



BRIEFING PAPER ON THE ORIGINS OF LAW FOR THE DEFINITION OF
THE RIGHT OF SELF DEFENCE IN THE 100 SERIES RUF
BY STEVEN KAY QC

The right to act in lawful self defence and the standard to be applied in the exercise of that right against the hostile acts of pirates, as expressed within the 100 Series Rules for the Use of Force¹ are accurately stated and a proper standard for the maritime industry to follow. The 100 Series RUF now brings clarity to this vexed subject at a time when it is recognized universally that there is a large scale international problem as to how to deal with attacks against merchant shipping and the occasions when force has to be used to protect ships and people on board. The 100 Series has been specifically devised to reflect national and international sources of law, all of which have a common standard, being the **necessary and reasonable use of force** as the objective standard to be used by a person when considering the need to repel an attack against himself, another, or to protect property.

The United Nations Convention on the Law of the Sea affirms the universality of the crime of piracy under international law² and also affirms that the prosecution of pirates takes place under the competence of national jurisdictions.³ Certain UN Security Council Resolutions have recently called for the investigation and prosecution of piracy by States, thus affirming the

¹ Version 9

² UNCLOS Article 101; For earlier authority see *The Case of SS. Lotus* PCIJ Sept. 1927;

³ UNCLOS Article 105; Convention on the High Seas Article 19.



domestic nature of criminal proceedings, but the international nature of the crime.⁴

Customary international law permits prosecutions for piracy within the jurisdiction of any State whether there is a nexus with the crime or not, but there is a distinction to be drawn in cases where the issue concerns the acts of an individual or corporation *resisting* piracy as such activity is not by definition piracy.⁵ Criminal proceedings against such persons who may be accused of a crime arising from the use of excessive force can be within the more limited jurisdictional group of Flag State or States of individuals concerned. In such circumstances the objective standard used in the 100 Series RUF, as the necessary and reasonable use of force to protect a ship or those aboard, is a standard test that conforms with the law of self defence in all jurisdictions. It may be that certain States investigating or undertaking criminal proceedings in respect of the use of force apply a greater element of subjectivity in their assessment of criminal liability,⁶ but that is only to the advantage of an individual who has been trained to apply the objective standard as advocated by the 100 series RUF.

The right of self defence against a criminal attack, is well established in international law. The origin of the doctrine is recognized to have been the *Caroline* case as determined between the United States and Great Britain in 1842, where the test of self defence was expressed as:

⁴ SC/RES 1846 of 2008; SC/RES 2015 of 2011; SC/RES 2039 of 2012

⁵ Congo v Belgium ICJ Feb. 2002

⁶ Marshall Islands Penal Code Article 3



“did nothing unreasonable or excessive; since the act justified by necessity of self defence, must be limited by that necessity and kept clearly within it.”⁷

International law as reflected in the UN Charter at Article 51 refers to States having an “inherent right” of self defence. In effect, this right is carried out by individuals, all of whom carry out personal acts pursuant to the right of the State. The International Criminal Court Statute at Article 31 similarly reflects international customary law as it provides an individual with the right of lawful self defence when:

*The person acts **reasonably** to defend himself or herself or another person ...against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.*

Professor Ian Brownlie in “International Law and the Use of Force by States”⁸ discusses particular problems of self-defence on the high seas but concludes that it seems clear that vessels on the open sea may use force proportionate to the threat offered to repel an attack by another vessel.

The European Convention for the Protection of Human Rights and Fundamental Freedoms at Article 2 establishes not only the right to life, but also the right to defend one’s life:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of

⁷ Letter of US Secretary of State Daniel Webster July 27 1842; Also see *Nicaragua v US* (1986) ICJ Rep 14

⁸ *International Law and the Use of Force by States* (1963) at 305-8



a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

Not surprisingly, international law does not vary from mainstream national law for it is based upon the practice and customs of States. A brief review of the extracts of the laws of self defence of some of the Flag States and other States reveals the objective standard as the bedrock of all systems of law. The 100 Series Rules has not introduced into the test the subjective element that is to be found in the laws of some States so as to avoid dilution of the standard and unnecessary conflict.

Liberia:

- *“the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion”⁹*

Singapore:

- *The right of private defence in no case extends to the inflicting of more harm than it **is necessary** to inflict for the purpose of defence.*
- *When the right of private defence of the body extends to causing death
The right of private defence of the body extends, under the restrictions mentioned in section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:*

(a) such an assault as may reasonably cause the apprehension that death will

⁹ Liberian Code of Laws Revised Chapter 5 Title 26



- otherwise be the consequence of such assault;*
- (b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;*
- (c) an assault with the intention of committing rape;*
- (d) an assault with the intention of committing non-consensual penile penetration of the anus;*
- (e) an assault with the intention of kidnapping or abducting;*
- (f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.¹⁰*

Bahamas

- Notwithstanding the existence of any matter of justification for force, force cannot be justified as having been used in pursuance of that matter —
(1) which is in excess of the limits hereinafter prescribed in the section of this Title relating to that matter;
(2) which in any case extends beyond the amount and kind of force reasonably necessary for the purpose for which force is permitted to be used.¹¹*

China

- Criminal responsibility is not to be borne for an act of legitimate defense that is under taken to stop present unlawful infringement of the state's and public interest or the rights of the person, property or other rights of the actor or of other people and that causes harm to the unlawful infringer.*
- Criminal responsibility shall be borne where legitimate defense noticeably exceeds the necessary limits and causes great harm. However, consideration shall be given to imposing a mitigated punishment or to granting exemption from punishment.*
- Criminal responsibility is not to be borne for a defensive act undertaken against ongoing physical assault, murder, robbery, rape, kidnap, and other violent crimes that seriously endanger personal safety that causes injury or death to the unlawful infringer since such an act is not an excessive defense.¹²*

¹⁰ Singapore Penal Code (Chapter 224)

¹¹ Bahamas Penal Code Chapter 84

¹² Criminal Law of the People's Republic of China - Article 20



Greece

- *An act committed by someone in order to prevent a present danger that cannot be prevented by any other means when such danger threatens the perpetrator individually or the perpetrator's property or another through no fault of the perpetrator is justified, if the damage caused to the other person is substantially lower in form and significance than the damage threatened.*¹³

Malta:

- *No offence is committed when a homicide or a bodily harm is ordered or permitted by law or by a lawful authority, or is imposed by actual necessity either in lawful self-defence or in the lawful defence of another person*¹⁴

Cyprus

- *An act or omission which would otherwise be an offence may be excused if the person accused can show that it was done or omitted to be done only in order to avoid consequences which could not otherwise be avoided, and which if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil, that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided.*¹⁵

Panama:

- *commits no offense if that person acts in self defense of his person, his rights or a third person or property, if circumstances so require. The defense is legitimate if the following conditions: Existence of an unjust aggression, actual or imminent that results or could be affected by the fact; Using a rational means to prevent or repel aggression, and Lack of sufficient*

¹³ Greece Penal Code – Article 25

¹⁴ Malta Criminal Code – Article 224

¹⁵ Cyprus Criminal Code Article 17



*provocation on the part of one who advocates or is defended.*¹⁶

UK:

- *A person may use such force as is **reasonable** in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.*¹⁷

France

- *A person is not criminally liable if confronted with a present or imminent danger to himself, another person or property, he performs an act **necessary** to ensure the safety of the person or property, except where the means used are **disproportionate** to the seriousness of the threat.*¹⁸

UAE

- *There shall be no crime if the act occurs by exercising the right of private defense. The right of private defense shall arise if the following conditions are fulfilled:*
*First: If the defender faces **immediate danger of a crime** against himself, his property, or the person or property of a third party, or if he believes in the existence of such a danger and his belief is based on **reasonable** grounds.*
Second: If it becomes impossible for a defender to resort to public authorities to prevent the danger in due course of time.
Third: If a defender has no other means to repel such a danger.
*Fourth: If defense is **necessary** to fend off the aggression and is compatible*

¹⁶ Panama Penal Code – Article 32

¹⁷ UK Criminal Law Act 1967 s.3(1)

¹⁸ France Penal Code - Article 122-7



*with said aggression.*¹⁹

Steven Kay QC.

10 January 2013

Steven Kay QC

9 Bedford Row International

London WC1R 4AZ

England

0044 207 489 2727

goodnightvienna@gmail.com

www.9bedfordrow.co.uk

www.internationallawbureau.com

¹⁹ UAE Penal Code – Article 56