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TARGETED KILLING

Will Obama's Targeted Killing Policy Say What "Areas of Active Hostilities" Means?

By [Heather Brandon](#) Thursday, May 5, 2016, 6:31 AM

Recently, the Obama Administration [announced](#) that it will soon release a redacted version of its Presidential Policy Guidance (PPG) governing the use of force in counterterrorism operations outside the United States and "areas of active hostilities." This includes drone strikes and other targeted killings. The PPG only allows lethal targeting when capture is not feasible and there is "near certainty" of no civilian harm. National security experts and former U.S. military officials have [emphasized](#) the importance of restraining the targeted killing program, noting its creation of substantial national security costs by generating resentment among local populations and recruiting support for extremist groups, while straining U.S. relations with its allies and impeding the flow of critical intelligence about terrorist operations.

President Obama signed the PPG in 2013 and the next day, in a [speech](#) at the National Defense University, he revealed its existence, stating that the PPG provides "clear guidelines, oversight and accountability" for the use of drones. However since then, the only details released to the public consist of a two-and-a-half page [factsheet](#) outlining the PPG's basic parameters and sporadic statements providing fragments of further clarity in [congressional testimony](#), [speeches](#), [legal memos](#), and comments from [administration officials](#). As long as the PPG's release is accompanied with only minimal redactions, its disclosure will be an important step towards greater transparency and accountability for the U.S. targeted killing program.

But to assess the legality of U.S. targeting, it is crucial to know where the PPG does and does not apply. Yet to date, as commentators have [noted](#), no clear definition has been given for the term that provides the key to this issue—"areas of active hostilities." Unlike conflicts between two or more states ("international armed conflicts" or "IACs"), where [armed conflict](#) is triggered by any use of force between the parties, that is not the case for non-international armed conflicts (NIACs) when the fighting is between a state and non-state armed group or between these groups. Such violence is normally governed by law enforcement rules, which must comply with the stricter standards of

international human rights law (IHRL). These rules only permit lethal force as a last resort, when strictly necessary to protect human life. For the less stringent law of armed conflict (LOAC) targeting rules to apply, these situations of violence must reach a threshold level of intensity and organization of the fighting groups.

The NIAC threshold is set out in the [Tadic](#) case and requires “protracted armed violence” between either government forces and sufficiently organized non-state groups or between two or more of these organized non-state groups. The United States accepts the Tadic formulation; however, as discussed below, it takes a broad view of how this test is applied geographically and considers that the PPG imposes policy constraints that are not required as a matter of law.

In some ways, the PPG’s requirements do bring U.S. targeting closer to IHRL standards by, for example, requiring capture “when feasible” and for strikes to have “near certainty” of no civilian harm. However, the extent to which this is reflected in practice is contingent on how the PPG’s terms are defined--and where it applies. As Ryan Goodman and Thomas Earnest [observed](#), “‘areas of active hostilities’ is a term of art, as far as we can tell, developed by the administration at an unknown date, and not found in international law.” In his recent [speech](#) at the American Society of International Law (ASIL), new State Department Legal Adviser Brian Egan confirmed that “areas of active hostilities” is not a legal term but “is a term specific to the PPG.” Despite this, the Obama Administration has continued to use international law concepts and terminology when describing “areas of active hostilities.” Both Egan and an anonymous “[senior administration official](#)” recently commented that among the factors taken into consideration when determining whether to designate an “area of active hostilities” was the “scope and intensity of the fighting”—the second prong of the Tadic NIAC test. Yet the same administration official also said that designating geographic zones as “areas of active hostilities” “is not the same as a determination that an armed conflict is taking place in the country at issue.”

Consequently, according to the PPG there could be an “area of active hostilities,” where the fighting falls below the Tadic threshold for a NIAC. And in that country, the United States would not need to comply with the heightened targeting restrictions in the PPG but could instead use lethal force in accordance with LOAC targeting requirements. Conversely, there could also be countries where the threshold levels for armed conflict are met but they would not be considered “areas of armed hostilities” under the PPG.

Egan ostensibly [acknowledged](#) this when he specified that the current “areas of active hostilities” were Iraq, Syria, and Afghanistan (and possibly part of the Pakistan-Afghanistan border, as “sometimes others have referred to the Afghanistan-Pakistan border region as being part of what we talk about with respect to Afghanistan”). As Rita Siemion and I [noted](#) previously, this would suggest that the PPG applies in countries like Yemen, Libya, and Somalia.

Further, the administration could designate as “areas of active hostilities,” countries where the violence does not meet the Tadic criteria for armed conflict. And in those areas, U.S. targeting guidelines would fall short of the standards required by a law

enforcement framework. The legality of this result depends on how one evaluates the question of how far the geography of the armed conflict extends. The United States considers that it is engaged in an armed conflict with al Qaeda (interpreted to also [cover ISIS](#)) and associated forces, which it maintains permits the application of LOAC targeting rules both in and outside “areas of active hostilities.” According to this view, if the NIAC threshold is met with respect to a particular group, the intensity of the fighting does not need to be reestablished in each location where members of that group are found. Subject to other international law constraints such as the jus ad bellum, this permits LOAC targeting rules to follow fighters wherever they may travel, with the PPG sometimes imposing additional constraints as a matter of policy but which are not legally required.

This view is at odds with the [ICRC](#), which contends that IHRL standards and a law enforcement framework govern the use of lethal force in countries where the legal threshold for NIAC is not met. The German Federal Prosecutor General made a similar finding in his 2013 [decision](#) on the legality of drone strikes. The [ICRC](#) states that LOAC “applies in the whole territory of the parties involved in a NIAC,” not just areas where combat is taking place. It also considers that LOAC rules would “be extended to hostilities that spill over into the territory of the adjacent non-belligerent State.”

Egan in his ASIL speech confirmed the U.S. position, noting that the PPG imposes policy, rather than legal obligations, and stating that President Obama instituted the PPG because it is “the right approach to using force to meet U.S. counterterrorism objectives and protect American lives consistent with our values.” Egan went on to note that this policy obligation remains waivable by the administration, saying that “[o]f course, the President always retains authority to take lethal action consistent with the law of armed conflict, even if the PPG’s heightened policy standards may not be met.” However, he didn’t specify what circumstances would justify a decision to waive PPG standards.

Hopefully when the PPG is released it will provide a precise definition of “areas of active hostilities” (along with other terms referred to in the factsheet, such as “[continuing, imminent threat](#),” and “feasibility of capture”). In addition, there should also be an explanation of when discretion may be exercised to waive PPG targeting rules and instead apply less-stringent LOAC targeting rules outside “areas of active hostilities.” Without clarity over when and where these rules apply, the risk remains that a subsequent administration could interpret them in ways not intended and broaden the use of lethal force outside “areas of active hostilities.” As President Obama nears the end of his final term, he must ensure that the constraints he implemented on the use of lethal force in counterterrorism operations are clear, precise, and enduring—and that they comply with international law.

Topics: [Targeted Killing](#), [Targeted Killing: Drones](#), [International Law](#), [International Law: LOAC](#)

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