

A Defining Moment—
Ought And Can We Distinguish
“Terrorist Acts,” “Criminal Acts” And “Acts of War”
Under The Rule of Law?

by

Ronald R. Robinson, Esq.

Chair of the Defense Research Institute’s Subcommittee on
The Terrorism Risk Insurance Acts of 2002/2005

Berkes Crane Robinson & Seal LLP
515 S. Figueroa Street – Suite 1500
Los Angeles, California 90071
rrobinson@bcrslaw.com
(213) 955-1150

Copyright © 2006 by the author

I. INTRODUCTION

Increasingly, over the past half-century, civilian populations of Sovereign States, not just their military forces, have become direct targets of death and destruction at the hands of terrorists. The immediacy of the threat of terrorism compels private citizens to conduct themselves more as combatants than as civilians. When the threat becomes reality, the resulting terrorist acts are horrific and not unlike the worst of circumstances that can and do arise from crimes, civil riots, or wars. Consequently, public and private security and safety agencies are, at every level, compelled to adopt various tactics used by military forces to protect civilian populations. Thus, all of our institutions of justice are engaged in the application of our laws in a multi-layered and complex confrontation with terrorism and to adjudicate both losses incurred and the means employed to prevent those losses. The nature and scope of any given terrorist act of violence and destruction justifies imposition of traditionally available civil justice awards, criminal justice penalties, *and* military actions to redress the grievances of the casualties of terrorism. The law may impose those sanctions on terrorists and/or those who were negligent in their duty to prevent, defend against, mitigate or prevent terrorist acts. Therefore, we are witnessing a unique legal event, a broad ranging and simultaneous jurisdiction of civil, criminal, and military courts and tribunals and an application of the bodies of law they administer to one circumstance – the threat and the aftermath of terrorist acts.

In a free society, the mandate of its laws and systems of justice is to check and balance the exercise of power in its political and private arenas in order to preserve the rights of the individual promised by the ideals of liberty. This mandate to check and balance power has evolved by a process of measured and deliberate legal analysis over the course of several hundred years. The resulting complex array of protections that preserve individual rights is imbedded in the bodies of law enforced in our civil, criminal and military courts and tribunals. Each of these jurisdictions have, over time, evolved different and distinct rules of procedure and evidence as well as roles and powers for their judges and triers of fact. These differences reflect the distinctions in the bodies of substantive law that justify imposition of civil awards, criminal penalties and punishments for breaches of military codes of conduct in these respective forums. Yet the mandate that preserves the promise of liberty is common to them all.

We are now in the midst of what is, in essence, an across the board implementation and an ever increasing adaptation of the procedural, evidentiary, and substantive components of each these bodies of law to enable

these separate jurisdictions to define, engage, and confront all aspects of terrorism. It is of serious concern, therefore, that this process is driven in significant part, by the demands of those with great political and economic power in a context of extreme exigent circumstances. Will this rhetoric or the traditional process of independent legal analysis and deliberation redefine the law that responds to this threat? How will we determine whether power, rhetoric or reasoned legal analysis and deliberation will control the outcome of this process. Calls from public and private sectors demand a “war on terrorism,” accuse terrorist of “war crimes,” and promise swift, unrelenting, and *preemptive action* to both (i) prevent such acts against our now combatant civil societies, and (ii) if they fail, redress the losses of the casualties of those acts. What is the impact of these calls and these promises on the mandate of liberty protected by our bodies of law? If “eternal vigilance” is the price of that liberty, we ought not simply assume that the checks and balances that preserve individual rights are successfully addressing the impact of the powers and the rhetoric now in play.

Our laws serve to define who we are, what we value and protect, and how much liberty we ensure for ourselves, but they also reveal and portend who we may be willing to become, what we may no longer value or protect, and how much liberty we are willing to relinquish to defend ourselves. Today, most Sovereign States, and other entities that proclaim themselves a *de jure, de facto*, or provisional government (“State”), *profess to act to protect* individual rights under the moral authority of the secular ethics and religious laws of their peoples. Vigilant free peoples constantly question whether the exercise of private and public power in a State serves *to protect the liberty of all or to abridge the individual rights of the powerless*. “Liberty’s questions” focus on the quality and protections of the laws that preserve it. Does a State guarantee and assure, by law, protection of every individual’s rights of freedom of speech, press, association and religion? Are a State’s laws enacted by, for and with the consent of the people subject to them? Is this body of law applied equally to each individual governed, regardless of any personal attribute, real or perceived, of any nature whatsoever, that may be asserted to distinguish one from another; i.e., an individual’s status (“Status”)? Are the laws administered by tribunals independent of and not subject to the control of the State or powerful private interests? When the answer to each of “liberty’s questions is “yes,” free peoples judge a State as governing morally under what many term the “Rule of Law” (this term is used herein in that specific sense).

If we ask “liberty’s questions” about the new or adapted laws that we impose to control civil awards, criminal penalties, and authorization of military action against terrorists, will the answers be “yes”? Will our defense of life and liberty against this adversary precipitate a change in the historic balance in law that protects the exercise of individual rights of freedom of speech, press,

association, and religion? How do we ensure that individual rights survive in a society forced to adopt the protections required for combatants? For the Rule of Law to survive as we have known it, we must *define this threat and its results in law* in a manner that consistently protects the mandate of freedom in each of the jurisdictions that simultaneously responds to the demands for redress of grievances.

Are the ideals of liberty, in fact, at risk in the confrontation between law and terrorism? Do “liberty’s questions” have any relevance to this struggle? Terrorists adamantly define themselves as patriots at war, and not criminals, rightfully employing the strategies of warfare to redress the “moral wrongs” they assert as their “cause” by any means. They wrap their “cause,” not in a flag, but in the cynical manipulation of ideals of justice, tolerance, and freedom that form the bedrock of the liberty of the peoples and Sovereign States they attack. It is the most basic element of these ideals, the “righting” of a “morally wrong” act or circumstance upon which terrorists rely to justify and, thus, to feed power to their “cause.” To reduce, marginalize, or, perhaps, completely defeat terrorism we must unmask the terrorist’s “cause” as being nothing other than the triumph of absolutism, dictatorial power and intolerance over individual rights. This effort will fail, however, unless we first directly address, oppose, and seek to end both *real and perceived* acts of intolerance, inequality, injustice, and misuse of power *from any quarter or by any Sovereign State or peoples, including our own*. This is why the ideals of liberty are in play in this struggle and why “liberty’s questions” must now be asked about the exercise of civil, criminal, or military law as it confronts terrorism

This paper proposes the creation of a series of legal definitions that distinguish terrorism from crime and war which are consistent with and serve the mandate of the Rule of Law. Thus, if subjected to “liberty’s questions,” these definitions, if properly conceived and rendered, ought to mandate an answer of “yes.” Such definitions ought and can control the application of law as it confronts terrorism in civil, criminal and military jurisdictions. They ought and can be simultaneously applied as amendments to each of our bodies of law because the consequences of terrorism simultaneously invoke each of their jurisdictions. This thesis is proffered as the starting point for a debate on the application of the Rule of Law to terrorism in all legal forums. We propose one approach to those definitions below simply to frame the questions in that debate, not dictate to their answer.

II. FRAMING THE TERRORISM DEFINITION DEBATE UNDER THE RULE OF LAW

The Rule of Law is premised on the ideal that each of us is pledged, in our private and public conduct, to preserve and protect the rights of those

whose Status, causes, ethics, beliefs, religions, politics, ideologies, doctrines, strategies, intent, or conduct we cannot abide and they likewise are pledged to protect our parallel rights. The Rule of Law respects and tolerates a vast array of diverse private and public codes of ethical conduct. These private codes, and the Rule of Law that both arises from and protects them, act in concert to create a balance in the adjudication of private and public conduct that serves to define and protect an individual's right to think, speak, write, associate and worship. Thus, the Rule of Law carefully distinguishes between each of the elements or factors at play in private, public, diplomatic and military conduct; i.e., the resulting conduct derived from an analysis of the Status of individual, the cause, belief, ideal or position advanced, the strategy and means employed to further it, and the intent behind it (hereinafter, the "Action Paradigm").

One oft cited example of a discerning and just application of power to an Action Paradigm is the mere *advocating* of the yelling of the term "fire" in a crowded theater, at some undefined *future time*, in order to *disrupt* an objectionable play will be *distinguished* in law from the *act* of doing so. Generally, it is the act that is subject to civil or criminal penalty. Likewise, merely *advocating* rebellion or war, at some undefined *future time*, to further a "cause" will be *distinguished* in law from the *act* of doing so. Again, it is the act that is subject to civil, criminal, or military response. There are myriad distinctions and divergent iterations to these general circumstances that affect and alter the imposition of legal penalties and military force, but each instance is an exercise of the balance in law between one's exercise of a right and the nature of the timing, means, and consequence of one's resulting act. The Rule of Law imposes differing penalties or none at all to any element of the Action Paradigm based on questions of means, motive, degrees of involvement, intent, and immediacy of danger, as well as a host of other mitigating factors. Each of these factors serves to balance rights and consequences under the Rule of Law.

The Rule of Law definitions proposed here are intended to preserve ideals of liberty when our civil, criminal, and military forums confront calls for the imposition of penalties or force to redress grievances. Thus, they embody answers to the questions of the legality of the status, strategy, means, motive, intent, and conduct of alleged terrorists; i.e., the adjudication of the Action Paradigm of terrorism. These definitions will, therefore, address the operative terms in the following questions. Who is a "terrorist," and who is a "criminal" or a "patriotic warrior"? When is their conduct a "terrorist act" as opposed to a "crime" or "act of war"? What distinguishes between strategies of "terrorism" and those of "criminal conduct" or "warfare"?

Crimes, war and terrorism share several common elements or factors in the Action Paradigm. Such conduct usually arise because of circumstances characterized by want, need, powerlessness, disenfranchisement,

intolerance, inequality, injustice and misuse of power. Whether these circumstances are (i) real or perceived, (ii) fairly subject to debate, or (iii) cynically manipulated distortions of unacceptable conditions, the conduct that results is fueled by basic forces, such as simple anger or greed, as well as by the moral outrage that is often a hallmark of a "cause." Sometimes, however, there is no element of anger, greed, or "cause" at play, but only an irrational hatred of those who are viewed as the source of one's unendurable circumstance. When appeals for help, understanding or enlightenment, political advocacy or passive resistance fail to rectify the "wrong," the redress inflicted can, at first blush, be viewed and hence defined as crime, war, and/or terrorism. This initial impression stems from a fact common to all three forms of conduct. Although different in scale, context, means and intent, the method of violent redress is the same in each case – damage to property and the infliction of personal injury and death. Nevertheless, ought and can terrorist acts be distinguished under the Rule of Law from circumstances of traditional criminal acts and acts of war? The answer is "yes," if such distinctions in fact serve to preserve the mandate of liberty under the Rule of Law.

Traditionally, and in very broad brush, a criminal act is defined as the taking by one from another of that which does not belong to the former, without consent of the latter. It can also constitute injury to or destruction of person or property by violence or stealth for any reason. The illegality of the conduct, now deemed in law to be criminal, proceeds from negligent acts, intentional acts or prohibited acts that might endanger life or property. Allegations of criminal conduct can be alleged against individuals, groups of individuals, and private and public entities, including local, regional or national governments. The redress for such grievances can be both civil awards and criminal penalties. The death and destruction caused by the intentional acts of alleged terrorists may also meet the traditional definitions of crime, because this is a direct consequence of their conduct. Ought the status of terrorist or criminal be alleged when one intentionally takes that which does not belong to them without consent, or destroys person or property by violence or stealth for a "cause" or no rational reason at all? When a State harbors or employs one to engage in such conduct that results in death and destruction, ought such a State itself can be viewed as a criminal or terrorist government?

Traditionally, and in very broad brush, an act of war is defined as conduct by a Sovereign State, or a *de jure, de fact*, or provisional government, using its own and/or another's armed military forces, to engage in insurrection, revolt, rebellion and/or civil or military hostilities, *intended* to usurp another State's inherent powers in order to govern, depose or conquer the latter. Acts of war are not usually the result of innocent, negligent, or careless conduct, although such conduct has sometimes been construed as an act of war by a State

and precipitated a war in response. Self proclaimed provisional, *de jure*, or *de facto* governments, as well as individuals, can each commit acts of war. Ought the Status of terrorists or warrior be invoked when one is engaged in or fomenting insurrection, revolt, rebellion, civil hostilities, or war, the result of which may well be the usurpation or control of another State's inherent powers to govern? When a State harbors or employs one to engage in such conduct, ought it be viewed as a terrorist or a government at war?

The element or factor in the Action Paradigm of terrorism that distinguishes it from the conduct of crime and war does not arise from (i) any Status that can be ascribed to the individual that commits the illegal action, (ii) his or her cause, ideal, or position, (iii) the strategy and means employed, or (iv) the resulting loss. Criminal acts and acts of war (i) can be performed by anyone, (ii) are each often justified by "causes" or ideals, (iii) often employ the same means, and (iv) result in the same forms of loss. Rather, it is terrorism's fundamental and overriding *intent* that distinguishes it from crime and war. The terrorist's *intent is not* to engage in traditional criminal conduct merely in order to take life or property. The terrorist's *intent is not* to depose or conquer a State or directly usurp the exercise its inherent powers. Instead, terrorists *intend* to (i) coerce or intimidate a State, or a cognizable group of individuals, to change its social, economic, moral, religious, political or ideological beliefs, doctrines, policies, positions or ideals, and (ii) thus alter or affect the course or conduct of such State or peoples in order to advance or impose upon them the various mandates that flow from blind obedience to the terrorist's "cause."

Consequently, if a terrorist's conduct is solely defined by this specific *intent*, it follows that *conduct by the same individual(s)* occurring without that intent, whether before, after, or during a terrorist act, ought be defined as a criminal act or an act of war, depending on the intent at play that distinguishes them from the terrorist act. Strict definitions of intent, when applied to criminal acts or acts of war, can serve to distinguish these circumstances from those wherein a terrorist advances his or her "cause" by engaging in terrorist acts. The Rule of Law best serves the ideals of liberty when it carefully distinguishes between the elements of the Action Paradigms of criminal, terrorist and warrior conduct. The specific intent behind one's degree of involvement, motive, and strategy and means of conduct traditionally has served in law to distinguish between lawful and unlawful conduct. Thus, the Rule of Law is well equipped, if given the proper definitions, to preserve the individual rights of those accused of crime, misconduct of war or terrorism. What is open to debate, however, is whether the Rule of Law is equipped with the definitions it requires to preserve the Rule of Law and the liberty it guarantees when adjudicating the conduct of terrorism and the measures taken to defend against it.

When one is engaged in terrorism, a very different, fundamental *intent* is at play driving the conduct that otherwise could be defined as crime or war. If one *intends only* to endanger, take or destroy property or person, without consent, based on conduct that is solely an expression of *anger, hatred, greed, want, or irrational thinking*, one commits a crime. Admittedly, criminal acts encompass negligent and prohibited conduct, but those “types” of crimes have little correlation to the conduct of terrorists. If one State *intends only* to conquer and govern another by violence, one engages in acts of war. If one *intends only* to control the prerogatives of free peoples or a State by violence, one engages in terrorism. Thus, depending on the specifics of intent, one’s conduct, under the Rule of Law, may render him or her a criminal engaged in crime, a patriot engaged in warfare, or a terrorist engaged in terrorism. These distinctions drive the debate, proposed here, on how best to preserve the Rule of Law as it is increasingly and pervasively applied to terrorists and terrorist acts.

III. WHO IS A “TERRORIST” AND WHAT IS “TERRORISM;” DISTINGUISHING “TERRORIST ACTS” FROM “CRIMES” AND “ACTS OF WAR”

As any lawyer will tell you, the way one frames a debate question will shape, if not determine, the answer received. This paper seeks to initiate and to frame a vigilant and diligent debate that asks whether we require a series of new and strict definitions of terrorism to be applied to and followed by all existing bodies of law. If properly drafted, these definitions can be the means by which we measure whether the confrontation between the Rule of Law and terrorism is creating an unintended consequence. Will our protection of life and liberty in this struggle erode the rights of freedom of thought, speech, religion, association and conduct in the social, moral, religious, legal, economic, commercial, and political arenas, both private and public, of our respective Sovereign States.

Why frame the debate in this way? The real “cause” of terrorism, both as a strategy and an objective, is the triumph of absolutism, the imposition of dictatorial fiat, and the institution of intolerance over those whose Status, causes, ethics, beliefs, religions, politics, ideologies, doctrines, strategies, intent, or conduct terrorists hate, will not endure, will not tolerate, and cannot, therefore, abide. There is no tension in the “cause” of the terrorist’s Action Paradigm that serves to balance the exercise of individual rights as against the consequences of the resulting conduct. There is, therefore, no role for the Rule of Law in the society terrorists envision and will kill to achieve. Our confrontation of this stark reality should not, therefore, serve their “cause.”

One could argue that the terms at issue are seemingly intuitive and obvious and that further legal definition is not worthy of debate. Thus, today many assert that we always intuitively know, and thus our laws can, without

any further specific definitions, justly adjudicate the differences and the similarities in conduct between (i) crime, warfare, and terrorism, (ii) criminals, patriots, and terrorists, and (iii) criminal acts, acts of war, and terrorist acts. They assert that our laws and our rights are neither in conflict nor at risk in the current confrontation.

The response to this argument is found in the lesson taught in the definitional debate over the ideal meaning of the term “pornography.” Many have asserted that we intuitively “know it when we see it” and that the law addressing it needs no refinement. Yet, free societies have grappled with this very question for centuries. It has been the subject of almost constant debate; one that seeks to balance the tension between social, moral, and religious questions of ethics and individual fights of free speech. Far too often the term has been “intuitively” defined by the use of subjective or parochial ethical perspectives. One person’s art has thus often been another’s pornography. Under the Rule of Law, decades of independent analysis and deliberation, under a mandate that protects free speech, have answered this question through application of strict definitions of “obscenity.” Thus, art and pornography are legal in free societies, while obscenity is not.

Similarly, one may intuitively and subjectively view another’s conduct, *and thus seek to define his or her status in law*, as a criminal act, an act of war or a terrorist act because “we know it when we see it.” Such definitions are the product of neither objective analysis nor independent deliberation. The Rule of Law cannot, pursuant to such definitions, specifically address, let alone appropriately deal with, the protection of individual rights that are at stake in the confrontation with terrorism. Under a Rule of Law that protects individual rights, advocacy of the *strategy of terrorism* ought not be punishable, *per se*, outside of the defined and limited scope of a terrorist act. In other words, to be illegal, the strategy advanced ought to aid or be in furtherance of an actual terrorist act. Otherwise, such advocacy is potentially free speech, a right protected by the Rule of Law. Similarly, the Status of an individual or State that so advocates ought not be defined as that of a *terrorist, per se*, outside of the defined and limited scope of a terrorist act. In other words, for such “status” to be illegal, the strategy advanced by the State or person ought to be in aid or in furtherance of an actual terrorist act. Otherwise, such person or State is potentially exercising freedom of speech or association, rights protected by the Rule of Law. The distinction being drawn preserves a person’s right to thought and association as a factor to be distinguished in law from the resulting conduct. Like distinctions in the Action Paradigm will serve to protect all individual rights potentially at risk in the confrontation between law and terrorism.

Terrorists are not constrained by the ideals of freedom and the society they espouse does not preserve or protect the rights of those who dissent

or differ from the ideology of their “cause.” In responding to them as individuals and to their rhetoric, strategy, and conduct, the Rule of Law ought to be specifically empowered and capable of protecting even the potential terrorist in the exercise of lawful conduct, speech, religion, and association. This is the price of preserving liberty for all. This goal ought and can be accomplished by definitions that specifically define the terms “terrorist,” “terrorism” and “terrorist act.” Those definitions ought and can be made a part of the existing body of law that governs our civil, criminal, and war tribunals and courts.

IV. A STARTING POINT FOR THE DEBATE OVER DEFINITIONS OF “TERRORIST,” “TERRORISM” AND “TERRORIST ACT”

Agreed upon definitions of the terms that distinguish terrorist acts from criminal acts and acts of war can serve to ensure consistent application of the Rule of Law in all bodies of law in each free State. Such a consensus will require an unprecedented mobilization of social, economic, legal, and political debate on the part of all individuals and States. Under agreed definitions of terrorism, peoples and States may form alliances, consistent with the Rule of Law, to deploy more effectively their rhetoric, their courts, and their military forces in a coordinated and pervasive response against terrorism. The agreed definitions must affirm rather than weaken the protection of individual rights. This effort will, better than any other, serve the Rule of Law to punish terrorists justly, marginalize terrorism, and reduce or prevent terrorist acts. Failure in any degree to preserve the mandate of liberty under the Rule of Law perpetuates or creates the intolerance, inequity, injustice, and misuse of power that, real or imagined, provides terrorists the “causes” that are the excuse for their illegal conduct.

The below proposed definitions of terrorism, crime, and war are not designed to replace the myriad definitions already in place or to dictate those to come. They are intended, instead, to reveal and rectify any failure, in any jurisdiction of justice or body of law, to protect the ideals of the Rule of Law. Thus, they fulfill their only intended purpose – to be the means by which we measure our success in preserving of our ideals of liberty in the midst of our defense against terrorism.

A definition proceeds from a context in which terrorists and terrorism are the contextual antecedents of a terrorist act. Thus, we begin by defining a “Terrorist Act” by how that conduct is *intended* to impact our social, economic, moral, religious, political, or ideological arenas. With that as the controlling definitional factor, we differentiate what is “Terrorism” and who is a “Terrorist.” Based on these distinctions, we then define an “Act of War” and a “Criminal act,” differentiating them from a “Terrorist Act,” as now defined. In turn all of these definitions serve to determine whether one is to be treated in law

as a "Criminal" or a "Warrior," as opposed to a "Terrorist" and one's conduct treated in law as "Crime," "War" or "Terrorism." The thesis is as follows:

A "Terrorist Act" is the infliction of bodily injury, death, damage to tangible or intangible property, or a violent and dangerous act, that interferes with the conduct of private or public affairs and results in a loss to an individual, a cognizable group of individuals, or a Sovereign State. Such a loss must be directly planned, caused, or carried out by an individual, a group of individuals, and/or a Sovereign State, with the intent to interrupt, disable, or destroy social, economic, legal, or political operations, and/or infrastructures of another individual, a cognizable group of individuals or a State, in order to, or to attempt to, coerce or intimidate such individuals, groups, or State to change a social, economic, moral, religious, political, or ideological belief, doctrine, policy, position, or ideal or to alter or affect the private or public course or conduct of such individuals or groups or the government of such State.

"Terrorism" is a strategy that is strictly defined by and limited to the intent employed to plan or carry out a "Terrorist Act." The advocacy by a person or State of a strategy or a component of a strategy, that might otherwise be used in an overt act, in furtherance or in aid of a "Terrorist Act," does not render such stratagem actionable under civil or criminal law or the rules of war, *per se*, when advocated or employed outside of the defined and limited scope of a "Terrorist Act." Thus, to meet the definition of "Terrorism," the strategy must be employed by a "Terrorist" engaged in an overt act in actual furtherance of or aid to a "Terrorist Act."

A "Terrorist" is an individual person or Sovereign State that employs the strategy of "Terrorism" to engage in a "Terrorist Act." The advocacy by a person or State for change in a social, economic, moral, religious, political, or ideological belief, doctrine, policy, position, or ideal or an alteration of a private or public course or conduct that might otherwise be used to justify or conduct a "Terrorist Act," does not render their status actionable under civil or criminal law or the rules of war, *per se*, when advocated or employed outside of the defined and limited scope of a "Terrorist Act." Thus, to meet the definition of a "Terrorist," the individual or State must be engaged in an overt act in actual furtherance of or aid to a "Terrorist Act."

An "Act of War" is a course of conduct, whether declared or undeclared, that results in the infliction of bodily injury, death, or damage to tangible or intangible property ("Hostilities"), when carried out by a Sovereign State, or an entity that constitutes a provisional or *de jure*, or *de facto* government ("State"), using its own or other armed military forces, for the purpose of "Deposing" and/or "Conquering" another State by insurrection, revolt, rebellion, or other usurpation of a State's inherent powers, or to otherwise support a faction engaged in domestic or civil Hostilities against another faction, with the intent to "Depose" or "Conquer" a given State. "Deposing" and/or "conquering" another State means to engage in "Hostilities" specifically intended to overthrow the constituted government thereof or to take control of its inherent powers. A State's defense against such attacks by means of the conduct aforesaid is likewise an "Act of War." A State or whose conduct meets this definition of an "Act of War," has not committed a "Terrorist Act" or a "Criminal Act," *per se* and is engaged in "War," as opposed to "Terrorism" or "Crime," *per se*, and is not a "Terrorist," *per se*, as defined here. An individual who engages in an "Act of War" is a "Warrior," not a "Criminal" or "Terrorist," *per se*, as defined here.

A "Criminal Act" is a course of conduct, whether intended, negligent or prohibited by law, that results in the infliction of bodily injury, death or damage to tangible or intangible property, or the taking of the same without consented, by an individual, group of individuals or private and public entities, including local, regional or national governments. One whose conduct meets this definition of a "Criminal Act," has not committed a "Terrorist Act" or an "Act of War," *per se*, and is engaged in "Crime," as opposed to "Terrorism" or "War," *per se*. One who engages in a "Criminal Act" is a "Criminal," not a "Terrorist" or "Warrior," *per se*, as defined here.

Conduct by the same State or individual(s) that occurs in one event or circumstance may meet and be defined by only one the above definitions at a time, whether such conduct occurs directly before, after or during such event or circumstance, depending upon which of the above *intents, strictly defined*, is at play to distinguish the application of one definition over another. Conversely, none of the above definitions apply simultaneously at in any given one moment in time such event or circumstance.

V. CONCLUSION

Are free peoples and States in a ‘war’ with terrorists or terrorism? Should they, therefore, declare “war” on this adversary in the historical or legal sense of that term? Free peoples and States seek no dominion or power over this adversary. They seek, instead, to protect themselves and to preserve liberty under the Rule of Law. Only the Rule of Law can serve to justly define a response to loss in civil, criminal, diplomatic and military arenas. When subjected to violent redress of grievance in furtherance of a terrorist’s “cause,” free Sovereign States and peoples ought and can respond under the full power and scope of the Rule of Law. To the extent that military forces, as well as courts, are needed to protect them from terrorist acts, both must act in furtherance of the Rule of Law and not in contradiction of its ideals. Thus, it would be wise not to term the defense of liberty as a “war” on terrorists, use its rhetoric or invoke its rules alone in all of our legal jurisdictions.

There is, however, reason to consider whether the Rule of Law, which has evolved for several centuries to address traditionally illegal civil, criminal and military conduct, is properly prepared to confront the unique form and scope of terrorism free peoples and States face today and at the same time preserve the ideals of liberty. This paper advances the argument that over the past few decades this new and virulent form of terrorism is putting at risk the very exercise of individual rights that serve as the foundation of our Rule of Law. Therefore, as the bodies of civil, criminal and military law evolve to confront terrorism, it would be wise to measure them against agreed upon and specific definitions of the term “terrorist act” and its antecedents – “terrorists” and “terrorism.” If properly drawn, these definitions can serve to protect the ideals of liberty that are the prime target of this old but newly dangerous and empowered adversary.

In a test of ideals, if our adversary succeeds in defining who we become, what we value and protect and the means of our defense, our response will then be controlled by and we will thus become our adversary, failing by our own hand without a blow struck. We are in the midst of such a defining moment.

ACKNOWLEDGEMENTS

The analysis, opinions, and proposals that form the thesis of this paper are the sole responsibility of the author. It is, however, important to acknowledge that others made significant contributions by way of comments and suggestions. They include **Steven M. Crane**, a founding partner in the Los Angeles, California, U.S. law firm of Berkes Crane Robinson & Seal LLP, and **Donald Goodrich**, President of the Families of September 11, an advocacy group comprised of the families of the casualties of the attack on the World Trade Center and the Pentagon of September 11, 2001. Mr. Goodrich is a partner in the law firm of Donovan & O'Connor, LLP, North Adams, Massachusetts and Bennington, Vermont, U.S.

The author also wishes to acknowledge the insights and comments in several papers relied upon, in part, in the writing of this paper. The first paper, "*RELIGION, TERRORISM, LAW AND THE DREAM OF PEACE*" was presented at the World Jurist Association Regional Conference on Terrorism in Madrid, Spain in 2003. It is authored by **Fr. Ranzilio Callangan Aquino, PhD., JurDr.**, of the Philippine Judicial Academy Supreme Court of the Philippines. The second paper is entitled "*A GLOBAL DEFINITION OF TERRORISM*" and was submitted to the 2002 Annual Conference of the Asia Pacific Risk and Insurance Association by **Thomas A. Player, Jr.**, Chairman of the Insurance and Reinsurance Group, Morris Manning & Martin, LLP; **Harold D. Skipper**, Chairman, Professor and C.D. Star Chair of International Insurance, Georgia State University, and **Janet Lambert**, Partner, Reinsurance and International Risk Team, Barlow Lied & Gilbert.

ABOUT THE AUTHOR:

Ronald R. Robinson is a Founding and the Executive Partner of the Los Angeles, California, U.S. law firm of Berkes Crane Robinson & Seal LLP. He has over 20 years of experience as a trial and appellate attorney specializing in complex, multi-party, and multi-district insurance coverage litigation. He has served on Defense Research Institute's ("DRI") Law Institute, as Chair of its Insurance Law Committee, as Chair of its Excess & Reinsurance Committee, and as co-founding Editor of "*Covered Events*," DRI's insurance law newsletter. He presently serves as Chair of the DRI's Subcommittee on the Terrorism Risk Insurance Acts of 2002/2005.

Mr. Robinson's national insurance coverage practice in the U.S. includes: underwriting advice, litigation and ADRs; casualty, E&O, D&O, and

reinsurance advice, litigation and ADRs, with an emphasis on bad faith, asbestos, toxic tort, environmental, and entertainment-related insurance. His practice also includes entertainment and intellectual property insurance advice, litigation, and ADRs.

Mr. Robinson presents papers at conferences hosted by DRI, the World Jurist Association, the American Law Institute, the American Bar Association, the American Conference Institute, Executive Enterprises, and other legal education organizations. He has published over 30 articles, book chapters, and White Papers on the critical issues arising in and affecting insurance coverage disputes, including a number of pieces focused on the current terrorism insurance risk transfer debate.