

# EXTERNAL REVIEW



HUMAN RIGHTS AT SEA



**AN EAST AFRICAN LEGAL REVIEW OF THE  
APPLICATION OF THE  
100 SERIES RULES FOR THE USE OF FORCE**

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**100 Series™**

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## **1.0. General Overview**

The 100 Series Rules for the Use of Force (the “Rules”) stem from the inherent right to self defence. The latter is widely recognized by laws at both international and domestic levels. These newly adopted rules are specially crafted to suit the piracy, armed robbery at sea and hijacking phenomena. Owing to the nature of the situation they intend to accommodate, the Rules are a sort of harmonized version of the right to self defence.

However, since they apply to non-state actors – Privately Contracted Armed Security Personnel (PCASP), the Rules do not coincide with the provisions of the use of force and inherent right to self-defence under the UN Charter which exclusively apply to States. Moreover, since the context in which the Rules apply is criminal in nature, the right as well as the liability thereof is personal (individual) in nature. This suggests that that the theme of the Rules is not a subject of normal international treaties. This is even more relevant as the Rome Statute of the International Criminal Court does not cover crimes of piracy, armed robbery at sea or hijacking.

However, even though the Rome Statute does not apply to other crimes than genocide, war crimes, crimes against humanity and the crime of aggression, it recognizes the right to self defence and defence of person. According to Article 31 (1) (d) of the Rome Statute a person shall not be criminally liable if he or she acts reasonably to defend herself against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person.

In the absence of international comprehensive rules of use of force and self defence that

specifically cover private persons, the Rules partly draw their legitimacy from international instruments that partially cover the theme and, for a larger extent, draw legitimacy in settled rules of self defence in domestic jurisdictions. The latter scenario, however, subject the Rules to some exceptions as to jurisdiction *ratione materiae* and jurisdiction *ratione loci*. This is so even though the crime of piracy attract universal jurisdiction in many countries. However, most domestic statutes recognize the universality of piracy and not the right to self defence thereof.

## **2.0. International genesis of the Rules**

At the international level, the Rules draw their legitimacy in the IMO Maritime Safety Committee (MSC) Circulars, ISO PAS 28007 and established international law. ISO PAS 28007 was developed as an initiative by the maritime industry and based on a request by the International Maritime Organization (IMO) to provide guidelines for certified companies deploying PCASP on board ships. It was specifically developed for organizations operating in the Piracy High Risk Area including the Indian Ocean.

Although ISO PAS 28007 was a private maritime industry initiative, it was undertaken on the request and aegis of the IMO. Hence, it is binding upon member states to the Convention on the International Maritime Organization. To become a member of the IMO, a state must ratify a multilateral treaty known as the Convention on the International Maritime Organization (IMO Convention). Among the member states of the East African Community, only Rwanda and Burundi are not members of the IMO.

Article 28 (a) of the IMO Convention gives powers to the Maritime Safety Committee to

make rules for any matter directly affecting maritime safety. It is from this basis ISO PAS 28007 was adopted. Moreover, the Rules passed through the IMO as an **INF paper for MSC 92** (Wednesday 24 April 2013) and were submitted as guidance in **ISO PAS 28007-2** “Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)”. Since the Rules draw their source from a treaty, they may be applied by courts in a member state to the IMO Convention.

However, the ISO PAS 28007 is not applied uniformly and is not the sole applicable rules at sea. Certified Maritime Security Companies do apply different practices to their operations in places other than Piracy High Risk Areas.<sup>1</sup> Lack of uniformity deprives the Rules of the legal customary legal basis. It is a settled principle that for a rule to attain the status of a custom, a rule must *inter alia*, be applied uniformly.<sup>2</sup> Moreover, although the Rules draw their source from ISO PAS 28007, the latter does not adopt the International Code of Conduct principles, which were developed for land-based private security operations rather than for the maritime environment. This adds to the possible challenge of the Rules as a customary norm. However, this is remedied if it is established (as it is) that the Rules draw a source from a codified norm.

Being a norm that draws a source from a treaty, the Rules would be applicable in the East African jurisdictions because international law is generally accepted as source of law in East African countries. For instance, **Article 2-(5) of the Constitution of the Kenya of 2010** provides that:

The general rules of international law shall form part of the law of Kenya.

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<sup>1</sup> However, the Rules are endorsed by the Marshall Islands flag State in **Marine Notice 2-011-39**.

<sup>2</sup> Shaw, Malcolm N., *International Law* (5<sup>th</sup> Ed), Cambridge University Press, p. 72.

Moreover, **Article 2-(6)** of the same Constitution provides that:

Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Although the Constitution of the United Republic of Tanzania, 1977 does not have a similar provision to that of its Kenyan counterpart, rules of international law are accepted as part of domestic law in Tanzania.<sup>3</sup>

Both Tanzania and Kenya are members of the IMO. Hence they are bound by the Rules since the Rules draw their source from the IMO Convention as shown above.

### **3.0. Domestic Applicability of the Rules**

#### **3.1. Statutory Position**

In principle, the Rules fall in the category of the right to self-defence and defence of others or property. In East Africa, the right to defence is recognized under statute and under common law. The Penal Code of Tanzania (Cap. 16 of the Laws of Tanzania) provides that:

#### **Section 18:**

... a person is not criminally liable for an act done in the exercise of the right of self defence or the defence of another or the defence of property...

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<sup>3</sup> Helen Kijo-Bisimba and Chris Maina Peter, *Justice and Rule of Law in Tanzania: Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries*, LHRC, 2005, p. 45.

**Section 18A:** every person has the right–

- (a) to defend himself or any other person against any unlawful act or assault or violence to the body; or
- (b) to defend his own property or any property in his lawful possession, custody or under his care or the property of any other person against any unlawful act of seizure or destruction or violence.

Moreover, statutory law regulates the use of force when a person exercises the right to defence. Like the Rules, statutory law in Tanzania stresses that in exercising the right to defence a person should use reasonable force and such force should only be used where necessary for that defence. In this regard, the Penal Code of Tanzania (Cap. 16 of the Laws of Tanzania) provides as follows:

**18B. - (1):**

In exercising the right of self defence or in defence of another or in defence of property, a person shall be entitled to use only such reasonable force as may be necessary for that defence.

**Section 18B – (1) of the Penal Code of Tanzania** is essentially similar to **Rule 103** of the Rules. The latter provides that:

**When under attack or when an attack is imminent, reasonable and necessary use of force may be used in self-defence, including, as a last resort, lethal**

## **force**

While the Rules are more elaborative than the Penal Code of Tanzania as to when exactly force should be used, both provisions establish the right to use force where necessary, or in more specific terms of the Rules, where when an attack is imminent. Since the two provisions *generally* apply *mutatis mutandis*, the courts in Tanzania would more likely be willing to apply the Rules in interpreting the statutory laws in Tanzania, especially the Penal Code when the matter in question is maritime in nature. The courts in Tanzania tend to apply norms that are similar to domestic rules and principles as supporting sources (commonly referred as “persuasive authorities”)

Actually, permission to use lethal force as provided by the Rules is shared by the Penal Code of Tanzania. **Section 18C** enlists situations where a person is permitted to use force which may result to death or grievous bodily harm: These situations include:

- (a) where the act of the aggressor raise a reasonable apprehension that death of a person will occur;
- (b) where the act of the aggressor raise a reasonable apprehension that grievous bodily harm will occur;
- (c) where the aggressor intends to abduct or kidnap a person; or
- (d) where the act of the aggressor endangers life or property

These situations are similar or relate to piratical acts. Most piratical acts endanger life or property and mostly raise a reasonable apprehension that death or grievous bodily harm will occur in the particular scene. The following extract from the case of **Republic v. Liban Ahmed Ali & 10 Others** (Criminal Case No. 1374/09) in the **Chief**



**Magistrate's Court at Mombasa (Kenya)** demonstrates a piratical scene:

Upon the high seas of Indian Ocean, jointly being armed with offensive weapons, namely four AK 47 Rifles, 199 rounds of ammunitions, and three knives, the pirates attacked a merchant ship namely Safmarine Asia and at the time off such act put in fear the lives of the crew of the vessel... Safmarine Asia was moving from Dar es salaam to Salala in Oman. The master of the ship moved it to about 600 nautical miles from the Somali Coast because of threat of piracy. It was attacked by 10-12 pirates in three boats one of which was bigger and others smaller. As they tried to board the ship, the master maneuvered it until they failed. They made three attempts during the course of which the two smaller boats refueled from the big one and chased the merchant ship. The third time they shot at the ship using AK 47 rifles and rocket propelled grenades, hitting the ship's main mast and damaging it....

In such a situation, courts in Tanzania would be willing to apply the Rules as a supporting norm since the domestic jurisprudence coincides with the Rules. According to the Court of Appeal of Tanzania, killing another person in self-defence or defence of another person is justifiable only where the defender believes that a person's life is in imminent danger and that his or her action is absolutely necessary for the preservation of life.<sup>4</sup> Hence, the jurisprudence in Tanzania suggests that the court would conclude that the right to self defence or defence of another was rightly exercised where the

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<sup>4</sup> *Seif Mohamed Senzagala v. Republic* [1994] TLR 122.  
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defender acted with an honest and reasonable belief that: (i) his or another person's life is in imminent danger; (ii) his action is absolutely necessary to save the life.

In **Daudi Sabaya v. Republic**<sup>5</sup>, the Court of Appeal exemplified the situation where person's life is in imminent danger is where the aggressor threatens to attack a person with a knife. Hence the defender would be justified in taking a harmful action to the aggressor since it is necessary for the preservation of life against the aggressor's threatened act of violence to the defender's or another person's body.

Both Statutory and case law in Tanzania requires the use of force to be necessary. However, there are little guidelines as to where exactly a conduct becomes necessary. If called to decide in a particular context, the courts in Tanzania would find the Rules of vital assistance since the Rules are relatively more comprehensive in impliedly prescribing a necessary conduct. A conduct would definitely become necessary where the aggressor persists after warnings. **Rule 101** reads that:

**Non-kinetic warnings may be used where there is a reasonable belief that a craft is displaying behaviour(s) assessed to be similar to those of a potential attacker.**

Use of force in self-defence or defence of another would definitely be necessary if the aggressor would persist after non-kinetic warnings have been used by the defender. If the aggressor so persists, his act would be a clear manifestation of a danger to life. Therefore, the defender's conduct would absolutely qualify as an act "necessary to save

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<sup>5</sup> [1995] TLR 148  
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life”. The Rules exhaust all reasonable precautions that fit in the maritime context. Note 1 and 2 to Rule 101 provides that:

**Note 1:** Non-kinetic warnings *may* include, but are not limited to, the use of VHF, loud-hailers and/or recorded defensive messaging equipment projected by electronic means (Long / Medium Range Acoustic Devices (L/MRAD)) and evasive ship actions. Non-kinetic warnings by visual signal means may include, but are not limited to, the use of flashing lights, flares and non-lethal eye-safe lasers as per manufacturer’s instructions. Non-kinetic warnings including the use of water cannon and/or high pressure water hoses may also be appropriate.

**Note 2:** Firearms may be held up and visually shown to a potential attacker as part of a non-kinetic warning and an accompanying verbal warning given by PCASP. Normal safety procedures shall be conducted on all firearms and the TL shall command the PCASP to “*Load*” the firearms with ammunition at the designated loading bay. Loaded firearms should have safety catches applied.

If well used these precautions are very reasonable and necessary. In this regard, the Rules coincide with the jurisprudence of the courts in Tanzania which recognize the use of force to be justifiable only where the conduct of the defender was sensible and where it was an act of last resort. The precautions also do away the possibility that the defender was the original aggressor. The jurisprudence of the courts in Tanzania suggests that the use of force is not justifiable where the aggressor ceases to be aggressive.<sup>6</sup> As such,

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<sup>6</sup> *Salum Abdallah Kihonyile v. Republic* [1992] TLR 349.  
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deterrence is one of the necessary measures that the defender may employ before resorting to the use of force against the aggressor. The Rules provide the mode of deterrence that may be employed. Rule 102 provides that:

**Firearms may be used to fire aimed Warning Shots when it is assessed by the TL or in the TL's absence, other PCASP, that Warning Shots may deter an actual, perceived or threatened attack.**

**Explanatory Note 2 to Rule 102** expressly insists that these should only be used as deterrence. The Note partly reads:

... They are solely intended to further reinforce the *deterrence* of a perceived attack... (Emphasis added)

This is very important in a jurisdiction like that of Tanzania where an original aggressor is not excused in using force even if he is subsequently overwhelmed by the victim.

### **3.2. Common Law Position**

As hinted above, In East Africa, the right to defence of person and property is based on statutes and common law. In Kenya, for example, the rules governing the right to defence are wholly based under common law. This is provided under **section 17 of the Penal Code of Kenya** (Cap. 63 of the Laws of Kenya):

... criminal responsibility for the use of force in the defence of person or property shall be determined according to the

principles of English Common Law...

English common law principles regarding use of force in the defence of person or property are also applicable in Tanzania. Rules of common law were received in Tanzania (then Tanganyika) pursuant to Tanganyika Order-in-Council of 1920 which accorded the status of applicable laws to English common law, principles of equity and statutes of general application which were in force in England as of 22<sup>nd</sup> July 1920. That position is maintained to-date.<sup>7</sup> However, English common law is applicable in Tanzania only where the respective matter is not codified. Hence, with regard the use of force in self defence, the court would only resort to the English common law if the matter is not provided by a written law (statute). Hence, its role is only supplementary.

### **3.2.1. The English common law regarding use of force in the defence of person or property**

As explained above, unless where the matter is codified English common law regarding use of force in the defence of person or property is applicable in Tanzania. In Kenya, English common law rules governing the right to defence are wholly based under common law. Hence, the courts in the two countries would be willing to apply the Rules to the extent they coincide with the common law.

The general theme contained in the Rules coincide with the general common law principle that a defendant is entitled to use reasonable force to protect himself, others for whom he is responsible and his property.<sup>8</sup> Both the Rules and common law seem to

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<sup>7</sup> See section 2-(2) of the Judicature and Application of Laws Act (Cap. 358 of the Laws of Tanzania)

<sup>8</sup> See *R v. Beckford* (1988) 1 AC 130.

emphasize on the reasonableness of the force used by the defender. There is no thumb rule as to what exactly constitutes “reasonable force” and each case must be determined on its own merits. However, the Rules put a clear criteria as to what may be considered as a “reasonable force”. According to **Rule 103 of the Rules**, a reasonable force is that which is used to counter an imminent attack. According to Explanatory **Note 2 to Rule 103**, an attack is imminent when the need to defend against it is manifest, instant and overwhelming.

This coincides with the common law principle held in **Palmer v. The Queen** [1971] A.C. 814, 832:

“If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment... or may be pure aggression”

The contexts under which piratical attacks occur do justify the use of force in self defence or defence of others or defence of property, in the sense that most of the attacks are imminent. This may be exemplified by the following passage extracted from the case of **Hassan M. Ahmed v. Republic**, *Criminal Appeal Nos. 198, 199, 200, 201, 202, 203, 204, 205, 206, and 207 of 2008, High Court of Kenya at Mombasa*:

... Al –Bisar at a cargo ship, flying an Indian flag set sail from Dubai heading to Kismayu in Somalia. The ship offloaded its cargo at Kismayu on 7<sup>th</sup> January 2006 and was loaded with charcoal and set off for Dubai on 14<sup>th</sup> January 2006. While at sea, the

ship was attacked by the [pirates] who approached the ship in high speed boats as they fired in the air. Eight of them gained entry onto the ship via ladders. They were armed with AK -47 Rifles and revolvers. Two pirates remained in the boat. The pirates roughed up the crew on the ship and demanded to be given USD 50, 000 and an International mobile phone. The pirates took control of the ship from 16<sup>th</sup> January 2006 up to 21<sup>st</sup> January 2006 when American Navy officers intercepted them. Before the interception, the pirates had launched attacks on three other ships one of which had made a distress call which was picked by the American Navy officers – hence the interception...

In such a situation a court in Tanzania and Kenya will be willing to apply the Rules since they have similar taste as the English common law, the latter being the applicable law in courts of law.

#### **4.0. The Jurisdictional Challenge**

The applicability of the Rules is mainly stumbled by the fact that the offences upon which the courts may be called to determine the issue of use of force in defence are not within the jurisdiction *ratione materiae* of the courts. It is crystal clear that courts in

Tanzania and Kenya have jurisdiction over the offence of piracy.<sup>9</sup> However, the person relying on the defence of person or property is not the offender of piracy but a victim. Hence he or she would rely on the defence when he is charged with the offences of murder or assault. However, courts in Kenya and Tanzania have no jurisdiction over the offences of murder and assault occurring in High Seas unless offenders are nationals of the country exercising jurisdiction or that the act took place within the territorial waters of the respective state. This seems to render the applicability of the Rules impracticable.

However, the Rules may undoubtedly still be applied in civil cases where loss of life or personal injury results from the use of force in defence of person. According to **section 363 of the Merchant Shipping Act of 2003** (Tanzania) a person may rely on the right of defence when he or she is sued for loss of life or personal injury which occurred on board a vessel. There is a word-to-word similarity between section 363 of the Merchant Shipping Act of 2003 (Tanzania) and **section 404 of the Merchant Shipping Act of 2009** (Kenya). However, the term “on board” in the provisions impliedly exclude contexts under which piratical attacks occur. A few piratical attacks would be executed by persons “on board”. Even the Rules seem to exclude the possibility of the attack from within the vessel.

## **5.0. The Rules as an aspect of Human Rights**

The Rules are recognized around the world as an example of lawful maritime norm upholding basic human rights.<sup>10</sup> This is so because they protect the inviolable right to

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<sup>9</sup> Section 341 of the Merchant Shipping Act of 2003 (Tanzania) and section 371 of the Merchant Shipping Act of 2009 (Kenya).

<sup>10</sup> <https://www.humanrightsatsea.org/rules-for-the-use-of-force-ruf/> last visited on 7 July 2012, 10:39 AM



life. The right to life is often seen as the most important human right (Universal Declaration of Human Rights 1948, Article 3 “Everyone has the right to life, liberty and security of person”). Although the Universal Declaration of Human Rights (UDHR) is not a treaty, it is recognized universally as a cornerstone human rights norm. In Tanzania for example, the UDHR is domestically applicable. According to **Article 9 (f) of the Constitution of the United Republic of Tanzania of 1977**:

... the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring –

(f) that human dignity is preserved and upheld in accordance with the spirit of the **Universal Declaration of Human Rights**; (emphasis added)

The right to life is also enshrined in Article 6 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and Article 4 of the African Charter on Human and People’s Rights 1981 (ACHPR). Both Tanzania and Kenya have ratified the ICCPR and ACHPR. Hence, both countries are obliged to respect and promote the right to life. In light of that, the courts in the two countries would be willing to apply the Rules under the spirit of protecting the right to life.

The right to life is a justiciable right in Tanzania and Kenya. **Article 14 of the Constitution of the United Republic of Tanzania 1977** and **Article 26 (1) of the Constitution of Kenya 2010** provide for the right to life. As such, a person may invoke self-defence or defence of person to establish that he did not kill arbitrarily or summarily. This is actually the spirit of the Rules. Implicit in that, the courts in

Tanzania and Kenya may apply the Rules in that context.

## **6.0. Conclusion**

Although the Rules have not been considered before in piracy trials, they may be applied in the future. The Rules are likely to be accepted by East African courts as part of the applicable law due to their concurrence with the acceptable norms for the use of force in the defence of person or property. The Rules are broadly in line with the statutory position and common law position concerning the use of force in the defence of person or property. Owing to their treaty-oriented genesis, the Rules may be applied in East African courts as part of the duty of the East African states to respect treaties. Lastly, the applicability of the Rules may well be upheld due to their protection of human rights, particularly the right to life. However, the Rules may only be applied in East Africa in matters that East African courts have jurisdiction over.

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## **About the author**

**Raphael Kamuli** is the Founder of [Ubuntu Institute of Social Justice](#); Advocate of the High Court of Tanzania; and author in Sea Piracy Law, Human Rights Law and International Criminal Justice. He is also the Tanzanian Correspondent for the [Human Rights at Sea](#) UK-based charity.

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