

5.7.3 Persons Belonging to Non-State Armed Groups. Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent.²⁰⁹

5.7.3.1 Formal Membership. Formal membership in an armed group might be indicated by formal or direct information or by other types of information.

In some cases, there might be formal or direct information indicating membership in the group. This might include:

- using a rank, title, or style of communication;
- taking an oath of loyalty to the group or the group's leader;
- wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or
- documents issued or belonging to the group that identify the person as a member, such as membership lists, identity cards, or membership applications.²¹⁰

Although in some cases this type of formal or direct information might be available, in many cases it will not be available because members of these groups seek to conceal their association with that group. In such cases, the following types of information might indicate that a person is a member of a non-State armed group:

- acting at the direction of the group or within its command structure;
- performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces;
- taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation;²¹¹
- accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access;²¹²
- traveling along specific clandestine routes used by those groups;²¹³ or
- traveling with members of the group in remote locations or while the group conducts operations.²¹⁴

5.7.3.2 Functional Membership. Some non-State armed groups might not be organized in a formal command structure, as generally is required for POW status during international armed conflict.²¹⁵ Such groups might lack a formal distinction between those

members and non-members who nonetheless participate in the hostile activities of the group.²¹⁶

An individual who is integrated into the group such that the group's hostile intent may be imputed to him or her may be deemed to be functionally (*i.e.*, constructively) part of the group, even if not formally a member of the group. The integration of the person into the non-State armed group and the inference that the individual shares the group's intention to commit hostile acts distinguish such an individual from persons who are merely sympathetic to the group's goals.²¹⁷

The following may indicate that a person is functionally a member of a non-State armed group:

- following directions issued by the group or its leaders;²¹⁸
- taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis;²¹⁹ or
- performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.

²⁰⁹ Cf. *Al-Adahi v. Obama*, 613 F.3d 1102, 1108 (D.C. Cir. 2010) (“The district court seemed to think it important to determine Al-Adahi’s motive for attending the al-Qaida training camp. We do not understand why. Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a *fatwa* announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida.”).

²¹⁰ Cf. *Alsabri v. Obama*, 684 F.3d 1298, 1304-05 (D.C. Cir. 2012) (upholding a district court’s determination that petitioner was part of the Taliban, al-Qaida, or associated forces, including by considering “an English translation of a document appearing to be Alsabri’s application to attend an al Qaeda training camp” and “an English-language translation of a 92-page collection of documents that the government maintains were internal Taliban or al Qaeda records” that “were captured by Coalition forces from the ‘Director of Al-Qa’ida Security Training Office.’”).

²¹¹ Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

²¹² Cf. *Alsabri v. Obama*, 684 F.3d 1298, 1306 (D.C. Cir. 2012) (“[I]t is difficult to believe that ‘Taliban fighters would allow an individual to infiltrate their posts near a battle zone unless that person was understood to be a part of the Taliban.’”) (quoting *Alsabri v. Obama*, 764 F.Supp.2d 60, 94 (D.D.C. 2011)); *Uthman v. Obama*, 637 F.3d 400, 406 (D.C. Cir. 2011) (“In two prior cases, this Court has stated that staying at an al Qaeda guesthouse is ‘powerful—indeed ‘overwhelming’—evidence’ that an individual is part of al Qaeda. *Al-Adahi*, 613 F.3d at 1108 (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 873 footnote 2 (D.C. Cir. 2010)) (alterations omitted). The reason for that assessment is plain: It is highly unlikely that a visitor to Afghanistan would end up at an al Qaeda guesthouse by mistake, either by the guest or by the host.”).

²¹³ Cf. *Suleiman v. Obama*, 670 F.3d 1311, 1314 (D.C. Cir. 2012) (“There is no dispute that Suleiman’s travel was initiated at the suggestion of and facilitated by a Taliban recruiter, and that he traveled a well-worn path to Afghanistan frequently used by Taliban recruits. We have stated that such travel may indicate that an individual traveled to Afghanistan to join the Taliban.”) (citing *Al Odah v. United States*, 611 F.3d 8, 14 (D.C. Cir. 2010)); *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (“[T]raveling to Afghanistan along a distinctive path used by al Qaeda members can be probative evidence that the traveler was part of al Qaeda.”); *Al Odah v. United States*, 611 F.3d 8, 16 (D.C. Cir. 2010) (finding it significant that “Al Odah traveled to Afghanistan on a series of one-way plane tickets purchased with cash in a manner consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda”).

²¹⁴ *Cf.* *Hussain v. Obama*, 718 F.3d 964, 968-69 (D.C. Cir. 2013) (“Evidence that Hussain bore a weapon of war while living side-by-side with enemy forces on the front lines of a battlefield at least invites — and may very well compel — the conclusion that he was loyal to those forces. We have repeatedly affirmed the propriety of this common-sense inference.”); *Uthman v. Obama*, 637 F.3d 400, 405 (D.C. Cir. 2011) (“Being captured in the company of a Taliban fighter and two al Qaeda members and Osama bin Laden bodyguards 12 miles from Tora Bora in December 2001 might not be precisely the same as being captured in a German uniform 12 miles from the Normandy beaches in June 1944. But it is still, at a minimum, highly significant. And absent a credible alternative explanation, the location and date of Uthman’s capture, together with the company he was keeping, strongly suggest that he was part of al Qaeda.”).

²¹⁵ *Refer to* § 4.6.3 (Being Commanded by a Person Responsible for His or Her Subordinates).

²¹⁶ *Compare* § 4.7 (*Levée en Masse*).

²¹⁷ *Compare* § 5.8.3.2 (Examples of Acts Not Considered Taking a Direct Part in Hostilities).

²¹⁸ *Cf.* *Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011) (“[D]emonstrating that someone is part of al Qaeda’s command structure is sufficient to show that person is part of al Qaeda.”); *Al-Adahi v. Obama*, 613 F.3d 1102, 1109 (D.C. Cir. 2010) (“When the government shows that an individual received and executed orders from al-Qaida members in a training camp, that evidence is sufficient (but not necessary) to prove that the individual has affiliated himself with al-Qaida.”); *Salahi v. Obama*, 625 F.3d 745, 752 (D.C. Cir. 2010) (“Evidence that an individual operated within al-Qaida’s command structure is ‘sufficient but is not necessary to show he is ‘part of’ the organization.” (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010))).

²¹⁹ *Refer to* § 5.8.3 (“Taking a Direct Part in in Hostilities”).