

# Israel – Hamas 2024 Symposium – Press Access during Armed Conflict

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The conflict between Hamas and Israel remains a focus of global media coverage. The unprecedented nature of Hamas's attack on October 7, 2023, the troubled, long-standing history of the independence of Palestine, and questions regarding the tactical and operational decisions of both the Israel Defense Forces (IDF) and Hamas have predictably flooded international media outlets.

However, since October 7, some foreign press members have been barred from access to the conflict area. Primarily, only press already inside the Gaza enclave are given access, but under the watchful escort of the IDF, which controls where journalists go, whom they speak to, and what is ultimately published. Some foreign press members have criticized these stringent conditions, arguing they prevent a balanced picture of the conflict from reaching international audiences.

On January 9, 2024, Israel's Supreme Court denied an appeal by the Foreign Press Association (FPA) seeking journalistic access to the war-torn Gaza Strip. The court justified its denial on security and operational grounds, stating that the independent entry of

journalists would endanger Israeli soldiers engaged in the conflict. The FPA claims the argument of troop safety does not withstand scrutiny given Palestinian journalists continue to operate in Gaza, and the foreign press would still find value in access to areas of Gaza where no troops are present. The FPA appeal also relied on a 2008 ruling by the Israeli Supreme Court that compelled Israel to allow press access in previous conflicts.

While the extent of press access in war is not a new source of tension, the issues presented in this conflict provide an opportunity to contemplate whether international law provides any legal protection of press access to a conflict and, if so, to what extent a State must legally justify its restriction on that access.

### **Press Access and the Realities of War**

Freedom of the press is often cited as the cornerstone of a free world, keeping a crucial balance of power and ensuring accountability. Sometimes referred to as the fourth branch of government in the United States, the press is vital in providing an additional check on the actions of those in power, particularly during armed conflict. 165 States recognize freedom of the press in some form, and global views of press freedom reflect overwhelming support, with strong majorities across Europe, North America, and Latin America expressing its importance.

However, the realities of war often directly conflict with unfettered press access. There are prudent and appropriate national security-based limits on freedom of the press. During armed conflict, protecting troop locations, operational plans, and unit capabilities are justifiable reasons to restrict access or, at a minimum, to review content prior to publication. In 2003, the United States expelled a war correspondent from Iraq for live-broadcasting details about U.S. troop movement while embedded with the 101st Airborne Division. Moreover, in March 2023, Ukraine instituted restrictions on media access based on “zones” defined by the assessed level of danger.

Journalist safety is also a consideration in a State’s decision to limit access. The Gaza conflict appears to be exceptionally dangerous for members of the media. The intense fighting in Gaza has resulted in record-high journalist deaths and arrests. In four months of fighting, at least 98 journalists have perished, with sixteen reported injured, four missing, and 25 in custody. In a broader context, that number compares to 65 journalists killed (globally) in the year 2023 and 88 the previous year.

Finally, social media and the 24/7 news cycle may impact States’ calculations concerning media access to conflict zones. Whereas previously stories were written, printed, and distributed, today, a Tweet or status update can be uploaded in less than thirty seconds without responsible fact-checking or vetting. The speed at which information travels may force States to further limit media access to war zones.

### **Press Access in International Humanitarian Law**

While the protection of journalists in the Gaza conflict, or any armed conflict, is directly addressed in international law, journalistic access to a conflict is less clearly contemplated. The Geneva Conventions and their Additional Protocols contain two explicit references to media personnel. Article 4A(4) of the Third Geneva Convention lists war correspondents as prisoners of war. Similarly, Article 79 of Additional Protocol I (AP I) (which is not applicable in this conflict) recognizes that journalists are “engaged in dangerous professional missions in armed conflict” and shall be considered protected civilians. The International Committee of the Red Cross Commentary to AP I acknowledges that, during armed conflict, journalists may need special protection given the dangerous nature of their profession. It acknowledges, however, that the rights to seek and obtain information are not at issue in the provision.

While the United States has not ratified AP I, the same protective rule appears in the U.S. Department of Defense (DoD) Law of War Manual (§ 4.24). The DoD Law of War Manual recognizes the dangerous nature of journalistic work. It stresses that journalists should distinguish their activities from those of military forces to avoid enemy attack (§§ 4.24.2, 4.24.2.1). It also observes that the DoD operates “under the policy that open and independent reporting is the principal means of coverage of U.S. military operations” (§ 4.24.2.2). However, it cautions that there is no “special right” for journalists to access a combat zone without the consent of the State and that the law of war does not prohibit States from taking “security measures” to protect sensitive military operations (§ 4.24.2.2).

### **Press Access in International Human Rights Law**

Unlike IHL, international human rights law (IHRL) directly addresses the right to access and publish information. The International Covenant on Civil and Political Rights (ICCPR), to which both the United States and Israel are parties, codifies the right to “freedom of expression” in Article 19(2) which states, “Freedom of expression” is the right to “seek, receive, and impart information and ideas of all kinds, regardless of frontiers . . . .”

As described under Article 19, “freedom of expression” guarantees that same freedom to the press and to individuals. Press access to war zones involves receiving information, allowing the press to then impart that information to the public. Therefore, the press’s right to *impart* fulfills the public’s right to *receive* information on global events. The UN Human Rights Committee (UNHRC) General Comment No. 34 further solidifies the circular importance of “a free, uncensored, and unhindered press” (para. 13). The Committee embraces the media’s right to receive information to “carry out its function” to impart said information and the public’s right to receive media output (para. 13). The press’s vital role in upholding Article 19 reflects how such restrictions impact not only the rights of the press but also the rights of its audience.

While freedom of expression is fundamental and considered as customary international law, it is not an “absolute right.” Rather, States may restrict freedom of expression when doing so is: (1) provided by law; (2) in support of a legitimate aim; (3) necessary to accomplish the

legitimate aim; and (4) proportionate. The Human Rights Committee has emphasized that any limitation on freedom of expression requires a substantial burden of justification by government agencies. Indeed, Article 19(3) itself acknowledges that such restrictions are only possible if they are provided by law and they are necessary for the respect of others' rights or for the protection of national security or public order.

Similarly, in the context of cyber operations, the *Tallinn Manual 2.0* International Group of Experts concurred that any limitation on international human rights must have a legitimate purpose, be non-discriminatory, and be legally authorized. A majority of them further agreed that State interference with human rights to achieve a legitimate objective must be assessed against the severity of the infringement on that right and must be the least intrusive means available to achieve said objective. Finally, in General Comment 34, the UNHRC opined that any restriction on freedom of expression constitutes a "serious curtailment of human rights," suggesting a departure from the right must be grounded in solid justification.

The Israeli Supreme Court's justification for restricting press access cites concerns surrounding soldier safety and operational security. These are legitimate aims in every conflict. However, more information is needed to determine whether such restrictions are necessary and proportionate. Preserving troop locations and soldier lives is a less compelling justification if hostilities have temporarily ceased and troops are not present. Perhaps, like in Ukraine, "zones" of Gaza could be identified based on national security and safety concerns, with limitations appropriate for each zone.

The ICCPR also allows States to derogate from certain rights. Conditions under which a State may derogate from non-fundamental human rights are prescribed in each treaty but are generally narrowly defined (see *Tallinn Manual 2.0*, rule 38). Under the ICCPR, derogation is permissible in cases of public emergency threatening the nation (to include armed conflict). The ICCPR further explains that any State availing itself of the right to derogate must immediately inform other parties to the Covenant of the reasoning for such a derogation (ICCPR, art. 4(3)). While Israel has the option to derogate via a formal statement or justification for temporary excusal from compliance with Article 19, it has yet to do so.

While the relationship and interaction of IHL and IHRL in armed conflict is debated, there appears to be an understanding that when IHL is silent, IHRL may serve as a gap-filler. Here, freedom of expression via treaty could be viewed to fill an IHL gap. If so, the justification requirements for limiting or derogating from freedom of expression could be similarly imposed on States looking to limit press access to a war zone.

Finally, the territorial application of IHRL impedes acceptance of its relevance in conflict. While the UN Human Rights Committee argues that the ICCPR applies extraterritorially, both the United States and Israel disagree, maintaining that the instrument does not apply

beyond a State's national territory. In a 2004 [advisory opinion](#), the International Court of Justice reiterated Israel's argument that IHRL is "intended for the protection of citizens from their own Governments in times of peace."

## Concluding Thoughts

Regardless of differing opinions of how or whether IHRL applies in a particular conflict, States should consider applying the IHRL legal framework when placing wartime limitations on press access and freedom of expression. By articulating a legitimate purpose for restrictions on the press and ensuring those restrictions are proportionate, States may avoid any perception of ill-intent. Failure to do so risks raising doubt about the fidelity of such limitations. Based on open-source information presently available and the acutely deadly nature of this conflict, Israel's partial ban on allowing the press into Gaza appears to be reasonably justified under IHRL. However, additional transparency, to the extent national security allows, may assist in the foreign press's acceptance of such conditions, as well as any perceptions of malintent.

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