Israel-Hamas 2024 Symposium – A Gaza Ceasefire: The Intersection of War, Law, and Politics

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by Marika Sosnowski | Jan 18, 2024

Ceasefires are a unique tool in armed conflict. This is because they exist at the intersection of war, law, and politics. Political scientist Cindy Wittke has suggested that attempts to pin down and categorise ceasefires will ultimately reveal a “lack of fit” as to whether law, be it domestic and/or international, is at all “fit” to deal with the challenges ceasefires pose.

This “lack of fit” has perhaps been most obvious in the UN Security Council’s wrangling over a ceasefire in the aftermath of the Hamas attacks on Israel on October 7, 2023. The inability of the Council to come to any sort of meaningful agreement on what it has variously labelled “an immediate, durable and fully respected humanitarian ceasefire” (October 16); “humanitarian pauses” (October 18); “pauses in fighting to allow humanitarian aid access, the protection of civilians and a stop to arming Hamas and other militants in the Gaza Strip” (October 25); “urgent and extended humanitarian pauses and corridors” (November 15); “an immediate humanitarian ceasefire” (December 8) and “create the conditions for a sustainable cessation of hostilities” (December 22) reveals the inherently contentious nature of ceasefire agreements.

An Old Problem

This state of affairs is not new. As early as 1977, legal scholars noted the "semantic tangle" of ceasefires, lamenting that this "reveals the dilemma in which the international law of war finds itself in this area with no general understanding as to the meaning of any of the numerous terms used in connection with the cessation of hostilities." Some scholars lay the blame for this firmly at the door of the United Nations, where words are used in a disjointed, *ad hoc* fashion "without regard to their prior usage and, worse still, inconsistently."

In Gaza, like in many other ceasefire negotiations, from Syria to Somalia to Sudan, the signatories to a ceasefire seem to get to decide on the public name that it goes by, a marketing ploy for what are in fact important agreements between belligerents that have real ramifications for civilians and combatants.

In international relations, while a decision of the UN Security Council is a binding order establishing a legal duty to comply, there is never any guarantee of compliance. For example, a Security Council resolution passed on November 15 which called for "extended humanitarian pauses and corridors" in Gaza went largely unactioned by Israel and/or Hamas. It seems that the current resolution creating "conditions for a sustainable cessation of hostilities" has not fared any better.

Hugo Grotius, the founding father of the laws of armed conflict, said that when a ceasefire is signed, the legal state of war is "not dead but sleeping." In doing so, he was no doubt cognisant of the fact that the legal nature and legal effects of ceasefire agreements remain ambiguous because they are concluded in an environment where the laws of war continue to apply.

In this paradigm, a ceasefire agreement itself or a breach of a ceasefire does not have any legal consequences because the ceasefire agreement only suspends hostilities without ending the legal state of war. This is not altogether undesirable, as the implication of legal norms would potentially stymie political creativity around what could be included in or bargained for with a ceasefire.

The Legal Obligation of Ceasefires?

Despite Grotius's assumption that ceasefires do not create legal obligations, the United States may be hesitant to commit to a "ceasefire" because the particular wording of a "ceasefire" may indeed create some type of legal obligation. This argument was tested in 2017 at the International Court of Justice (ICJ) when Ukraine attempted to hold Russia accountable for breaching the terms of the Minsk Agreements, a series of ceasefire agreements signed between Russia, Ukraine and separatist groups operating in the Donetsk and Luhansk region of Ukraine supported by Russia.

In their arguments, both Russia and Ukraine addressed disagreements about the legal status of ceasefire agreements. In doing so, they underscored the reality that ceasefires sit at a juncture in armed conflict where the division between the fields of politics and law is increasingly blurred. While the ICJ did not firmly decide on this matter, the submissions point to the fact that both Ukraine and Russia were cautious about ceasefire agreements potentially creating forms of legal responsibility for signatories.

Stopping Violence

Diplomacy has different rhythms. In the current crisis, one of these is calls for a ceasefire of some sort at the Security Council, while another is calls for a ceasefire on the streets. However, concentrating so squarely on getting to a big-C ceasefire obscures other, potentially equally important, rhythms and opportunities.

If the idea of a ceasefire (whatever it is called) is primarily to stop the violence of war for a period of time in order to alleviate civilian suffering, then the five-plus-two-day "ceasefire" plus hostage deal negotiated by Qatar and implemented on November 24 was, to date, the best "ceasefire" there has been in the current Gaza war. The agreement purportedly contained over six pages of detailed terms and was arguably successfully implemented because of the specificity of these terms. For example, the deal included precise details around how prisoner swaps would occur and how these would be facilitated, the timing of air sorties over certain parts of Gaza, and how aid would be distributed into the Strip and by whom. This enabled an arrangement where all parties to the conflict got something they wanted: a pause in violence in exchange for hostages and prisoners being freed, and an increase in humanitarian aid. Further, the specific wording of the terms of the ceasefire did not allow for Hamas or Israel to stray from what had been agreed.

Domestic pressure on the Israeli government is growing for another such deal, particularly after Israel Defense Forces killed three hostages. On December 21, Hamas reportedly rejected Israel's most recent offer for a seven-day truce in return for the release of the remaining women and children and elderly men, demanding instead that Israel end its offensive before any further negotiations. However, arguably, this was a starting point for further negotiations as in early January 2024, Israeli officials were back in Egypt negotiating again for a truce. The United States is well-placed to leverage its relationship with Israel and facilitate Qatar and Egypt to pressure Hamas into such a deal. Even U.S. President Joe Biden recognises the opportunity of this kind of ceasefire, saying, "there's no expectation at this point" but "we're pushing it."

Arguably, Israel foresaw such a scenario shortly after the October 7 attacks, because in the subsequent ten weeks, it arrested thousands of Palestinians in the occupied West Bank on minor charges, presumably in the knowledge that it would need to swap large numbers of

prisoners for Israeli hostages. In 2011, 1,000 Palestinian prisoners were released in exchange for one Israeli soldier, Gilad Shalit. Hamas continues to hold 129 hostages, the majority men and many reservists in the Israeli military.

Thinking Broadly and Creatively

The idea at the heart of international law is that it imposes obligations on States, non-State parties, and individuals which cannot be bargained away. However, in reality, power such as that wielded by the United States on the Security Council or Israel on the ground, enables parties to obfuscate these obligations, or at least, pick and choose when and where they decide to fulfil them.

In the 1930s, Marcel Junod, a delegate of the International Committee of the Red Cross, noted that in the Spanish Civil War and during the Italian invasion of Abyssinia, it was never enough to just rely on the persuasive power of international law. Other factors need to be drawn upon from which to make a convincing legal argument. But, at the same time, Louis Henkin has contended that, "[i]t is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

Indeed, the international community is ordered around certain social, political, and legal norms, and this structure has the ability to mould and shape the actions of actors even in the absence of vertical enforcement mechanisms. Law comes into effect via rules, practices, and institutions that socially construct the law through the perception of the actors to which it applies. The perception of legality makes it harder for actors to denounce unilaterally. Ceasefire agreements with specific terms are a way to create such quasi-legal obligations. If signatories do not stick to the terms, there will be consequences, even if these are largely symbolic.

There is an old Arab proverb: "[k]now each other as if you were brothers; negotiate deals as if you were strangers to each other." Fixating so firmly on a big-C ceasefire at the UN Security Council does not help us think through or appreciate all the ceasefire options potentially available with fresh eyes, "as if they were strangers." Advocates for a ceasefire in Gaza, of which I am one, need to think more broadly and creatively about how this may come about to be the most effective in easing civilian suffering.

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