

TODAY'S WORLDVIEW

Why the Israel-Gaza war represents a broader crisis for global justice



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Reporter

October 20, 2023 at 12:00 a.m. EDT

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The bloody Hamas-led attack on Israel and the subsequent bombardment of Gaza have led to rival accusations of war crimes and calls for the International Criminal Court to do something.

But what can The Hague-based court actually do? Few know the answer better than Luis Moreno Ocampo.

Close to four decades ago, the then-32-year-old Argentine lawyer was thrust into the global spotlight as the deputy prosecutor of the “Trial of the Juntas,” beating Argentina’s former military dictatorship in the courts — a landmark case that was made into an Oscar-nominated film released last year. He went on to have a long and storied career in global justice, becoming the inaugural chief prosecutor for the nascent ICC in 2003. There, he indicted both Libyan leader Moammar Gaddafi and Sudan’s Omar al-Bashir, though neither lived to face trial.

Now 71, Moreno Ocampo finished serving at the ICC 11 years ago. However, he is still active in the world of international humanitarian law and has been closely watching the war in Israel-Gaza. He spoke to Today’s WorldView this week, not long after the office of current ICC prosecutor Karim Khan confirmed that the court had jurisdiction over the conflict in Israel-Gaza.

The conversation took place the same day as the strike on al-Ahli Hospital, though he said it was too early to talk “with precision about this specific incident because we don’t know the facts.” Moreno Ocampo spoke on the phone from Brazil, where this month he took up a new academic role. “I’m in São Paulo because I spent six years at Harvard,” he said later. “American thinks of America solutions. That was the Second World War. Now the world is different.”

The following transcript has been edited for length and clarity. Links have been added where appropriate.

Today’s WorldView: First off, given what you’ve been seeing and your own time as chief prosecutor of the ICC, how likely is it that we’ll see the ICC open prosecutions in the Israel-Gaza war?

Moreno Ocampo: Well, that is absolutely at the discretion of the prosecutor. And he can also decide where to investigate, what crimes to investigate and when to present charges. What is clear is that after a long process, starting in my time, Palestine became a state party in 2015. In 2021, the court's judges confirmed to the prosecutor, that Gaza, the West Bank and East Jerusalem, are part of the territory of Palestine.

Therefore, that means that any genocide, crimes against humanity or war crimes committed in that territory could be investigated by the ICC and the investigation is open.

Q: And this means the ICC can prosecute Palestinians, too, for crimes committed outside of those territories, right?

A: Absolutely. The [Oct. 7] Hamas attack was absolutely committed from Gaza, so it's absolutely under the jurisdiction of the court. It's absolutely clear that the ICC could say, okay, we'll start with the crimes committed by Hamas. The prosecutor could choose for his first case to be the Hamas case.

Q: In terms of potential crimes that the ICC would investigate — crimes against humanity and war crimes — what have you seen so far that stands out?

A: Well, the Hamas attack is clearly a crime against humanity, meaning a widespread and systematic attack against a civilian population. Taking hostages is also a war crime. It's also possibly genocide because Hamas has the intention to destroy Israelis.

The problem is that the response from Israel ... it's complicated. Just the blockade of Gaza — just that — could be genocide under Article 2(c) of the Genocide Convention, meaning they are creating conditions to destroy a group. There's forced displacement, another problem. Here, it's more complicated. Israel has the right to defend itself, even to attack those who attack Israel from a different territory. I agree with that.

But Israel has a right to kill Hamas members. It cannot kill civilians and it cannot forcibly displace civilians from that. And that's a problem. I think, of course, Hamas is using the Palestinians as shields. Therefore, it's very difficult to discriminate between civilians and combatants. But that does not give [Israel] permit to kill combatants and civilians at the same time. You have to discriminate. Israel cannot pretend it's just destroying Hamas because in the meantime it is killing masses of civilians. That is a crime for a crime.

These are war crimes, possibly a crime against humanity. And then there's the starvation in Gaza, also possibly a genocide.

Q: How could Israel avoid these accusations?

A: Well, the most important part is to stop the crimes. That's complicated because Western politicians are not talking about stopping the crimes, they are talking about opening a humanitarian corridor. That's not the problem. This is not a natural disaster. This is because of the decision of Israeli officers. So they should put pressure on Israeli officers to not commit crimes.

And look, it's not just because it's illegal or legal. History should teach us but humanity is not learning. When Americans were attacked in the twin towers, if we didn't attack Afghanistan, they could have had prosecutions. Send the troops to arrest Bin Laden, arrest his people and then prosecute them. That is legal. But instead, President Bush decides war. Because war sounds more powerful — but it's not.

Afghanistan is a great example, because 20 years later the Taliban is back in power. Al-Qaeda has allies around the world now. Stanley McChrystal, the head of U.S. troops in Afghanistan, said that when you kill massively, you create retaliation. It's "insurgency math" — you have 10 terrorists, you kill two and you end up with 20. You multiply the fighters. And obviously, that will happen here.

Q: What role can global institutions like the United Nations or the ICC play?

A: The U.N. Security Council is divided because of Ukraine, so they will do nothing here. The case is showing how primitive our global institutional system is. We saw the same in [Nagorno-Karabakh] just two weeks ago. Azerbaijan committed genocide against Armenia and nothing happened. We really need to adjust our institution and invent new things.

Right now, the only invention is the ICC. And the only one who can investigate today is the ICC. But even if they do, it will be too late. We have to prevent the crimes. We need to oppose the cycle of violence. That is the missing part.

Q: What practical issues do you think that the ICC will face in any investigation into the conflict? Israel isn't a party to the Rome Statute that founded the court. And Gaza is controlled by Hamas, who don't seem likely to cooperate either.

A: It's not just about the court itself, it's about how states support courts. There are Hamas leaders in Doha, Qatar, for example. If the Arab countries agreed, they could push these leaders to surrender themselves to the court, to argue their cases. If you are willing to die, you should be willing to face justice.

Q: But do you think that could happen? And even if that happened, would Israel cooperate?

A: No. Look, I'm telling you what should happen. When I was a prosecutor, for three years I was involved in the Israel-Palestinian conflict. Eventually, I ruled that when Palestine becomes a state recognized by the U.N., it could come back.

During that time, I had a conversation with a high-ranking Israeli official because they were pissed off it took me three years to make their decision. He told me: Look, we believe that you are impartial. We believe in your impartiality. The problem for us is that we don't like impartiality. We like partiality. I have the life of my kids at risk. I don't like to put the life of my kids in the hands of an impartial person. I like a partial person.

That idea, that it's just me against the others, has created this impossible conflict. The Palestinians feel the same.

Q: There's a lot going on in the world now for the ICC. Outside of Israel-Gaza, there's the situation in Nagorno-Karabakh. There's the prosecution of Russian President Vladimir Putin and the war in Ukraine. There's plenty of other situations where the ICC might get involved, such as the war in Ethiopia.

A: Yes, Yes. There's Sudan, India and Pakistan ...

Q: There's so many. How can the ICC possibly do everything it should do? How will it have the bandwidth?

A: Well that's the point. We need more. We need to keep evolving and creating other systems to create solutions to conflicts. We did nothing else [after the ICC]. Because there are no global solutions, the world has become more tribal. Everywhere, tribal leaders are flourishing. They promise to protect their own people and people need protection. The lack of global solutions is moving the world toward tribal solutions.

The problem is politicians have a different mandate. So we've got a problem. And the Gaza-Israel conflict is just a very bad example of a problem.