Deconstructing the Wall: The Analysis and Implications of the 2004 International Court of Justice Advisory Opinion on the Use of Border Walls

Noah T. Black
George Mason University

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Introduction to the Israeli Barrier

In 2002, the Israeli government began construction on a barrier in and around the Occupied Palestinian Territory of the West Bank and Jerusalem. The West Bank is located to the west of the River Jordan and the Dead Sea. The western ‘border’ of the West Bank is typically referred to as part of the Green Line, a de facto border that the Arab Nations and Israel negotiated in the 1949 Armistice Agreements. Officially known as “Armistice Demarcation Lines,” the track known as the Green Line “[delineated] the lines beyond which the armed forces of [Israel and Jordan] shall not move”, as outlined in Article IV, paragraph 2 of the agreements (Jordanian-Israeli General Armistice Agreement). In 1967, Israel captured the West Bank territory, as well as other Palestinian territories, and it became the Occupied Palestinian Territory of the West Bank (Metz 29). This territory was seized from the jurisdiction of Jordan and is not recognized as part of the country of Israel, therefore, the Green Line is still referenced in modern discussion of Palestine and Israel. This Green Line is regarded as the spot where Israel stops and the territory of Palestine begins. Although this line is the de facto border, Israeli armed forces are allowed to operate beyond it due to the status of the West Bank as an Occupied Territory.
Israel proposed the barrier as a way for the government to limit Palestinians from moving into and out of the West Bank. Israel’s government claimed that the barrier is intended to limit Palestinian terrorist attacks by regulating movement with the 39 gates in the barrier that Palestinians are permitted to use (B’Tselem, “The Separation Barrier – Statistics”). Since 2002, there have been several petitions against the route of the barrier, with the Israeli High Court of Justice (IHCJ) declaring its illegality in specific portions of the route each time someone brought suit against the wall. After the most recent amendment to the route of the barrier in 2007, 85 percent of the modified path lies to the east of the Green Line (B’Tselem, “The Separation Barrier”). As of 2012, approximately 60 percent of the barrier’s construction in and around the West Bank, including through the city of Jerusalem, has been completed, with a tenth of the route currently under construction. The remaining 30 percent is part of the proposed route of construction. As of 2011, roughly 670,000 dunams – about 170,000 acres – of the West Bank territory is west of the barrier (B’Tselem, “The Separation Barrier – Statistics”).

There are two main reasons why the construction of the barrier is controversial. The first is that there is concern over the effects of the barrier on the rights of the Palestinian populace, such as the right to self-determination or the right to freedom of movement. The second is that the current route of the barrier extends beyond the Green Line.

As a result of these concerns being expressed by the international community, the United Nations General Assembly requested an Advisory Opinion on the legal consequences of the wall in Palestine. The International Court of Justice (ICJ), the judicial organ of the United Nations, published an Advisory Opinion in 2004. The Opinion contained several conclusions: 1) by fourteen votes to one, the construction of the wall in the West Bank and Jerusalem is illegal according to international law, 2) by fourteen votes to one, Israel is obligated to stop construction
and deconstruct the barrier, 3) by fourteen votes to one, Israel is obligated to make reparations, 4) by thirteen votes to two, all other states are obligated not to recognize the legitimacy of the barrier and not to supply aid to continue the construction of the barrier, and 5) by fourteen votes to one, the United Nations General Assembly and Security Council ought to debate how to best end the situation that is contrary to international law (201-202).

Goals, Methodology, and Significance

The goal of this essay is to find out what implications the 2004 ICJ Advisory Opinion’s conditions for the illegality of the Israeli barrier has on the use of walls/barrier in and around territories under foreign occupation, including partially recognized states that the occupying power considers part of its territory. Since the Advisory Opinion discusses, both implicitly and explicitly, the conditionality that makes the barrier illegal, these conditions – if legitimate – can be applied to other spaces where there are barriers in order to ascertain the legality of these other circumstances. In general, Israel and its advocates reject both the jurisdiction and the legitimacy of the Advisory Opinion of the ICJ in the matter of the wall. The general consensus in the international community is that this ruling is legitimate, evident by the UN General Assembly’s resolution in 2004 to comply with the ICJ’s Advisory Opinion. 150 countries voted in favor, with the only states to vote against the resolution being Australia, the Federated States of Micronesia, Israel, the Marshall Islands, Palau, and the United States (United Nations, “UN Assembly votes overwhelmingly to demand Israel comply with the ICJ ruling”). Because the United States is a permanent member on the Security Council of the UN, this resolution did not come to fruition, as actions of the UN General Assembly must be approved by all five permanent members of the Security Council.
In the course of this paper, I will briefly analyze the jurisprudence – or legal philosophy – of the International Court of Justice, as well as the critiques of the Advisory Opinion. I will also summarize Israel’s defense arguments and determine whether or not they have been rightfully dismissed by the ICJ. Additionally, I will study the various human rights law treaties that these texts reference in their judgment of the barrier in order to sufficiently understand the context in which these judgments were made. Then, I will apply the Advisory Opinion to another so-called border wall, specifically the construction of a barrier made of sand by the Moroccan government against the partially recognized state of the Sahrawi Arab Democratic Republic, or Western Sahara.

Answering these questions will help to provide insight into two main areas in modern international relations. The first is that it may be possible to accurately predict the legality of the border constructions in Western Sahara, as well as being able to develop a sort of legality checklist that can be applied to any barrier construction. This will allow the territories that feel a barrier violates their rights to determine if their case can be brought to the ICJ with a chance of a result in their favor. Secondly, by determining if the two barriers are illegal or not, it is possible to look at the efficacy of the ICJ and UN as a whole. If the barriers are legal, then no changes need to be made and the ICJ must be analyzed as to why it ruled that the Israeli barrier is illegal. If the barriers are illegal and no changes have come from the ICJ or UN’s actions, then this calls their effectiveness and international political clout into question. In either case, this research provides an opportunity for reflection into the international governmental bodies that represent a large number of state governments.
Analysis of the Israeli Argument

The main proposition for Israel is contained in three primary arguments that will be referred to here as the ‘self-defense argument,’ the ‘necessity argument,’ and the ‘proportionality argument,’ but each one of these propositions has its critique. The self-defense argument asserts that the right to self-defense overrides any and all human rights violations that may arise because of the barrier’s construction. Secondly, the necessity argument puts forth the idea that the barrier was only constructed out of need. Thirdly, the proportionality argument claims that the human rights violations that result from the barrier and the possible human rights violations of terrorism are equal, and therefore the barrier is justified in its construction. In the following sections, I will analyze and review the three pro-barrier arguments and determine their legitimacy.

Analyzing the Claim to Self-Defense

The first argument in favor of the barrier is grounded in Article 51 of the Charter of the United Nations, which reads: “Nothing in the present Charter shall impair the inherent right of the individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security” (10-11). Israel uses the beginning of this clause to emphasize their argument that even if the wall violates international law, it acts as self-defense and is therefore valid, as “nothing... shall impair” the right to self-defense.

To support this idea, Arye Schreiber argues that subsequent to the terrorist attacks of September 11, 2001, the world “widely and rightly understood” that the right of self-defense applied “whether or not the attack came from a state” (160). However, his main arguments are based in actions that were “in the wake of 9/11” (Schreiber 160). Ignoring the prominent
academic and global assertion that after 9/11, governments “have adopted a plethora of invasive
counterterrorism measures that expand the powers of security agencies and inflict severe legal,
political, and economic costs” (Hegemann and Kahl 199). Schreiber fails to outline who “widely
and rightly” understood 9/11 to constitute a broad interpretation of Article 51’s application, or to
justify such an interpretation. In their Opinion, the ICJ argued that the right to self-defense
applies “in the case of armed attacks by one State against another State” (194). This would mean
that actions taken against terrorist organizations or non-state actors would be limited by other
parts of the UN Charter and human rights law treaties. While this argument may seem to be too
strict of an interpretation of Article 51, it could have arisen from a concern about the actions
taken in the Middle East by Western countries in the years following the attacks on September
11th that were justified using the argument of self-defense or national security. This idea of using
national security as a legitimizing argument for human rights abuses is explained by Rebecca
Sanders:

In crises, law is ignored or suspended in the name of emergency. Sovereign power
asserts itself as the real source of order, eroding the neutral, independent rule of
law and harkening the growth of dictatorship. Other scholars have noted
similarities between current practice and past human rights violations conducted
in the name of national security. During the Cold War, policy makers favoured
the doctrine of ‘plausible deniability’. Rather than openly derogate from
constraining rules, human rights abuses at home or abroad, unsavoury alliances,
and illegal activities were pursued covertly with the intent of evading discovery,
responsibility and justification. (Sanders 605 – 606)
This analysis of plausible deniability outlines how governments use fear and crises, which are most often terrorist attacks in the modern era, as opportunities to introduce new policies that inflict the kinds of costs that Hegemann and Kahl mention.

According to the ICJ, since Palestine is not recognized by Israel or the Security Council of the United Nations as a state, the self-defense argument does not apply in the case of the barrier. In order for the self-defense argument to be seen as valid by the Court, Israel would have to either recognize Palestine as a state, therefore giving it all the sovereignty that comes with such status, or destroy the current barrier and reconstruct it in such a way that the rights of the Palestinians are not violated.

Additionally, I would argue that the claim that self-defense overrides any human rights violations cannot be made as a result of the initial rhetoric. When the UN Charter reads that “nothing in the present Charter” will prevent the right to self-defense, they have caught states in a technicality. By asserting that the current charter guarantees the self-defense override, they allow other documents, such as international human rights law treaties and conventions, to technically be above the right to a state’s right to self-defense. Therefore, the assertion by the ICJ that the right to self-defense does not apply in the case of armed attack by a non-state actor is supplementary to the language in the Charter that outlines the states’ right to self-defense in the first place.

_Examining the Assertion of Necessity_

The second argument is one that argues that the only way to defend Israel from terrorism was through the barrier’s construction. If proven valid, this argument would disqualify the
barrier’s violations of international law. Yet for this case to be acceptable, the Israeli government would have had no other option to prevent terrorist attacks than to build this barrier. No other policies or tactics, whether they be more or less feasible, would have to exist. The ICJ mentioned that according to global treaties, the state claiming necessity is not the sole judge of this conditionality (195). Next, the Court stated that they are “not convinced that the construction of the wall along the route chosen” is the only way to protect Israel from terrorist attacks (195). This is important to note, because all of the reasons why the barrier violates international law are founded on the fact that it extends beyond the Green Line, effectively acquiring territory for Israel and creating enclaves, therefore significantly impeding on the Palestinians’ right to freedom of movement and right to self-determination. Self-determination is outlined in Article 3 and 4 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as the ability of a people to “freely determine their political status and freely pursue their economic, social and cultural development,” as well as the right to “autonomy or self-government in matters relation to their internal and local affairs” (4-5). By passing through the Palestinian territory and restricting movement within the territory, the barrier restricts these abilities, as well as diminishing or eliminating any notion of Palestinian autonomy.

The Israeli High Court of Justice (ICHJ) has taken a similar approach, issuing very specific rulings that focus on the route of the wall, which has been revised again and again (B’Tselem, “The Separation Barrier”). The IHCJ’s main concern seems to be that the route of the wall has created enclaves and limited the Palestinians’ access to things like hospitals and schools. This would be comparable to the ICJ’s jurisprudence, though the ICJ was concerned with the wall as a whole, rather than focusing on particular sections of the wall. This focus on the route of the barrier makes up almost the entire controversy. It seems that if the barrier had been
constructed either along the Green Line or solely on Israeli territory, then a much lower number of human rights violations would have occurred and the conversation would solely be about Palestinians traveling back and forth between the West Bank and territory held by Israel.

Evaluating the Notion of Proportionality

The third argument is that when weighed against each other, the human rights abuses perpetrated by the Israeli barrier and the threat of terrorism are proportional. In order for this argument to hold true, then there must be minimal violations of human rights. This would be true either because human rights law treaties do not apply to Palestine or for the barrier to not violate a significant number of rights. To advocate for this methodology, Israel has asserted that the International Covenant of Political and Civil Rights (ICPCR) does not apply to Palestine in the case of the wall because “humanitarian law is the protection granted in a conflict situation,” while human rights are “intended for the protection of citizens from their own Government in times of peace” (qtd. in International Court of Justice, 177). This is to say that because Palestine is under foreign occupation and because there are numerous clashes between Israelis and Palestinians – be it settlers, civilians, or militants – Palestine is in a “conflict situation.” Under the Israeli assertion human rights law treaties such as the ICPCR would not apply, while under peaceful circumstances, human rights law would apply.

This justification could work, considering that the stated reason for the construction of the wall is to defend Israel from Palestinian terrorism. However, there is one strange aspect of this argument’s rhetoric. It makes very little sense for the words “from their own Government” to be in this line of reasoning. Palestine is under foreign occupation by the Israeli government, and according to international law, Israel is at the very least partially responsible for the protection of
human rights in the Occupied Territories of Palestine as outlined in Article 73 of the UN Charter (14). Nevertheless, the Court rejected this argument, saying that the human rights outlined in the Covenant referenced do “not cease in times of war” (177). Therefore, the rights outlined in the ICPCR do apply in the case of the barrier. Moreover, the Court asserts that the Convention on the Rights of the Child and the International Covenant on Economic, Social and Cultural Rights apply to Palestine in all situations, not just in the debate over the barrier (192). Consequently, not only do the rights outlined in the ICPCR apply to Palestine, but they must also apply to all territories, regardless of the presence or absence of conflict.

By arguing that human rights law cannot apply to Palestine, given Israel’s rejection of the ICPCR in regards to the current issue, Israel is basing their argument in this case on the concept that is known as ‘legal-space theory.’ Legal-space theory asserts that actions of one state inside the borders of another “would not be governed by the Convention obligations of the first State, if the second State is not also a party to the Convention” (Wilde, 670). To simplify this analysis, legal-space theory allows one state to violate human rights law treaties in another state as long as the latter has not signed the treaty. This is yet another inherent problem, as some agreements are only signed by very specific states, usually the states that are considered the ‘global North.’ This means that the powerful nations of the world would be able to abuse the human rights agreed upon in these conventions, as long as these human rights abuses took place in countries that are not also signatories – which are usually the countries with less clout and influence. Furthermore, the phrasing of this model limits human rights law treaties and conventions to territories that are internationally or overwhelmingly recognized as states. By enforcing these conventions exclusively on those countries that were parties of these treaties, a “two-tier system of human rights treaties” is created, meaning that citizens of some countries are afforded the protection of
human rights law treaties while others are not (Wilde 671). If the ICJ had ruled that human rights law treaties did not apply to Palestine, whether it be the lack of statehood, then human rights violations could legally take place in myriad regions across the globe. Regions like the Sahrawi Arab Democratic Republic (declared independence from Morocco), Kosovo (declared independence from Serbia), Abkhazia (declared independence from Georgia), the Turkish Republic of Northern Cyprus (declared independence from Cyprus), South Ossetia (declared independence from Georgia), the Nagorno-Karabakh Republic (declared independence from Azerbaijan), the Transnistria (declared independence from Moldova), and Somaliland (declared independence from Somalia) would not be protected from human rights violations by the countries that they declared their independence from. Secondly, if the ICJ had limited the reach of human rights law treaties by saying that they did not apply in times of war, then violations could occur in any country that is involved in an armed conflict at the time of the violation.

Schreiber counters the ICJ’s jurisprudence with the assertion that the Court ought to have weighed the rights and obligations that the wall contradicted against the violations of international law or abuses of human rights that the law is meant to prevent and therefore did not properly address the issue of proportionality (160). This argument makes sense in the discipline of foreign policy; it is important to do cost/benefit analyses in decision-making. However, I argue that in order to weigh these two against each other, one would have to compare the value of human lives on either side of the wall. This would violate the very concept of human rights, which are meant to show the equality of all individuals in the face of the law and of governance. Furthermore, I would argue that if these two were to be weighed against each other, Israel would not have won its right to the construction of the barrier. This is because in the 92 communities that are directly affected by the wall, Palestinian access to water, education, and medical services
is severely limited (B’Tselem, “The Separation Barrier – Statistics”). And as Steve Niva points out, the barrier has actually increased the number of suicide bombings and destroyed Palestinian infrastructure, leaving the administrative arena vulnerable to extremist groups such as Hamas (78). So the violations that the barrier was meant to prevent have actually been exacerbated, though conveniently contained only within the Occupied Palestinian Territories, while the violations that the barrier is causing are not alleviated.

**Drawing Conclusions and Developing Conditions**

To summarize, the barrier is contrary to international law for several reasons. Firstly, it significantly impedes on the Palestinian right to self-determination. This right is outlined in the United Nations Charter and was expanded to include non-self-governing territories. The wall impedes on the right to self-determination by creating a “de facto annexation” of Palestinian territory that interferes with territorial sovereignty, something that non-self-governing territories do have (181). Secondly, the barrier limits access to healthcare, education. In its very essence, the barrier prevents movement. This would not be an issue if only the movement into Israel was limited, but Palestinians’ freedom of movement is restricted when traveling from areas of the West Bank to other areas of the West Bank due to the course of the barrier and the enclaves it creates. All of these violations of international law arise from the route of the barrier. If it had stayed on or behind the Green Line, then none of these specific human rights abuses or international law violations would have occurred.

Therefore, the conditions which make the Israeli barrier contradictory to international law are: 1) the de facto annexation of territory, which is done by extending the barrier beyond the territory of Israel, the constructing state, and 2) rights that are guaranteed by international
covenant are restricted by the barrier, while 3) no other state entities threaten Israel, the constructing state.

**Employing Conditions**

If we then take these conditions and apply them to other barriers across the globe, we can determine if they contradict international law – or at the very least if a case could be made for their illegality in the International Court of Justice. In this section of the essay, I will apply the conditions outlined in the ICJ’s 2004 Advisory Opinion to the Moroccan built barrier in the disputed territory of the Western Sahara. To do this, I will briefly summarize the post-colonization history of the region. After properly outlining the situation, I will then apply the conditions outlined above. I have chosen this case study for two main reasons. The first is that unlike the Israeli barrier, the Moroccan barrier is not in the front of the public consciousness. Secondly, this is a case of a state building barriers as part of an occupation in another state’s territory, though it is a disputed territory. The analysis and application will be based on whether or not this barrier fits the conditions outlined above.

**The Moroccan Berm**

In order to properly apply the conditions outlined above, we must first understand the history of the Moroccan barrier in Western Sahara. Western Sahara is a disputed territory that lies directly to the south of the country of Morocco and was released from Spanish rule in 1975. Previously, during the process of decolonization, the 1974 International Court of Justice ruling asserted that the indigenous Sahrawi tribes in the region known as Western Sahara did have the right to self-determination (de Orellana 482). This means that the region had the right to establish
its own political entity after Spain left. However, Morocco and Mauritania, the state that is just south of Western Sahara, moved in to claim the region. In defense, the Sahrawis founded the Frente Popular de Liberación de Saguía el Hamra y Río de Oro, or POLISARIO, as the military and political organization of Western Sahara. Mauritania was pushed out by POLISARIO forces and recognized the establishment of the Sahrawi Arab Democratic Republic (SADR), which was founded in 1976 (Farah 77).

Though Mauritania recognized the SADR and pulled its troops out of Western Sahara, Morocco continued to claim sovereignty over the region – despite there being no other country that recognized this claim (Farah 77). In 1980, the Moroccan government began construction on a barrier in the northwestern corner of Western Sahara, known as the “useful triangle” and encircled roughly 15% of the territory (Damis 165). This was the first barrier that Morocco constructed in Western Sahara. Morocco built up more barriers to the south and east, each one farther into Western Sahara than the one that preceded it. By 1987, six barriers had been built (“The end”; Damis 165). Roughly seven feet tall, the longest portion of the completed barrier runs over 1,000 miles from the northeastern corner of the region to the southwestern coast in a diagonal, snaking line. It is composed of compacted sand, barbed wire, and an unknown amount of landmines (Damis 165). The Sahrawis have named this barrier “the wall of shame” and call the territory that Morocco encircled the “occupied territories” (“Minister of Communication”; Copete 12). Morocco, on the other hand, dubbed the wall “the Defensive Wall” (“Minister of Communication”). For the purpose of this essay, we will refer to this barrier as ‘the Moroccan Berm,’ with a berm being a wall constructed out of compacted sand.

The construction of walls that moved farther south each time constitutes the “territorial acquisition resulting from the threat or use of force” that is contrary to international law
(International Court of Justice 137). The argument for self-defense or necessity would likely be used by the Moroccan government. However, the acquisition of territory by force is neither necessary nor justifiable in terms of self-defense. Many states have launched military campaigns in foreign soil without establishing a continuous block of territory that is considered to be a part of that state’s territory. The argument of necessity would also be brushed aside fairly easily, considering that in order to protect their civilians from Sahrawi forces, Morocco could have simply built a berm on their internationally recognized border and then launched a military campaign in the south to prevent attacks on their territory.

Moreover, the Sahrawi POLISARIO forces and the SADR are not recognized by the Moroccan government, meaning that the ICJ would disregard the argument of self-defense because of their interpretation of Article 51 of the UN Charter. Furthermore, as I previously mentioned, Article 51 could be interpreted in such a way that does not allow for the argument of self-defense to override the inherent right to self-determination that the Sahrawis have, as asserted by the UN General Assembly (Rice-Oxley et al.). In regards to the argument that has – rarely and wrongly – been used to defend the Israeli barrier that Israel is the administrative entity over the West Bank and therefore has the power to construct the wall in the territory, Morocco is not recognized as the sovereign nor the administrative power of Western Sahara (Copete 12).

However, because the berm does not create enclaves within territory that Morocco does not occupy, the barrier does not obviously restrict access to other guaranteed rights. Though, it could be interpreted as preventing Sahrawi access to rights because the majority of highly populated cities and resources in the region are behind the Moroccan Berm (Damis 165; Brown 19). This could be interpreted as restricting other rights because cities have more healthcare-
related and educational infrastructure than the sparsely populated region under POLISARIO control.

**Conclusion**

By analyzing the rhetoric of both the ICJ’s Advisory Opinion and some of its main critiques, it is possible to develop a sort of illegality checklist. The conditions for illegality that are outlined by the ICJ and have stood up as legitimate are that the barrier creates a forceful acquisition of territory by a foreign entity, the barrier violates the populations’ inalienable right to self-determination, or the barrier violates human rights like access to healthcare, education or freedom of movement within one’s own territory. It is then logical to take these conditions that applied to the barrier in and around the West Bank and apply them to other barriers across the globe. Looking at the Moroccan berm, these conditions are met. The Moroccan berm especially constitutes a forceful acquisition of territory, considering the construction of walls that move farther and farther into territory that was considered the Sahrawis’, though it may not restrict the Sahrawis’ access to other rights in the portion of Western Sahara that is not occupied by Morocco.

As for the efficacy of the ICJ, it is logical to question its ability to bring about any real legal change in the situations on which it delivers rulings or advisory opinions. In both cases outlined above, the ICJ issued legal documents outlining the illegality of the situation and the situation did not change. In the case of Israel, no change occurred because of the veto power of the UN Security Council. In this area, I would suggest research into the reasons behind both the noncompulsory status of many of the ICJ’s actions and the veto power of the Security Council.
Due to the high number of walls built and proposed, I highly recommend further research into the conditions of these barriers. Namely, investigation into the American built walls in Iraqi cities during the height of wall construction in order to ascertain the legality of the so-called “surge” program (Niva 56). Additionally, I would recommend investigation into the application of these conditions to other barriers that are along borers, namely those between Iraq and Saudi Arabia, Saudi Arabia and Yemen, India and Bangladesh, and the United States and Mexico.
Works Cited


