

# CONSEQUENCES UNDER DOMESTIC LAW OF ISIF'S INVESTMENTS IN COMPANIES INVOLVED IN THE ISRAELI SETTLEMENTS AND SUPPORTING ISRAEL'S OFFENSIVE IN GAZA

## Introduction

1. This memorandum sets out the legal consequences under the Proceeds of Crime Act 1996 (“**PoC Act**”) the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (“**MLTF Act**”) for ISIF and / or the NTMA regarding ISIF’s investments in companies operating in Israel’s settlements illegally established by Israel in East Jerusalem, the West Bank of Palestine and the Syrian Golan Heights (“**Settlements**”), and one company supporting Israel’s military offensive in Gaza, (the “**Relevant Companies**”).
2. Through their activities, the Relevant Companies are aiding and abetting the transfer by Israel of parts of its own civilian population into the territory it occupies (“**Crime of Transfer**”) and the appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (“**Crime of Appropriation**”) in relation to the Settlements (the “**Relevant Crimes**”), and War Crimes in relation to the ongoing Israeli offensive in Gaza.
3. This memorandum outlines the following:
  - a. the Relevant Crimes constitute “Criminal Conduct” for the purpose of the PoC Act and Part 2 of the MLTF Act (section A);
  - b. the Relevant Companies are aiding and abetting the Relevant Crimes (section B);
  - c. revenue generated by the Relevant Companies falls within the scope of sections 2-4 of the PoC Act and constitutes “proceeds of criminal conduct” for the purpose of Part 2 of the MLTF Act (section C);
  - d. the legal consequences for ISIF and/or the NTMA (section D).

## A. The Relevant Crimes constitute “Criminal Conduct” for the purpose of the PoC Act and Part 2 of the MLTF Act

4. The term “criminal conduct” is central to both the definition of “proceeds of crime” under the PoC Act and to the definition of “proceeds of criminal conduct” under Part 2 of the MLTF Act. This section outlines the circumstances in which the commission of the Relevant Crimes constitutes “criminal conduct” for the purpose of these Acts.
5. According to section 1 of the PoC Act, the term “criminal conduct” means “any conduct—
  - (a) which constitutes an offence or more than one offence, or
  - (b) which occurs outside the State and which would constitute an offence or more than one offence—
    - (i) if it occurred within the State,
    - (ii) if it constituted an offence under the law of the state or territory concerned, and
    - (iii) if, at the time when an application is being made for an interim order or interlocutory order, any property obtained or received at any time (whether before or

after the passing of this Act) by or as a result of or in connection with the conduct is situated within the State;”

6. According to section 6 of the MLTF Act, “‘criminal conduct’ means—
  - (a) conduct that constitutes an offence[, or]
  - (b) conduct occurring in a place outside the State that constitutes an offence under the law of the place and would constitute an offence if it were to occur in the State, [...].”

### **Basis in Irish law of the Relevant Crimes**

7. Both the Geneva Conventions Act, 1962 (“**GC Act**”) and the International Criminal Court Act 2006 (“**ICC Act**”) make the Crime of Transfer and Crime of Appropriation offences under Irish law. Subsection 3(1) of the former Act provides: “Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I shall be guilty of an offence [...]”.<sup>1</sup> According to section 2, “the Scheduled Conventions” refers to the four Geneva Conventions set out in the Schedules to that Act and “Protocol I means the Protocol, additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) adopted at Geneva on 8 June 1977, the text of which is set out in the Fifth Schedule to this Act”.
8. According to Article 49 of the Geneva Convention relative to the protection of civilian persons in time of war of August 12, 1949, (“Fourth Geneva Convention”), “[t]he Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies”. Article 85(4) of Protocol I further provides that “In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed wilfully and in violation of the Conventions or the Protocol: (a) the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention; [...]”. Additionally, Article 147 of the Fourth Geneva Convention provides that a “grave breach” of the Convention includes the “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” when “committed against [...] property protected by the present Convention”.
9. Subsection 7(1) of the ICC Act provides that “[a]ny person who commits [...] a war crime is guilty of an offence”. According to subsection 6(1), “‘war crime’ means any of the acts specified in Article 8.2 [of the Rome Statute of the International Criminal Court (“**Rome Statute**”) outlined in Schedule 1 to the ICC Act] (except subparagraph (b)(xx))”. Article 8(2) includes among the list of war crimes proscribed by the Rome Statute: “Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” (Article 8(2)(a)(iv)) and “The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation

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<sup>1</sup> As inserted by section 3 of the Geneva Conventions (Amendment) Act 1998 and amended by section 66 and section 2 of Schedule 3 of the ICC Act.

or transfer of all or parts of the population of the occupied territory within or outside this territory” (Article 2(b)(viii)).

10. Subsections 3(1) of the GC Act and 7(1) of the ICC Act also apply to War Crimes committed in the context of the ongoing Israeli offensive in Gaza, including: intentionally directing attacks against the civilian population or civilian objects; intentionally launching an attack where the damage to civilians or civilian objects is not proportionate to the military advantage; attacking hospitals; and intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies.

11. As with the GC Act, the ICC Act vests Irish courts with full universal jurisdiction in relation to these offences. Section 12 provides in relevant part:

“(1) An Irish national who does an act outside the State that, if done within it, would constitute an ICC offence or an offence under section 11(1) is guilty of that offence and liable to the penalty provided for it.

(2) Subsection (1) also applies in relation to a person of any other nationality who does an act outside the State that, if done within it, would constitute both—

(a) a war crime under subparagraph (a) (grave breaches of the Geneva Conventions) or (b) (other specified serious violations of the laws and customs applicable in international armed conflict) of Article 8.2, and

(b) an offence under section 3 (grave breaches of the Geneva Conventions and Protocol I thereto) of the Geneva Conventions Act 1962.”<sup>2</sup>

### **Accessory liability and the GC Act and ICC Act**

12. It is clear that the principles of common law accessory liability apply in relation to the liability of an accessory to an offence under subsection 3(1) of the GC Act, in that it refers to a person who “aids, abets or procures the commission by any other person of a grave breach of any of the Scheduled Conventions or Protocol I”. It is well established that the meaning of the underlined terms has its basis in common law.<sup>3</sup>

13. It is also the case that the principles of common law accessory liability apply in relation to the liability of an accessory to an offence under section 7 of the ICC Act, but the position is more complex than under the GC Act. Section 8 of that Act is entitled “Offences ancillary to genocide, crimes against humanity and war crimes” and provides:

“(1) Any person who does any act specified in paragraph 3 of Article 25 (crimes ancillary to genocide, crimes against humanity and war crimes) is guilty of an offence (in this Act referred to as an ‘ancillary offence’).

(2) Subsection (1) is without prejudice to section 7 (penalties for assisting offenders) of the Criminal Law Act 1997.”

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<sup>2</sup> The term “ICC offence” is defined by section 9(1) of the ICC Act as including a “war crime”.

<sup>3</sup> *R v Browne* [1993] NI 323, 329 and *R v Gnanago* [2011] UKSC 59, para. 13.

14. Subsection 7(1) of the Criminal Law Act 1997 provides: “Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.” While this provision “is merely a deeming provision as to how aiders and abettors are to be dealt with at trial”,<sup>4</sup> its use of the terms “aids, abets, counsels or procures” means that it clearly applies to accessory liability at common law. Therefore, while subsection 8(1) of the ICC Act refers to the modes of accessory liability prescribed under the Rome Statute (which may not be coterminous with accessory liability at common law), subsection 8(2) implies the application of common law accessory liability to the offences created by the ICC Act. It does so because there is clearly nothing in section 7 of the Criminal Law Act 1997 which could be prejudiced, in terms of that section’s *general* operation, by subsection 8(1) of the ICC Act; section 8 of the ICC Act must therefore be read as meaning that subsection 8(2) is without prejudice to the application of section 7 of the Criminal Law Act 1997 to accessories to offences under the ICC Act itself, so as to avoid subsection 8(2) having a superfluous meaning.
15. This view is consistent with the general presumption that common law accessory liability applies to all offences created by statute.<sup>5</sup> It is also supported by subsection 13(1) of the ICC Act and the explanatory memorandum to the International Criminal Court Bill 2003.<sup>6</sup> The former provides: “The law (including common law) of the State shall [...] apply in determining whether a person has committed an offence under this Part [2].” It is under Part 2 which sections 7 and 8 fall. The explanatory memorandum states in relation to section 8 of the International Criminal Court Bill, 2003 (whose terms are exactly the same as those in section 8 of the ICC Act) as follows: “Subsection (1) creates offences of conduct ancillary to any act which constitutes an offence under section 7. The offences include the forms of secondary liability in Article 25.3 (Individual Criminal Responsibility), defined by reference to the principles of secondary liability under the laws of the State.”
16. As to jurisdiction in relation to accessories, it is clear from the terms of subsection 3(1) of the GC Act outlined at para. 7 above that a person who, while located outside of Ireland, aids and abets an offence under that section is liable to be tried by an Irish court. In relation to the ICC Act, it is of note that section 12 of that Act (outlined at para. 11 above) does not refer explicitly to the conduct of accessories. However, it is well established at common law that a court’s jurisdiction in respect of a secondary offender derives automatically from its jurisdiction in respect of the principal offender.<sup>7</sup>

### **The liability of corporate entities under the GC Act and ICC Act**

17. While the Fourth Geneva Convention and Rome Statute do not themselves provide for the criminal liability of corporate entities, this is clearly provided for by subsection 3(1) of the GC Act and sections 7 and 8 of the ICC Act, both of which refer to the liability of a “person”. According to subsection 18(j) of the Interpretation Act, 2005, “[a] reference to a person in relation to an offence (whether punishable on indictment or on summary conviction) shall be read as including a reference to a body corporate”. The fact that section 12 of the ICC Act (which, as outlined at para. 11 above, vests Irish courts with extra-territorial jurisdiction in

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<sup>4</sup> *R v Jefferson* [1994] 99 Cr. App. R. 13, 22 (referring to the equivalent statutory provision under English law, section 8 of the Accessories and Abettors Act, 1861).

<sup>5</sup> *Ibid.*

<sup>6</sup> See: <https://data.oireachtas.ie/ie/oireachtas/bill/2003/36/eng/memo/b362003-memo.pdf>.

<sup>7</sup> *R v Robert Millar (Contractors) Limited* [1970] 2 QB 54, 73.

relation to offences under that Act), refers to the “nationality” of a person does not contradict this position. In *Daimler Company Ltd v Continental Tyre and Rubber Company (Great Britain) Ltd*, the House of Lords held that the concept of nationality was capable of applying to a company.<sup>8</sup>

### **The Relevant Crimes as “criminal conduct”**

18. For the purpose of limb (a) of the definitions of “criminal conduct” in both section 1 of the PoC Act and section 6 of the MLTF Act, the commission or aiding and abetting of the Relevant Crimes, no matter where in the world such conduct is committed and no matter by whom it is committed, “constitutes an offence” under section 3 of the GC Act and section 7 of the ICC Act. This is so on the basis that these are crimes in respect of which Irish courts are vested with universal jurisdiction by those Acts (as outlined above).
19. Further, and in any event, the commission or aiding and abetting of the Relevant Crimes, no matter where in the world they are committed and no matter by whom they are committed, also meet the criteria in limb (b) of the definitions of criminal conduct in section 1 of the PoC Act and section 6 of the MLTF Act. In particular, as to the requirement that the conduct in question constitutes an offence under the law of “the state or territory” (PoC Act) or of “the place” (MLTF Act), according to the universal jurisdiction provisions in the GC Act and ICC Act, the offences to which these provisions apply form part of the law of every “territory” or “place”. In other words, the exceptional application of universal jurisdiction to an offence under Irish law renders the provision of *Irish* law creating that offence a part of the law of every “territory” or “place”.

### **Summary**

20. It follows from the foregoing that the commission by a natural person or body corporate of the Relevant Crimes or the aiding and abetting of the commission of either crime by a natural person or body corporate constitutes “criminal conduct” for the purpose of section 1 of the PoC Act and section 6 of the MLTF Act no matter the nationality of that person or body corporate and no matter where either crime is committed or aided and abetted.

### **The commission of the Relevant Crimes**

21. There is a significant body of evidence establishing the commission by Israeli officials (the “**Principal Offenders**”) of the Crime of Transfer and the Crime of Appropriation in the context of the Settlements. We include at Schedule 1 a list of publications to this effect, and a short summary signposting the most relevant parts of the reports for each crime below. We further include a brief legal analysis of the manner in which the Crime of Appropriation is committed (no corresponding analysis is provided in relation to the Crime of Transfer because such analysis is comprehensively provided in a number of the annexed publications). In addition, we identify the principal offences being perpetrated by Israeli officials in Gaza in the context of the current offensive.

### **The Crime of Transfer**

22. In relation to the Crime of Transfer specifically, the Lynk Report at Annex 1 (see in particular sections III and IV) provides an authoritative, recent and succinct legal and factual analysis of

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<sup>8</sup> [1916] 2 AC 307, 349.

how this crime has been committed through the establishment and expansion of the Settlements. Further analysis of this kind is available in the following documents (listed in reverse chronological order): the Poissonnier and David Article; the Meron Article at Annex 6; the Kearney Article at Annex 8; the Human Rights Council Report (see in particular paras. 13-16, 18-30 and 112) at Annex 13; the Crawford Opinion (in particular paras. 4-20) at Annex 16; the ICJ Advisory Opinion (see in particular para. 120) at Annex 19, and the UNSC Report (in particular paras. 220-228) at Annex 21. The Aysev Article at Annex 5 outlines the reason why the Crime of Transfer, as committed by Israeli officials in relation to the Settlements, must be considered to be an ongoing crime and not one which ceases upon completion of the acts which result in the initial movement of members of Israel's civilian population onto the Palestinian and Syrian territory occupied by Israel.

23. The following reports (listed in reverse chronological order) further detail the measures by which the Israeli authorities have transferred parts of its civilian population into the Settlements, see: the EU Six Monthly Reports; This is Ours Report (chapters 1 and 2); the FMEP Reports; the By Hook and By Crook Report (chapters 1, 2, 4 and 5); and the Land Grab Report (chapters 1, 4, 5 and 6).
24. The reports which specifically address measures used to appropriate land for the establishment of Settlements are outlined below. Being relevant to the establishment of Settlements, these measures are also relevant to the Crime of Transfer.

### **The Crime of Appropriation**

25. The elements of the Crime of Appropriation are outlined in the Elements of Crimes, as follows:

“Article 8 (2)(a)(iv) War crime of destruction and appropriation of property

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.
4. Such property was protected under one or more of the Geneva Conventions of 1949.
5. The perpetrator was aware of the factual circumstances that established that protected status.
6. The conduct took place in the context of and was associated with an international armed conflict.
7. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.”

26. Each element is addressed in turn.

*Element 1: The perpetrator destroyed or appropriated certain property.*

27. The term ‘appropriation’ refers to “*taking, obtaining or withholding property, theft, requisition, plunder, spoliation or pillage*”.<sup>9</sup> It is clear that the seizure of land/property by the Israeli authorities in

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<sup>9</sup> Knut Dörmann, “Part 2. Jurisdiction, Admissibility and Applicable Law. Article 8” in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary (Third Edition)* (Bloomsbury: 2016), pp. 340-341.

East Jerusalem, the West Bank and the Golan Heights through the means outlined in the reports at Schedule 1 involves the ‘taking’ (etc.) of that land/property.

*Element 2: The destruction or appropriation was not justified by military necessity.*

28. It must be noted that “*military necessity covers only conduct that is lawful in accordance with the laws and customs of war*”.<sup>10</sup> It follows that the appropriation of land/property for the construction of Settlements cannot be justified by military necessity as the transfer of civilian population onto occupied territory which these Settlements facilitate is itself unlawful.

*Element 3: The destruction or appropriation was extensive and carried out wantonly.*

29. Whether the appropriation was ‘extensive’ must be evaluated in light of the facts of the case, such that in some cases even one single incident can be deemed ‘extensive’.<sup>11</sup> The evidence outlined in the reports at Schedule 1 clearly demonstrates that the appropriation of land for the construction of the Settlements have been extensive.
30. Regarding whether the appropriation was ‘carried out wantonly’, the perpetrator must have acted “*with the intent to destroy [or appropriate] the property in question or in reckless disregard of the likelihood of its destruction [or appropriation]*”.<sup>12</sup> There is no question that the acts of appropriation of the land/property on which the Settlements are established were committed with the intent to appropriate the land/property.

*Element 4: Such property was protected under one or more of the Geneva Conventions of 1949.*

31. A broad range of property is protected by Article 53 of the Geneva Convention relative to the protection of civilian persons in time of war of August 12, 1949, (“**Fourth Geneva Convention**”), which states:

*“Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations”.*

32. According to Article 154 of the Fourth Geneva Convention, the Fourth Geneva Convention is supplementary to Sections II and III of the Hague Conventions respecting the Laws and Customs of War on Land (“**Hague Regulations**”) where the relevant States are parties to both conventions.<sup>13</sup>
33. Article 154 renders a number of provisions of Sections II and III the Hague Regulations “*relevant for the determination of the lawfulness or unlawfulness of various forms of appropriation*”.<sup>14</sup> The relevant provisions of the Hague Regulations include:

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<sup>10</sup> Ibid., p. 341.

<sup>11</sup> ICTY, Judgment, *Prosecutor v. Prlic et al.*, IT-04-74-T, Judgment, Trial Chamber, para. 126.

<sup>12</sup> ICTY, Judgment, *The Prosecutor v. Dario Kordic and Mario Cerkez*, IT-95-14/2-T, Trial Chamber, para. 341.

<sup>13</sup> Israel has not signed or ratified the 1907 Hague Regulations, but the Israeli High Court has found that the 1907 Hague Regulations are part of customary international law, and thus binding on all states, including those not party to the treaty. *Suleiman Tamfiq Ayyub et al. v. Minister of Defense et al.*, Israeli High Court Judgment 606/78, at 6. Palestine ratified the Fourth Geneva Convention in 2014.

<sup>14</sup> Knut Dörmann and others, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (International Committee of the Red Cross, Cambridge University Press: 2003), p. 90.

- Article 46 which states that “private property [...] must be respected. Private property cannot be confiscated”;
  - Article 55 which states: “The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct”; and
  - Article 56 which states: “The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings”.
34. Evidently, all publicly and privately owned land which has been appropriated for the purpose of the construction or expansion of the Settlements is protected under the Geneva Conventions. It is also evident that Israel is not administering this land “in accordance with the rules of usufruct”.<sup>15</sup>
35. It is of note that in the International Court of Justice (‘ICJ’) Advisory Opinion, the court found that property confiscated for the construction of the wall the subject of that Opinion contravened *inter alia* Article 56 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.<sup>16</sup>

*Element 5: The perpetrator was aware of the factual circumstances that established that protected status.*

36. It is clear from the systematic manner in which the Israeli authorities have appropriated land for the purpose of establishing Settlements, including their identification of the status of that land through surveys and from their reliance on the Ottoman and British Mandate land laws as part of the appropriation process (as outlined in the reports at Schedule 1), that those responsible for its appropriation were aware of the factual circumstances that established its protected status. It is relevant in this context that according to the general introduction to the Elements of Crimes, the “[e]xistence of intent and knowledge can be inferred from relevant facts and circumstances”.

*Element 6: The conduct took place in the context of and was associated with an international armed conflict.*

37. According to Article 2 common to all four Geneva Conventions, an international armed conflict extends to “all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”.<sup>17</sup> It is well established that Israel occupies East Jerusalem, the West Bank and the Syrian Golan Heights for the purpose of this common Article 2.<sup>18</sup>

*Element 7: The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*

38. There is no doubt as to the awareness of the Israeli authorities of the factual circumstances which establish the status of the Palestinian and Syrian territory it occupies.

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<sup>15</sup> See the Crawford Opinion, paras. 52-63 and 70.

<sup>16</sup> ICJ Advisory Opinion, para. 132.

<sup>17</sup> Dörmann (n 14 above), p. 22.

<sup>18</sup> ICJ Advisory Opinion, para. 101.



### Ongoing nature of the crime

39. As with the Crime of Transfer, the Crime of Appropriation, as committed by Israeli officials for the purpose of establishing, maintaining and expanding the Settlements, is an ongoing crime. In his analysis of the same question in relation to the Crime of Transfer, Aysev notes the relevance of Draft Article 14 of the International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Internationally Wrongful Acts which relates to the extension in time of the breach of an international obligation.<sup>19</sup> The ILC's commentary on that Article states:

"Whether a wrongful act is completed or has a continuing character will depend both on the primary obligation and the circumstances of the given case. [...] The question whether a wrongful taking of property is a completed or continuing act likewise depends to some extent on the content of the primary rule said to have been violated. Where an expropriation is carried out by legal process, with the consequence that title to the property concerned is transferred, the expropriation itself will then be a completed act. The position with a *de facto*, 'creeping' or disguised occupation, however, may well be different. Exceptionally, a tribunal may be justified in refusing to recognize a law or decree at all, with the consequence that the resulting denial of status, ownership or possession may give rise to a continuing wrongful act."<sup>20</sup>

40. Aysev further summarises the approach adopted by the European Court of Human Rights to distinguishing between continuing and completed acts of appropriation as follows:

"A similar approach in relation to continuing violations is employed in the international human rights jurisprudence. In the aforementioned *Loizidou [v Turkey]* case [concerning the Turkish occupation of Northern Cyprus] before the ECtHR, Turkey argued that under article 159 of the Constitution of the Turkish Republic of Northern Cyprus of 1985, the property in question had been expropriated, and this had occurred prior to Turkey's acceptance of the Court's jurisdiction in 1990. The ECtHR found the 1985 Constitution to be in contravention of international law as well as the relevant Security Council resolutions, and therefore could not be attributed legal effect, meaning that the expropriation of Ms. Loizidou's property was not legally completed at that time and the property continued to belong to her. Consequently, the ECtHR found the ongoing refusal of Turkey to grant Ms. Loizidou access to her property after 1990 to constitute a continuing violation of its treaty obligations, even though the initial act of confiscation of property took place before the critical date. In contrast, in *X v United Kingdom*, the European Commission of Human Rights (hereinafter 'the Commission') refused to find a continuing situation where the applicant was deprived of his property due to an Act of Parliament abolishing the rights of landowners whose property adjoined that of British Railways. Instead, the Commission characterized the expropriation as an instantaneous act with enduring effects. The distinguishing factor between these two cases, similar to the approach of the ILC, is that in the former case the expropriation was *de facto* in nature whereas in the latter it was *de jure*. Accordingly, *de facto* expropriation was treated as a continuing

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<sup>19</sup> International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with commentaries* (2001), p. 59. Available at

[https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>20</sup> *Ibid*, p. 60, para. 4.

violation due to the perpetuation of an unlawful state of affairs whereas de jure expropriation, even if it is a violation, was regarded as a completed act.”<sup>21</sup>

41. Similar to its condemnation of the Turkish occupation of Northern Cyprus, the UN Security Council, in its most recent resolution on the Israeli Settlements, “[c]ondemn[ed] all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including *inter alia* the construction and expansion of Settlements, transfer of Israeli settlers (“**Settlers**”), confiscation of land, demolition of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions” and further reaffirmed that “the establishment by Israel of settlements in the Palestinian territory occupied since 1967, including East Jerusalem, has no legal validity”.<sup>22</sup> Accordingly, the appropriation of property underpinning the Settlements is of a purely *de facto* nature. It follows in turn that the commission of the Crime of Appropriation in respect of land on which the Settlements are established is an ongoing crime.

### **Crimes in Gaza**

42. Crimes being perpetrated by Israeli officials in Gaza are also relevant to the activities of the company Motorola (see para. 74 below).
43. Israel’s ongoing offensive in Gaza has drawn attention from the Prosecutor of the International Criminal Court,<sup>23</sup> and the International Court of Justice has deemed it plausible that Israel’s acts amount to genocide.<sup>24</sup> There is extensive report of conduct by Israeli officials amounting to War Crimes under Article 8 of the Rome Statute,<sup>25</sup> including, *inter alia*: intentionally directing attacks against the civilian population or civilian objects; intentionally launching an attack where the damage to civilians or civilian objects is not proportionate to the military advantage; attacking hospitals; and intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival,<sup>26</sup> including wilfully impeding relief supplies.<sup>27</sup>

### **B. Aiding and abetting of the Relevant Crimes by the Relevant Companies**

44. The Relevant Companies are aiding and abetting, or have aided and abetted, the Principal Offenders in their commission of the Relevant Crimes. Additionally, one of the Relevant

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<sup>21</sup> Aysev Article, pp. 48-49.

<sup>22</sup> UN Security Council Resolution 2334, para. 1. See also UN Security Council Resolution 252 which states (para. 2) that “all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status”.

<sup>23</sup> International Criminal Court, ‘Statement of ICC Prosecutor Karim A. A. Khan KC from Ramallah on the situation in the State of Palestine and Israel, 6 December 2003, available at: <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-kc-ramallah-situation-state-palestine-and-israel>

<sup>24</sup> UN OHCHR, ‘Gaza: ICJ ruling offers hope for protection of civilians enduring apocalyptic conditions, say UN experts’, 31 January 2024, available at: <https://www.ohchr.org/en/press-releases/2024/01/gaza-icj-ruling-offers-hope-protection-civilians-enduring-apocalyptic>

<sup>25</sup> Amnesty International, ‘Damning evidence of war crimes as Israeli attacks wipe out entire families in Gaza’, 20 October 2023, available at: <https://www.amnesty.org/en/latest/news/2023/10/damning-evidence-of-war-crimes-as-israeli-attacks-wipe-out-entire-families-in-gaza/>

<sup>26</sup> Human Rights Watch, ‘Israel: Starvation Used as Weapon of War in Gaza’, 18 December 2023, available at: <https://www.hrw.org/news/2023/12/18/israel-starvation-used-weapon-war-gaza>

<sup>27</sup> Al Jazeera, ‘Impeding aid to Gaza could be crime under ICC jurisdiction, says prosecutor’, 29 October 2023, available at: <https://www.aljazeera.com/news/2023/10/29/impeding-aid-could-be-crime-under-icc-jurisdiction-prosecutor-warns>

Companies is aiding and abetting War Crimes in Gaza. The Relevant Companies can be split into four groups: banks, tourism companies, communications companies and a retail company. The activities of the Relevant Companies in the Settlements and, in the case of Motorola, in relation to Gaza (“**Relevant Activities**”) have been investigated by the ‘Who Profits Research Center’ (“**Who Profits**”), an “*independent research center dedicated to exposing the commercial involvement of Israeli and international corporations in the ongoing Israeli occupation of Palestinian and Syrian land and population*”.<sup>28</sup> A summary of their investigations for each of the Relevant Companies is set out below, along with an assessment as to how the companies are aiding and abetting the Principal Offenders.

45. In relation to the Relevant Crimes (i.e. those underpinning the Settlements), the following is of general relevance to the manner in which the Relevant Companies aid and abet these offences. The essence of the Crime of Transfer is the transfer by the Principal Offenders of members of Israel’s civilian population to the Palestinian territory it occupies and the ongoing maintenance of them in the Settlements.<sup>29</sup> As outlined in the reports referred to in paras. 22-24 above, a central means by which the Principal Offenders do this is by making it inviting and feasible for Settlers to live in the Settlements. It follows that commercial activity which knowingly enhances the liveability of the Settlements aids and abets the Crime of Transfer. This, in turn, is also true for the Crime of Appropriation as the ongoing maintenance of a presence of Settlers in the Settlements is central to the ongoing “taking” and “withholding” (i.e. the ongoing appropriation) of the land on which they are built.<sup>30</sup>
46. The Relevant Companies have knowledge of the Relevant Crimes. This is demonstrated *inter alia* by the fact that, as part of its preparation of a database of businesses involved in the Settlements, which includes all eleven Relevant Companies, the UN Office of the High Commissioner for Human Rights contacted all businesses which are now included on the database and informed them of their involvement in the Settlements.<sup>31</sup>

## Banks

47. Who Profits has outlined the role that the following banks play in financing local councils of, financing construction in and operating branches in the Settlements.

### *Discount Bank*

48. According to Who Profits, Discount Bank is a publicly-traded Israeli commercial bank with a turnover of up to 1 billion USD, which operates in twelve Settlements.<sup>32</sup> It has financed

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<sup>28</sup> <https://www.whoprofits.org/sections/view/3?who-profits-research-center>

<sup>29</sup> See paras. 22-24.

<sup>30</sup> According to a map published in June 2020 by the UN Office for the Coordination of Humanitarian Affairs, there are over 630,000 Settlers living in approximately 250 Settlements situated throughout the West Bank and East Jerusalem. The map is available at [https://www.ochaopt.org/sites/default/files/westbank\\_a0\\_25\\_06\\_2020\\_final.pdf](https://www.ochaopt.org/sites/default/files/westbank_a0_25_06_2020_final.pdf). It outlines the manner in which the Settlements are located throughout that territory.

<sup>31</sup> UN Human Rights Council, 43rd Session, Report of the UN High Commissioner for Human Rights, ‘Database of all business enterprises involved in the activities detailed in paragraph 96 of the independent international fact-finding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem’, 12 February 2020, paras. 20-22, available at:

<https://documents.un.org/doc/undoc/gen/g20/053/49/pdf/g2005349.pdf?token=7DSu6IANpSAsSx1qn9&fe=tr>. See also generally, “Database Pursuant to Human Rights Council Resolution 31/36”, available at <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session31/database-hrc3136>.

<sup>32</sup> <https://www.whoprofits.org/companies/company/3822>

and [https://www.whoprofits.org/writable/uploads/old/uploads/2018/06/old/financing\\_land\\_grab\\_web.pdf](https://www.whoprofits.org/writable/uploads/old/uploads/2018/06/old/financing_land_grab_web.pdf)  
Financing Land Grab: The Direct Involvement of Israeli Banks in the Israeli Settlement Enterprise, February 2017.

Settlement construction through providing loans for construction projects and holding as collateral the borrower's contractual and rights to the land and the project. It is reported to have supported construction projects in seven Settlements, and it operates branches in two settlements.

49. Discount's subsidiary, Mercantile Bank, has provided services to Settlement local and regional councils through the provision of multiple loans and accounts. It also has branches in two Settlement neighbourhoods.

*Hapoalim Bank*

50. According to Who Profits, Hapoalim Bank is a publicly-traded Israeli bank with a turnover of 25-50 billion USD and a presence in nineteen Settlements.<sup>33</sup> It has financed construction in infrastructure projects in the Settlements, including the construction of hundreds of housing units, transport lines and energy projects. The bank also provides loans and other banking services to Settlement local and regional councils. It has branches in ten Settlement neighbourhoods.

*Leumi Bank*

51. According to Who Profits, Leumi Bank is a publicly-traded Israeli commercial bank with a turnover of approximately 1 billion USD and a presence in twelve Settlements.<sup>34</sup> It has financed construction for infrastructure projects in the Settlements, including hundreds of housing units, a shopping complex, and 'smart' traffic lights. The bank also provides loans and other banking services to Settlement local and regional councils. It has branches in six Settlement neighbourhoods.
52. Through Leumi Partners, the bank owns 20% of the shares in Taavura Holdings, a large road haulage and logistics company with significant involvement in the occupation. Who Profits reports that Taavura provided heavy haulage and installation engineering services to the Israeli authorities for construction of the Separation Wall.<sup>35</sup> This wall encircles the Settlements and is a key element of the physical infrastructure which enables their existence, was found by the ICJ to be illegal under international law for contributing to the *de facto* annexation of Palestinian territory.<sup>36</sup> The company also contributed to the construction of the new fast train which services the Settlements.

*Mizrahi Tefahot Bank*

53. Mizrahi Tefahot Bank is a publicly-traded Israeli commercial bank with a turnover of 1.9 billion USD and a presence in eighteen Settlements.<sup>37</sup> It has financed construction in infrastructure projects in the Settlements, including for the construction of hundreds of housing units. The bank also provides banking services to Settlement local and regional councils and has branches in five Settlement neighbourhoods. Its subsidiary, Bank Yahav, also operates branches in two Settlement neighbourhoods.

*First International Bank of Israel*

54. First International Bank is an Israeli commercial bank.<sup>38</sup> In 2021 it was contracted by developers to establish a parking lot for buses in the Atarot Settlement and it holds as collateral

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<sup>33</sup> <https://www.whoprofits.org/companies/company/3825>

<sup>34</sup> <https://www.whoprofits.org/companies/company/3790>

<sup>35</sup> <https://www.whoprofits.org/companies/company/3988>

<sup>36</sup> <https://www.icj-cij.org/case/131>

<sup>37</sup> <https://www.whoprofits.org/companies/company/3753>

<sup>38</sup> <https://www.whoprofits.org/companies/company/3818>

all of the developer's rights in the project and an entitlement to the profits from the asset. It has similarly granted a loan for a construction project on 7,657 metres of land in the Givat HaMatos Settlement and also funded the construction of around 300 new housing units in the Settlement of Ariel and construction in the Settlement of Modi'in Ilit. It has also supported infrastructure projects in occupied territory such as the expansion of a major road.

#### Banks: Aiding and Abetting

55. The above banks aid and abet, or have aided and abetted, the Relevant Crimes in various ways.
56. *Financing construction:* The construction of infrastructure in the Settlements, including housing, transport, shopping centres, and energy projects, assists Israeli government officials in committing the Relevant Crimes by providing the means by which Settlers can maintain their presence in the Settlements. Improved infrastructure increases the ability and desire of the civilian population to move to and remain in the Settlements, thereby encouraging the transfer of the population and enabling the Settlers to maintain a presence on the appropriated land. By financing the construction of infrastructure in the Settlements, the banks are thereby aiding and abetting the commission of the Relevant Crimes.
57. *Services to regional and local councils:* Regional and local councils of the Settlements provide local government representation and services to Settlers and therefore play a key role in encouraging and enabling their ongoing presence in the Settlements. By providing loans and bank accounts to the councils, the above banks aid and abet the commission of the Relevant Crimes.
58. *Providing local bank branches:* The availability of banking services is central to the functioning of a modern community. Accordingly, the provision of such services in the Settlements are critical to their 'success'. By providing local banking services through the establishment and operation of branches in the Settlements, the banks therefore aid and abet the commission of the Relevant crimes.
59. In addition, the activities of Taavura Holdings outlined at paragraph 52 above clearly constitute aiding and abetting of the commission of the Relevant Crimes.

#### **Tourism Companies**

60. The involvement of digital tourism companies in the Settlements, including each of those listed below, has been the focus of reports by both Human Rights Watch (2018)<sup>39</sup> and Amnesty International (2019).<sup>40</sup>

##### *Booking Holdings Inc*

61. Booking.com, which is fully owned by Bookings Holdings Inc, is one of the world's leading digital travel companies.<sup>41</sup> The company's website offers properties in various Settlements.

##### *Expedia Group Inc*

62. Expedia Group Inc is a US-based online travel company which promotes tourist accommodation through its travel booking and search websites, including Expedia.com and Hotels.com.<sup>42</sup> Both websites have been found to list accommodation in multiple Settlements.

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<sup>39</sup> Human Rights Watch, 'Bed and Breakfast on Stolen Land', 20 November 2018, available at:

[https://www.hrw.org/sites/default/files/report\\_pdf/israel1118\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/israel1118_web_0.pdf) ("Human Rights Watch Report").

<sup>40</sup> Amnesty International, 'Israel and Occupied Palestinian Territories: Destination: Occupation digital tourism and Israel's illegal settlements in the Occupied Palestinian Territories', 20 January 2019, available at: <https://www.amnesty.org/en/documents/mde15/9490/2019/en/> ("Amnesty International Report").

<sup>41</sup> <https://www.whoprofits.org/companies/company/3768>

<sup>42</sup> <https://www.whoprofits.org/companies/company/7282?7282-2>

### *Tripadvisor Inc*

63. Tripadvisor Inc is a US-based publicly traded company that owns and operates online travel brands and websites.<sup>43</sup> Through its websites, Tripadvisor advertises hotels, resorts, restaurants and guesthouses in seven Settlements in the West Bank. It also advertises tourist attractions in the Gush Etzion cluster of Settlements in the West Bank, including a shooting range run by ex-Israeli military personnel, a winery, a heritage centre, a museum, and jeep tours.

### Tourism Companies: Aiding and Abetting

64. The above tourism companies aid and abet the Principal Offenders by enabling certain Settlers to generate income from properties they own in the Settlements and by supporting the wider-tourism-related economic activity of the Settlements, thereby enhancing the ability of those Settlers who benefit from this activity to remain in the Settlements.
65. The fact that properties offered by the above tourism companies make up a small percentage of the overall number of properties in the Settlements is immaterial for two reasons. First, this fact is merely a reflection of the scale on which the Crime of Transfer is being committed by the Principal Offenders and therefore does nothing to undermine the liability of the tourism companies as accessories for their contribution to a subset of the transferred civilian population remaining on the relevant occupied territory. It is relevant in this regard that “even the settlement of a few individuals would qualify” for the purpose of the term “parts of its own civilian population” in the definition of the Crime of Transfer.<sup>44</sup> Accordingly, if, hypothetically, only the owners of the properties in the Settlements made available for use by the above tourism companies (as well as those other Settlers who benefit from the contribution to the tourism-related industry made by these companies) had been transferred onto the territory occupied by Israel, this would be sufficient to establish the Crime of Transfer. Second, and in any event, once there is participation in a crime, that participation needs only to be trivial to establish accessory liability.<sup>45</sup>
66. As to the knowledge of these tourism companies, it is notable that as part of their preparation of the above-mentioned reports, both Human Rights Watch and Amnesty International wrote to them in relation to their involvement in the Settlements and the Relevant Crimes underpinning them.<sup>46</sup>

## **Communications Companies**

### *Bezeq Israel Telecommunications Corp*

67. Bezeq is a major Israeli telecommunications provider which is publicly traded on the Tel Aviv Stock Exchange.<sup>47</sup> Bezeq and its subsidiaries provide domestic, international, and cellular phone services, broadband internet, satellite TV, and corporate networks.
68. Who Profits has documented Bezeq providing services in the Settlements since at least 2012. Between 2012 and 2021, Bezeq acted as an external infrastructure and utility provider for the expansion of the Beitar Illit and Efrat Settlement project, which included 8,333 housing units. In 2020, Bezeq was awarded a license to provide high-speed internet to Settlements in the

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<sup>43</sup> <https://www.whoprofits.org/companies/company/3767?trip-advisor>

<sup>44</sup> Knut Dörmann, “Part 2. Jurisdiction, Admissibility and Applicable Law. Article 8” in Otto Triffterer and Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary (Third Edition)* (Bloomsbury: 2016), p. 410.

<sup>45</sup> Peter Charleton, Paul A. McDermott and Marguerite Bolger, *Criminal Law* (Tottel: 2006), para. 3.35.

<sup>46</sup> Human Rights Watch Report, pp. 8, 43 and 49 and Amnesty International Report, p. 19.

<sup>47</sup> <https://www.whoprofits.org/companies/company/3705>

occupied West Bank. As of 2022, Bezeq owned 40 properties in Settlements in the occupied West Bank.

69. Bezeq's fully-owned subsidiary Pelephone has a license to provide cellular services in Settlements in the occupied West Bank until September 2032, and in 2021 secured the rights to use land in the Settlement of Beitar Illit to install cellular antennas. Bezeq's fully-owned subsidiary DBS or "Yes" provides multi-channel satellite and online television transmissions to subscribers in Settlements in the occupied West Bank.

Bezeq: Aiding and Abetting

70. Through providing internet, phone and satellite services to the Settlements, which are necessary for modern life, Bezeq enables Settlers to establish and enjoy their lives in the Settlements. It thereby assists Israeli government officials in the commission of the Crime of Transfer and Crime of Appropriation by making it possible and attractive for Israeli citizens to move to the Settlements and build their lives there long-term.

*Motorola Solutions Inc*

71. Motorola Solutions Inc is a US provider of communications products, video equipment, telecommunications equipment, software, systems and services.<sup>48</sup> It has provided security systems for the Ariel Settlement municipality since 2018, including the supply, installation and maintenance of the systems. It also supplies a command and control system, cameras, and communication software to the Jordan Valley regional council, which includes over 20 Israeli Settlements in the occupied West Bank. It has also provided a remote communication system to the Mateh Binaymin regional council (which includes over 40 Israeli Settlements and outposts) and Modi'in Ilit Settlement in the occupied West Bank, technological security measures for Kiryat Arba Settlement regional council, and radio systems for Efrat Settlement council. In 2022, Motorola Solutions received NIS 63,179 for the shielding of a new office of the Population and Immigration Authority in the Settlement of Beitar Illit in the occupied West Bank.
72. Since 2005, Motorola Solutions has provided the Israeli Ministry of Defense with a Wide Area Surveillance System known as MotoEagle in an NIS 400 million project. The system has been installed in dozens of Settlements in the West Bank, in some cases on private Palestinian land, and in the Separation Wall.
73. In 2022, Motorola Solutions was contracted to provide security cameras and video management systems for the Jerusalem Light Rail's Green Line, which connects large Settlements in occupied East Jerusalem through the centre of the city.
74. Moreover, Motorola Solutions is the developer and supplier of the Israeli military's smartphone devices. Such devices are being used in the military operation in Gaza, enabling continuous communication on the battlefield, even between soldiers on the ground and pilots in the sky. The number of such smartphones in the Israeli military has doubled since the beginning of the operation in Gaza.<sup>49</sup>

Motorola Solutions: Aiding and Abetting

75. Motorola Solutions aids and abets, or has aided and abetted, Israeli government officials in the commission of the Relevant Crimes. By providing surveillance and communication

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<sup>48</sup> <https://www.whoprofits.org/companies/company/3808>

<sup>49</sup> The analysis by Who Profits relating to Motorola's support for the ongoing military offensive in Gaza has not yet been published its website but will be published imminently.

systems directly to local and regional councils in the Settlements and the Ministry of Defence, Motorola Solutions directly helps Israeli government officials to maintain security in and control of the Settlements, which is critical to maintaining the Settlements and further encourages Israeli citizens to move to and remain in the territory. Moreover, providing a security system for the Jerusalem Light Rail Green Line helps Israeli government officials to provide safe and reliable transport to the Settlements. Improved infrastructure increases the ability and desire of the civilian population to move to and remain in the Settlements, thereby encouraging the transfer of the population and enabling the Settlers to maintain a presence on the appropriated land.

76. In addition, Motorola Solution's provision of smartphones to the Israeli military is assisting Israeli military and government officials in conducting the war in Gaza and therefore in committing the war crimes they are committing.

### **Retail Company**

#### *Rami Levi Hashikma Marketing*

77. Rami Levi Chain Stores Hashikma Marketing 2006 Ltd is the third-largest Israeli retail supermarket chain.<sup>50</sup> It operates a chain of discount supermarkets and is also engaged in the sale of clothing, retail, and cellular communications. Rami Levi operates supermarkets in eight Settlements and its online stores provide delivery to dozens of Settlements. Its fully-owned subsidiary, Rami Levi Hashikma Marketing Communication, operates branches in three Settlements. Its subsidiary, Good Pharm, operates a pharmacy store in the Settlement of Ariel. Its subsidiary, Beit Haperot, operates fruit and vegetable stores in three Settlements. In 2018 it opened a shopping mall in Atarot Settlement which includes 50 businesses, and in 2011 it won a tender to build a mall in the Settlement of Ariel, which is 4,000 square metres. Rami Levi's subsidiary, Hashikma N.G.N. International Communications 015 Ltd, holds a license to provide Bezeq telecommunication services.

#### Rami Levi: Aiding and Abetting

78. By providing everyday necessities to the Settlements in the form of food, clothing, pharmaceutical goods and communications, Rami Levi aids and abets, or has aided and abetted, the Relevant Crimes by increasing the ability and desire of Israel's civilian population to move to and remain in the Settlements, thereby encouraging the transfer of the population and enabling the Settlers to maintain a presence on the appropriated land.

### **C. Property falling within the scope of sections 2-4 of the PoC Act and constitutes "proceeds of criminal conduct" for the purpose of Part 2 of the MLTF Act**

79. Section 1 of the PoC Act defines the term "proceeds of crime" as meaning "any property obtained or received at any time (whether before or after the passing of this Act) by or as a result of or in connection with criminal conduct". Sections 2 ("interim order"), 3 ("interlocutory order") and 4 ("disposal order") of that Act further provide for orders being made by the High Court in respect of "specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime". Under the MLTF Act, the term "proceeds of criminal conduct" is defined by section 6 (in Part 2) of that Act as "any property that is derived from or obtained through criminal conduct, whether directly or indirectly, or in whole or in part, and whether that criminal conduct occurs before,

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<sup>50</sup> <https://www.whoprofits.org/companies/company/4028>



on or after the commencement of this Part.”<sup>51</sup> For the purpose of both Acts, the term “property” includes money.<sup>52</sup>

80. The revenue generated by the Relevant Companies through their Relevant Activities constitutes the proceeds of crime on two distinct and freestanding bases. First, it is the proceeds of the “criminal conduct” that is the Relevant Companies’ aiding and abetting of the Relevant Crimes by their Relevant Activities. Second, even if any of the Relevant Companies cannot be said to aid and abet the Relevant Crimes, it is the proceeds of the “criminal conduct” that is the ongoing commission of the Relevant Crimes themselves. In the latter case, this is because the ongoing commission of these crimes is a prerequisite to any activity by a commercial enterprise (or their customers) or Israeli public body taking place in the Settlements. This is true for the Relevant Companies both with and without a physical presence in the Settlements:
- a. For those Relevant Companies with a physical presence in the Settlements, their ability to operate in them, and on the land on which they are established, is dependent on the ongoing commission of the Crime of Appropriation in respect of that land. Similarly, the existence of customers/service-users in the Settlements is dependent on the ongoing commission of the Crime of Transfer.
  - b. For those Relevant Companies without a physical presence in the Settlements (in particular, those who provide tourism services), or who engage in Relevant Activities that do not require a physical presence (for example, the activity of lending money to a local authority of a Settlement or group of Settlements), the activities of their customers/service-users is dependent on the ongoing commission of the Crime of Transfer and Crime of Appropriation. For example, an owner of tourist accommodation in the Settlements which is listed on Booking.com could not own (or otherwise possess) the property in question without the Crime of Appropriation being committed in respect of the land on which it is situated or could not have a presence in the Settlements without the Crime of Transfer being committed.
81. Any revenue generated by Relevant Activities is therefore “obtained [...] by or as a result of or in connection with criminal conduct” (PoC Act) and “derived from or obtained through criminal conduct” (MLTF Act).<sup>53</sup>
82. Where revenue generated by Relevant Activities is mixed with revenue generated by a Relevant Company’s legitimate activities, the entirety of the combined monies constitutes the proceeds of crime. This is because that entire amount of money has been *in part* derived or obtained from criminal conduct. It is, furthermore, immaterial how small a part of these combined monies the revenue generated by Relevant Activities forms.
83. In addition, the fact that this revenue may have been generated by the Relevant Activities of a subsidiary of a Relevant Company, as opposed to the Relevant Company itself (as in the case of Booking Holdings Inc. and Booking.com B.V. or Leumi Bank and Taavura Holdings,

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<sup>51</sup> For ease of reference, hereafter both property that may be the subject of orders made under sections 2-4 of the PoC Act and the “proceeds of criminal conduct” as defined by section 6 of the MLTF Act are referred to collectively as the “proceeds of crime”.

<sup>52</sup> See section 1 of the PoC Act and section 2 of the MLTF Act.

<sup>53</sup> Use of the words “derived or obtained from” hereafter is a reference to these terms (from both definitions).

for example), is immaterial: it is sufficient that the revenue has been *indirectly* derived or obtained from “criminal conduct”.

84. It follows that the following constitute the proceeds of crime:
- a. Any monies transferred to ISIF, by way of a dividend payment or otherwise, from monies comprised in any part of revenue generated by Relevant Activities.
  - b. The proceeds of any sale by ISIF of its shares in a Relevant Company or in another entity which invests in a Relevant Company. This is because the value of a company’s shares is determined, at least in part, by its combined activities (past, current and envisaged). Therefore, the proceeds of the sale of a Relevant Company’s shares are in part derived or obtained from its Relevant Activities.
  - c. Any asset acquired by ISIF in any part with monies obtained in either of the ways referred to in paragraphs (a) and (b) above, any monies generated by that asset, any further assets acquired with these monies and so on. In relation to the PoC Act, this is expressly provided for by the provision in sections 2-4 of that Act quoted above. In relation to the MLTF Act, this stems from the definition of “proceeds of criminal conduct” in section 6 of that Act itself: an asset purchased with monies derived or obtained in part from criminal conduct has itself been *indirectly* derived or obtained in part from such conduct (and the same applies to monies generated by that asset, further assets acquired with these monies and so on).
85. Finally, in relation to the monetary threshold (€5,000) prescribed by sections 1A, 1B, 2 and 3 of the PoC Act, it is important to emphasise that it follows from the foregoing that it is the combined total of the above types of proceeds of crime that must exceed this threshold (rather than just the amount derived from or obtained through Relevant Activities). It is noted in this regard that the Minister for Finance stated in November 2023 that the total value of ISIF investments in the Relevant Companies stood at €4.2 million.<sup>54</sup>

#### **D. Conclusions: legal consequences for ISIF and/or the NTMA**

86. It is clear from the above that the mere divestment by ISIF of its direct investments in the Relevant Companies is not sufficient to avoid exposure to proceedings brought by the Criminal Assets Bureau (CAB) under the PoC Act and criminal liability under MLTF Act. To avoid exposure to proceedings by the Criminal Assets Bureau (CAB), ISIF must divest itself of, in addition to its direct investments in the Relevant Companies, all other investments and monies obtained, in whole or in part, with the revenue generated by these investments. The measures that CAB may take are set out in the various provisions of the PoC Act.
87. As to liability under the MLTF Act, this arises under subsection 7(1) (which falls under Part 2) of that Act. That subsection provides:
- “A person commits an offence if—
- (a) the person engages in any of the following acts in relation to property that is the proceeds of criminal conduct:

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<sup>54</sup> See: <https://www.oireachtas.ie/en/debates/question/2023-11-23/79/>.

[...]

(ii) converting, transferring, handling, acquiring, possessing or using the property;”

[...]

and

(b) the person knows or believes (or is reckless as to whether or not) the property is the proceeds of criminal conduct.”

88. Clearly ISIF has handled, acquired, possessed or used the monies/assets that are, as outlined above, “the proceeds of criminal conduct”. If it is not the case that ISIF is a “person”, separate and distinct from the NTMA, for the purpose of subsection 7(1) of the MLTF Act, then liability under that subsection rests with the NTMA itself, as the latter is clearly a “body corporate” for the purpose of subsection 18(j) of the Interpretation Act, 2005.<sup>55</sup>
89. Furthermore, ISIF’s (or the NTMA’s, if appropriate) knowledge or belief that, or recklessness as to whether or not, the relevant monies/assets are “the proceeds of criminal conduct” is established by *inter alia* ISIF’s knowledge that the Relevant Companies are listed on the UN database of companies involved in the Settlements and the various engagements with ISIF by civil society organisations (including GLAN) and politicians on the basis that the Relevant Companies are complicit in conduct that is illegal – including in connection with the Illegal Israeli Settlements Divestment Bill 2023.
90. It is also relevant in this context that there is no presumption under Irish law (such as exists in the United Kingdom) that statutory provisions are not intended to bind organs of the State.<sup>56</sup>

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<sup>55</sup> See para. 17 above and subsection 3(2) of the National Treasury Management Agency Act 1990.

<sup>56</sup> See Dodd, *Statutory Interpretation in Ireland* (Bloomsbury Professional: 2008), para. [1.39].

## Schedule 1

### List of reports and other documents which demonstrate the commission of the Crime of Transfer and the Crime of Appropriation

- i. Michael Lynk, (UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967), Report to the UN General Assembly entitled “Situation of human rights in the Occupied Palestinian Territory, including East Jerusalem, with a focus on the legal status of the settlements” (29 July 2021) (“Lynk Report”; Annex 1);
- ii. Office of the European Union Representative in the West Bank and Gaza Strip, Six-Month Reports on Israeli settlements in the occupied West Bank, including East Jerusalem (Reporting periods January-June 2017 to January-December 2021) (“EU Six Monthly Reports”; Annex 2)
- iii. Kerem Navot and B’Tselem, “This is Ours – And This, Too: Israel’s Settlement Policy in the West Bank” (March 2021) (“This is Ours Report”; Annex 3),
- iv. Yesh Din, “Ill-Gotten Gains: Theft of Palestinian land – declaring “state land” where settlement of title was halted when Israel occupied the West Bank” (15 March 2021) (“Ill-Gotten Gains Report”; Annex 4)
- v. Uzay Yasar Aysev, “Continuing or Settled? Prosecution of Israeli Settlements under Article 8(2)(b)(viii) of the Rome Statute” (February 2019) (“Aysev Article”; Annex 5)
- vi. Ghislain Poissonnier and Eric David, “Israeli Settlements in the West Bank, a War Crime?” *La Revue des droits de l’homme* (10 December 2017) (“Poissonnier and David Article”; Annex 6);
- vii. Theodor Meron, “The West Bank and International Humanitarian Law on the Eve of the Fiftieth Anniversary of the Six-Day War”, *American Journal of International Law* (1 April 2017) (“Meron Article”; Annex 7);
- viii. Michael Kearney, “On the Situation in Palestine and the War Crime of the Transfer of Civilians into Occupied Territory”, *Criminal Law Forum* (2016) (Kearney Article; Annex 8);
- ix. B’Tselem, “Expel and Exploit: The Israeli Practice of Taking over Rural Palestinian Land (December 2016) (“Expel and Exploit Report”; Annex 9);
- x. Kerem Navot, “Blue and White make Black: The Blue Line Team in the West Bank” (December 2016) (“Blue and White make Black Report; Annex 10);
- xi. Yesh Din, “Land Takeover Practices Employed by Israel in the West Bank” (27 September 2016) (“Land Takeover Practices Report”; Annex 11);
- xii. Foundation for Middle East Peace, 24 Volumes of “Reports on Israeli Settlement in the Occupied Territories” (1 March 1991 - 1 March 2014) (“FMEP Reports”);<sup>57</sup>

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<sup>57</sup> Available at <https://fmep.org/resources/?rcat%5b%5d=3>.

- xiii. Kerem Navot, “Israeli settler agriculture as a means of land takeover in the West Bank” (August 2013) (“Israeli Settler Agriculture Report”; Annex 22);
- xiv. UN Human Rights Council, “Report of the independent international factfinding mission to investigate the implications of the Israeli settlements on the civil, political, economic, social and cultural rights of the Palestinian people throughout the Occupied Palestinian Territory, including East Jerusalem” (7 February 2013) (“Human Rights Council Report”; Annex 13);
- xv. Yesh Din, “The Road to Dispossession: A Case Study – The Outpost of Adei Ad” (February 2013) (“Adei Ad Report; Annex 14);
- xvi. B’Tselem, “Under the Guise of Legality Report: Israel’s Declarations of State Land in the West Bank” (February 2012); (“Under the Guise of Legality Report”; Annex 15);
- xvii. James Crawford SC, “Opinion: Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories” (24 January 2012) (“Crawford Opinion”; Annex 16);
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