ibid.*, p. 11.
- ³ *Ibid.*
- ⁴ *Ibid.*
- ⁵ United Nations Convention on the Law of the Sea (UNCLOS) Art. 39, Dec. 10, 1982.
- ⁶ Various unmanned systems that could be applied include unmanned underwater vehicles (UUVs), unmanned surface vehicles (USVs), and unmanned aerial vehicles (UAVs).
- ⁷ *The Commander’s Handbook on the Law of Naval Operations*, (NWP 1-14M), Para 2.5.3.1. (2007).
- ⁸ NWP 1-14M Para. 9.2.2.
- ⁹ UNCLOS Art. 5.
- ¹⁰ *Ibid.* art. 7. See also Roach and Smith, *Excessive Maritime Claims*, at 89 (3rd ed., Leiden/Boston 2012).
- ¹¹ On November 1, 2012 Iran fired warning shots at a U.S. MQ1 Predator Drone flying 16nm from the Iranian coastline asserting that it had entered Iranian airspace over its claimed TTS. Thomas Erdbrink and Rick Gladstone, “Defense Minister Confirms Iran Fired on US Drone,” *New York Times*, November 9, 2012.
- ¹² NWP 1-14M Para. 9.2.2.
- ¹³ *Ibid.*
- ¹⁴ *Ibid.*
- ¹⁵ International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Louise Doswald-Beck ed., 1995), art. 82.
- ¹⁶ NWP 1-14M, Para. 9.2.2.
- ¹⁷ Wolff Heintschel von Heinegg, *The International Law of Mine Warfare at Sea*, 23 *Israel Yearbook on Human Rights* 75 (1994).
- ¹⁸ SAN REMO MANUAL, Art. 89.
- ¹⁹ Tony Capaccio, “U.S. Would Block Iran From Mining Hormuz Strait, Commander Says,” *Bloomberg*, February 12 2012, at <http://www.bloomberg.com/news/2012-02-12/u-s-would-block-iran-from-mining-hormuz-strait-commander-says.html>. The U.S. Navy would move to stop any Iranian attempt to lay mines in the Strait of Hormuz or Persian Gulf as an “act of war” the international community wouldn’t tolerate, the U.S. Navy’s top Gulf commander said. “The laying of mines in international waters is an act of war,” Admiral Fox said today. “We would, under the direction of the national leadership, prevent that from happening. We always have the right and obligation of self-defense and this falls in ‘self-defense.’ See also “U.S. Navy Commander Warns Iran: Don’t Try Closing Gulf Oil Passageway,” *Fox News*, July 2, 2008, at <http://www.foxnews.com/story/0,2933,374905,00.html>.
- ²⁰ U.N. CHARTER Art. 51.
- ²¹ NWP 1-14M Para. 4.4.3.1.
- ²² See *Corfu Channel* (U.K v. Albania), 1949 I.C.J. (Dec. 15) [hereinafter *Corfu Channel*]; *Military and Paramilitary Activities (Nicar. v. U.S.)*, June 27, 1986, 25 I.L.M. 1023 [hereinafter *Nicaragua*]; and *Oil Platforms (Islamic Republic of Iran v. United States of America, Judgment*, I. C. J. Reports 2003, p. 161 [hereinafter *Oil Platforms*].
- ²³ D.G. Stephens and M.D. Fitzpatrick, *Legal Aspects of Contemporary Naval Mine Warfare*, 21 *Loy. L.A. Int’l & Comp. L. Rev* 573 (1999).
- ²⁴ *Nicargaua*, Para. 253.
- ²⁵ *Corfu Channel*, p. 22.
- ²⁶ *Oil Platforms*, at paras. 64, 72. See also *Interpreting Self-Defense Restrictively: The World Court in the Oil Platforms Case*, Leopold von Carlowitz, *Sicherheit und Frieden (Security and Peace)*, p. 86, (23. Jg) 2/2005.
- ²⁷ *Ibid.*, at Para. 64.
- ²⁸ *Ibid.*, at Paras. 51, 60-64.
- ²⁹ *Ibid.*, at Paras. 73-77.
- ³⁰ *Ibid.*, at Para. 73-77.

³¹ Nicaragua Para. 199, Oil Platforms Para. 51.

³² *Ibid.*, at Para. 195.

³³ Oil Platforms.

³⁴ *Ibid.*, at Paras. 73-77.

³⁵ *Ibid.*

³⁶ Oil Platforms (Islamic Republic of Iran *v.* United States of America), Preliminary Objection Submitted by the United States of America, December 16, 1993, p. 15.

³⁷ *Ibid.* at 16.

³⁸ NWP 1-14M, Para. 5.5.1.

³⁹ *Ibid.*, at Para. 4.4.3.

⁴⁰ *Ibid.*, at Para. 9.2.2

⁴¹ von Heinegg at p. 76.

⁴² NWP 1-14M, Para. 9.2.2.

⁴³ Oil Platforms, Para. 73.

⁴⁴ von Heing at pp. 71-73.

⁴⁵ Stephens and Fitzpatrick, p. 576.