COMMENTS

ACTS OF TERRORISM AND COMBAT BY IRREGULAR FORCES—AN INSURANCE "WAR RISK"?

The development of modern warfare techniques, accentuated by vast technological advancements, has been accompanied by the emergence of world-wide terrorism.[1] Recent incidents of violent destruction by well organized, politically motivated terrorist military groups have shocked the world.[2] Protracted guerrilla warfare conducted by irregular forces, professed as essential by twentieth century revolutionaries,[3] has proved an effective form of modern warfare.[4] Such warfare incorporates terrorism as a major tactic.[5] Many problems are posed by these acts of international terrorism, not the least of which is the plight of the innocent victim. Where the injured is insured under normal personal or property casualty insurance policies which exclude loss resulting from certain specified "war risks", an issue is presented as to whether the terrorist activity is among the "war risks" so excluded. If so, a court may deny the insured indemnification under the policy.

The purpose of this Comment is to explore the "war risk" clause commonly included in insurance policies and to evaluate its applicability when destruction is the result of terrorist activities of guerrilla forces and armed bands.[6]

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1. U.S. DEP'T STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT FOREIGN POLICY, *The Role of International Law in Combating Terrorism*, Pub. No. 8689, General Foreign Policy Ser. 270 (Jan. 1973) [hereinafter cited as U.S. DEP'T STATE, Pub. No. 8689].

2. *Id.*

3. MAO TSE-TUNG, ON GUERRILLA WARFARE 20-22 and 41-45 (S. Griffith transl. 1961) [hereinafter cited as MAO TSE-TUNG].

4. *Hearings Before the Committee on Foreign Relations* 5, 90th Cong., 2d Sess. 62 (1968) [hereinafter cited as 1968 *Hearings*].

5. MAO TSE-TUNG, *supra* note 3, at 20-22 and 41-45.

6. The scope of this Comment is limited to losses caused by terrorist activities of guerrilla forces and armed bands actively involved in the overthrow or destruction of a sovereign government. Discussion of possible application of "riot" exclusionary insurance clauses to terrorism by groups lacking such ambitious ultimate purposes, complex military organization, or capacity to add significantly to the destruction or overthrow of a soveriegn is beyond the intended scope of this article.

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I. PAN AMERICAN WORLD AIRWAYS, INC. V. AETNA CASUALTY AND SURETY CO.[7]

In the recent *Pan American World Airways* case, a federal court was confronted with the issue of whether the loss of a Boeing 747 jumbo jet, which was hijacked and destroyed by Arab terrorists, was the result of certain "war risks" excluded by the aircraft standard marine aviation hull policy. The airliner, enroute from Amsterdam to New York via London, was hijacked by two armed terrorists working for the most radically militant faction of the fedayeen terrorist groups: the Popular Front for the Liberation of Palestine (PFLP).[8] The hijacking was part of a larger plan to capture four Israeli (El Al) airliners. Partial frustration of the plan resulted in the alternative hijacking of the Pan Am aircraft.[9] The terrorists demanded that the jumbo jet be flown to Beirut, Lebanon, where the aircraft was boarded by other members of the PFLP. The passengers were held on the aircraft as hostages. The hijackers then ordered the aircraft flown to Cairo, Egypt, where, prior to landing, fuses were lit to explosives planted in the aircraft. At Cairo the passengers were given only minutes to disembark after landing; several were injured in the ensuing panic. The aircraft was totally destroyed by explosions and fire.[10]

The aircraft hull was insured by a syndicated aviation underwriting group, of which Aetna was a member, for all normal aviation risks under a policy containing the standard marine policy "war risk" exclusions.[11] It was further covered by policies from other insurers, including the United States Government, which insured the aircraft against losses resulting from "war risks".[12]

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7. Civil No. 71-1118 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

8. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 2, 3, 19-33 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

9. *Id.*, at 33-34.

10. *Id.*, at 38-47.

11. The policy recited that among the causes of loss excluded were: "War, invasion, civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not; . . . ." *Id.*, at 9.

12. Policies of both the "war risk" insurers and the government recited among the enumerated risks covered:

> War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution or insurrection, military or usurped power or confiscation and/or nationalization or requisition or destruction by any government or public or local authority or by

In holding the former liable for the loss, the court declared that the hijacking and destruction by the PFLP was not a result of "war, civil war, revolution, rebellion, insurrection, or warlike operation". This was found true even conceding that the PFLP may have been working methodically toward the overthrow of a sovereign and may have engaged in other activities that could be properly called "warlike operations".[13] The court recognized that while this hijacking of a private, commercial United States aircraft was for propaganda purposes, it was not warlike because the attack was not directed against a sovereign with which the terrorists were at war.[14] The court, in finding that the loss was too remote to be considered the result of a "warlike operation" or "civil insurrection", indicated doubt that the contracting parties had imagined "war risks" to encompass terrorist hijacking or destruction occurring thousands of miles from a given sporadic conflict.[15] Rather, the airline hijacking and the potential danger of monumental loss in lives and property posed by each such occurrence was deemed to be an ordinary aviation risk of which the insurer was aware. Further, the court indicated that if such risk was not to be assumed in the normal hull policy, it should have been so specified in the contract. The fact that the insurer chose not to derogate from the terms derived from the ancient common marine insurance hull policy and that he failed to specifically include hijacking among the war risk exclusions, was also considered by the court as it applied the usual rule of public policy to interpret insurance contracts most favorably to the insured.[16]

The court in the *Pan Am* case did not foreclose the possibility that "war risks" might include some commercial aircraft hijackings by irregular forces.[17] However, it did find that a terrorist hijacking was not the result of "war risks" where there was: (1) no actual condition of war in which the terrorist organization was involved;[18] (2) no foreseeable danger of loss arising from the proximity of the war;[19] and, (3) no intent of the perpetrators that the hijacking contribute to conquest or coercion of a

any independent unit or individual engaged in irregular warfare.
Id., at 11.

13. *Id.*, at 94-95.
14. *Id.*, at 88-89.
15. *Id.*, at 71 & 94.
16. *Id.*, at 53-69.
17. *Id.*, at 81.
18. *Id.*
19. *Id.*, at 94.

sovereign government against which the terrorist group was actively engaged in war.[20]

II. WAR RISK CLAUSES

For a proper understanding of the implications of the *Pan Am* case, it is essential to consider the historical development of "war risk" clauses. This development contributes significantly to an analysis of the intent of parties to insurance contracts involving the conditions and activities described in "war risk" clauses.

War exclusionary clauses such as those found in the *Pan Am* case appear with a minimum of variations in almost all forms of personal and commercial accident, casualty, liability, and fire insurance policies. Life insurance policies universally exclude such risks from coverage, both for double indemnity accidental death benefits and for accidental injury disability waiver-of-premiums benefits.[21] Commercial, property, cargo, and marine policies which insure against all forms of accidental fire and casualty, exclude liability when losses occur as the result of "war risks".[22]

These clauses have been adopted generally from marine insurance policies in which the need for such insurance first arose. These policies contained the standard "free of capture and seizure" clause which included descriptions of "war risk" exclusions.[23]

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20. *Id.*

21. The greatest variety of insurance war risk exclusionary clauses seems to appear in life insurance policies. Some depend upon death while in the military service during war ("status" clauses). Other exclusions merely provide for death resulting from war ("results" causes). For examples of life insurance clauses, see Annot., 36 A.L.R.2d 996 (1954) and Billing, *Of War Clauses*, [1952] INS. L.J. 793, 798 [hereinafter cited as Billing]. For comparison of "status" and "result" clauses, see Note, *The War Clause in Life Insurance Contracts*, 4 UTAH L. REV. 120 (1954).

22. *See* Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118 at 9 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973 (aviation property); International Dairy Engineering Co. v. American Home Assur. Co., 352 F. Supp. 827 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973) (property-cargo); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967) (marine); Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961) (cargo-property); E. IVAMY, MARINE INSURANCE 217 (1969) [hereinafter cited as IVAMY]. Examples compiled from student survey of insurance companies, conducted Oct. 1973 (on file with CALIF. W. INT'L L.J.).

23. For discussion of emergence of "war risks" clauses from "free of capture and seizure" clauses, see IVAMY, *supra* note 22, at 217. For a sample Stand-

After the creation of "war risk" exclusionary clauses for normal marine casualty insurance, a separate group of "war risk" underwriters emerged in London. The problem of allocating losses between normal casualty insurers and "war risk" insurers, as presented in the *Pan Am* case, naturally developed.[24]

The vast body of English maritime law, wherein the applicability of "war risk" exclusions has been extensively litigated, has historically provided American courts with substantial precedent for interpreting "war risk" clauses.[25] However, one important divergence between modern American and British decisions has arisen in the definition of proximate causation. The British common law view was that a loss could be the result of war even though caused from a risk normal to the insured activity aggravated by a war in which the insured was directly or indirectly involved.[26] The modern American position is that for a loss to be the result of a "war risk", the loss must be attributable to risks peculiar to the use of military operations and the proximate result of conflict between armed forces.[27] The loss cannot be the result of a risk common to the activity involved which is

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ard Form of English Marine Policy, and Cargo All Risk Clause, see *id.*, at 534-35.

24. *See* Note, *Allocation of Risk Between Marine and War Insurer*, 51 YALE L.J. 674 (1942). Consideration of British litigation allocating loss between "war risk" and marine risk insurers is useful to the study of interpretation of war risk clauses. In such cases courts have been compelled to carefully scrutinize fact situations to determine whether resulting losses were caused by normal risks or war risks. United States v. Standard Oil, 178 F.2d 488 (2d Cir. 1949), *aff'd*, 349 U.S. 54 (1950); Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F. 976 (2d Cir. 1922), *aff'd*, 263 U.S. 487 (1924); Brittain S.S. Co. v. The King, [1921] 1 A.C. 99 (1920); Clan Line Steamers, Ltd. v. Liverpool and London War Risks Ins. Ass'n Ltd., [1943] 1 K.B. 209 (1942); Liverpool & London War Risk Ins. Ass'n v. Marine Underwriters of "Richard de Larrinaga," [1921] 7 Lloyd's List L.R. 151 (H.L. 1921).

25. Although the Supreme Court overturned its previous requirement that American courts were *bound* to apply British law while interpreting and applying "war risk" exclusionary clauses in marine policies in Standard Oil Co. v. United States, 340 U.S. 54 (1950), British law still appears to provide United States courts with substantial interpretive assistance in situations where insufficient analogous American authority is found. *See* Note, 26 N.Y.U.L. REV. 362 (1951); *see also* International Dairy Engineering Co. of Asia v. American Home Assur. Co., 352 F. Supp. 838 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (2d Cir. 1973); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967); Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 94 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

26. *See* cases cited note 24 *supra.*

27. *Id. See also* cases cited note 25 *supra.*

merely aggravated by a condition of war.[28]

A major problem in arriving at a judicial determination of whether a certain loss was the direct result of "war risks" is to determine what the concept of "war" encompasses.[29] Certainly some state of general military conflict is contemplated.[30] During World War II and the Korean conflict, numerous life insurance cases in the United States involved litigation of the issue of whether a state of war is to be defined by constitutional or international technical formalities, or by actual physical military conflict by government and irregular forces.[31] While most policies now in effect recite that exclusions apply to both declared and undeclared war,[32] the cases arising out of World War II and the Korean conflict are worthy of note. These cases help to establish an understanding of the intent of the contracting parties as to the meaning of war; the tendency of courts to construe ambiguous "war risk" clauses in terms most favorable to the insured; and, the judicial willingness to give a common sense meaning to policy wording where it appears certain that the contracting parties intended such interpretation.[33]

In the case of life insurance contracts, decisions varied as to whether deaths at Pearl Harbor[34] hours before declaration of war, deaths after hostilities ceased in World War II and before formal peace treaties were signed,[35] or deaths during the Korean war were the result of "war".[36] Those decisions which adopted

28. *Id.*

29. To avoid confusion of terms surrounding the concept of war and the existence of war, the following definitions will be employed herein: (1) "state of war" will be used to mean the existence of an armed conflict formally and constitutionally declared by sovereign governments; (2) "condition of war" shall be used to refer to a broad concept of war in fact, including armed conflict between nations or parts thereof, fighting without formal declaration of war.

30. Rogers, *Modern Warfare and Its Effect on Policy Construction*, [1952] INS. L.J. 360, 361 [hereinafter cited as Rogers].

31. *See* Annot., 36 A.L.R.2d 996 (1954).

32. Follman, *Commercial Accident Insurance*, [1952] INS. L.J. 737, at 744.

33. *See* Rogers, *supra* note 30, at 361.

34. *See* New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946), *cert. denied*, 331 U.S. 881 (1947) *noted in* 56 YALE L.J. 746 (1947). *See also* Rosenau v. Idaho Mut. Ben. Assn., 65 Idaho 408, 145 P.2d 227 (1944); Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (D.C. La. 1944); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943).

35. Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948).

36. Beley v. Pennsylvania Mutual Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953); Stanberry v. Aetna Life Ins. Co., 26 N.J. Super. 498, 98 A.2d 134

a broad view of war held that such exclusions applied because the term "war" should be considered in the factual context viewed through the exercise of executive authority competent to commit military forces to combat.[37] Military conflict was of prime importance. Courts which adopted a restrictive view of the term "war" approached the definition as a political question, holding that judicial cognizance of war may be taken only upon formal declaration by the proper political authority.[38]

The modern trend evidences a common sense approach towards the broader interpretation. Today there is substantial authority favoring a determination that a state of war is a question of fact for executive determination, as necessary for protection of its soverign national interest.[39] Once such a determination has been made by official statement or by government-directed overt military action, the trend has been to declare that a condition of war exists for insurance purposes.[40] The American courts

(1953); Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554, *cert. denied*, 347 U.S. 928 (1953).

37. Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554, *cert. denied*, 347 U.S. 928 (1953); Hooker v. New York Life Ins. Co., 161 F.2d 852 (7th Cir.), *cert. denied*, 332 U.S. 809 (1947); New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946), *cert. denied*, 331 U.S. 811 (1947); Vanderbilt v. Travelers Ins. Co., 112 Misc. 248, 259, 184 N.Y.S. 54, 55 (Sup. Ct. N.Y. County 1920), *aff'd without opinion*, 202 A.D. 738, 194 N.Y.S. 986 (1st Dep't 1922), *aff'd per curiam*, 235 N.Y. 514, 139 N.E. 715 (1923).

38. Savage v. Sun Life Assur. Co. of Canada, 57 F. Supp. 620 (D.C. La. 1944). Pang v. Sun Life Assur. Co., 37 Hawaii 208 (1945); West v. Palmetto State Life Ins. Co., 202 S.C. 422, 25 S.E.2d 475 (1943).

39. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862).

40. Langlas v. Iowa Life Ins. Co., 245 Iowa 982, 63 N.W.2d 885 (1954); Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554, *cert. denied*, 347 U.S. 928 (1953); New York Life Ins. Co. v. Bennion, 158 F.2d 260 (10th Cir. 1946), *cert. denied*, 331 U.S. 881 (1947); New York Life Ins. Co. v. Durham, 166 F.2d 874 (10th Cir. 1948); Rosenalle v. Idaho Mut. Ben. Assn., 65 Idaho 408, 145 P.2d 227 (1944); *cf.* Beley v. Pennsylvania Mut. Life Ins. Co., 373 Pa. 231, 95 A.2d 202 (1953). Justice Musmanno stated that:

> [T]o deny that the Korean military action is not war in its popularly accepted meaning is to deny the evidence of one's senses. Courts normally take judicial notice of whatever is unquestioningly accepted by informed society as fact. . . . Courts know that in Korea, armies are pitted against each other utilizing every device known to modern warfare in the effort and determination to exterminate each other. We know this to be true because every medium of communication extant informs us that it is true. There is not one voice, one printed word, or one picture in the newspapers, radio broadcasts and television images which present themselves before our eyes or appeal to our ears that bespeaks anything to the contrary. In addition, judges have physically seen soldiers who have returned from Korea and have witnessed the

are now more prone to determine that in the practical sense of the word, war envisages the conduct of warring forces irrespective of the formal technicalities of international law.

This broad interpretation of war adopted in the life insurance cases seems in harmony with what Korean era spokesmen of the insurance industry argued was intended by the parties.[41] Since life insurance policies would seem to be basically contracts of adhesion, it seems probable that "war risk" exclusionary clauses are the subject of minimal consideration or objection by the average insured during the period of solicitation of his policy. Therefore, his intent as to the meaning of such clauses is practically impossible to ascertain. In commercial casualty, marine, and aviation insurance contracting, much more extensive negotiation of terms is probable. However, due to a lack of published materials by such insured businesses, their intentions regarding the precise meaning of the "war risk" clause seems unsure beyond the obvious intent that they receive maximum insurance coverage for minimum premiums. Since writings of the insurance industry regarding its intent are the only published sources available, they should prove enlightening in determining the intent of the parties, providing the inherent bias in such material is recognized.

Taking judicial cognizance of the fact that insurers are responsible for language used in insurance contracts, American courts tend to interpret ambiguities in such contracts against the drafters of the policies in terms most favorable to the insured.[42] As in other contracts, maxims of construction usually dictate that the words of insurance contracts should be construed in accordance with the ordinary meaning of the language used and not given a strained, unnatural, or technical construction.[43] Hence,

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evidence of their contact with forces which have inflicted wounds peculiarly the result of gunfire and cannon fire, the trademark of war.

373 Pa. 231, 240-41; 95 A.2d 202, 213 (concurring opinion).

41. *See* Rogers, *supra* note 30, at 361.

42. Flota Mercante Domicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967); Continental Cas. Co. v. Beelar, 405 F.2d 377 (D.C. Cir. 1968); Sincoff v. Liberty Mut. Fire Ins. Co., 11 N.Y.2d 386, 183 N.E.2d 899, 230 N.Y.S.2d 13 (1962); Silverstein v. Commercial Cas. Ins. Co., 237 N.Y. 391, 143 N.E. 231 (1924); Mahon v. American Cas. Co., 65 N.J. Super. 148, 157-58, 167 A.2d 191, 196 (1961):

> Ambiguities in insurance policies should be resolved, where reasonable to do so, strictly against the insurer . . . [in order to] . . . arrive at a construction fairly according with the intent of the insurer in writing it and the reasonable expectations of the assured in buying it.

43. Judicial construction is typified by the statement that:

in drafting war clauses using common English, it is the task of the insurance industry to select effective verbiage.

After the litigation arising out of the Korean conflict, the solution envisioned by the insurers was to refrain from reliance upon the courts' inconsistent interpretations of "war".[44] Therefore, contract language was drafted enumerating all the risks which insurers had previously considered implied in the word "war",[45] including "declared" and "undeclared war", "civil war", "insurrection", and "warlike operations". Though insurers thought these risks had been included within the term "war", the vast majority of the life insurance claims arising from the Korean conflict were paid by insurers without dispute.[46] The industry was generally content to resort to redrafting future contracts specifically incorporating these terms.[47]

Characteristically, each of the specifically recited "war risks" is unique to a general armed conflict between multiple national forces or between irregular forces and at least one national force.[48] Without a condition of war, no "war risk" should be

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> It is the settled law in this state that contracts of insurance in their construction are governed by the same rules as other contracts, and that terms used in them are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows them to have been used in a technical or different sense.

Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 564, 261 S.W.2d 554, 557 (1953).

44. Rogers, *supra* note 30, at 360-61.

45. *Id.* *See also* Wheeler, *The War Clauses*, [1953] INS. L.J., at 727-28 [hereinafter cited as Wheeler]:

> The word "war" is ordinarily used in the policies in a generic sense and would encompass war of every type. Where the all inclusive word "war" is used, the contract is not rendered ambiguous by reason of failure to spell out the various types of war, such as civil war, world war, foreign war, limited war, general war, public war, legal war, constitutional war, declared war and undeclared war. Writers on the subject of international law have classified types of war other than those listed, but the fact remains that each of these types of war is a war in fact and the use of the adjectives would *limit* rather than enlarge the meaning of the word "war" as used in the contract.

46. Rogers, *supra* note 30, at 360.

47. *Id.*

48. Wheeler states that:

> A condition or state of war will exist at any time when any warlike or aggressive act is recognized to be an act of war. [W]hile the language in some of the cases would appear to indicate otherwise, it would seem reasonable to assume and hold that an act of war may be committed only in time of war. An agressive act, which may also be called a warlike act, may or may not be considered to be an act of war by the party attacked, but any recognition that such an aggressive act is an act of war would seem to require a holding that war exists and that it is in time of war.

Wheeler, *supra* note 45, at 732-33.

applied as the cause of a loss.[49] Where there is a condition of war, it can include any or all of the particular activities regarded as "war risks". The insurer intends that all loss resulting from war and the specific types of conflict described should be excluded from coverage under an insurance policy.[50]

III. DETERMINATION OF A CONDITION OF WAR

Assuming the necessity of the existence of some condition of war before any "war risk" can be applicable, and focusing upon the judicial tendency to allow inferences of a state of war from informal military actions by proper executive authority,[51] an issue of primary import involves what governmental actions are necessary to give rise to such inferences. Little problem is posed where large military forces of two or more belligerent sovereign nations are pitted against each other across international boundaries[52] or where different entities in a single nation, each militarily capable of exerting sovereign authority over some substantial area, are militarily engaged against each other.[53] At the other extreme, the determination is more difficult where governments are required to react against a small irregular force at home or abroad with only limited military force in defense of another government or society.[54] There is a fine distinction between large-scale criminal activity requiring use of only ordinary internal police equipment and procedures, and small-scale military aggression by significant, well organized irregular forces, which would be sufficient to provoke such sovereigns to resort to military force to maintain political stability and public order.

How should courts draw this line? How should courts define such abstract terms as aggression? Due to political biases and patent confusion involved in defining a term such as aggression, internationally adopted definitions and statements of political theorists seem to lack sufficient definiteness to be of more

49. *Id.* *See also* Rogers, *supra* note 30, at 360-61.

50. *Id.*

51. Montoya v. U.S., 180 U.S. 261 (1901); The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

52. Western Reserve Life Ins. Co. v. Meadows, 152 Tex. 559, 261 S.W.2d 554, *cert. denied*, 347 U.S. 928 (1953).

53. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862).

54. *See* Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

than negligible judicial value.[55] The problem of evaluating the potency of an irregular force, its interrelation with its other allied forces, and the overall significance of the irregular force to the ultimate goals of its allies' movement, increases the difficulty of establishing a judicial standard for the existence of a condition of war. Modern revolutionaries indicate that there is a shifting complexity of structures of regular and irregular forces in prosecution of protracted "wars of liberation",[56] as shown by the revolution in China[57] and the continuing conflict in the Republic of Vietnam.[58] The analysis of the complex political, military, economic and sociological factors interwoven into each limited conflict or revolution,[59] which would be necessary for a court to evaluate in order to determine whether any given guerrilla conflict constitutes a state of war, would seem overburdensome. Attempts to arrive at a standard would seem fruitless unless an objective determination of the existence or nonexistence of a condition of war could be made. Such a determination could be more easily accomplished by taking judicial notice of guidance, expressed or implied, from the proper political agency of the government that is responsible for analyzing and reacting to the particular situation. In other words, retrospective analysis of response by the war making agencies of a soverign government would probably be a more satisfactory foundation for determination of standards for a condition of war.[60]

American judicial authority reveals a tendency to allow inference of a condition of war for "war risk" purposes to be drawn from observance of military reaction of a sovereign against irregular forces.[61] Such guerrilla aggression has been held to include attacks upon either the sovereign entity and its military forces, or civilians and property entitled to protection by the sovereign.[62]

55. Hazard, *Why Try Again to Define Aggression?*, 62 AM. J. INT'L L. 701 (1968).

56. MAO TSE-TUNG, *supra* note 3, at 20-22, 41-45, and 51-57.

57. *Id.*

58. 1968 *Hearings, supra* note 4.

59. MAO TSE-TUNG, *supra* note 3.

60. Montoya v. United States, 180 U.S. 261 (1901).

61. In a case involving the issue of whether conflict between settlers and Apache Indians constituted a state of war the court said:

> [T]he fact the Indians are engaged in acts of general hostility to settlers, especially if the government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war.

Id. at 267.

62. *Id. See also* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2

It would seem that any standard defining "state of war" for insurance purposes should require judicial recognition of the use of any regular military forces committed by the sovereign in response to quelling irregular force activity.

The weaponry employed by the sovereign is another factor courts could easily consider as bearing on the issue of a condition of war for insurance purposes.[63] Such a condition would be most easily inferred where the sovereign's military utilized such technologically advanced weapons as tanks, naval vessels, aircraft, "mines, torpedoes, bombs or other engines of war . . . ,"[64] capable of inflicting "wounds peculiarly the result of gunfire and cannonfire, the trademarks of war."[65]

The existence of such military hostilities at the time of a loss should be the key to determining whether a condition of war exists. Though courts differ as to whether post truce ceasefire violations are part of the condition of war, the better view from an insurance standpoint would seem to be that such outbreaks are part of war. This is especially apparent where formal termination of hostilities has imposed a state of peace over soldiers still willing to fight.[66] In excluding all the unpredictable fortuitous risks arising from the common concept of modern war, it appears that the parties to an insurance contract intend such exclusions to apply to the engagement of one or more sovereign's military forces utilizing destructive military hardware against its enemies for the full period of actual hostilities.

Black) 635, 666 (1862); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967); Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961); Hamilton v. McClaughry, 136 F. 445 (D. Kan. 1905); Pesquerias y Secaderos de Bascalao de Espana, S.A. v. Beer, 79 Lloyd's List L.R. 417 (K.B. 1946), *rev'd*, 80 Lloyd's List L.R. 318 (C.A. 1947) 1 All E.R. 845 (H.L. 1949).

63. Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

64. IVAMY, *supra* note 25, at 534.

65. Beley v. Pennsylvania Mutual Life Ins. Co., 373 Pa. 231, 240-41, 95 A.2d 202, 213 (1953) (Musmanno, J., concurring). *See also* Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540, 543 (S.D.N.Y. 1967).

66. *Compare* Stawski v. John Hancock Mut. Life Ins. Co., 7 Misc. 2d 424, 163 N.Y.S.2d 155 (Sup. Ct.), *appeal dismissed on consent*, 170 N.Y.S.2d 489 (1st Dep. 1957), *with* Shneiderman v. Metropolitan Cas. Co., 14 App. Div. 2d 284, 220 N.Y.S.2d 947 (1st Dept. 1961).

IV. MODERN ENUMERATED WAR RISKS AND IRREGULAR FORCES

Having established the factual existence of the commonly conceived war within which losses have occurred, courts have engaged in further examination of the insurance policy to determine under which, if any, of the specifically excluded risks a given loss occurred.[67] While all types of military forces participating in a war may seem capable of acts included within the term "war risks", courts seem to differentiate between participants for purposes of determining under which of the enumerated "war risks" the insurance parties possibly meant to exclude the act involved.[68]

A. Acts of War, Warlike Operations, and Hostilities

For insurance policy purposes, the term "war" itself has been interpreted in a technical sense meaning the forcible contest of arms between two or more *de jure* or *de facto* governments.[69] Frequently, terms such as "belligerent" or "enemy" are used in this connection to apply to entities engaged in the war. Each term in itself also refers to sovereign governments.[70] By definition, neither indigenous guerrilla forces such as the Viet Cong nor armed terrorist bands such as fedayeen are technically capable of an "act of war".[71]

The term "warlike operations" in insurance contracts has been interpreted much more broadly than has the term "war".[72]

67. Cases cited in note 40 *supra*. *See also* Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

68. *Compare* Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967), *with* International Dairy Engineering Co. v. American Home Assur. Co., 474 F.2d 1242 (9th Cir. 1973), *aff'g*, 352 F. Supp. 827 (N.D. Cal. 1970).

69. Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 465 (1863); Gitlow v. Kiely, 44 F.2d 227, 233 (S.D.N.Y. 1930), *aff'd*, 49 F.2d 1077 (2d Cir.), *cert. denied*, 284 U.S. 648 (1931); Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 93 (S.D.N.Y., Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

70. Welts v. Connecticut Mut. Life Ins. Co., 48 N.Y. 34 (1871).

71. International Dairy Engineering Co. v. American Home Assur. Co., 474 F.2d 1242 (9th Cir. 1973), *aff'g* 352 F. Supp. 827 (N.D. Cal. 1970) (Viet Cong); Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 93 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973 (fedayeen).

72. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 93-95 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

The earlier British and American decisions tended to distinguish "warlike operations" as meaning any military operation in time of war, from "hostilities" as referring to actual specific defensive or offensive operations.[73] The modern trend is to disregard such distinctions.[74] The combat reflected by these terms is not solely limited to action by and against military forces of sovereign belligerents. While little American case law interpreting "warlike operations" is available for study, modern cases seem to indicate that it might include international combat between any number of guerrilla or irregular forces, belligerent governments, and nonbelligerent governments, and their neutral civilian citizenry. A simple defensive response by United States forces using two high explosive 106mm recoilless rifle shots against a very limited automatic and small arms rebel attack from a seized ship was held to be a "warlike operation".[75] Hence, a limited military combat act between a defending sovereign and a belligerent armed rebel band would seem to be included in the definition where the conflict encompassed use of modern military weaponry.[76] One American case tends to support the position that "warlike operation" includes a situation where two irregular forces are opposing each other with acts of terrorism and combat during a period when the sovereign governments of each are formally disengaged.[77]

A more difficult problem is presented where the attack involved is principally against private civilians and property of a non-belligerent state. Where the attack is by a belligerent state against the private citizen or his property interest, the single American case on point held that the loss being litigated was

73. Queens Ins. Co. v. Globe & Rutgers Fire Ins. Co., 282 F. 976, 979 (2d Cir. 1922), *aff'd*, 263 U.S. 487 (1924).

74. *See* Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

75. Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967); Banque Sabbag S.A.L. v. Hope, [1972] 1 Lloyd's List L.R. 253 (Q.B.), *aff'd*, C.A., Feb. 20, 1973 (by implication).

76. *Compare* Home Ins. Co. v. Davila, 212 F.2d 731 (1st Cir. 1954) ("civil insurrection" case where damage sustained directly from irregular force activity), *with* Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967) ("warlike operations" case where damage sustained directly from U.S. defensive fire, provoked by offensive guerrilla fire). Note that from a causation standpoint, it is immaterial whether the loss was the direct result of offensive or defensive operations on the part of the irregular force, or offensive or defensive operations of the government force.

77. Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961).

the result of "warlike operations".[78] Such a result is questionable when a guerrilla force or armed band attacks only specific private interests of citizens of non-belligerent states. Several European cases arising out of World War II conduct, indicate that activity such as assassination and property destruction by resistance movements in France, Belgium, the Netherlands, Italy, and Yugoslavia could be considered "acts of war or warlike operations".[79]

In those instances, a state or condition of war existed at all times throughout. Activities by resistance movements against political enemies, traitors, and use of private domestic property by conquering enemy armies were found to be forms of combat operation incident to war. Analogous American litigation is unavailable for study, probably because the United States has not been engaged in a war on its own land since the Civil War. For

78. Bergman v. American Liberty Ins. Co., 6 Misc. 2d 987, 161 N.Y.S.2d 390 (Mun. Ct. 1956), *rev'd*, 11 Misc. 2d 482, 172 N.Y.S.2d 662 (App. Term 137 Dep't, 1958). Recovery for the value of a ring was sought under a property policy where the ring was lost as an El Al airliner bound from Vienna to Tel Aviv due to pilot error, drifted near the Bulgarian frontier and was shot down by Bulgarian military personnel using anti-aircraft fire. The appellate court held the loss was within the clause excluding loss resulting from "warlike operations".

79. Interpreting "war risk" clauses in cases involving losses resulting from terrorism by resistance movements in World War II, one European court has stated that:

> [W]ar . . . is no longer exclusively a contest between two armies arrayed in the field as it used to be in times past. Instead it includes every activity of the warring States to an extent that one may well speak of total war. War assumes . . . a special form if a State is occupied by the enemy . . . and if the population of the territory which has been seized but not yet conquered does not submit to the domination of the invader. In these circumstances organized resistance arises . . . it is necessarily clandestine, given the disproportionate strength of the forces opposing each other. It is an underground war consisting of ambushes, assaults, sabotage, and acts of terrorism. In other words, it is guerrilla warfare . . . .

Beccarini v. Societa La Sictura, [1950] Ann. Dig. 352, 353 (No. 111) (Ct. Cass., Italy). *See also* Van Hoeve de Feyter v. Fire Ins. Co. of 1859, Ltd., [1947] Ann. Dig. 169 (No. 81) (Dist. Ct. Dordrecht, Neth.) (purposely burned grain shed to avoid enemy use was "act of war"). *Accord*, Sabatier v. Cie d'Assurances Generales, [1947] 2 Gaz. Pal. 184 (Cour. Comm. Seine, France) summarized in [1946] Ann. Dig. 228 (train derailed by French Resistance); Cie D'Assur. La Nationale v. Vve. Cabenel, [1946] Ann. Dig. 228 (No.95) (Ct. App., Montpellier, France) ("Collaborator" executed by French Resistance); Smulders & Piccinati v. Societe Anonyme "La Royale Belge," [1943-1945] Ann. Dig. 303 (No. 102) (Civ. Ct. Liege, Belgium) (Died in motorcade ambushed by "partisans"); Saporiti v. S.A. Infortuni Milano, [1950] Ann. Dig. 353 (Ct. App., Milan, Italy) *notes reversal of* [1948] Ann. Dig. 433 (No. 130) (Ct. of First Instance, Milan, Italy), (Resistance assassination); *cf.* Office Departemental des Pupilles de la Nationa a Lille v. Vve Watremez, [1946] 2 Gaz. Pal. 101 (Cass. Civ. France) *noted in* [1946] Ann. Dig. 229.

that reason, the European viewpoint that terrorism by armed resistance bands and guerrilla forces during war are "acts of war" or "warlike operations", is worthy of note.

The World War II European cases are obviously distinguishable from the *Pan Am* decision because neither the United States, nor any private individual, nor the Pan Am 747 was at war in any generic sense of the word with the fedayeen or any of the states involved in Mid-East tensions.[80] Neither Pan Am nor its passengers were responsible for any act or omission which the average traveler would foresee resulting in his involvement and possible injury in the Mid-East conflict. This is especially true where, as here, the airliner already over 2,000 miles from the Mid-East, was enroute to a destination even more distant.[81]

The PFLP could have miscalculated the timing of their explosives or caused some other freak accident prior to landing resulting in the aircraft exploding. In all probability, over 100 people would have been killed, maimed, or injured. Many of the hypothetical victims undoubtedly would have been covered by insurance policies in which they had purchased coverage for double indemnity in the case of accidental death or waiver-of-premiums in the event of disability caused by accidental injury. Both of these benefits are universally excluded where the accident was the result of "war risks".[82] It does not seem reasonable that either the insurer or the insured would have contemplated, within the meaning of the standard "war risk" exclusions, death at the hands of an armed band from a different part of the world not engaged in any sort of combat with the nation of which the insured and insurer are nationals. In the words of United States District Court Judge Frankel in the *Pan Am* decision:

> [T]here is no warrant in the general understanding of English, in history, or in precedent for reading the phrase "warlike operations" to encompass the infliction of intentional violence by political groups (neither employed by nor representing governments) upon civilian citizens of non-beligerent powers and their property at places far removed from the locale or the subject of any warfare. This conclusion is merely reinforced when the evident and avowed purpose of

80. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 94 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

81. *Id.*

82. Billing, *supra* note 21.

> the destructive action is not coercion or conquest in any sense, but the striking of spectacular blows for propaganda effects.
>
> That the PFLP istself [*sic*] and the fedayeen generally may have engaged elsewhere in "warlike operations" does not affect our result. Battles between fedayeen forces and Israelis, bombing of Israeli territory, and other forms of comparable violence, whether called "guerrilla" or "commando" or whatever, were probably "warlike" in a pertinent sense. But that scarcely extends the adjective to all bombings, killings, and destruction anywhere under PFLP auspices.[83]

Given this analysis, it would seem that the loss was beyond the contemplation of the insurance industry when drafting the clauses if their intent had been to exclude risks arising from a state of war to which the insured could reasonably be foreseen to be exposed.[84] However, the *Pan Am* court did recognize the possibility that other activity by the PFLP, when conducted against forces or citizens involved in the Arab-Israeli conflict, would constitute "warlike operations".[85] Where citizens of neutral nationality owned private property located where irregular forces were engaged in military conflict, the resulting damage to such private property has been held to be the product of "warlike operations" for purposes of insurance.[86] Such a holding is reasonable in view of the fact that cargo "casualty" and "war risk" insurance premiums change frequently, depending upon the stability of the applicable military and political atmosphere at all points enroute at the time any specific contract is issued. Businessmen negotiating such contracts would at least avoid a certain degree of risk of war damage when shipping goods to areas of the world where it is known that armed terrorist groups such as the fedayeen operated and dangerous political tension exists.[87]

The issue of whether or not "warlike operations" includes terrorists strikes by irregular forces against official government agencies or nationals of countries with which the irregular force

83. Civil No. 71-1118, at 94-95 (S.D.N.Y. Sept. 24, 1973) (footnote omitted).

84. Rogers, *supra* note 30.

85. Civil No. 71-1118, at 95 (S.D.N.Y. Sept. 24, 1973).

86. Hamdi & Ibrahim Mango Co. v. Reliance Ins. Co., 291 F.2d 437 (2d Cir. 1961).

87. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at i (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

is warring, where those strikes are beyond the area of normal hostilities, is judicially unresolved. Some relevant implications appearing in the *Pan Am* decision suggest such a possibility. On the one hand, the court dismissed acts of terrorism by the PFLP "at places far removed from the locale or subject matter of warfare" when those acts were against "citizens of non-belligerent powers."[88] In so finding, the court did not foreclose the possibility that "warlike operations" might include fedayeen terrorism abroad, where the violence is directed against Israeli nationals or official government agencies. Possibly the Arab terrorists' murder of Israeli athletes at the 1972 Summer Olympics in Munich, Germany,[89] seizure of recently released Jews from Russia and forced closure of their refugee pilgrimage relaxation camps in Austria,[90] or seizure of El Al airliners might be considered "warlike operations". Indeed the latter possibility seems to have been given further credence by the court's statement that:

> [I]t must be recalled, Diop and Gueye [PFLP terrorists] were assigned originally to help with the frustrated El Al hijacking. An El Al success would have been above all a victory in the "war" against Israel.[91]

The alternative contention, that such terrorist acts abroad would not be within the term "warlike operation", would seem to be supported in reason by the argument that the contracting parties, especially with regard to passengers and their insurers, would not have prospectively imagined such acts of terrorism so distant from the location of a war as acts incident thereto.[92] Any attempt to extend the condition of war beyond the geographic and political boundaries of the countries of the combatants involved, and to extend outward to some arbitrary point conceived as the foreseeable "zone of danger" of the war, would seem unmanageable as a judicial standard. The court would have to decide in each specific instance whether the average reasonable insured and insurer would have contemplated such a "warlike oper-

88. *Id.*, at 94.

89. U.S. DEP'T STATE, Pub. No. 8689, *supra* note 1.

90. Blackmail in Vienna, 102 TIME, Oct. 8, 1973, at 50.

91. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at 89 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973. El Al is an airline owned and operated by the government of Israel.

92. *Id.*, at iii. Prior to the Pan Am hijacking herein involved, of the numerous previous Arab terrorist hijackings, only one had been of a non-El Al aircraft, and that was a T.W.A. flight enroute to Tel Aviv, Israel,

ation", taking into consideration the normal public policy rules which interpret ambiguities in favor of the insured to enforce the protection he purchased.

In determining if individual acts of terrorism by irregular forces constitute "warlike operations", consideration of another factor from the *Pan Am* decision appears to be of some value. The intent of the guerrilla force, where it can be determined, may provide a clue as to whether the act of terrorism is tied to some condition of war. Judge Frankel infers that where it can be determined that harassment or conquest of some recognized enemy is the motive for the attack, it would seem more probable that loss was the result of a "warlike operation" than if the avowed purpose of the attack was mere spectacularism for propaganda purposes.[93] Determining such intent would seem extremely difficult absent the substantive statement of intent by the PFLP in the *Pan Am* case. Considering the fact that professed guerrilla tactics rotate about a combination of indecisive military engagements, including limited attacks at the enemy's flank and rear, terrorist strikes against all interests favorable to the guerrilla's enemy, and intensive propaganda campaigns to gain support of indigenous population,[94] it becomes readily apparent that such a finding of intent, even if useful, would usually be impossible.[95]

B. Civil War, Insurrection, Rebellion or Revolution[96]

The "war risks" specified by the terms describing a civil revolution are closely allied to risks contemplated in the terms "warlike operations" or "hostilities". The major technical distinction is that while "warlike operations" require belligerent parties of different nationalities sustaining combat across international boundaries, a civil revolution contemplates war only within one recognized nation.[97] From the time of the Civil War, American

93. *Id.*, at 94. *See* text accompanying note 83 *supra.*

94. MAO TSE-TUNG, *supra* note 3.

95. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118, at vii (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973. Court implied doubt as to the usual usefulness of analyzing intent of the terrorist as Chief Judge Magruder suggested in Home Ins. Co. v. Davila, 212 F.2d 731, 737 (1st Cir. 1954).

96. Hereinafter in the text all these terms shall be considered synonymously in the term "civil revolution". Comparative distinctions as needed appear below. *See* Home Ins. Co. v. Davila, 212 F.2d 731 (1st Cir. 1954).

97. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862).

courts have recognized such a concept of war where multiple governmental factions—either *de jure* or *de facto*—existing within a single country, claim sovereign rights against each other.[98] The United States Supreme Court in *The Prize Cases*[99] enunciated some objective standards based on a sovereignty concept as a test for civil war:

> A civil war . . . becomes such by its incidents . . . the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold [*sic*] in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a *war*.[100]

Modern federal case authority indicates that destruction of property by irregular forces, indigenous to the country whose duly constituted sovereign they are actively attempting to overthrow, is the result of insurrection or rebellion for insurance purposes.[101] In *Home Insurance Co. v. Davila*,[102] Chief Judge Magruder presented an extensive analysis of insurrection and rebellion. The court denied recovery to an insured, under a policy excluding civil insurrection and revolution risks, for the loss of three buildings burned as a result of terrorist activity by a small "extremist" group calling themselves the Nationalist Party of Puerto Rico. In holding that the loss was excludable from indemnification by the insurer as the result of civil insurrection or rebellion, Chief Judge Magruder described revolutions in terms of an evolutionary process. Originating with a small insurrection by a weak rebel force resolved to overthrow the government but lacking the capability to do so, a conflict can develop into a rebellion as it gains force

98. *Id.* *See also* Dole v. Merchants' Mut. Marine Ins. Co., 51 Me. 465 (1863).

99. The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862).

100. *Id.*, at 666-67.

101. *See* Home Ins. Co. v. Davila, 212 F.2d 731 (1st Cir. 1954) (buildings in Puerto Rico burned by terrorist group); International Dairy Engineering Co. v. American Home Assur. Co., 253 F. Supp. 827 (N.D. Cal. 1970), *aff'd*, 474 F.2d 1242 (9th Cir. 1973) (cargo and property of neutral company destroyed in U.S. action against Viet Cong); Indemnity Ins. Co. v. du Pont, 292 F.2d 569 (5th Cir. 1961) (aircraft enroute from Miami, Fla., to Birmingham, Ala., hijacked to Cuba, fired on by government troops and forced to ditch off Guantanamo Bay).

102. 212 F.2d 731 (1st Cir. 1954).

and magnitude. It becomes a revolution when it has accomplished its purpose and the sovereign government is overthrown. Furthermore, the court indicated that losses from terrorist strikes at all stages of the revolutionary movement, intended by the perpetrators to contribute thereto, regardless of whether the strikes were aimed at sovereign or private interests, were excludable from insurance coverage as the result of "civil insurrection, rebellion, civil war, or revolution".[103]

In applying the *Davila* standard, the *Pan Am* court determined that neither the requisite intent that the hijacking be aimed at assisting in some way the overthrow of the Jordanian government nor the requisite existence of any such active rebellious movement to accomplish such revolution was present.[104] However, the *Davila* standard seems to leave no doubt that destruction resulting from terrorist violence by guerrilla forces engaged in an active insurrection, intended to further the revolu-

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103. In *Davila*, Chief Judge Magruder wrote:

> 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 . . . an insurrection aimed to accomplish the overthrow of the constituted government is no less an insurrection because the chances of success are forlorn . . . . At the time of its breaking out, an insurrection may not necessarily look impressive either in numbers, equipment, or organization. As the insurrection develops into an affair of greater magnitude the insurrection . . . may be spoken of as a "rebellion." If the insurrection or rebellion proceeds to attainment of its objective, . . . then the movement, retroactively, will be dignified by the characterization of a "revolution." . . . The first forcible action of the insurgents need not necessarily be directed against military establishments of the regularly constituted government. It may start as a sudden surprise attack upon the civil authorities of a community with incidental destruction of property by fire or pillage, even before the military forces of the constituted government have been alerted and mobilized into action to suppress the insurrection. When an insured suffers a loss at such an incipient state of the insurrection, it must be deemed a loss by fire caused directly or indirectly by insurrection, within the meaning of the exclusionary language of the policies, even though the insurrection has not yet proceeded to a stage where rebel armed forces, . . . are actually engaged in military operations against an army of the constituted government . . . . Whether it was an "insurrection" or not depended upon what was in their minds as the objective or objectives of the uprising.

Id., at 736-37. Lacking specific intent to overthrow the sovereign government, civil riots (such as the 1966 Watts riots, or possibly the Wounded Knee seizure incident of 1973) seem to fall outside the scope of "war risks". For a discussion of "Riot Insurance" beyond the scope of this comment *see* Note, 77 YALE L.J. 541 (1968). Considering the application of *Davila* to destruction by SDS and Weathermen bonds, the *Pan Am* court expressed doubt that such incidents would constitute insurrections. Civil No. 71-1118, at vii, viii (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

104. Civil No. 71-1118, at 73-82 (S.D.N.Y. Sept. 24, 1973), *appeal docketed* No. 73-2604, 2d Cir., Oct. 8, 1973.

tionary movement, would fall within the "war risk" definitions of civil revolution. Certainly each case requires extensive factual analysis, but adjudication of the issue of applicability of such standards to losses sustained in underdeveloped countries where guerrilla warfare and internal political upheaval are prevalent[105] is a frequently recurrent possibility. The standard is helpful as a guide to possible solution of whether certain insurance benefits would be denied to parties of neutral nationalities while abroad where an insurrection develops from which they sustain loss. Such cases might include: an American's auto overturned and damaged in Athens in a student revolt against the government of Greece;[106] the execution of an American student by a new military government in Santiago during a revolution in Chile;[107] terrorist blackmail kidnap, ransom, and murder of American business executives in South America;[108] destruction of a Y.M.C.A. facility in Central America in a revolt against a local government and the United States troops located therein.[109]

V. RECOMMENDED MINIMUM CRITERIA FOR CLASSIFYING TERRORISM AMONG WAR RISKS

After finding the existence of a condition of war concurrent with injury caused by irregular forces, the court has the difficult task of determining whether there is a sufficient nexus between the war and the act inflicting the injury in order to qualify the loss as the result of "war risks". The court should closely analyze both the specific terrorist act and the irregular force involved before ruling that a link between the loss and a "war" exists.

Due to public policy considerations favoring recovery by the insured for his loss in accordance with the purpose of the insurance contract, the court should require the insurer to prove that such a nexus exists.[110] This is consistent with the judicial tendency to interpret ambiguities in insurance contracts in favor of

105. MAO TSE-TUNG, *supra* note 3, at 41.

106. San Diego Union, Nov. 18, 1973, § 1, at 1, col. 4.

107. *Slaughterhouse in Santiago*, 82 NEWSWEEK, October 8, 1973, at 53-54.

108. *See Living in Fear—Executive Kidnapping*, 81 NEWSWEEK, June 11, 1973, at 98-99; *Argentina—A Way of Death*, 102 TIME, December 3, 1973, at 56.

109. National Board of Y.M.C.A. v. United States, 395 U.S. 85 (1969).

110. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973.

the insured. If the insurer fails to sustain this burden of proof, the court should determine the loss to be the result of normal criminal conduct and among the risks assumed by the insurer.[111]

The modern emergence of large-scale terrorism as a tactic used by irregular forces has basically occurred since the currently popular "war risk" terms were drafted.[112] This has placed a new burden upon the proponent of the proposition that a given terrorist act provides the required link between a given loss and a war sufficient to justify attributing the loss to "war risks." In order to establish the existence of the requisite nexus between a loss and a "war" which conventional warfare normally provides, irregular force activity should satisfy at least five criteria. The act of terrorism may fall within one of the enumerated "war risks" if: the guerrilla force perpetrating the act is a para-military group actively engaged as a dedicated belligerent in the war,[113] the guerrilla force is of sufficient strength that its general aggressive acts would warrant military resistance wherever possible by enemy sovereign military forces;[114] the terrorist act itself is within the area normally expected to be circumscribed by the war involved;[115] the act resulting directly in the loss was concurrently intended by the perpetrators to be an accomplishment of some military significance against its enemies;[116] and finally, the equipment used to inflict the loss and the damage itself is the type which normally could be foreseen to result from an act of war.[117]

111. *Id.* *See also* United States v. Standard Oil Co. of New Jersey, 178 F.2d 488 (2d Cir. 1949), *aff'd*, 349 U.S. 54 (1950); Airlift Int'l, Inc. v. United States, 335 F. Supp. 442 (1971), *aff'd per curiam*, 460 F.2d 1065 (5th Cir. 1972).

112. *Compare* U.S. DEP'T STATE, Pub. No. 8689, *supra* note 1, *with* discussion of drafting modern "war risk" clauses in text accompanying notes 44-47 *supra.*

113. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973; Home Ins. Co. v. Davilla, 212 F.2d 731 (1st Cir. 1954).

114. *Id.* *See also* Montoya v. United States, 180 U.S. 261 (1901); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

115. Pan American World Airways, Inc. v. Aetna Cas. & Sur. Co., Civil No. 71-1118 at 94-95 (S.D.N.Y. Sept. 24, 1973), *appeal docketed*, No. 73-2604, 2d Cir., Oct. 8, 1973 (see quote on this point in the text accompanying note 83 *supra.*

116. *Id.* *See* Home Ins. Co. v. Davila, 212 F.2d 731 at 736-37 (1st Cir. 1954) *and* Note 103 *supra.* *See also* discussion of this point in text accompanying notes 93-95 *supra.*

117. Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

Recent technological developments have substantially increased the mobility and potency of irregular forces, giving rise to the possibility of immediate global escalation of an originally local conflict. The resulting effects on modern warfare precipitated by such technological advancements seem to have been beyond the contemplation of the parties to insurance contracts when the contemporary "war risk" clauses were drafted immediately after the Korean conflict.[118] Unless all five standards are met, terrorist activity does not appear to satisfy all basic elements of "war risks". Therefore, in order to fulfill the intent of the parties to insurance contracts containing a "war risks" clause, all five criteria should be met before a loss caused by combat or terrorism by irregular forces is adjudicated to be the result of war risks.

VI. CONCLUSION

The emergence of international terrorism as a tactic of modern warfare, as illustrated by the increasing frequency of violent attacks by guerrillas against enemy and neutral governmental and private interests,[119] should be recognized by courts in determining which "war risks" are excluded in insurance policies. Unless the language of the policy specifically defines "war" to the contrary, the court should attempt to ascertain the probable intent of the parties to the insurance contract by application of a broad interpretation of the concept of a state of war, especially where the insurance contract seems to cover the whole field of "war risks".[120] Such an interpretation should be based on the common sense approach of "war in fact" between opposing forces of significant strength to warrant recognition that the conflict poses a serious threat to the political stability of one or more of the sovereign belligerents. Military response by a sovereign employing destructive equipment adapted for modern warfare should be considered by courts as prima facie evidence of that sovereign's implied declaration of a state of war within the common sense meaning of the term.[121] Having found such a condition to exist, courts should recognize as contemplated by the contracting par-

118. See authorities cited in note 112 *supra.*

119. U.S. DEP'T STATE, Pub. No. 8680, *supra* note 1.

120. Wheeler, *supra* note 45; *see also* discussion of this point in text accompanying notes 45-50 *supra.*

121. Montoya v. United States, 180 U.S. 261 (1901); Flota Mercante Dominicana v. American Mfrs. Mut. Ins. Co., 272 F. Supp. 540 (S.D.N.Y. 1967).

ties the complete spectrum of battle techniques common to modern warfare, from acts of terrorism by small guerrilla units to battlefront confrontations of huge armies.

Where a certain litigated loss is the direct result of terrorism by a small irregular force, the court should scrutinize carefully both the act and the force involved to verify the actual link of the act to the war. This nexus may be found and the act of terrorism may fall within the enumerated "war risks" if all of the minimum recommended criteria have been established.[122] However, where any one of these factors is lacking, the court should grant the insured indemnity for his loss pursuant to the insurance contract. Given such a case, the loss should not be considered the result of a "war risk". Without a change of language in future insurance policies specifically excluding loss resulting from certain or all acts of terrorism, such acts should be considered normal criminal risks assumed by the insurance company.

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122. See discussion of this point in the text accompanying notes 113-17 *supra.*