

Minutes from the 10th Meeting of the Joint Legal Committee
November 5, 2008 [10:00 AM-12:00 PM], King David Hotel, West Jerusalem

1 **Attendees:**

2 ***Palestinian***

- 3 • Hiba Husseni, Attorney-at-Law, Head of Palestinian team (HH)
- 4 • Azem Bishara, NSU legal advisor (AB)

5 ***Israeli***

- 6 • Mike Blass, Deputy to the Legal Advisor of the Israeli Government (MB)
- 7 • Lee Arad, Israeli NSU legal advisor (LA)

8 **Summary:**

- 9 • The first half of 10th meeting of the Legal Committee focused on agreeing the
10 attached Israeli-Palestinian (I-P) document (annex II) reflecting the positions of each
11 party concerning the agenda for the Legal Committee. While there are 4 main agreed
12 issues on the agenda, there is no agreement yet on whether and where another 8
13 issues ought to be discussed. It was agreed between the teams to raise the
14 disagreement over the agenda in the next meeting of the Legal Committee with Dr.
15 Erekat and Udi Dekel.
- 16 • At the meeting the Palestinian team outlined the vision for an agreement on end of
17 claims and presented an in-exhaustive list of issues in relation to end of claims in
18 general and to compensation for occupation in particular.
- 19 • On the issue of end of claims, the Palestinian team argued that prior to concluding an
20 agreement on end of claims, all claims and issues have to be addressed and resolved.
21 These include all issues being currently raised and/or discussed at the various levels
22 and committees, including refugees, Jerusalem, borders, water, economics, state-to-
23 state issues and compensation for occupation.

- 1 • On compensation for occupation, the Palestinian team outlined the view that this is a
2 category in-and-of itself with many sub-issues; addressing and resolving them in a
3 satisfactory manner is required prior to concluding an agreement on end of claims.
- 4 • The Palestinian team outlined its views on compensation for occupation stressing the
5 general framework of international law; due reparations resulting from Israeli
6 wrongful acts during its occupation of Palestinian territory under international law;
7 compensation is due, as a matter of general principle, for two types of claims: public
8 and private claims. The former include, *inter alia*, claims pertaining to illegal
9 construction of settlements, use and depletion of natural resources, damage to the
10 environment etc..., while the latter include claims of private persons, including
11 damage to private property, torture, and other human rights violations.
- 12 • The Palestinian team also raised the need to discuss valuation standards and methods
13 and how claims should be dealt with i.e. what is the required mechanism.
- 14 • The Israeli team responded by questioning the standing of any future Palestinian state
15 to raise public claims since such claims would have occurred prior to its
16 establishment. The Palestinian team responded by reiterating the standing of the
17 PLO as the representative of the Palestinian people to raise and bring such public
18 claims.
- 19 • On substance, the Israeli side stated that they are willing to discuss private claims.
20 However, public claims should all be put aside and ought not be dealt with.
21 Otherwise they will raise and insist on addressing Israeli public claims resulting from
22 the illegal actions of PLO and all of its factions, the PA as well as Hamas against
23 Israel. These include, per the Israeli view, claims for damages resulting from attacks
24 against and inside Israel and the cost of measures that Israel had to take to thwart and

1 protect from PLO/PA actions. The Israeli team further argued that raising public
2 claims is not conducive to the efforts to reach a peace agreement and that the best
3 way to deal with these public claims is to mutually agree to put them aside.

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5 **Meeting Minutes:**

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7 MB: We said that today we go over the agenda for the committee again and that you
8 would clarify what you mean by compensation for occupation. But before we start, we
9 asked about military courts and traffic laws.

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11 HH: The answers to your questions on military courts and traffic law are ready. I was
12 under the impression that we handed you those answers in our last meeting. We will send
13 them to you by email.

14

15 MB: We also asked about the activities of the PA against Hamas and the legal
16 framework for those activities.

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18 HH: There are several presidential decrees and cabinet decisions which comprise the
19 legal framework.

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21 MB: Are these subject to PLC approval when it convenes?

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23 HH: No. Such process of approval applies only to presidential decrees that have the
24 effect of laws and replace laws during emergency times. But under the Basic Law the
25 president has the power in the sphere of security and he is the “commander in chief”. So

1 the decrees he issues in relation to the security situation are not subject to PLC review or
2 veto when the PLC reconvenes since the issuance of such decrees is within the presidential
3 constitutional powers to begin with. Other decrees that have the power of law and within
4 the powers of the PLC will be reviewed once it convenes, e.g. amendments to tax law.
5 Generally the President do not issue decrees with the power of laws.

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7 MB: The President term ends in January?

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9 AB: That is what some argue and there is a legal dispute. According to the Basic law the
10 presidential elections should be conducted every 4 years, which is January 2009. According
11 to a law adopted by the PLC the next elections should be conducted at the same time for
12 the Presidency and the PLC. The PLC term is for 4 years but it was elected in 2006, which
13 sets the date of the new elections for 2010.

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15 HH: In either case there will be elections once the term ends, whether in 2009 or 2010.

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17 LA: The sense we have is that Abu Mazen wants to stay only until January 2009
18 because he doesn't want to be a disputed president.

19

20 HH: He has usually opted for consensus.

21 For our meeting today we prepared a draft I-P agenda based on our last discussion. This is
22 subject to amendments of course if we misunderstood your positions. [Attached as annex

23 I].

24

1 MB: I think that it reflects the list of issues. Sometimes it's not very accurate but these
2 inaccuracies are marginal. On the 1st issue, mutual legal assistance, yes correct. On the 2nd
3 issue, state immunity, yes correct. We agree that it should be part of our discussions. On
4 the 3rd issue, end of claims including compensation for occupation, we agree that we
5 should discuss end of claims but on compensation for occupation our position is not
6 reflected because we are waiting for clarifications on what is meant by it.
7 On the 4th issue, transitional arrangements, yes correct. On the 5th issue, yes our position is
8 that diplomatic immunity should be discussed by the State-to-State committee as part of
9 their discussion on diplomatic arrangements. On the 6th issue, private property in swapped
10 areas, yes we think it should be discussed in the Territorial Committee. On the 7th issue,
11 truth and reconciliation, yes by the Culture of Peace Committee, but as a personal view I
12 recommend that they keep in mind the differences between our case and that of Northern
13 Ireland and South Africa since we are moving towards separation, while in those cases the
14 political objective was integration. On the 8th issue, Jerusalem, our position is that it is not
15 being discussed now but when there will be a decision to discuss it then all issues
16 pertaining to Jerusalem, including legal, will be discussed as part of a package in one
17 committee. On the 9th issue, dispute resolution, our position is that it will be discussed and
18 agreed by Saeb and Tal and not the political level.

19

20 HH: In relation to dispute resolution we think that it should be discussed in detail at our
21 level. I asked Saeb about it and he said that there is no agreement between Tal and him on
22 it but that he will get back to his notes to double check. Saeb and Tal are in agreement in
23 principle that an overarching dispute settlement mechanism for the agreement is required.
24 However, it will be our job here to discuss the details of that mechanism and the model we
25 want to adopt since these are legal issues at core. There are two levels for dispute

1 resolution, one at the level of the agreement and second at the level of each issue, e.g.
2 pressing environmental issues will be dealt with according to what is agreed under
3 environment. But the first level should be discussed in detail and that is why we see this
4 committee discussing it.

5

6 LA: From a conceptual perspective, I think that it was agreed that there will be a
7 general dispute resolution mechanism and that it will be part of the general provisions of
8 the agreement. In addition each of the spheres will discuss the dispute resolution at their
9 level.

10

11 That is the understanding on our side. In addition to the general provision, each
12 committee will discuss the dispute resolution in its sphere. We discussed it internally and
13 we think it is best if left for each of the spheres.

14

15 MB: So given that there will be two levels of dispute resolutions: one general and the
16 other at the committees/sphere issue, here we will discuss dispute resolution for the legal
17 cooperation arrangements.

18

19 AB: Our understanding is that in this committee we will be discussing both the general
20 dispute mechanism for the whole agreement as well as specific dispute resolution for the
21 legal cooperation arrangements sphere.

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23 LA: We should raise this issue then in our meeting with Saeb and Udi. On the 10th issue
24 you listed concerning the Territorial Link and Safe Passage, we think that this issue should
25 be discussed elsewhere, but we do not know where yet. The question of jurisdiction will

1 certainly be decided by the political level since it is essentially about the status of the link
2 and under whose sovereignty it is. As to the legal issues following agreement on the status
3 of the link they will be discussed as part of the discussion on all details pertaining to the
4 link.

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6 MB: On the 11th issue, family unification, our view is that it is an internal Israeli
7 immigration policy issue and is not an issue for the negotiations, even not by the political
8 level.

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10 On the last issue, “end of conflict”, there is a paragraph being worked on by Saeb and Tal.

11

12 HH: Ok, we will refer with this issue to Saeb again.

13

14 MB: Can we move to the specific issue of compensation for occupation.

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16 HH: Yes. This is work in progress and today we will present our preliminary thoughts
17 on the issue. So by no means this is the final, official, comprehensive or concrete position.
18 So do not take it as a statement that will prejudice further discussion or other issues.

19

20 MB: Ok, plus we established that nothing is agreed until everything is agreed.

21

22 HH: We think of compensation for occupation as part of end of claims. Within that
23 concept it needs to be addressed before we close the door on all claims and sign an
24 agreement on the issue. End of claims is cross thematic. Many issues are being discussed
25 by the other committees, economics, state to state, refugees, water...etc. Like those issues,

1 compensation for occupation is one of the issues that need to be addressed to have an end
2 of claims.

3

4 Broadly, we see two categories of claims under compensation for occupation, public and
5 private claims, with the exception of commercial or labor disputes between private entities
6 which in our thinking should be exempted from the scope of an agreement on end of
7 claims. We have a list of what the private and public claims are. There may be a crossover
8 of claims which fall under both categories e.g. settlements built on private land.

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10 LA: So you see double compensation? Private persons being compensated but also
11 Palestine?

12

13 HH: I was referring to a case where you have a settlement partially built on private land
14 and partially on public land.

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16 MB: Assume 50% is on public land and 50% on private land.

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18 HH: So we see 50% compensation for public and 50% for private. The method and
19 valuation of compensation may be different for both.

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21 MB: For private claims it is for loss of use of land?

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23 HH: It will be for loss of use, damage and monetary compensation.

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25 MB: Ok, what will the public claims be for then?

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AB: The framework is international law and UN resolutions. Israel's status in the occupied territories is that of an occupier and its powers and authorities are governed by international law including international humanitarian law. Israel's actions that violate these laws constitute international wrongful acts to which reparations are owed. The construction of civilian settlements for the occupier's civilian population in occupied territory, irrespective of whether they are on public or private lands, is a violation of the 4th Geneva Convention and that violation needs to be remedied and compensated for.

MB: But there was no Palestinian state at the time, settlements were established on public lands and these settlements will be evacuated. What will we compensate Palestine for in that case?

HH: So you are saying that no political body existed.

LA: Yes, but also who suffered that damage. There was no state and you are saying that the newly established state will be claiming damage that it did not sustain.

AB: Concerning the argument that settlements were established on public lands, you know as well as we do that many settlements were constructed on private lands which remain private to this day and that others were established after declaring large areas of lands as public, a process which was very problematic to say the least and we view it as invalid.

1 MB: If there were any mistakes or the process was not proper it will be remedied and
2 private lands that were mistakenly declared public can be restored to their private owners
3 and compensated for. But then these are under the category of private claims which still
4 does not deal with the issue of public claims.

5

6 AB: Correct. On public claims you argue that there was no political body that sustained
7 damage at the time of the violation. There are two parts to this. First the issue of timing.
8 There are examples of political entities claiming damage sustain before they were
9 established. The most notable example is Israel and the agreements signed with Germany
10 on compensation for acts which occurred prior to its establishment. So in terms of
11 temporal capacity, Palestine will have such a capacity under international law. It terms of
12 who are the damages owed for, these are damages for the violation of intentional norms.
13 Given the nature as public claims there are owed to the PLO as the representative of the
14 Palestinian people whose right to self determination will be materialized in the legally
15 recognized self determination unit which is the occupied territory. The PLO as a subject of
16 intentional law has already the capacity to bring claims and once the state of Palestine is
17 established it will succeed the PLO.

18

19 MB: So you are talking about violations of international law. In that case, what about
20 the actions of organizations and factions comprising the PLO against Israel and Israelis?
21 Will those be discussed?

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23 HH: Your point is that it has to be reciprocal?

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25 MB: Yes, both will have to be on the table.

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HH: If we are to reach an agreement on end of claims that agreement need to address all claims.

MB: So all the wave of attacks during the second intifada and before that?

AB: Claims are being brought to courts in Israel and the U.S already.

LA: These are claims by private persons, not public claims.

MB: Public claims mean all claims, also damages done by the actions of Hamas, for action taken against or inside Israel.

HH: Hamas is not part of the PLO and its actions were not sanctioned by the PLO.

LA: But if Hamas joins the PLO you will have to assume claims for their actions.

MB: This issue is a guardian knot. There is no untying it. They only way is to cut it.

LA: Like we did with Egypt and Jordan. We established a committee which was never activated.

On the private level people should be compensated, yes.

1 MB: If we are talking on private people who suffered damages wouldn't it be reasonable
2 to say their claims will be addressed but that the public claims will be put aside.

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4 LA: Maybe on the public level that's the way it should be, but on the private level
5 people should be compensated.

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7 MB: Both sides made mistakes during the years. Both sides should have started political
8 talks earlier. This has legal aspects and may amount to supporting negligence, but it's not
9 only legal. Damages were severe. If we go back to the Israeli society and say that we have
10 to pay for establishing settlements on public lands they will ask very hard questions and no
11 one will understand why after having to evacuate settlements and lands they see as
12 promised to them, they still have to pay compensation. Take the example of PLO actions
13 in Munich, who will compensate Israel for that? or for the sociological or economic
14 damage to Israeli society.

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16 LA: Or all the defensive measures Israel had to take to defend from attacks

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18 MB: The best way to move forward on this issue is to put it aside.

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20 HH: Let me summarize. We see compensation for occupation as part of end of claims
21 and we touched on private and public claims. For private claims you see a possibility for
22 discussion but for public claims this will bring counter claims and due to the fact that it
23 was all in the past; the complexity of the issue; and because it is not clear who
24 compensation are owed for and for what kind of violations and damages, it should be left
25 out and not be opened.

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MB: I think that we should discuss private claims but leave aside public ones.

LA: So next time for the Saeb-Udi meeting, what should we do?

MB: I think that we will present the agenda and discuss it. Maybe we should link state immunity to compensation for occupation and private claims, and then we can move forward on two tracks. The one is state immunity and private claims and the second is mutual legal assistance.

HH: We can be very pragmatic and take one issue and start working on it. The other way is to wait until there is clarity on the agenda before we move on any of the issues.

LA: That is an issue for all other committees as well. We think it would be best if we move forward on some of the issues.

MB: Let us see what we can agree and accomplish and put it on the side. I prefer that. The other option as you said is to wait until the agenda is clear. I think the first option is better in order to have a sense of progress. Let us discuss it with Saeb and Udi. Should we start discussing we can agree on how to move forward.

HH: So for the next meeting with Saeb and Udi.

MB: Let us present our work so far and the progress we made and then see what discussions are needed in the future.

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Annex I- Draft agenda for the Legal Committee presented by the Palestinian team at the beginning of the meeting

- I. Mutual legal assistance and cooperation
- II. State immunity and claims against one state in the courts of the other state
- III. End of claims [P: *including those pertaining to occupation*]
- IV. Transitional arrangements related to the above listed issues and other legal issues
- V. [P: *Diplomatic and consular immunities*] [I: *possibly in the State-to-State Committee*]
- VI. [P: *Private property rights in the “swapped areas”*] [I: *–in the Territorial Committee*]
- VII. [P: *Truth and reconciliation*] [I: *possibly in the Culture of Peace Committee*]
- VIII. [P: *Legal issues related to Jerusalem*] [I: *at the political level*]
- IX. [P: *Dispute resolution mechanism*] [I: *at the political level and by Dr. Saeb-Tal Beker*]
- X. [P: *Jurisdiction issues related to Safe Passage, and Territorial Link as may be relevant*] [I: *by the political level followed by another committee, possibly infrastructure/passages*]
- XI. [P: *Family unification between Palestinian and Israeli citizens*] [I: *by the political level*]
- XII. [P: *End of conflict*] [I: *by the political level*]

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Annex II- Agreed I-P draft agenda for the Legal Committee following discussion in the meeting

- XIII. Mutual legal assistance and cooperation
- XIV. State immunity and claims against one state in the courts of the other state
- XV. End of claims [P: *including those pertaining to occupation*] [I: *willing to address private claims for compensation only but public claims should be put aside by both parties*]
- XVI. Transitional arrangements related to the above listed issues and other legal issues
- XVII. [P: *Diplomatic and consular immunities*] [I: *possibly in the State-to-State Committee*]
- XVIII. [P: *Private property rights in the “swapped areas”*] [I: *–in the Territorial Committee*]
- XIX. [P: *Truth and reconciliation*] [I: *possibly in the Culture of Peace Committee*]
- XX. [P: *Legal issues related to Jerusalem*] [I: *Currently Jerusalem is not being discussed. When it will be discussed all issues pertaining to Jerusalem will be addressed in one committee.*]
- XXI. [P: *Dispute resolution mechanism (DRM) for the legal cooperation sphere as well as general DRM for the whole agreement, while committee specific DRM by the relevant committee*] [I: *Dispute resolution mechanism in the legal cooperation sphere will be discussed by the Legal Committee while committee specific DRM by the relevant committee and the general DRM for the whole agreement by Drs. Erekat- Becker*]
- XXII. [P: *Legal issues related to Safe Passage, and Territorial Link as may be relevant*] [I: *by the political level and another committee(s)*]
- XXIII. [P: *Family unification between Palestinian and Israeli citizens*] [I: *Unwilling to discuss as it is an internal Israeli immigration policy issue*]
- XXIV. [P: *End of conflict*] [I: *by Drs. Erekat- Becker*]