Former ICC Prosecutor: High Court Approval Could Save Settlements From War Crime Label

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Where the Israeli High Court of Justice has approved specific settlements as legal, this could provide a complete defense to any allegations that they are war crimes, former International Criminal Court chief prosecutor Luis Moreno-Ocampo told the Jerusalem Post on Thursday.

Moreno-Ocampo is in Jerusalem lecturing at the The Fried-Gal Transitional Justice Initiative at the Hebrew University Law School.

Although Moreno-Ocampo has stepped down from his post, he was the boss of the current ICC chief prosecutor who will decide whether or not the settlements qualify as a war crime, is considered highly influential internationally and his statement could be a major coup in the debate over the issue.

Moreno-Ocampo did not by any means say that the settlements were legal under international law.

But he did say that “Israel’s High Court is highly respected internationally” and that anyone prosecuting Israelis regarding settlement activity would be incapable of proving criminal intent if those Israelis explained that they honestly believed their actions were legal once ratified by the country’s top court.

“At least they could show no intention” to commit a crime said the former chief ICC prosecutor.

The High court has weighed in many times over the years about whether particular settlements or outposts were legal or not, occasionally ordering the state to remove outposts for being built illegally, but mostly accepting the legality of the settlements in the context of Israeli-Palestinian negotiations.

In other words, the High Court has ratified most settlements as legal pending a deal that resolves the conflict, at which time politician decisions might be taken to withdraw from certain disputed areas of the West Bank.

Not that Moreno-Ocampo was saying that Israel could sit on its laurels.

Rather, he argued that even if Israel had such a defense at the moment, it should not stand on ceremony with that defense indefinitely and should still move to resolve the conflict.

“How many years can you use this argument? How many years do you get to negotiate?” he asked rhetorically, effectively undermining the idea that Israel could defend the settlements legality indefinitely by saying that it has immunity until there is a peace agreement.

All of this brought Moreno-Ocampo to his broader theme that “Israel should not abandon “ engagement with the international community “or isolate itself.”

Instead, he said Israel should promote extensive debate about its reasons for the settlements being legal and produce “20 books on the issue” because the debate over whether building settlements can be a war crime is “a completely new discussion with no previous law” to rest on for conclusions.

Moreno-Ocampo explained that he understood that on Israel’s side “some lawyers say that [the West Bank]is not occupied territory and is disputed territory,” but that “the Palestinian side then cites the International Court of Justice case” where it ruled in 2004 that the West Bank was occupied territory, while declaring Israel’s West Bank wall illegal.

Next, the Post pressed him as to why Israel should believe it has a chance at a fair shake on the settlements issue when the UN Secretary General, the President of the ICC’s Assembly of State Parties and current ICC Prosecutor Fatou Bensouda all recognized a State of Palestine without hearing all of Israel’s arguments against recognition.

Moreno-Ocampo acknowledged that “it’s a very political debate, not a legal debate,” but disagreed with the idea that there had been no debate.

He said that even as Bensouda did not hold a public debate on the issue, that the UN General Assembly had hotly debated the issue.

Defending the decision and pushing Israel to do some soul-searching, he asked “Why Israel [could not stop] so many states from voting for Palestine? Israel should think about that, and not be isolated. You need to think why Israel is so isolated?” Acknowledging that many Middle Eastern countries would take the Palestinians side no matter what, he asked “Why did so many Latin American countries vote against Israel” on the Palestine issue? Shifting gears, he tried to reassure Israel about cooperating with the ICC, noting that even as Bensouda took direction from the UN General Assembly on the Palestinian statehood issue, “the UN General Assembly cannot force the prosecutor about how she interprets crimes.”

In other words, Bensouda is free to declare the settlements as not war crimes even if Israel would lose such a vote in the UN General Assembly.

Regarding the debate over whether the IDF committed war crimes during the 2014 Gaza war, Moreno-Ocampo referred to the situation as “unprecedented and highly complicated.”

He explained, “until now, all cases before the ICC were very simple - massive attacks against civilians in places like Sudan, genocides, burning houses with civilians inside, mass raping women.”

But the 2014 Gaza war presents a ton of new legal issues for the ICC Prosecutor to grapple with.

“What legal standards are we going to use - are we going to use international humanitarian law to define duties or are we also including human rights law, which is more demanding,” in its standards for how far armies need to go to protect civilians from the opposing side during fighting, asked Moreno-Ocampo.

Israel and similar thinking Western armies often emphasize international humanitarian law or the laws of war over human rights law when fighting wars, with the punchline being that while both allow “collateral damage” to civilians, international humanitarian law usually gives an army wider latitude on the issue.

He said the focus must be on the “facts, intention should be clear, the meaning of proportionality, and definitions of collateral damage should be reviewed by the ICC,” and encouraged “Israel to be prepared in this debate and to engage.”

Giving a surprisingly complimentary view of some of Israel’s experts, he stated “Israeli lawyers understand this issue from the inside. Gabriela Blum a Professor at Harvard [and a former lawyer in the IDF’s MAG] understands issues in a different way. She did not learn just about it [the law of war] in books, but learned in reality – the world would benefit a lot from hearing Israel’s views.”

Despite this complimentary view, Moreno-Ocampo rejected the suggestion of many Israeli and US military lawyers and their supporters that the ICC Prosecutor’s Office should have more ex-military lawyers on staff.

He said “we don’t need them [ex-JAGSs) inside, we need senior people who can understand all of the games,” adding ”sometimes people [ex-JAGs] might not understand hum rights law as much” as other experts.

Next, Moreno-Ocampo discussed a complex scenario many observers expect with investigations into alleged war crimes from the 2014 Gaza war, in which the IDF investigates and convicts a number of individual soldiers for war crimes or breaking rules of engagement, without necessarily doing so with senior commanders or questioning its own targeting policy.

How would Bensouda handle a situation where she accepted the IDF’s investigations of individual junior soldiers, but was unsatisfied with fewer investigations of senior commanders and targeting policy? Moreno-Ocampo volunteered the ICC’s Prosecutor’s conduct with Colombia as a potential example, where there was an ongoing dialogue and process for 12 years between the parties.

He said the ICC Prosecutor did not jump into intervening on her own as soon as she was unsatisfied.

Rather, the office asked the “government of Colombia what is happening with the generals” when it saw “colonels getting convicted, but not generals” despite suspicions that generals had approved operations where hundreds of civilians were killed.

Told that Israel’s State Comptroller is preparing a report on targeting policy, but that those reports can sometimes take years, Moreno-Ocampo suggested that Bensouda would likely be patient as long as she believed the process was moving forward in good faith.

Another hot potato which Bensouda will need to tackle will be the dispute about how much Western-style militaries can use artillery in urban settings with dense civilian populations, like in Gaza.

Moreno-Ocampo stated, “the Issue is not so much legal, the law is disputed and there are different arguments, but the consequences are really bad for the party shooting - you create reactions against you.”

He said, “I have a video of a 2007 attack in Baghdad by a US helicopter, where by mistake the US military thought two journalists were legitimate targets” shooting them along with another seven innocent civilians.

Dismayed, he said “they followed the rules, when one journalist was wounded on the ground, they did not shoot him because he did not reach for a weapon, but a neighbor came to rescue him and they took him as a combatant, asked permission to engage and shot him.”

The result he said was the US turning the child of the killed civilian, a paradigm for who it wanted to liberate from Saddam into an eternal enemy who said he would “only be comforted if I find an American and kill him and drink his blood.”

Summarizing, he said “it was all legal, but it’s a disaster.”

Breaking with the UNHRC June report over how much the IDF must disclose its intelligence to defend its decisions to close cases, Moreno-Ocampo said the IDF should “not share intelligence. The ICC must disclose evidence to the defense. The defense will demand to see the entire picture.”

In other words, he said that because of the ICC Prosecutor’s obligation to disclose evidence to the defense, evidence which could then get into the wrong hands, the IDF could not be obligated to disclose intelligence to defend its decisions.

In contrast, the UNHRC report had demanded disclosure of intelligence by the IDF to defend certain instances where it claimed it mistakenly killed civilians based on mistaken intelligence.

Still, Moreno-Ocampo stated that any IDF officer, if under investigation by the ICC, should present themselves before the ICC and “defend himself, explain himself, I had this perception in this report, I can’t provide you” the intelligence a specific attack was based on, but “I can explain the reason I believed” it necessary to undertake a specific attack.

The former ICC prosecutor distanced himself from an earlier proposal he made in January for a bilateral commission between Israel and the Palestinians to address war crimes issues.

He admitted that it would be very difficult to get Hamas to investigate its own war crimes, such as the thousands of rockets it fired at Israeli civilians.

But Moreno-Ocampo also pushed back at those who complain about “lawfare,” the phenomenon of bringing Israelis before the ICC and other foreign courts which Israel supporters call an abuse of the system.

Moreno-Ocampo also recounted how a professor (who he refused to name) came to him when he still headed the ICC, asking him about how Hamas could investigate itself if Israel and Hamas ever agreed to a long-term truce.

He said, “some people talk about lawfare, but it’s better than warfare.”