War Risks & Terrorism

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CATEGORISING HORROR: MARINE INSURANCE COVERAGE AND TERRORISM[‡]

Paul Myburgh[*]

" 'Terrorism' is what we call the violence of the weak, and we condemn it; 'War' is what we call the violence of the strong, and we glorify it."

Sydney J Harris

"...Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity."

W B Yeats

1 INTRODUCTION

The attacks on the Twin Towers of the World Trade Center and the Pentagon on September 11, 2001 resulted in the largest loss in the history of insurance.[1] Whilst acts of terrorism are nothing new,[2] the catastrophic nature of the events of September 11 and the magnitude of the resulting losses have resulted in a unprecedented focus on insurance coverage for acts of terrorism.

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1 Estimates of the total loss vary, but seem to have settled around the US$60 billion mark. See Nathalie LJT Horbach, Omer F Brown II and Tom Vanden Borre "Terrorism and Nuclear Damage Coverage" (2002) 20 Journal of Energy & Natural Resources Law 231 at 232 n 3.

2 See eg Jeffrey F Addicott "Legal and Policy Implications for a New Era: The 'War on Terror' " (2002) 4 The Scholar 209, 212 n 17, who notes that, although terrorism is typically traced back to France's Reign of Terror under Robespierre and the Jacobians, the Hebrew Zealots were already conducting random acts of assassination against the occupying Romans in Judea prior to the fall of Jerusalem by the Roman legions under Titus in 70 CE.

The September 11 attacks immediately raised concerns about the security of other modes of transportation. The Port of New York and New Jersey was closed to maritime traffic and similar closures or restrictions of maritime traffic were put in place in major US and overseas ports. Whilst these restrictions have gradually been loosened, port and maritime security remains a high priority for the United States and the international community.[3]

As the events of September 11 graphically demonstrated, it is impossible to quantify or predict the exact form that future acts of terrorism will take. However, the following potential maritime terrorism risks have been identified and discussed by commentators. Some of these risks would undoubtedly have seemed fanciful before September 11, 2001, but are now being taken seriously. They include:

- the hijacking, bombing or ramming of cruise ships,[4] warships,[5] or ships carrying flammable or hazardous cargoes;[6]

- the running aground of ships in highly populated waterfront areas, bridges, highly visible or symbolic landmarks[7] or hazardous facilities such as nuclear reactors;[8]

- the sinking of ships in narrow commercial channels to block vital imports such as oil;[9]

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3 See Robert C North "Long-term Implications for Marine Transportation" Journal of Commerce, September 24, 2001, p 12.

4 See Alicia A Caldwell and Pedro Ruz Gutierrez "Terrorism Trail Leads Agents Underwater" Orlando Sentinel Tribume, June 9, 2002, p B1 for a discussion of the risks of "scuba terrorism" in relation to cruise liners.

5 See Bill Glenton "A Sea Change Required on Security Risks" Financial Times, London, September 7, 2002, p 19 (discussing the bombing of the *USS Cole* anchored off Aden and the planned attack on a British ship in the Straits of Gibraltar).

6 For example, the shipments of plutonium waste from Japan to the United Kingdom on the *Pacific Pintail* and the *Pacific Teal*: on which, see Howard W French "Japanese Shipment of Nuclear Fuel Raises Security Fears" New York Times, July 5, 2002, p A3.

7 For example, the Golden Gate Bridge, the Statute of Liberty or the Sydney Opera House; see John McKelvie "Marine Cargo & Terrorism" (March 2002, unpublished manuscript on file with the author) pp 13-14.

8 See Keith Darce "Experts Debate How to Protect U.S. Shores" Times-Picayune, New Orleans, September 15, 2002, p 1.

9 See North, supra n3.

- the importation of biological, bacteriological or radiological weapons in cargo containers[10] to target container terminals and inland storage and distribution points;[11] and

- the infiltration of terrorists on board ships or inside cargo containers.[12]

The purpose of this paper is, first, to analyse existing US and English marine insurance case law on war risks and terrorism and, second, to examine the insurance coverage of potential future acts of maritime terrorism in the light of existing jurisprudence and discuss future trends in this area.

2 JURISPRUDENCE

2.1 War Risks[13]

The catastrophic nature of the September 11 attacks, the deliberate characterization by the Bush administration of these attacks as "acts of war" and the ongoing rhetoric of a "war against terrorism" have all raised the question of whether acts of terrorism such as those listed above, could or would be defined by the courts as "war risks" for the purposes of insurance coverage.[14]

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10 See Julia Malone "War on Terrorism", Atlanta Journal and Constitution, August 27, 2002, p 6A (quoting Customs Commissioner Robert Bonner: "We don't want to wait for the nuke in a box").

11 See McKelvie, supra n 7, 13-14.

12 The reality of this risk is perhaps most strikingly illustrated by the case of Rizik Amid Farid, nicknamed "Container Bob", a 43 year-old suspected al-Qa'eda operative discovered by Italian police in a cargo container being shipped from Egypt to Canada. The container was kitted out with a bed, toilet, lap-top computer, two cellphones and supplies for a long journey. Farid was carrying a Canadian passport and airport security passes. He disappeared while free on bail. See Thanassis Cambanis "Port Security Called Lacking" Boston Globe, March 27, 2002, p B1; John-Thor Dahlburg "Guarding the Coast, and More" Los Angeles Times, April 13, 2002, p AA1; Richard Owen and Daniel McGrory "Business-Class Suspect Caught in Container" The Times, London, October 25, 2001.

13 On war risks generally, see Michael D Miller *Marine War Risks* (2 ed, LLP, London, 1994). Howard N Bennett *The Law of Marine Insurance* (Clarendon Press, Oxford, 1996) Chapters 10 and 11; N Geoffrey Hudson *The Institute Clauses* (2 ed, LLP, London, 1995).

14 In the aftermath of September 11, Congress was quick to remind American insurers that Bush's war rhetoric was a reflection of the "passion and determination of our country, not the legal reality", and that attempts to invoke war risks exclusions would be seen as "legal maneuvering" which was "unsupportable and unpatriotic". Several insurers issued public statements announcing their intention not to invoke war risk exclusions, which, as commentators have pointed out, had

Clause 1.1 of the latest version of the Institute War Clauses (Cargo) provides a standard example of war risks coverage which extends to: "war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power".

2.1.1 *"War" and "civil war"*

In the United States, cases dealing with the insurance meaning of "war" have relied heavily on public international law definitions of the concept.[15] Some English cases have followed suit. For instance, in *Driefontein Consolidated Gold Mines Ltd v Janson*[16] Mathew J at first instance cited with approval Hall's definition of a "state of war":[17]

> When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other, until one of the two has been brought to accept such terms as his enemy is willing to grant.

However, for the most part, English courts have preferred to rely on private law principles of contract interpretation rather than public international law definitions. In *Kawasaki Kisen Kabushiki Kaisha of Kobe v Bantham Steamship Company Ltd*[18] Sir Wilfred Greene MR, interpreting a charterparty

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rather more to do with public relations than waiver of legal rights. See generally Jane Kendall "The Incalculable Risk: How the World Trade Center Disaster Accelerated the Evolution of Inurance Terrorism Exclusions" (2002) 36 Univ of Richmond LR 569, 570-571; Jeffrey W Stempel "Some Favor: The Insurance Industry's 'Waiver' of the War Risk Exclusion" (2002) 10 Nevada Lawyer 15.

15 *Pan American World Airways Inc v The Aetna Casualty & Surety Co* 505 F 2d 989 (2d Cir 1974); [1975] 1 Lloyd's Rep 77: The court relied on Lauterpacht's definition of war as a "contention between two or more States through their armed forces . . ." 2 L Oppenheim, International Law 202 (H Lauterpacht, 7th ed 1952). War is "(that) state in which a nation prosecutes its right by force." See *The Brig Amy Warwick (The Prize Cases)* 67 US (2 Black) 635, 666 (1862); *Bas v Tingy (The Eliza)* 4 US (4 Dall) 32, 35-36 (1800). Cf, in respect of "semi-sovereign entities", *Hamdi & Ibrahim Mango Co v Reliance Insurance Co* 291 F2d 437, 442 (2d Cir 1961).

16 [1900] 2 Q B 339.

17 *Hall on International Law*, 4th ed. p. 63. Cf also Sir Wilfred Greene MR's references in *Kawasaki Kisen Kabushiki Kaisha of Kobe* v *Bantham Steamship Company Ltd* [1939] 2 K B 544 (CA) to Bynkershoek, Grotius, and Westlake's definition of "war" as "the state or condition of governments contending by force," which, his Lordship rather grudgingly admitted, "accords with common sense as far as it goes".

18 [1939] 2 K B 544 (CA).

clause allowing cancellation "if war breaks out involving Japan", emphatically rejected an argument that the word "war" had a technical meaning found in the principles of international law:[19]

> Where these principles of international law for this purpose are to be found I must confess that I remain in complete doubt, since the only source of these principles suggested to us was the writings of various writers on international law. It is to be observed, as indeed it was to be expected, that these writers do not speak with one voice, and it is possible to extract from their pages definitions of "war" which not only differ from one another, but which are inconsistent with one another in important respects. ... [T]o say that English law recognizes some technical and ascertainable description of what is meant by "war" appears to me to be a quite impossible proposition.

Similarly, Sir Wilfred Greene rejected arguments that a formal declaration of war,[20] the severing of diplomatic relations, or an *animus belligerendi* on the part of both, or at least one of the combatants, were prerequisites to a finding that a state of war existed. There was no need, he said, to import into the contract some "obscure and uncertain technicalities of international law rather than the common sense of business men." Rather, courts should rely on "common sense principles".[21]

The *Bantham* case essentially provides a negative "you'll know it when you see it" definition of war, which is arguably of limited use. It does not address the issue of whether there are positive prerequisites or typical indicia of war in the context of insurance. This question was canvassed at some length in the leading US insurance case, *Pan American World Airways Inc v The Aetna Casualty & Surety Co*[22] which concerned the hijacking of a Boeing 747 aircraft

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19 See also *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406 per Lord Mustill (interpretation of words "civil war"): "The words under construction are to be given their ordinary business meaning, which is not necessarily the same as the one which they bear in Public International Law. The statements of jurists are a useful source of insights, but they do not provide a direct solution"; *Ocean Star Tankers SA v Total Transport Corp of Liberia Ltd (The Taygetos) (No 2)* [1988] 2 Lloyd's Rep 474. *National Oil Co of Zimbabwe (Pte) Ltd v Sturge* [1991] 2 Lloyd's Rep 281 per Saville J: "In the context of a commercial contract such as the policy under discussion, the expressions 'civil war', 'rebellion' and 'insurrection' bear their ordinary 'business' meaning."

20 So too *Pan Am*, supra n 15: "an undeclared de facto war may exist between sovereign states", citing *New York Life Insurance Co v Bennion* 158 F2d 260, 263 (10th Cir 1946), cert denied, 331 US 811 (1947); *Arce v State* 83 Tex Crim 292, 202 SW 951 (Crim App 1918).

21 See *Leyland Shipping Co Ltd* v *Norwich Union Fire Insurance Society Ltd* [1942] AC 691 per Lord Dunedin.

22 [1975] 1 Lloyd's Rep 77.

on a scheduled flight from Brussels to New York by two members of the Popular Front for the Liberation of Palestine (PFLP), who ordered the aircraft to Beirut where it was loaded with explosives. It was then flown to Cairo where it was blown up and destroyed.

The main issue in the *Pan Am* case was whether these acts were covered by the war risks clauses in the relevant aviation insurance policy. At first instance, the District Court held that "war" required the employment of force between governments or de facto or quasi-governmental entities, and the PFLP did not meet this criterion.[23] This finding was affirmed by the Court of Appeals. Relying on both English and US authorities, the Court of Appeals held that war is "a course of hostility engaged in by entities that have at least significant attributes of sovereignty" and concluded that the loss of the aircraft was not caused by a warlike act:[24]

> The hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government.

The sovereignty or quasi-sovereignty requirement is controversial in so far as English authority is concerned. Some of the English cases cited by the Court of Appeals in *Pan Am* do appear to lend some support to this view. For example, in *British Steamship Co v The King*[25] Lord Atkinson stated that the term "hostilities" connotes "the idea of belligerents, properly so called, enemy nations at war with one another." And in *Pesquerias y Secaderos de Bacalao de Espana SA v. Beer (Pysbe)*[26] the House of Lords categorised the loss of gear from trawlers commandeered by Basque forces for the use of the Republican government as due to "civil war" and therefore excepted from coverage by a war risk exclusion. In so finding, the House of Lords emphasized that the Basque Militia was "an organised force recognized by the [Republican] government."

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23 368 F Supp 1098 (SDNY 1973); [1974] 1 Lloyd's Rep at p 229.

24 This reference would seem to be to the rules adopted in the Hague Convention of 1907 that require belligerents to "carry arms openly, wear distinctive insignia, and operate lawfully in accordance with the laws and customs of war". See Gene Rappe "The Role of Insurance in the Battle Against Terrorism" (2000) 12 DePaul Bus LJ 351, 365-368. Such "rules" seem incredibly quaint nearly 100 years on, given the myriad forms of guerilla warfare, and do not even cover all situations in relatively conventional wars: see *Ex Parte Quirin* 317 US 1 (1942) where the US Supreme Court had to invent the category of "unlawful belligerents" to allow German soldier saboteurs caught in civilian clothes in New York and Chicago to be tried in US military courts.

25 [1921] 1 AC 99, 114.

26 (1949) 82 Ll L Rep 500.

However, the other English authority, *Curtis & Sons v Mathews*,[27] referred to by the Court of Appeals in *Pan Am*, is more problematic. This case concerned the 1916 Easter Rising in Dublin, during which a Provisional Government was proclaimed by the rebels, and armed forces of about 2,000 men occupied various public buildings in Dublin, including the General Post Office. British forces shelled the Post Office with 18 pound guns. A fire started by the shelling reached the insured building about 100 yards from the Post Office. Roche J held that the claim was covered by the war risks clause in the policy and was "satisfied that Easter week in Dublin was a week not of mere riot but of civil strife amounting to warfare waged between military and usurped powers and involving bombardment". Roche J's decision was upheld in the Court of Appeal. The Court of Appeals in *Pan Am* distinguished the *Curtis* case on the somewhat tenuous ground that "the Irish rebels had more of a claim to the incidents of statehood in Ireland in 1916 than the PFLP had in Jordan in 1970".[28]

After the *Pan Am* case was decided, the English courts again had the opportunity to define the nature of a "civil war" in *Spinney's (1948) Ltd v Royal Insurance Co Ltd*[29] when considering the effect of fighting and looting by various Christian and Muslim factions in Beirut. Mustill J held that civil war is a sub-species of war, with the special characteristic of being civil – that is, being internal rather than external.[30] His Honour declined to attempt any general definition of a civil war, but noted that the issue will generally involve a consideration of three questions:

> *(1) Can it be said that the conflict was between opposing "sides"?*
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> As regards this question, Mustill J observed that, while international jurists regarded war as an "armed conflict between states, and have given the same general meaning to a civil war, regarding the latter as concerned either with a conflict between the state and a body of inhabitants who have a sufficient cohesion and apparatus of government to merit recognition as a kind of

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27 [1918] 2 KB 825; [1919] 1 KB 425 (CA).

28 See Bennett, supra n 13, p 187: "Although *Curtis* saw the declaration of a Provisional Government, it can hardly be said to have enjoyed 'significant attributes of sovereignty'." *Sed contra Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406: "*Curtis v. Mathews* ... provides an example of the way in which an uprising on a comparatively modest scale may be converted by other factors into a civil war."

29 [1980] 1 Lloyd's Rep 406; see also *Holiday Inns Inc v Aetna Inurance Co* 571 F Supp 1460 (SDNY 1983).

30 So too *National Oil Co of Zimbabwe (Pte) Ltd v Sturge* [1991] 2 Lloyd's Rep 281.

quasi-state, or with a conflict between two such quasi-states, each claiming to be the state itself", in ordinary speech "civil war" has a wider meaning. Nevertheless, for there to be a civil war it must be possible to ascertain combatants' allegiance to one side or another, and to identify each side by reference to a "community of objective, leadership and administration".

(2) What were the objectives of the "sides", and how did they set about pursuing them?

Again, Mustill J noted that, whereas the classical view of international law was that the objective of war must be to seize complete dominion over the whole or part of a state where the term is used in ordinary speech this was not the only motive which can ever put the combatants into a state of civil war:

> If all the other requirements are satisfied, I believe that there would be a civil war if the objective was not to seize complete political power, but (say) to force changes in the way in which power is exercised, without fundamentally changing the existing political structure. Again, other requirements being satisfied, I believe that there would be a civil war if the participants were activated by tribal, racial or ethnic animosities. Nevertheless, one should, in my view, always begin by enquiring whether the parties have the object of seizing or retaining dominion over the whole or part of the state. If it is found that they do not, there may still be a civil war; but it will then be necessary to look closely at the events to see whether they display the degree of coherence and community of purpose which helps to distinguish a war from a mere tumultuous internal upheaval.

(3) What was the scale of the conflict, and of its effect on public order and on the life of the inhabitants?

Mustill J held that the list of factors to be considered when deciding whether internal strife has reached the level of civil war include the number of combatants; the number of casualties, military and civilian; the amount and nature of the armaments employed; the relative sizes of the territory occupied by the opposing sides; the extent to which it is possible to delineate the territories so occupied; the degree to which the populace as a whole is involved in the conflict; the duration and degree of continuity of the conflict;[31] the extent to which public order and the administration of justice

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[31] But see *Ocean Star Tankers SA v Total Transport Corp of Liberia Ltd (The Taygetos) (No 2)* [1988] 2 Lloyd's Rep 474 which seems to apply a more static test relating to the "state or condition" of war: "There was 'war' across the North Atlantic at the height of the 1939-45 war, even in areas where there had in fact been no submarine attacks in the immediate vicinity."

have been impaired; the degree of interruption to public services and private life; the question whether there have been movements of population as a result of the conflict; and the extent to which each faction purports to exercise exclusive legislative, administrative and judicial powers over the territories which it controls.

2.1.2 *"Revolution", "rebellion" and "insurrection"*

There is apparently no judicial consideration of the term "revolution" in the insurance context. The OED definition involves the "complete overthrow, accompanied by actual or threatened force, of an established government by its former subjects and its successful and complete substitution by another government." The terms "rebellion" and "insurrection" were considered briefly in *Spinney's* case. Mustill J adopted the OED definition of "rebellion" as being "... organised resistance to the ruler or government of one's country; insurrection, revolt", adding that "the purpose of the resistance must be to supplement the existing rulers or at least to deprive them of authority over part of their territory". "Insurrection" was held to be a similar concept, but suggesting the notion of an incipient, limited or less organized rebellion.

In *Pan Am*,[32] the District Court adopted a similar definition of "insurrection", namely: "a violent uprising by a group or movement ... acting for the specific purpose of overthrowing the constituted government and seizing its powers".[33] And in *National Oil Co of Zimbabwe (Pte) Ltd* v *Sturge*[34] it was held that the activities of Renamo, a South African apartheid regime-sponsored local group sabotaging pipelines and oil fields in Moçambique, amounted to an insurrection. The court held that "rebellion" and "insurrection" have somewhat similar meanings: "[E]ach means an organised and violent internal uprising in a country with, as a main purpose, the object of trying to overthrow or supplant the government of that country, though 'insurrection' denotes a lesser degree of organisation and size than 'rebellion'."

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[32] [1974] Lloyd's Rep at p 225; 368 F Supp at p 1124, citing *Home Insurance Co v Davila* 212 F2d 731, 736 (1st Cir 1954); cf *The Brig Amy Warwick (The Prize Cases)* 67 US (2 Black) 635, 666 (1862).

[33] See also *Younis Bros & Co Inc v CIGNA Worldwide Insurance Co* 91 F.3d 13 (CA 3rd C 1996) in which it was held that losses sustained during Charles Taylor and Prince Johnson's armies' campaigns to overthrow the Liberian government were due to "rebellion" or "insurrection": "To constitute an insurrection or rebellion within the meaning of these policies, there must have been a movement accompanied by action specifically intended to overthrow the constituted government and to take possession of the inherent powers thereof."

[34] [1991] 2 Lloyd's Rep 281.

2.1.3 *"Hostile act by or against a belligerent power"*

The term "hostilities" refers to acts or operations of war committed by belligerents and the agents of belligerents; it presupposes an existing state of war, civil war or at least organised armed rebellion.[35]

Atlantic Mutual Insurance Co v King[36] concerned an explosion on board the *Tennyson* sailing from Brazil to New York caused by an "infernal machine" placed in the hold by Niewerth, a German subject resident in Brazil. Bailhache J held that the loss was due to "hostilities" rather than "private devilment". The word "hostilities," as used in the clause, "meant hostile acts by persons acting as the agents of Sovereign Powers, or of such organized and considerable forces as were entitled to the dignified name of rebels, as contrasted with mobs or rioters, and did not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action might be". The concept of "agency" was applied extremely loosely here: the fact that Niewerth gave lodging to German sailors whose ships were interned at Bahia, that the German government had used and had exhorted civilians to act as agents of destruction, and that Niewerth would get no personal advantage out of placing the device was sufficient to bring the act within the ambit of "hostilities":

> I am disposed to think that a man is acting in such a case as this as the agent of his Government when knowing that the settled and concerted policy of that Government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy. It clearly would be so if in this case Niewerth had given such information to a German submarine as enabled it to torpedo the *Tennyson*. It is not the less so, in my opinion, if, having the means, he pursues the surer and simpler course of blowing her up himself.

2.2 Terrorism

An example of standard terrorism coverage is found in the Institute Strikes Clauses (Cargo), the latest version of which provides coverage for loss or damage caused by:

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[35] See *Britain Steamship Co v The King* (1920) 4 Ll L Rep 245; [1919] 2 KB 695; [1921] 1 AC 99 at pp. 114 and 133; *Board of Trade v Hain Steamship Co Ltd*, (1929) 34 Ll L Rep 197; [1929] AC 534 at pp 199 and 538; cf *Atlantic Mutual Insurance Co v King* [1919] 1 KB 307 at p 310.

[36] [1919] 1 KB 307.

1.1 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions

1.2 any terrorist or any person acting from a political motive.

There is no universal national or international definition of "terrorist" or "terrorism",[37] and there has been little in-depth analysis of these concepts by English or US courts in insurance cases. In the *Pan Am* case, the District Court described the acts of the PFLP hijackers as "terrorism" and, in the course of finding that they were not covered by war risks clauses, said:[38]

> there is no warrant in the general understanding of English, in history, or in precedent for reading the phrase "warlike operations" to encompass [1] the infliction of intentional violence by political groups (neither employed by nor representing governments) [2] upon civilian citizens of non-belligerent powers and their property [3] at places far removed from the locale or the subject of any warfare. [4] This conclusion is merely reinforced when the evident and avowed purpose of the destructive action is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects.

It is therefore a fair inference that the *Pan Am* court regarded the above elements as the hallmarks of terrorism.

The concept of "acts of terrorism" was also considered in passing in two US insurance cases arising from the 1989 Chilean fruit scare, when the United States Embassy in Santiago received an anonymous telephone call in which the caller threatened that fruit bound for the United States from Chile had been injected with cyanide. The caller told embassy personnel the fruit had been poisoned in order to protest the plight of the Chilean poor and to bring economic injustice in Chile to the attention of the United States and the world. In *Coexport International Inc v New Hampshire Insurance Co*[39] Williams DJ held that:

> the plaintiffs' fruit was destroyed because ... the U.S. and Canadian governments feared that it might have been poisoned by terrorists, or because the fruit could not be adequately sampled to ensure that it was safe. Since the destruction of much of plaintiff's fruit was proximately caused by the acts of terrorists, plaintiff's losses for this fruit is [sic] covered.

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37 For a review of different definitions, see Addicott, supra n 2, 212-218; see also Horbach, Brown and Vanden Borre, supra n 1, 235-239.

38 [1974] 1 Lloyd's Rep at p 230; 368 F Supp at p 1130.

39 1991 US Dist LEXIS 6743 (Ill).

Similarly, in *New Market Investment Corp v Fireman's Fund Insurance*[40] the jury determined that the alleged acts of terrorism were the proximate and real efficient cause of the plaintiff's loss, rather than delay, loss of market, or the actions of the government.

3 ANALYSIS

It is highly unlikely that any of the maritime terrorism risks outlined at the beginning of this paper will meet the *Pan Am* standard for traditional war risks, unless they are conducted by actors which have the "significant attributes of sovereignty" required by the Court of Appeals. This threshold test would seem to require a sufficient connection between the perpetrators of acts of public violence and a foreign sovereign entity or quasi-sovereign entity already engaged in hostilities which meet the traditional definitions of war or war-like activities. Such a scenario is not beyond the realms of possibility, but establishing the connection to a legal standard is likely to be difficult. Rizzo has speculated that, following the commencement of US "military activities" in Afghanistan, in the event of "future acts of terrorism as a result of its military activities in Afghanistan or other areas of the Middle East, insurance carriers may be able to successfully invoke the war exclusion, as well as any terrorism exclusion, to preclude insurance coverage for any resulting personal injury or property damage losses."[41] With respect, that would seem to beg the question of whether such US "military activities" in Afghanistan met the traditional international law definitions of war required by the court in *Pan Am* (or were indeed lawful under international law).

As discussed above, the English legal test as set out in cases like *Spinney's* takes a broader view of "war risks" than *Pan Am*, and does not require combatants to be sovereign or quasi-sovereign entities. Nor does it necessarily require a motive to overthrow the other side and substitute one's own dominion – a "degree of coherence and community of purpose" will do. It may therefore be easier to argue under English insurance law that acts of violence perpetrated by individuals or groups connected to a definable "other side" fall within

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40 774 F Supp 909 (ED Pa 1991); 1991 US Dist LEXIS 14192; also see *Ontario Tree Fruits Ltd v Guardian Insurance Co of Canada* (Ontario Court of Appeal) 1998 ACWSJ LEXIS 83463; 1998 ACWSJ 521055; 79 ACWS (3d) 621.

41 James G Rizzo "Tragedy's Aftermath: The Impact of 9/11 on the Insurance Industry" 46 Boston Bar Jnl 10, 13.

traditional war risks clauses, provided they are sufficiently well organised and are carried out on a large enough scale.

On either the US or English approach, however, one might well ask whether, in the 21st century, traditional legal distinctions between the categories of war risks and terrorism risks continue to be practically helpful or conceptually viable. As Kendall graphically puts it: "For all practical purposes – including the quintessentially utilitarian matter of insurance – the last vestiges of the distinction between war and international terrorism went up in smoke along with the twin towers of the World Trade Center on September 11, 2001."[42]

War risks were historically singled out as a separate category of risk, precisely because they were acts of "public" rather than "private" violence, because their effects were potentially so catastrophic that they could cripple the private insurance industry, and because they were considered "incalculable risks", in the sense that they tended not to comply with the law of large numbers, making an application of actuarial probability principles difficult if not impossible.[43] The same concerns would seem to apply *a fortiori* to modern acts of "megaterrorism".[44]

Conventional warfare shades easily into guerilla warfare, which in turn appears equally capable of shading into organized, large-scale acts of terrorism. Looking for "bright lines" or principled distinctions by which to define or categorise irrational and unforeseeable acts of violence and horror seems to me to be an exercise in futility. Any legal definition of war or terrorism is likely to end up as hopelessly ideologically driven and subjective, and will inevitably be under- or over-inclusive for insurance purposes:[45]

> The problem with ... law is that it apparently cannot describe terrorism without describing too much. All political violence is potentially crime and potentially politics, and it is all potentially terror. ... Each attempt to define the act of terror resembles a clichéd description, both grand and vacuous, and contains an allusion to another doctrine in another branch of legal literature ... .

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42 See Kendall, supra n 14, 569.

43 See Kendall, supra n 14; Stempel, supra n 14.

44 See "Risky business; Ports and terminal operators want government action to provide terrorism insurance" Journal of Commerce, June 10, 2002, p 30: "Underwriters have hundreds of years of data available on earthquakes and hurricanes, but the magnitude of losses for Sept. 11 were beyond anyone's frame of reference. ... This is something that is brand new. No one knows how to charge for the coverage or how to predict the next event."

45 Ed Morgan "International Law's Literature of Terror" (2002) 15 Canadian Journal of Law & Jurisprudence 317, 324.

What surely matters, from an insurance industry standpoint, is the extreme nature of certain acts of public violence and their potentially catastrophic effects, regardless of whether they may be legally defined or categorised as species of war risks or terrorism. On that basis, a more pragmatic and conceptually defensible approach would involve the adoption for insurance law purposes of a generic legal category of extreme acts of public violence which could be defined and underwritten in a more standard and transparent manner.[46]

4 THE FUTURE?

The first and most predictable consequence of the events of September 11, 2001, is that terrorism exclusion clauses, or more carefully drafted terrorism exclusion clauses, are now appearing in insurance and reinsurance policies. This may provide a short-term solution for underwriters, but the broader and more significant long-term question is whether and how it may be possible to insure for terrorism risks at all.[47]

Government-backed schemes to insure or reinsure terrorism risks may provide a partial answer, albeit not a panacea.[48] The United Kingdom established Pool Reinsurance ("Pool Re") in 1993 to provide insurance against losses and damages caused by IRA attacks on industrial, commercial and residential properties located within the British mainland. Insurers are responsible for the first £100,000 of coverage per coverage type, with no reimbursement from the government. Claims exceeding £100,000 are paid from

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[46] But see Stempel, supra n 14, 16-17 who argues that the distinction between war and terrorism drawn in cases like *Pan Am*, supra n 15, can and should be upheld: "The purpose of the war risk exclusion is to prevent insurers from being wiped out by correlated claims that inflict abnormal losses throughout society. An act of terrorism or even several acts of megaterrorism do not inflict the country-wide correlated losses of a state of armed conflict (be it civil commotion, insurrection, civil war or war between established nations). Even where the conflict does not involve conventional troops or established governments, there is a difference between the occasional act of terror and the hostilities of insurrection, militias or guerilla troops. ... Although the Sept. 11 losses were a horrible human tragedy and an economic catastrophe, they are probably more like the Chicago and San Francisco fires than damage resulting in a theater of war. These famous fires caused great loss of property and life but were within the scope of insurance coverage. Put another way, on Sept. 11 Manhattan was dealt a terrible blow by the terrorists but Manhattan is a long way from becoming Kabul."

[47] Rizzo, supra n 41, 14.

[48] "Terrorism payouts may be capped" Yomiuri Shimbun, Tokyo, March 17, 2002, p 7; "Risky business; Ports and terminal operators want government action to provide terrorism insurance" Journal of Commerce, June 10, 2002, p 30.

premiums accumulated within a pool made up of insurance companies and syndicates of Lloyd's of London.[49] Should the pool become tapped, the government intervenes. Sri Lanka and Israel have similar schemes. France established a state-backed reinsurance scheme through its Caisse Centrale de Reassurance in the wake of the September 11 attacks, and Japan may also establish a fund pool. There was talk that the US would follow suit, but the proposed legislation only contemplates a temporary and less comprehensive government backstop.[50]

Such national government re-insurance schemes can only provide limited coverage on an ad hoc and strictly territorial basis, however. Given the international nature of insurance and reinsurance markets and the rise of "global" terrorist organisations in the 21st century, it seems clear that some form of intervention at the international level is necessary, perhaps along the lines of the International Oil Pollution Compensation Fund,[51] which could provide a pooled resource for more effective international back-up for civil insurers of both war and terrorism risks.

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49 William B Bice "British Government Reinsurance and Acts of Terrorism: The Problems of Pool Re" (1994) 15 Uni of Pennsylvania Jnl of Intnl Bus Law 441.

50 See Rizzo, supra n 41, 13-14: "On November 29, 2001, the House of Representatives passed the Terrorism Risk Protection Act, H.R. 3210, 107th Cong. (2001), proposed legislation requiring insurers to assume the first $ 1 billion in losses arising from a terrorist strike, while the government would pay 90% of any additional claims. Insurers would be required to reimburse the government for the amount of assistance given, as determined by assessments made by the Department of Treasury. ... A proposed Senate version [the Terrorism Risk Insurance Act], however, required insurers to assume the first $ 10 billion in claims with the government responsible for 90% of any additional claims. Notably, insurers would not be required to reimburse the government for those losses. ... Each proposal offered a sunset provision of two years with the possibility of extending the program if necessary.

Despite the fact that seventy percent of all commercial policies were set to expire on December 31st, and a dearth of available/affordable coverage, the Senate recessed for 2001 without enacting any terror insurance legislation. While industry representatives are optimistic that such legislation will be enacted in 2002, in the interim, disgruntled policyholders will be burdened by exorbitant premiums or the prospects of being uninsured for terror-related losses."

51 On which, see http://www.iopcfund.org/.