Ex-ICC Prosecutor Praises, But Doesn’t Endorse, Israeli Report on Settlements’ Legality

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By [Raphael Ahren](http://www.timesofisrael.com/writers/raphael-ahren/)

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The former chief prosecutor of the International Criminal Court this week praised Israel’s Foreign Ministry for the recent publication of a report arguing that Jewish settlements in the West Bank are legal under international law.

While not endorsing the report’s content, Luis Moreno Ocampo, who was visiting Israel this week, said a thorough discussion about the settlements’ legality was sorely needed and could be beneficial to all sides involved.

Earlier this month, the Foreign Ministry, under the directive of Deputy Foreign Minister Tzipi Hotovely, [published a report](http://www.timesofisrael.com/west-bank-settlements-are-legal-foreign-ministry-asserts/) arguing that Israel has “valid property claims” to West Bank territory, as “Jewish affinity” with the region dates back thousands of years. The [document](http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israeli%20Settlements%20and%20International%20Law.aspx), authored by the ministry’s legal adviser, also seeks to refute the claim that settlements violate the Geneva Conventions and thus constitute a war crime. The effort to portray Jewish settlements in the West Bank as illegal “ignores the complexity of this issue, the history of the land, and the unique legal circumstances of this case,” the report concludes.

Many Israelis scoffed at the report, doubting its effectiveness in a world where there is near-total consensus about settlements’ illegality. But Moreno Ocampo, who in 2003 became the ICC’s first chief prosecutor and held this role until 2012 when he was succeeded by Fatou Bensouda, praised the ministry’s attempt to present Israel’s point of view.

“That’s perfect. That’s exactly what they had to do,” he told The Times of Israel Tuesday in Jerusalem. “I never read the report. But I think that this is the way to do it: you explain your opinion.”

Israel’s report will naturally prompt a legal debate, with the Palestinians and others arguing against it, Moreno Ocampo allowed, adding that precisely such a conversation about the settlements’ legality is desirable, especially in the framework of the [ICC’s current probe](http://www.timesofisrael.com/icc-prosecutor-opens-probe-into-alleged-israeli-war-crimes/) into the conflict.

“So there would be a lot of discussions, and that’s what we need. We need this debate to better understand — what’s this crime, how does it apply? How can it be committed?” the Argentinean-born legalist said. “There are many legal debates that can be done here and that’s why I think it’s a great idea that the deputy minister put out the report.”

Moreno Ocampo is referring to settlements as a “crime” because the 1998 [Rome Statute](https://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf) — the ICC’s founding document — in article 8 (2)b(viii) explicitly defines a war crime as the “transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies.”

This phrasing was inserted at the behest of Egypt and Syria, clearly with Israeli settlements in mind. Moreno Ocampo admitted that this definition was proposed by Arab states but emphasized that it was eventually accepted by the 120 states that signed the Rome Statute. “Now it’s the law. But it’s a law that was never applied,” he said. Therefore, the debate whether and how it applies to Jewish West Bank settlements should be conducted even before the issue reaches the court, he said.

‘You have great lawyers in Israel. You have to present your side of the argument’

At the Palestinians’ urging, the ICC is currently [conducting a preliminary examination](http://www.timesofisrael.com/what-the-iccs-preliminary-examination-means-for-israel/) into the “situation in Palestine.” Besides the settlements, possible crimes that might have been committed include Israel’s actions during the 2014 Gaza war. However, since Israel’s legal justice system investigates any allegation of wrongdoing by Israeli soldiers, it appears [unlikely that the court will open](http://www.timesofisrael.com/palestine-at-the-icc-a-headache-israel-might-be-able-to-live-with/) a full-fledged investigation.

“If Israel conducts genuine proceedings, then the court will not intervene,” Moreno Ocampo said.

However, no Israeli court is investigating the settlements, which means that the ICC might choose to open an investigation into that matter.

It is a matter of legal debate whether the building of housing units in East Jerusalem or Ariel fulfill the court’s gravity requirement. In laying out the ICC’s raison d’être, the Rome Statute speaks about the need to prosecute “unimaginable atrocities that deeply shock the conscience of humanity.”

Clearly the world has seen worse crimes, and the court never probed other cases of population transfer into occupied territory, such as Turkish settlements in Northern Cyprus, which could indicate that the court does not deem such activity deserving of its attention. But Palestinians argue Israel’s “illegal land grab” is an ongoing injustice that calls for the ICC’s intervention.

This difference of opinion is precisely why Moreno Ocampo calls for an in-depth debate on Israel’s settlement enterprise. Does the Israeli government’s encouragement to settle the West Bank constitute a “transfer”? Or does this term only apply when moving to occupied territory is mandatory? For Palestinians it’s obvious that the West Bank is occupied, and they have a legal basis for their claim, Moreno Ocampo said. Yet Israelis argue that the territory is not occupied but disputed. “All this should be discussed,” he said.

(Interestingly, the Foreign Ministry’s recent report, entitled “[Israeli Settlements and International Law](http://mfa.gov.il/MFA/ForeignPolicy/Peace/Guide/Pages/Israeli%20Settlements%20and%20International%20Law.aspx),” merely rejects the claim that Jewish communities in the West Bank are “colonial,” but does not dispute that Israel is an occupying power in the territory.)

Moreno Ocampo, who came to Israel this week to lecture at the Fried-Gal Transitional Justice Initiative at Hebrew University Law School, said he understands Israelis’ apprehension regarding international human rights organizations, many of which are biased, but maintained that the ICC is different. While bodies such as the United Nations Human Rights Council or the UN General Assembly are political, the Hague-based court is above politics and exclusively focuses on the enforcement of the law, he insisted.

“In Israel and Palestine, it’s not just about the law; it’s about survival. I understand that, and I respect that,” he said. “But the Jewish people have to understand: this idea of international law, of international justice in particular, was created to protect minorities, [such as] Jews. The first international criminal justice system was [Nuremberg](https://en.wikipedia.org/wiki/Nuremberg_trials), which punished the Nazis for the Holocaust.”

‘I feel the same in both communities: a fear that the ICC doesn’t understand them’

Israelis aren’t the only ones wary of the ICC, Moreno Ocampo said. Before coming to Israel earlier this week, the 63-year-old Buenos Aires native spent some time on Palestinian campuses, where he heard disappointment with the court. “They don’t feel ICC is standing up for them,” he said. “I feel the same in both communities: a fear that the ICC doesn’t understand them and is not working for them. Both sides feel the same.”

While the Palestinian Authority [eagerly](http://www.timesofisrael.com/palestinians-to-submit-data-on-settlement-expansion-to-icc-this-month/) [provides](http://www.timesofisrael.com/palestinians-file-report-at-icc-on-deadly-duma-firebombing/) the court with documents ostensibly incriminating Israel, Jerusalem is more reluctant to cooperate with The Hague. Israeli officials [have met with the prosecutor’s office](http://www.timesofisrael.com/israel-to-engage-with-icc-over-war-crimes-probe/) but mostly to argue that the ICC doesn’t have jurisdiction to probe Palestinian complaints because Palestine cannot be considered a state.

Moreno Ocampo, who during his term as prosecutor [rejected the Palestinians’ request](http://www.nytimes.com/2012/04/04/world/middleeast/international-criminal-court-rejects-palestinian-bid-for-tribunal.html?_r=0) to prosecute Israelis over alleged war crimes, encouraged Israelis to fully cooperate with the current preliminary examination. “You have great lawyers in Israel,” he said. “You have to present your side of the argument.”