

Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives.<sup>198</sup>

## 5.7 COMBATANTS

In general, combatants, whether privileged or unprivileged, may be made the object of attack, provided they have not been placed *hors de combat*.

**5.7.1 Armed Forces and Groups and Liability to Being Made the Object of Attack.** Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities.<sup>199</sup> This is because the organization's hostile intent may be imputed to an individual through his or her association with the organization. Moreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.<sup>200</sup>

Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack.<sup>201</sup> For example, combatants who are

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63 miles up the Red River Valley from Hanoi that was capable of supplying seventy-five percent of the electricity for Hanoi's industrial and defense needs. Without question, it was a valuable target. ... The Lang Chi hydroelectric facility was attacked by Air Force F-4 Phantoms using LGB [laser-guided bombs] on 10 June 1972. They placed twelve 2000-pound LGB through the roof of the 50-by-100-foot building, thereby destroying the electric generating plant without breach of the dam, despite the fact that the roof of the power plant was 100 feet below the top of the dam.”).

<sup>198</sup> For example, Department of Defense, *Report to Congress: Kosovo/Operation Allied Force, After-Action Report*, 82 (Jan. 31, 2000) (“Following the end of Operation Allied Force, NATO released an initial assessment of their attack effectiveness against a number of targets. These targets destroyed or significantly damaged include: ... • Fifty-seven percent of petroleum reserves; • All Yugoslav oil refineries ... .”); Department of Defense, *Report to the Senate and House Appropriations Committees regarding international policies and procedures regarding the protection of natural and cultural resources during times of war*, Jan. 19, 1993, reprinted as Appendix VIII in Patrick J. Boylan, *Review of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention of 1954)* 201, 204 (1993) (“Similarly, natural resources that may be of value to an enemy in his war effort are legitimate targets. The 1943 air raids on the Ploesti oil fields in Romania, and the Combined Bomber Offensive campaign against Nazi oil, were critical to allied defeat of Germany in World War II, for example. What is prohibited is unnecessary destruction, that is, destruction of natural resources that has no or limited military value.”).

<sup>199</sup> See, e.g., ICRC AP COMMENTARY 1453 (¶4789) (“Those who belong to armed forces or armed groups may be attacked at any time.”); GREENSPAN, *MODERN LAW OF LAND WARFARE* 57 (explaining that “as members of the armed forces [non-combat military personnel except for medical personnel and chaplains] are legitimate objects of attack by the enemy,”).

<sup>200</sup> *Gherebi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C. 2009) (noting that “many members of the armed forces who, under different circumstances, would be ‘fighters’ may be assigned to non-combat roles at the time of their apprehension” and that “[t]hese individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure.”), *abrogated on different grounds by Uthman v. Obama*, 637 F.3d 400, 403 (D.C. Cir. 2011).

<sup>201</sup> W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, *Executive Order 12333 and Assassination*, Nov. 2, 1989, III CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1981-1988 3411, 3413 (“Combatants are liable to attack at any time or place,

standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.<sup>202</sup>

5.7.1.1 *U.S. Practice in Declaring Forces Hostile*. In DoD practice, an armed force or group may be designated as hostile (also known as declaring the force hostile) in rules of engagement. This means that personnel to whom such rules of engagement apply are authorized to attack the members of the group. In DoD practice, the authority to designate a group as hostile has been limited to only certain officials.<sup>203</sup>

5.7.2 Categories of Persons Who Are Combatants for the Purpose of Assessing Their Liability to Attack. The following categories of persons are combatants who may be made the object of attack because they are sufficiently associated with armed forces or armed groups:

- members of the armed forces of a State;<sup>204</sup>
- members of militia and volunteer corps;<sup>205</sup>

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regardless of their activity when attacked. 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.") (citations omitted).

<sup>202</sup> For example, 101st Airborne ROE Card, Iraq (2003), reprinted in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, 1 LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001 - 1 MAY 2003) 315-16 (2004) ("1. Fire at all members of forces DECLARED HOSTILE. You may immediately fire upon any force that you know to be hostile. ... **1. Facts:** An enemy unit maneuvers within your weapon range. **Response:** Shoot to eliminate the threat and accomplish the mission. **2. Facts:** An unarmed enemy soldier sees you and does nothing but stare at you. **Response:** Shoot to eliminate the threat. The soldier is a member of a Hostile Force and is lawful target.").

<sup>203</sup> For example, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01B, *Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces*, A-2, ¶2(b) (June 13, 2005), reprinted in INTERNATIONAL AND OPERATIONAL LAW DEPARTMENT, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, OPERATIONAL LAW HANDBOOK 94 (2014) ("Once a force is declared hostile by appropriate authority, U.S. forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force. Policy and procedures regarding the authority to declare forces hostile are provided in Appendix A to Enclosure A, paragraph 3."); CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3121.01A, *Standing Rules of Engagement for US Forces*, A-12, ¶6 (Jan. 15, 2000), reprinted in CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY, *Rules of Engagement (ROE) Handbook for Judge Advocates* 96 (May 1, 2000) ("6. Declaring Forces Hostile. Once a force is declared hostile by appropriate authority, US units need not observe a hostile act or a demonstration of hostile intent before engaging that force. The responsibility for exercising the right and obligation of national self-defense and as necessary declaring a force hostile is a matter of the utmost importance. All available intelligence, the status of international relationships, the requirements of international law, an appreciation of the political situation, and the potential consequences for the United States must be carefully weighed. The exercise of the right and obligation of national self-defense by competent authority is separate from and in no way limits the commander's right and obligation to exercise unit self-defense. The authority to declare a force hostile is limited as amplified in Appendix A of this Enclosure.").

<sup>204</sup> Refer to § 4.5 (Armed Forces of a State).

<sup>205</sup> Refer to § 4.6 (Other Militia and Volunteer Corps).

- participants in a *levée en masse*;<sup>206</sup>
- persons belonging to non-State armed groups;<sup>207</sup> and
- leaders whose responsibilities include the operational command and control of the armed forces or of a non-State armed group.<sup>208</sup>

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.<sup>209</sup>

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.<sup>210</sup>

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:

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<sup>206</sup> Refer to § 4.7 (*Levée en Masse*).

<sup>207</sup> Refer to § 5.7.3 (Persons Belonging to Non-State Armed Groups).

<sup>208</sup> Refer to § 5.7.4 (Leaders).

<sup>209</sup> 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.”).

<sup>210</sup> 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,’”).

- 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;<sup>211</sup>
- accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access;<sup>212</sup>
- traveling along specific clandestine routes used by those groups;<sup>213</sup> or
- traveling with members of the group in remote locations or while the group conducts operations.<sup>214</sup>

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.<sup>215</sup> Such groups might lack a formal distinction between those

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

<sup>212</sup> 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.”).

<sup>213</sup> 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”).

<sup>214</sup> 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.”).

<sup>215</sup> Refer to § 4.6.3 (Being Commanded by a Person Responsible for His or Her Subordinates).

members and non-members who nonetheless participate in the hostile activities of the group.<sup>216</sup>

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.<sup>217</sup>

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;<sup>218</sup>
- taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis;<sup>219</sup> 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.

5.7.3.3 *Dissociation or Renunciation.* A person may not be made the object of attack based on his or her association with a non-State armed group if that association has clearly been severed. Relevant factors in determining when an individual has unambiguously ceased to be a member of a non-State armed group may include:

- whether the individual has formally ceased to be a member of the group, such as by filing relevant paperwork or by otherwise formally renouncing any allegiance to the group;
- whether there are concrete and verifiable facts or persuasive indicia that he or she has affirmatively returned to peaceful pursuits, such as by participating in a reconciliation program and swearing an oath of loyalty to the government; and
- the amount of time that has passed since the person participated in the activities of the group in question, if coupled with other indicia of dissociation or renunciation.<sup>220</sup>

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<sup>216</sup> Compare § 4.7 (*Levée en Masse*).

<sup>217</sup> Compare § 5.8.3.2 (Examples of Acts Not Considered Taking a Direct Part in Hostilities).

<sup>218</sup> 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))).

<sup>219</sup> Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

<sup>220</sup> Stephen Pomper, Assistant Legal Adviser for Political-Military Affairs, Department of State, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through*

The onus is on the person having belonged to the armed group to demonstrate clearly and affirmatively to the opposing forces that he or she will no longer participate in the activities of the group.<sup>221</sup> Moreover, if persons who have dissociated from an armed group rejoin the group or fail to cease permanently their participation in hostilities, they may be made the object of attack.<sup>222</sup>

5.7.4 Leaders. Military leaders are subject to attack on the same basis as other members of the armed forces. Similarly, leaders of non-State armed groups are also subject to attack on the same basis as other members of the group. There is no objection to making a specific enemy leader who is a combatant the object of attack.<sup>223</sup>

Leaders who are not members of an armed force or armed group (including heads of State, civilian officials, and political leaders) may be made the object of attack if their responsibilities include the operational command or control of the armed forces. For example, as the commander-in-chief of the U.S. armed forces, the President would be a legitimate target in wartime, as would, for example, the Prime Minister of a constitutional monarchy. In contrast, the reigning monarch of a constitutional monarchy with an essentially ceremonial role in State affairs may not be made the object of attack.

In addition to leaders who have a role in the operational chain of command, leaders taking a direct part in hostilities may also be made the object of attack.<sup>224</sup> Planning or authorizing a combat operation is an example of taking a direct part in hostilities.<sup>225</sup>

As a matter of practice, attacks on the national leadership of an enemy State have often been avoided on the basis of comity and to help ensure that authorities exist with whom peace agreements may be concluded.

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*Practice*, 88 U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 181, 189 (2012) (“Relevant factors in determining that an individual has ceased to be a member of an organized armed group include the amount of time that has passed since that individual has taken relevant action on behalf of the group in question, and whether he or she affirmatively has disassociated himself or herself from the organized armed group.”).

<sup>221</sup> Wolff Heintschel von Heinegg & Peter Dreist, *The 2009 Kunduz Air Attack: The Decision of the Federal Prosecutor-General on the Dismissal of Criminal Proceedings Against Members of the German Armed Forces*, 53 GERMAN YEARBOOK OF INTERNATIONAL LAW 833, 844-45 (2010) (“Here, the Prosecutor-General takes the opportunity to identify different categories of lawful targets under the law of non-international armed conflict. As regards fighters belonging to a non-State party to the conflict, their qualification as lawful targets is not based on some form of legal status but on the mere fact of their functional integration into an organized armed group. If they are so integrated, they do not qualify as civilians even though they may eventually pursue civilian occupation. They only regain their civilian status if they clearly and irrevocably renounce their function in the organized armed group. Hence, the Prosecutor-General is not prepared to consider Taliban fighters to be lawful targets only insofar and for such time as they take a direct part in armed hostilities.”). Compare § 5.9.3 (Persons Who Have Surrendered).

<sup>222</sup> Refer to § 5.8.4.2 (No “Revolving Door” Protection); § 5.8.4.1 (Permanently Ceased Participation in Hostilities).

<sup>223</sup> Refer to § 5.4.6.4 (Attacks on Specific Individuals).

<sup>224</sup> Refer to § 5.8.3 (“Taking a Direct Part in in Hostilities”).

<sup>225</sup> Refer to § 5.8.3.1 (Examples of Taking a Direct Part in Hostilities).

## 5.8 CIVILIANS TAKING A DIRECT PART IN HOSTILITIES

Civilians who take a direct part in hostilities forfeit protection from being made the object of attack.

5.8.1 Civilians Taking a Direct Part in Hostilities – Notes on Terminology. This manual uses the phrase “direct part in hostilities” to indicate what activities cause a civilian to forfeit his or her protection from being made the object of attack. This usage does not mean that the United States has adopted the direct participation in hostilities rule that is expressed in Article 51 of AP I.

5.8.1.1 “Active” Versus “Direct”. The phrases “active part in hostilities” and “direct part in hostilities” have been used to describe when civilians forfeit their protection from being made the object of attack. As noted above, this manual uses “direct” rather than “active” in this context, although as discussed below, this usage should not be regarded as indicating a substantive difference between “active” and “direct.”

Common Article 3 of the 1949 Geneva Conventions refers to “[p]ersons taking no active part in the hostilities.” AP I and AP II use the phrase “direct part in hostilities.”<sup>226</sup> In addition, AP I uses the phrase “direct part in hostilities” to address other situations apart from the protection of civilians.<sup>227</sup>

Although the words *active* and *direct* can mean different things in the English language, the terms have sometimes been treated as the same for the purpose of applying the direct participation in hostilities rule.<sup>228</sup> One of the reasons for treating the terms the same is that although the English language version of the 1949 Geneva Conventions uses “active,” and the English language versions of AP I and AP II use “direct,” the French language versions of these treaties use the same word, “*directement*.”<sup>229</sup> Because the English and French language versions

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<sup>226</sup> AP I art. 51(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”); AP II art. 13(3) (“Civilians shall enjoy the protection [from being made the object of attack], unless and for such time as they take a direct part in hostilities.”).

<sup>227</sup> See, e.g., AP I art. 43(2) (“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities”); AP I art. 47(2) (“A mercenary is any person who ... [inter alia] (b) Does, in fact, take a direct part in the hostilities ...”).

<sup>228</sup> See, e.g., Prosecutor v. Tadić, ICTY Trial Chamber, IT-94-1-T, *Judgment*, ¶¶614-15 (May 7, 1997) (“The rules contained in paragraph 1 of Common Article 3 proscribe a number of acts which: ... (iii) are committed against persons taking no active part in hostilities ... the test the Trial Chamber has applied is to ask whether, at the time of the alleged offence, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offences are said to have been committed. If the answer to that question is negative, the victim will enjoy the protection of the proscriptions contained in Common Article 3.”); Prosecutor v. Akayesu, ICTR Trial Chamber, ICTR-96-4-T, *Judgment*, ¶629 (Sept. 2, 1998) (“‘The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities’. This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of ‘persons taking no active part in the hostilities’ (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, ‘all persons who do not take a direct part or who have ceased to take part in hostilities.’ These phrases are so similar that, for the Chamber’s purposes, they may be treated as synonymous.”).

<sup>229</sup> GC art. 3, 973 UNTS 289 (“*ne participant pas directement aux hostilités*”).