

## Memorandum of Law: Executive Order 12333 and Assassination

In 1977 President Gerald R. Ford promulgated Executive Order 11905, which provided, in part, that "No employee of the United States Government shall engage in, or conspire to engage in, political assassination." Each successive administration has repromulgated this prohibition. The Reagan Administration Executive Order 12333 containing the prohibition on assassination has been continued without change by President Bush. None of these executive orders defined the term "assassination." In the process of rewriting U.S. Army Field Manual 27-10, *The Law of War*, the following memorandum was prepared to explain the term in the context of military operations across the conflict spectrum.

DAJA-IA (27-1a)

### MEMORANDUM OF LAW

SUBJECT: Executive Order 12333 and Assassination

1. Summary. Executive Order 12333 prohibits assassination as a matter of national policy, but does not expound on its meaning or application. This memorandum explores the term and analyzes application of the ban to military operations at three levels: (a) conventional military operations; (b) counterinsurgency operations; and (c) peacetime counterterrorist operations. It concludes that the clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in EO 12333 or by international law.

2. Memorandum Purpose. The purpose of this memorandum is to explore "assassination" in the context of national and international law to provide guidance in the revision of U.S. Army Field Manual 27-10, *The Law of War*, consistent with Executive Order 12333. This memorandum is not intended to be, and does not constitute, a statement of policy.

3. a. Assassination in General. Executive Order 12333 is the Reagan Administration's successor to an Executive Order renouncing assassination first promulgated in the Ford Administration. Paragraph 2.11 of Executive Order 12333 states that "No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." The Bush Administration has continued Executive Order 12333 in force without change. Neither Executive Order 12333 nor its predecessors defines the term "assassination."

Appendix A contains a number of definitions from recognized sources that were considered in development of this memorandum. In general, assassination involves murder of a targeted individual for political purposes.

While assassination generally is regarded as an act of murder for political reasons, its victims are not necessarily limited to persons of public office or prominence.

The murder of a private person, if carried out for political purposes, may constitute an act of assassination. For example, the 1978 "poisoned-tip umbrella" killing of Bulgarian defector Georgi Markov by Bulgarian State Security agents on the streets of London falls into the category of an act of murder carried out for political purposes, and constitutes an assassination. In contrast, the murder of Leon Klinghoffer, a private citizen, by the terrorist Abu el Abbas during the 1985 hijacking of the Italian cruise ship *Achille Lauro*, though an act of murder for political purposes, would not constitute an assassination. The distinction lies not merely in the purpose of the act and/or its intended victim, but also under certain circumstances in its covert nature.<sup>1</sup> Finally, the killing of Martin Luther King and Presidents Abraham Lincoln, James A. Garfield, William McKinley and John F. Kennedy generally are regarded as assassination because each involved the murder of a public figure or national leader for political purposes accomplished through a surprise attack.

b. Assassination in Peacetime. In peacetime, the citizens of a nation — whether private individuals or public figures — are entitled to immunity from intentional acts of violence by citizens, agents, or military forces of another nation. Article 2(4) of the Charter of the United Nations provides that all Member States

shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purpose of the United Nations.

Peacetime assassination, then, would seem to encompass the murder of a private individual or public figure for political purposes, and in some cases (as cited above) also require that the act constitute a covert activity, particularly when the individual is a private citizen. Assassination is unlawful killing, and would be prohibited by international law even if there were no executive order proscribing it.

c. Assassination in Wartime. Assassination in wartime takes on a different meaning. As Clausewitz noted, war is a "continuation of political activity by other means." *On War* (Howard and Paret, eds. [1976]), p. 87. In wartime the role of the military includes the legalized killing (as opposed to murder) of the enemy, whether

<sup>1</sup> *Covert operations* are defined as "operations which are planned and executed so as to conceal the identity of or permit plausible denial by the sponsor. They differ from clandestine operations in that emphasis is placed on concealment of identity of [the] sponsor rather than on concealment of the operation." In contrast, low visibility operations are defined as "Sensitive operations wherein the political/military restrictions inherent in covert and clandestine operations are either not necessary or not feasible; actions are taken as required to limit exposure of those involved and/or their activities. Execution of these operations is undertaken with the knowledge that the action and/or sponsorship of the operation may preclude plausible denial by the initiating power." JCS Pub. 1, *Dictionary of Military and Associated Terms* (1 June 1987).

lawful combatants or unprivileged belligerents, and may include in either category civilians who take part in the hostilities. See Grotius, *The Law of War and Peace* (1646), Bk. III, Sec. XVIII(2); Oppenheim, *International Law II* (H. Lauterpacht, ed., 1952), pp. 332, 346; and Berriedale, 2 *Wheaton's International Law* (1944), p. 171.

The term *assassination* when applied to wartime military activities against enemy combatants or military objectives does not preclude acts of violence involving the element of surprise. Combatants are liable to attack at any time or place, regardless of their activity when attacked. Spaight, *War Rights on Land* (1911), pp. 86, 88; U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), para. 31. Nor is a distinction made between combat and combat service support personnel with regard to the right to be attacked as combatants; combatants are subject to attack if they are participating in hostilities through fire, maneuver, and assault; providing logistic, communications, administrative, or other support; or functioning as staff planners. An individual combatant's vulnerability to lawful targeting (as opposed to assassination) is not dependent upon his or her military duties, or proximity to combat as such. Nor does the prohibition on assassination limit means that otherwise would be lawful; no distinction is made between an attack accomplished by aircraft, missile, naval gunfire, artillery, mortar, infantry assault, ambush, land mine or boobytrap, a single shot by a sniper, a commando attack, or other, similar means. All are lawful means for attacking the enemy and the choice of one *vis-a-vis* another has no bearing on the legality of the attack. If the person attacked is a combatant, the use of a particular lawful means for attack (as opposed to another) cannot make an otherwise lawful attack either unlawful or an assassination.

Likewise, the death of noncombatants ancillary to the lawful attack of a military objective is neither assassination nor otherwise unlawful. Civilians and other non-combatants who are within or in close proximity to a military objective assume a certain risk through their presence in or in proximity to such targets; this is not something about which an attacking military force normally would have knowledge or over which it would have control.

The scope of assassination in the U.S. military was first outlined in U.S. Army General Orders No. 100 (1863). Paragraph 148 states

*Assassination.* The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. . . .

This provision, consistent with the earlier writings of Hugo Grotius (*Cf.* Bk. III, Sec. XXXVIII(4)), has been continued in U.S. Army Field Manual 27-10, *The Law of Land Warfare* (1956), which provides (paragraph 31):

(Article 23b, Annex to Hague Convention IV, 1907) is construed as prohibiting assassination, proscrip-

tion, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.'

The foregoing has endeavored to define *assassination* in the sense of what the term normally encompasses, as well as those lawful acts carried out by military forces in time of war that do not constitute assassination. The following is a discussion of assassination in the context of specific levels of conflict.

3. Conventional War. As noted in the quote from paragraph 31 of U.S. Army Field Manual 27-10, assassination in the context of a conventional war consists of "outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy 'dead or alive.' "

This prohibition complements the proscription on denial of quarter contained in article 23d, Annex to Hague Convention IV (1907). (The prohibition on denial of quarter makes it illegal to refuse to accept an enemy's surrender under any circumstances, or to put to death those who surrender or who are *hors de combat*.) However, neither proscription precludes the attack of enemy combatants with the intent to kill rather than capture so long as those who endeavor to surrender are availed that opportunity where circumstances permit. This is not always possible. The death of an enemy combatant who endeavors to surrender while caught in the center of the kill zone of an infantry ambush normally would not be a violation of either proscription, for example. Neither would the killing of an enemy soldier who, in the midst of an assault by his unit, has a change of heart and throws down his weapon, raises his hands, and dies in a hail of bullets put out by the defending unit repelling the enemy attack. The test is one of reasonableness.

As previously noted, enemy combatants are legitimate targets at all times, regardless of their duties or activities at the time of their attack. Such attacks do not constitute assassination unless carried out in a "treacherous" manner, as prohibited by article 23(b) of the Annex to the Hague Regulations (Hague Convention IV) of 1907. While the term "treacherous" has not been defined, as previously noted in this memorandum it is not regarded as prohibiting operations that depend upon the element of surprise, such as a commando raid or other form of attack behind enemy lines.

Thus, none of the following constitutes assassination, although the term has been applied loosely (and incorrectly) to the first two:

18 November 1941: Commando raid by No. 11 Scottish Commando at Bedda Littoria, Libya, to kill German Field Marshal Erwin Rommel.

18 April 1943: USAAF P-38 fighter aircraft intercept and down Japanese aircraft carrying Admiral Osoruku Yamamoto over Bougainville, killing Admiral Yamamoto.

30 October 1951: U.S. Navy airstrike kills 500 senior Chinese and North Korean military officers and security forces attending a military planning conference at Kapsan, North Korea.

Traditionally, soldiers have an obligation to wear uniforms to distinguish themselves from the civilian population. Law of war sources prior to World War II suggested that the prohibition on killing or wounding "treacherously" referred to soldiers disguising themselves as civilians in order to approach an enemy force and carry out a surprise attack. That concept was thrown into disarray during World War II by the reliance on partisans by all parties to that conflict. While frequently characterized as an assassination, the 27 May 1942 ambush of SS General Reinhard Heydrich by British SOE-trained Czechoslovakian partisans is representative of the practice of each party to the conflict employing organized resistance units to carry out attacks against military units and personnel of an occupying power.<sup>2</sup>

Reliance upon organized partisan forces changed state practice and, accordingly, the law of war. Coordinated British and U.S. revisions of their respective post-World War II law of war manuals reflected this change. For example, the following underlined sentence was added to paragraph 31 of FM 27-10:

(Article 23b, Annex to the Hague Convention IV, 1907) is construed as prohibiting assassination. . . .  
*It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*

The annotations to FM 27-10 state that the underlined sentence was inserted "so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons." The deliberate decision by many nations to employ surrogate guerrilla forces in lieu of or in conjunction with conventional military units to fight a succession of guerrilla wars since 1945 has served to raise further doubts regarding the traditional rule.

While state practice suggests that the employment of partisans is lawful, that is, would not constitute assassination, a question remains regarding the donning of civilian clothing by conventional forces personnel for the purpose of killing enemy combatants. However, in the one known case of such practice during World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts.<sup>3</sup>

Another unresolved issue concerns which civilians may be regarded as combatants, and therefore subject to lawful attack. While there is general agreement among law of war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant. Appendix B

places members of the civilian population into four distinct categories. Those who do not participate in the hostilities always are immune from intentional attack. The remaining three categories have been defined by one group of experts as follows:

War effort: all national activities which by their nature and purpose would contribute to the military defeat of the adversary.

Military effort: all activities by civilians which objectively are useful in defense or attack in the military sense, without being the direct cause of damage inflicted, on the military level.

Military operations: movements of attack or defense.

There is a lack of agreement on this matter, and no existing law of war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or "quasi-combatants" and thereby subject to attack generally has been a policy rather than a legal matter. The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of limited segments of the civilian population with each nation's conduct of military operations and vital support activities.

Three points can be made in this respect. (a) Civilians who work within a military objective are at risk from attack during the times in which they are present within that objective, whether their injury or death is incidental to the attack of that military objective or results from their direct attack. Neither would be assassination. (b) The substitution of a civilian in a position or billet that normally would be occupied by a member of the military will not make that position immune from attack. (c) Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation's war effort than that person's service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation's national security or war aims. Thus, more than 90% of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves. Attack of these individuals would not constitute assassination.<sup>4</sup>

<sup>2</sup> A degree of confusion exists, as Heydrich was characterized by the British law of war manual as the "civilian" governor in Czechoslovakia. While Heydrich's predecessor, Konstantin von Neurath, was a civilian, Heydrich's position as a uniformed officer in the SS, a military organization, clearly made him a combatant.

<sup>3</sup> Had he been captured by the Germans, he would have been subject to trial and execution as a spy.

<sup>4</sup> While a civilian head of state who serves as commander-in-chief of the armed forces may be a lawful target (and his or her attack therefore would not constitute an act of assassination), as a matter of comity such attacks generally have been limited. As previously stated, the death of an individual incidental to the attack of a military objective would not constitute assassination.

4. Counterinsurgency. Guerrilla warfare is particularly difficult to address because a guerrilla organization generally is divided into political and guerrilla (military) cadre, each garbed in civilian attire in order to conceal their presence or movement from the enemy. Appendix C illustrates a division of the "civilian" population in an insurgent environment.

Just as members of conventional military units have an obligation to wear uniforms in order to distinguish themselves from the civilian population, civilians have an obligation to refrain from actions that might place the civilian population at risk. A civilian who undertakes military activities assumes a risk of attack, and efforts by military forces to capture or kill that individual would not constitute assassination.

The wearing of civilian attire does not make a guerrilla immune from lawful attack, and does not make a lawful attack on a guerrilla an act of assassination. As with the attack of civilians who have combatant responsibilities in conventional war, the difficulty lies in determining where the line should be drawn between guerrillas/combatants and the civilian population in order to provide maximum protection from intentional attack to innocent civilians. The law provides no precise answer to this problem, and one of the most heated debates arising during and after the U.S. war in Vietnam surrounded this issue.<sup>5</sup> As with conventional war, however, ultimately the issue was settled along policy rather than legal lines. If a member of a guerrilla organization falls above the line established by competent authority for combatants, a military operation to capture or kill an individual designated as a combatant would not be assassination.

5. Peacetime operations. The use of force in peacetime is limited by the previously-cited article 2(4) of the Charter of the United Nations. However, article 51 of the Charter of the United Nations recognizes the inherent right of self defense of nations. Historically the United States has resorted to the use of military force in peacetime where another nation has failed to discharge its international responsibilities in protecting U.S. citizens from acts of violence originating in or launched from its sovereign territory, or has been culpable in aiding and abetting international criminal activities. For example:

— 1804-1805: Marine First Lieutenant Presley O'Bannon led an expedition into Libya to capture or kill<sup>6</sup> the Barbary pirates.

— 1916: General "Blackjack" Pershing led a year-long campaign into Mexico to capture or kill the Mexican bandit Pancho Villa following Villa's attack on Columbus, New Mexico.

— 1928-1932: U.S. Marines conducted a campaign to capture or kill the Nicaraguan bandit leader Augusto Cesar Sandino.

— 1967: U.S. Army personnel assisted the Bolivian Army in its campaign to capture or kill Ernesto "Che" Guevara.

— 1985: U.S. Naval forces were used to force an Egypt Air airliner to land at Sigonella, Sicily, in an attempt to prevent the escape of the *Achille Lauro* hijackers.

— 1986: U.S. naval and air forces attacked terrorist-related targets in Libya in response to the Libyan government's continued employment of terrorism as a foreign policy means.

Hence there is historical precedent for the use of military force to capture or kill individuals whose peacetime actions constitute a direct threat to U.S. citizens or U.S. national security.

The Charter of the United Nations recognizes the inherent right of self defense and does not preclude unilateral action against an immediate threat.

In general terms, the United States recognizes three forms of self defense:

- a. Against an actual use of force, or hostile act.
- b. Preemptive self defense against an imminent use of force.<sup>7</sup>
- c. Self defense against a continuing threat.<sup>8</sup>

A national decision to employ military force in self defense against a legitimate terrorist or related threat would not be unlike the employment of force in response to a threat by conventional forces; only the nature of the threat has changed, rather than the international legal right of self defense. The terrorist organizations envisaged as appropriate to necessitate or warrant an armed

<sup>5</sup> Extended civil litigation between Sam Adams and General William C. Westmoreland failed to resolve this issue, illustrating its complexity.

<sup>6</sup> In the employment of military forces, the phrase "capture or kill" carries the same meaning or connotation in peacetime as it does in wartime. There is no obligation to attempt capture rather than attack of an enemy. In some cases, it may be preferable to utilize ground forces in order to capture (e.g.) a known terrorist. However, where the risk to U.S. forces is deemed too great, if the President has determined that the individual(s) in question pose such a threat to U.S. citizens or the national security interests of the United States as to require the use of military force, it would be legally permissible to employ (e.g.) an airstrike against that individual or group rather than attempt his, her, or their capture, and would not violate the prohibition on assassination.

<sup>7</sup> See, e.g., U.S. Navy Regulations (1973), article 0915, which states in part that force may be used "to counter either the use of force or an immediate threat of the use of force," or JCS SM 846-88 (28 October 1988), Peacetime Rules of Engagement for U.S. Forces, pp. I-4 and I-5, which define hostile intent.

<sup>8</sup> The last has been exercised on several occasions within the past decade. It formed the basis for the U.S. Navy air strike against Syrian military objectives in Lebanon on 4 December 1983, following Syrian attacks on U.S. Navy F-14 TARPS flights supporting the multinational peacekeeping force in Beirut the preceding day. It also was the basis for the air strikes against terrorist-related targets in Libya on the evening of 15 April 1986. This right of self defense would be appropriate to the attack of terrorist leaders where their actions pose a continuing threat to U.S. citizens or the national security of the United States. As with an attack on a guerrilla infrastructure, the level to which attacks could be carried out against individuals within a terrorist infrastructure would be a policy rather than a legal decision.

response by U.S. military forces are well-financed, highly-organized paramilitary structures engaged in the illegal use of force.<sup>9</sup>

6. Summary. Assassination constitutes an act of murder that is prohibited by international law and Executive Order 12333. The purpose of Executive Order 12333 and its predecessors was to preclude unilateral actions by individual agents or agencies against selected foreign public officials and to establish beyond any doubt that the United States does not condone assassination as an instrument of national policy. Its intent was not to limit lawful self defense options against legitimate threats to the national security of the United States or individual U.S. citizens. Acting consistent with the Charter of the United Nations, a decision by the President to employ clandestine, low visibility or overt military force would not constitute assassination if U.S. military forces were employed against the combatant forces of another nation, a guerrilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States.

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## Appendix A

### General Definitions

While none is entirely satisfactory, the following definitions of *assassinate* or *assassination* were considered in the formulation of this memorandum.

*The Oxford English Dictionary* (1933) defines *assassination* as "the taking of the life of anyone by treacherous violence, especially by a hired emissary, or one who has taken upon him to execute the deed," and *assassin* as "one who undertakes to put another to death by treacherous violence. The term retains so much of its original application as to be used chiefly of the murder of a public personage, who is generally hired or devoted to the deed, and aims purely at the death of his victim."

*Webster's Third New International Dictionary of the English Language* (1976) defines *assassination* as "1. To murder (a usually prominent person) violently. . . . 3. to injure, wound, or destroy, usually unexpectedly and treacherously." Under the term *kill*, that dictionary defines *assassination* as "implies the killing of a person in governmental or political power."

*Webster's Ninth New Collegiate Dictionary* (1984) utilizes the same definition for *assassination* as the larger volume, quoted above, but defines the term under *kill* as applying to "deliberate killing openly or secretly, often for political purposes."

*The Random House Dictionary of the English Language* (2nd edition, 1987), defines *assassinate* as "to kill

suddenly or secretly, especially a politically prominent person; murder premeditatedly and treacherously."

*The Oxford Companion to Law* (1980) defines *assassination* as "the murder of a person by lying in wait for him and then killing him, particularly the murder of prominent people from political motives, e.g. the assassination of President Kennedy."

*Black's Law Dictionary* (5th edition, 1979) defines *assassination* as "murder committed, usually, though not necessarily, for hire, without direct provocation or cause of resentment given to the murderer by the person upon whom the crime is committed; though an assassination of a public figure might be done by one acting alone for personal, social or political reasons. . . ."

*Black's Law Dictionary* (4th edition, 1951) explains the distinction between *murder* and *homicide* by defining the latter as ". . . the act of a human being in taking away the life of another human being. . . . Homicide is not necessarily a crime. It is a necessary ingredient of the crime of murder, but there are cases in which homicide may be committed without criminal intent and without criminal consequences, as, where it is done. . . in *self-defense*. . . . [emphasis supplied]."

A recent law review article defines *assassination* as "the intentional killing of an internationally protected person." Brandenburg, *The Legality of Assassination as an Aspect of Foreign Policy*, 27 *Virginia Journal of International Law* (Spring 1987), p. 655; though limiting it to a class of individuals such as diplomats and other statesmen, who are protected by the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents (28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 [1973]).

Historical analyses of assassination contain similar definitions. For example, one source defines *assassination* as

. . . the sudden, surprising, treacherous killing of a public figure, who has responsibilities to the public, by someone who kills in the belief that he is acting in his own private or the public interest. McConnell, *The History of Assassination* (1969), p. 12.

Another analysis defines *assassination* as

. . . those killings or murders, usually directed against individuals in public life, motivated by political rather than personal relationships. Havens, Leiden, and Schmitt, *Assassination and Terrorism: Their Modern Dimensions* (1975), p. 4.

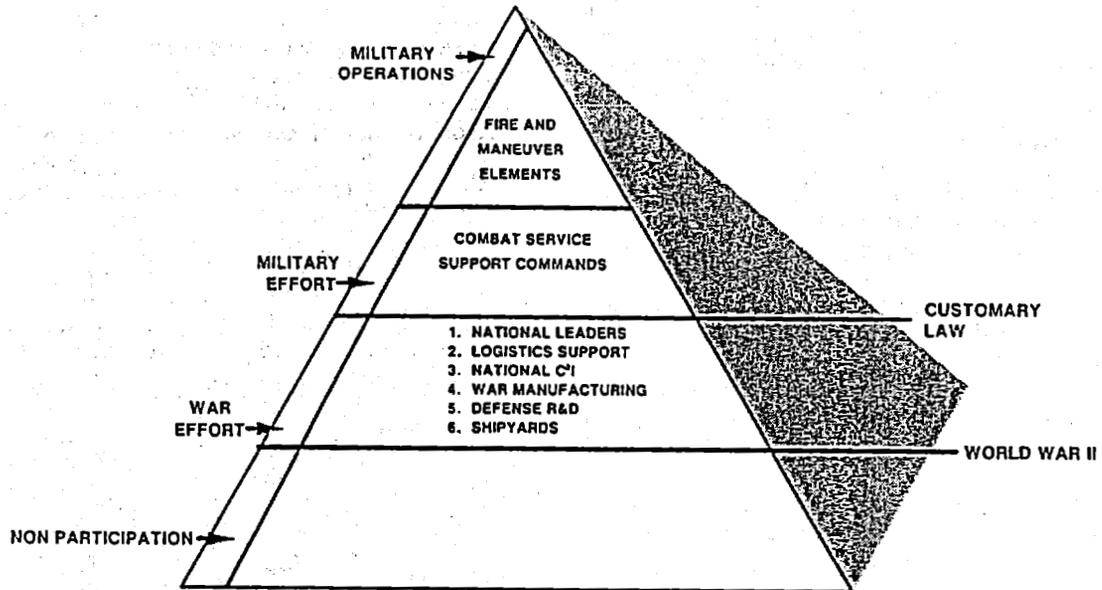
On the other hand, other scholars have declined to define the term. See, for example, Bell, *Assassins!* (1979), p. 22; and Ford, *Political Murder* (1985), pp. 1, 46, 196, 301-307.

<sup>9</sup> In a conventional armed conflict, such individuals would be regarded as unprivileged belligerents, subject to attack, but not entitled to prisoner of war protection or exemption from prosecution for their crimes. Employment of military force against terrorists does not bestow prisoner of war protection upon members of the terrorist organization.

## Appendix B

# CIVILIANS IN CONVENTIONAL WAR

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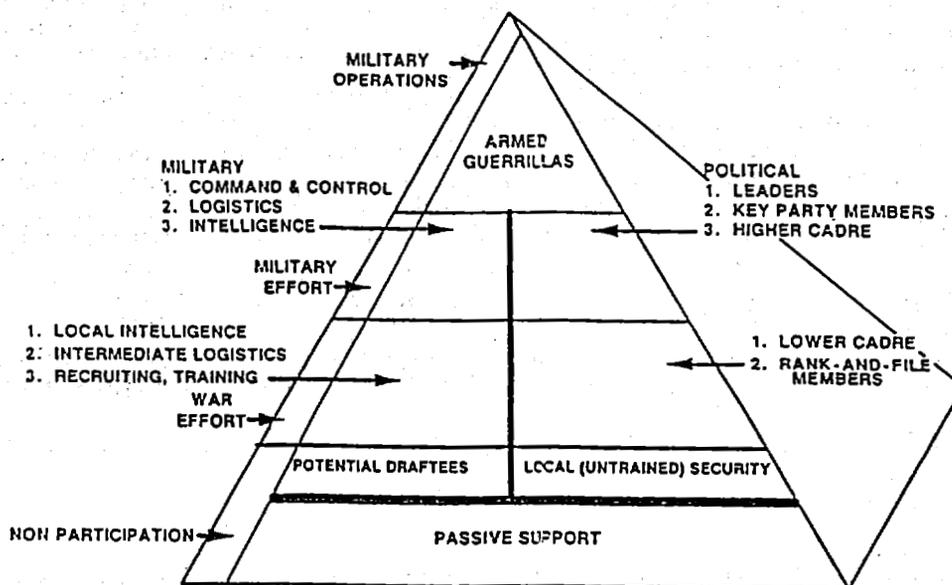


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## Appendix C

# REVOLUTIONARY WAR

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