

Israel – Hamas 2023 Symposium – The Law of Truce

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On November 9, 2023, Israel [announced](#) it would periodically “pause military operations” in its war in Gaza, just over a month after [Hamas’s shocking attack](#) precipitated the latest round of escalatory violence in the Middle East. Israel’s intent for those temporary cessations of combat—a unilateral decision, not an agreement with Hamas—is for them to be windows during which Palestinian and other civilians can safely evacuate the war-torn urban centers of Gaza and move “to the south, to get food and medicine.” On its [official X \(formerly Twitter\) account](#), the Israel Defense Forces (IDF) explicitly said, “there is no ceasefire,” instead clarifying that these are mere “tactical, local pauses for humanitarian aid for Gazan civilians.”

At four-hour chunks each day, these “pauses” are far from a general truce or armistice in prelude to a negotiated termination of the war. But they are consistent with President Biden’s [pressure](#) on Israel to better account for the [growing and vivid humanitarian crisis](#) among civilians caught between the IDF’s military campaign and Hamas. They still allow Israel the means and opportunity to aggressively destroy the military capacity of the terrorist organization and recover the hundreds of [kidnapped civilian hostages](#) believed to still [be under Hamas control](#). “Israel has an obligation to fully comply with international law, and we believe these pauses are a step in the right direction, particularly to help ensure that civilians

have an opportunity to reach safer areas away from the act of fighting,” said John Kirby, spokesman for Biden’s National Security Council. Though pauses will undoubtedly be helpful, Secretary of State Antony Blinken disagreed with the necessity and prudence of a full ceasefire, saying “those calling for an immediate ceasefire have an obligation to explain how to address the unacceptable result that would likely bring.”

The pauses may also be an acknowledgment of the worldwide calls for an abatement or cessation of hostilities, including those by leaders of various United Nations organizations on November 6. These include the World Health Organization and the High Commissioner for Human Rights, who said, “We need an immediate humanitarian ceasefire. It’s been 30 days. Enough is enough. This must stop now.” Even the UN’s Secretary-General has publicly decried the “graveyard of children” and explicitly demanded a ceasefire asserting, “[t]he unfolding catastrophe makes the need for a humanitarian ceasefire more urgent with every passing hour.” Nevertheless, United States, France, the United Kingdom, Japan, and six other Security Council members rejected Russia and China’s call for a UN-imposed ceasefire. Israel’s leadership appears committed to progressing with its military operations and will neither negotiate nor commence unilaterally a “ceasefire” until all hostages have been released.

In defiance of calls upon Israel to restrain its military operations (at least temporarily), its decision to “pause” its tactical warfighting but *not* unilaterally “ceasefire” or attempt to negotiate a truce or armistice with Hamas’s leadership raises questions of what—if anything—Israel is *obliged* to do under international law. Given its decision to “pause,” however fleeting those respites may be, a question remains whether the IDF has tacitly saddled itself with legal duties imposed by the rules of ceasefires, which treaty law typically refers to as “armistices.”

It may be the case that Israel’s choice to label its decision as a self-imposed, limited “pause” in the action was not just to maintain tactical advantage and an unrelenting operational tempo. It may also have a color of lawfare about it, for it may exploit a loophole in this area of international law in a way that permits the IDF to be free of certain legal requirements which, ironically, may effectively undermine the intended effect of these pauses. This post sketches the contours of the “law of truce,” demonstrating just how law-free this area actually is.

When “Less is More”

While the rules of the law of armed conflict are principle-based, complex, extensive, and well-established by treaty, customary international law, national policies, and military doctrine, the specific sub-genre regarding ceasefires is surprisingly barren. Not only is there a dearth of “law” that regulates the when, how, and why of ceasefires, there is unresolved ambiguity in the terms—even in the very words used to label it—and there are areas for which its *modern* application remains uncertain. This only serves to make evaluating the legal effects or legal duties of Israel’s “tactical pauses” more difficult.

What Are the Rules?

First, a matter of terminology. What Israel so far refuses to do (engage in a “ceasefire”) goes by many labels, e.g., “truce,” “armistice” (Hague Convention (IV) of 1907, art. 36), “suspension of hostilities” or “suspension of fire” (First Geneva Convention of 1949, art. 15), “suspension of military operations” (Lieber Code, art. 142). But its fundamental nature is best thought of as a *temporary halt* to certain *military conduct previously engaged in* by a nation’s armed forces or a non-State armed group during an international or non-international armed conflict.

The first step in researching the boundaries and duties of the positive law of armed conflict is usually the Geneva Conventions (GC). But GC I, Article 15, is surprisingly sparse on the subject. It demands that the parties “shall” arrange for “an armistice or a suspension of fire” only when “circumstances permit” and only for “the removal, exchange and transport of the wounded left on the battlefield.” This humanitarian objective is laudable and necessary, but only required when the parties themselves determine—under some undefined mechanism—that the circumstances of fighting call for it.

Parties have further discretion to make “local arrangements” for the “removal or exchange of wounded and sick” and “for the passage of medical and religious personnel and equipment” but even this is contemplated only in the context of a “besieged or encircled area.” Other than prohibiting perfidious use of a white flag of truce (Additional Protocol I, art. 37), this is the limit of what the text of the Geneva Conventions of 1949 says about ceasefires – what it calls an “armistice or a suspension of fire.”

GC IV, art. 14, does say a bit more, but in a narrower context of protecting certain classes—the “wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven—from the “effects of war” in one’s own territory or in “occupied territory,” not as the cessation of military conduct between belligerents. Article 14 addresses something more akin (but not identical) to Israel’s “tactical pauses”: the discretionary establishment of “hospital and *safety zones*,” which the parties may designate and regulate through a written agreement (a model of which is provided in Annex 1 to GC IV). Article 23 of GC I provides for a similar discretionary agreement to create safety zones in one’s own territory or in occupied territory, but for an even smaller class of people, just the “wounded and sick” members of the armed forces for which this Convention intended specifically to respect and protect.

Most of the “rules” of truces or ceasefires are found in only a handful of articles of the Hague Convention (IV) of 1907. A ceasefire is usually a mutual agreement among the belligerent parties, and the terms and conditions of that agreement control its scope and enforcement (Hague IV, art. 36). The parties would, in theory, come to agreement in writing on several key issues: the duration of the halt; its geographic applicability (it may be local or general, per

Article 37 of Hague Convention IV), restrictions and permissions on the means and methods of warfare during the halt; the relationship, travel, and communications permitted between the belligerents during the halt (Hague IV, art. 39).

In this sense, it is perhaps better to think of these as contracts to manage the relationship and conduct of the parties during a ceasefire, layered on top of the existing law of armed conflict. For example, the GC III rules for the treatment of prisoners of war do not cease, even temporarily, during the ceasefire unless the parties mutually agree to changes (presumably no less protective than GC III's baseline). It is also worth noting that an armistice or ceasefire is temporary and *can* (not must) be viewed as a preliminary step toward a treaty of peace. But it is "not a peace treaty" (DoD *Law of War Manual*, § 12.11.1.2; see also Lieber Code, arts. 135, 138). Therefore, the technical and formal rules of the Vienna Convention on the Law of Treaties would not govern by default the terms or enforcement of a ceasefire or armistice agreement, even if both adversarial belligerent States were already parties to that Convention.

Like in contract law, violation of the terms of the agreement by one party gives the other party a self-help remedy outside of a lawsuit and courtroom. Per Article 40 of Hague Convention IV, "[a]ny serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately." Importantly, violating a ceasefire agreement's terms is not a law of armed conflict violation. Breaching a mutually-agreed upon "neutral zone," for example, is not by itself a breach of the law of armed conflict but merely a bad faith violation of an agreement between adversaries. For this reason, breaching a ceasefire does not provide the victim party with a legal right of "reprisal" in which it—as a last resort—may violate norms and rules of international law to deter its adversary from the same unlawful conduct. All it may do is renounce its participation in the halt of hostilities and resume its (otherwise lawful) use of force.

Moreover, a ceasefire agreement that does not explicitly limit itself to a specific duration or time period can be terminated "at will" by any party, with no need for any justification. That party may recommence hostilities without committing "perfidy," provided that "the enemy is warned within the time agreed upon, in accordance with the terms of the armistice" (Hague IV, art. 36). This, of course, implies that a legitimate agreement must include such terms.

While a ceasefire, truce, or armistice is normally agreed voluntarily between the belligerents, it could be imposed on one or more of the belligerent parties by the United Nations Security Council under its Chapter VII authorities. During the temporary cessation of hostilities, regardless of which party initiated it and however it may be labeled, the law of armed conflict remains in force and applicable. As the International Criminal Tribunal for the former Yugoslavia Appeals Chamber described in the seminal *Prosecutor v. Tadić* case,

Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. . . . Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed . . . international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict (para. 70).

One article of the Geneva Conventions and six articles in the Hague Conventions devoted to the law of truce may seem inadequate to the task of regulating ceasefires. After all, temporarily shutting down lawful armed conflict can be extraordinarily complex, risky, and confusing for both the belligerent forces and civilians caught in the middle. It may be instructive to seek further guidance from the thirteen articles dedicated to armistices in the Lieber Code, which the U.S. Department of Defense (DoD) *Law of War Manual*, Chapter 12 cites in its discussion of armistices no less than nine times.

According to the Lieber Code, the parties that agree to a ceasefire are thought of as “contracting parties” (art. 141). Military commanders may negotiate and stipulate the terms, but the armistice, ceasefire, or truce agreement must be “ratified” by “the highest authorities of the contending parties” before it is considered effective (art. 135). Resumption of hostilities by one party requires giving notice to the other, as agreed upon in the terms of the truce or ceasefire (art. 137). When one party engages in conduct that “clearly” breaks the armistice agreement, the other party is “released from all obligation to observe it” (art. 145). The modifier “clearly” may establish a burden of proof that is absent from the language in Hague Convention IV’s Article 40 discussion of this self-help remedy (of course, it is up to the victim—not a neutral third party—to decide if that threshold is met).

Moreover, the agreement can be definite or indefinite in duration, apply to only certain forces or all belligerents, and apply to certain specified localities or the entirety of the territories engaged in the armed conflict (art. 137). When one party captures and detains combatants of the other party during a ceasefire in the act of violating the ceasefire, the detaining power must treat those combatants as prisoners of war, not as common criminals (art. 146).

Nevertheless, relying on a one hundred-and-sixty-year-old General Order applicable to the U.S. Civil War—no matter how influential this order became for the development of *jus in bello* over the next century—remains only persuasive secondary authority, akin to a learned treatise, or indicative of norms that may have congealed over time into customary international law. The Lieber Code, along with the Geneva Conventions and Hague law, leaves several questions open.

What do the Rules Miss or Confuse?

Is the purpose of a ceasefire, truce, or armistice (and the motive driving it) humanitarian in nature (as implied by GC I)? Or can it be for mundane tactical advantage like the consolidation of gains, reinforcement of defensive positions, rest and recovery, or the mutual recognition of a holiday, as suggested by the complete absence of purpose or motivation in Hague Convention IV?

If we turn to the 1863 Lieber Code, we find significantly more detailed prescriptions and proscriptions for armistices, including indicia of acceptable motives. These may be agreed upon as a means “preliminary to a treaty of peace, or to prepare . . . for a more vigorous prosecution of the war” (art. 138). The DoD *Law of War Manual* explains that armistices “usually precede negotiations for peace, but may be concluded for other purposes” because they have a “combined political and military character” (§ 12.11.2.1).

If the armistice, truce, or ceasefire is like a contract, and parties are bound to engage in these halts of hostilities honorably and in good faith, then is it permissible for one party to “force” another party to agree to a ceasefire generally, or to the specific terms of one, under threat? For instance, setting aside the moral dilemma, is it lawful for a party to threaten to continue, or escalate, its (otherwise lawful) use of force unless and until the other party agrees to the temporary ceasefire? If a party breaches an agreement it was forced into under duress, does the other party have any legal grounds to recommence hostilities? Would that recommencement be a mere violation of an (illegitimate) ceasefire agreement, or would the enforcement of that illegitimate ceasefire instead be better characterized as a *jus ad bellum* violation. Under art. 52 of the Vienna Convention, a “treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.” But ceasefires and armistices are *not* treaties.

If this “contract” must be “ratified” by superior authorities before it can be operative, who are they? Must they be civilian political elites? Can ratification be delegated to a senior military field commander? Is a truce, ceasefire, or armistice generally permissive or restrictive in nature? In other words, absent any preambulatory discussion in the written document, is an act permitted during the ceasefire as long as it is not expressly prohibited by its terms, or is an act prohibited unless it is expressly permitted?

Is knowledge of the existence and operation of a ceasefire, truce, or armistice imputed to every commanding officer at all echelons? Is there a reasonable period, depending on the tempo of hostilities and communication ability between military headquarters, after the truce begins in which knowledge of the halt should be imputed to all commanders?

Returning to the observation that a halt of hostilities has historically gone by many labels, it is noteworthy that the U.S. DoD *Law of War Manual* defines armistice variously as a “cessation of active hostilities” (§ 12.11.1), a suspension of “military operations” (§§ 12.11.1 and 12.11.1.2), a “prohibit[ion] [on] offensive military operations” (§ 12.11.4.3), a “suspension of

hostilities” (§§ 12.11.1.1 and 12.11.1.2), and a “suspension of arms” (§ 12.11.1.3). The *Manual* concludes that the word “armistice” “may also be used in a general sense to encompass [all] these terms” (§ 12.11.1.3).

Prior to the First World War, William Winthrop, the “Blackstone of military law,” defined a truce or armistice as “merely a suspension of active military operations of a hostile character” (*Military Law and Precedents*, p. 670, n. 34). But surely the qualifiers and verbs matter. We need simply consider a common non-kinetic cyber operation that may not rise to the level of an armed attack or use of force under the “modified effects test” or the “scale and effects” test. The DoD *Law of War Manual* explains that “an armistice agreement generally would be understood to prohibit offensive military operations, such as conducting attacks or seizing territory” (§ 12.11.4.3).

If a ceasefire is limited to restricting “active hostilities” (as in the Lieber Code, art. 135) or “fire” (as in GC I, art. 15), then a State or non-State actor could still engage in certain offensive cyber operations. For example, a belligerent could employ distributed denial of service (DDOS) attacks against an adversary’s government websites or social media accounts during the ceasefire, unless the parties expressly prohibit such conduct in its terms. But if a ceasefire regulates the halt to “military operations” more generally (as in Hague IV, art. 36), that agreement would naturally and implicitly preclude offensive cyber operations of this kind. Here, the U.S. DoD’s explication of armistice rules knowingly accepts terminological inconsistency in the extant law and dismisses the potentially harmful and relevant effects of that ambiguity leaving no real practical guidance to cyber planners or their legal advisors. If, for example, the IDF wished to disrupt or disable Hamas social media activities it viewed as contributing to the terrorist organization’s military effectiveness, the law of truce provides no definitive legal boundaries.

What Exactly is Israel’s “Pause” in Operations?

Any belligerent has the right to self-impose a halt to its own military activities (which goes almost without saying), but that does not impose a corresponding duty on the adversary (or even allies) to honor and respect that halt with their own forces. And doing so certainly does not appear to trigger the terms or norms of customary international law, or of the Hague or Geneva Conventions related to armistices, ceasefires, and truces.

Israel’s choice to disclaim a ceasefire and instead insist on its unilateral “tactical pauses . . . for humanitarian aid” is more than just a way to maintain its relatively furious and intense tempo of combat operations in and around Gaza at the time and place of its choosing. It permits Israel to meet at least some of the international demand for restraint (a political and strategic good) while not binding its military forces to the few explicit rules of truces or opening it to public condemnation for its actions leading to and during such an agreement. Calling it a “pause,” and doing so unilaterally, therefore is—whether intended or not—a form of lawfare strategy difficult to either fully condone or fully condemn.

What will matter more than this characterization are four facts still yet to be completely revealed: (1) whether Israel will determine that the pauses are no longer viable and create too much military risk to commit to them over a longer period; (2) whether Hamas will use the locations and timing of the pauses to “dishonorably” stage attacks against the IDF, unlawfully using the civilian traffic as a shield; (3) the short-term and long-term success of the pauses in effectuating Israel’s stated purpose, namely to give civilian non-combatants a greater chance of surviving this war; and (4) whether the evidence of civilian suffering on the ground in Gaza becomes so overwhelming over time that Israel becomes confronted by a unified Security Council demanding a “ceasefire” on its own terms (bound, of course, by the little that international law currently says about the law of truce).

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