LOCAL GOVERNMENT PENSION SCHEME: IMPLICATIONS OF THE CURRENT EVENTS CONCERNING GAZA

OPINION

1. I am instructed to advise the Local Government Association ("the LGA"). The advice is intended to assist administering authorities of Local Government Pension Scheme ("LGPS") funds. My conclusions are summarised at the end of this Opinion.

Introduction

2. It appears that numbers of administering authorities have recently received letters in similar terms, raising concerns about the investment of LGPS funds in what are said to be "companies in violation of international law". The particular letter which I have seen is addressed to Reigate & Banstead BC, from a Dr Christina Peers (I shall call it the "Peers letter"), and I shall assume for the purposes of this Opinion that it is typical.

3. More specifically, the "violations" alleged by the Peers letter relate ultimately to the conduct of the state of Israel in relation to Palestine and the Palestinian people. They are not limited to the recent events concerning Gaza, but it is evident that those events give the allegations a particular focus. The letter starts with a reference to a "case against four UK ministers now being considered by Scotland Yard", and it appears that this is a reference to complaints made to the police in January and May 2024 by the International Centre of Justice for Palestinians ("ICJP"), which are specifically about alleged war crimes and crimes against humanity in Gaza.

4. The thrust of the Peers letter is that Israel is enabled to continue in the actions to which its author refers "because of products, equipment and

services it received from a range of complicit companies", and that LGPS funds should not be invested in such companies.

5. I am currently engaged in preparing for the LGA an opinion which will update and elaborate upon more general advice which I gave (and was published) in 2014 concerning the nature and extent of the duties of administering authorities in relation to the investment of funds, and what are sometimes referred to as non-financial factors in the taking of investment decisions. That advice will address, in a wider context including problems of climate change, and government policy ambitions for the investment of pension funds, as well as boycott and disinvestment campaigns of various kinds, questions such as the dividing line between financial and non-financial, and what authorities may, may not, or might in future be compelled to do by way of consideration of such questions, pursuant to their ordinary public law and fiduciary duties.

6. This Opinion is intended to provide more urgent and finite advice about the suggestion, made in the Peers letter, that to make or maintain particular investments might be positively unlawful because of the alleged linkage between those investments and the commission of what are said to be crimes. It is not about what an administering authority might be entitled to do by way of refraining or divesting from such investments if it so decided – my more general opinion will, I hope, cast more light upon that.

7. I shall consider, first, the suggestion that administering authorities (or perhaps the individual members or officers who take or implement decisions) might themselves have some criminal liability; and secondly, the question of whether any underlying criminality on the part of relevant companies or those to whom they supply might mean that investing in those companies was unlawful as a matter of public law.

8. I should make clear that, as those instructing me are aware, I am a purely civil practitioner (and specifically a public law specialist with a particular

interest in, amongst other matters, the public law aspects of pensions). However, there are obvious advantages to having the present issues addressed in the context of the wider issues of LGPS investment with which I am familiar, and to the extent that this Opinion needs to deal with matters of criminal law, they are discrete and specific legal questions of a somewhat unusual nature which I am content that I have been able properly to research and address, rather than matters of ordinary criminal evidence and procedure.

9. This Opinion is concerned with the law as it applies in England. I have not looked specifically into the position in the remainder of the United Kingdom. However, I should be extremely surprised if the position in Wales was materially different, and I think it reasonably likely that it will be the same in Northern Ireland as well. There obviously are differences between the criminal law of England and Scotland, on which I cannot comment, although I think that the general statutory and public law position concerning local government pensions and their investment is probably fairly similar.

Potential criminal liability

10. The Peers letter does not offer very much by way of systematic legal analysis, although it does refer in a rather scattergun way to a number of domestic statutory provisions and provisions of treaties or other principles of international law. The ICJP letters are a little more closely argued, and the ICJP's published summary of its police complaint makes clear that it is based upon alleged "complicity" in acts which are war crimes, although of course this complaint is against government ministers, and the nature of the acts of complicity is not made very clear (the summary refers without further detail to "providing political cover, encouraging criminal acts, supplying weapons [and] withholding funds from agencies that provide life sustaining humanitarian aid." In the absence of some specific and focused allegation against one or more LGPS administering authorities, I shall seek

to undertake a systematic analysis of how (if at all) any criminal liability might arise.

International Criminal Court Act 2001

11. The most obvious starting-point for the discussion is ss 51 and 52 of the International Criminal Court Act 2001 ("ICCA").

12. Under ICCA s 51, it is an offence against the law of England and Wales to commit genocide, a crime against humanity or a war crime (all as defined in the 2001 Act, essentially by reference to the articles of the Rome Statute of the International Criminal Court ("ICC")), where the relevant acts are either committed within the jurisdiction or else committed elsewhere by UK nationals and residents (and service personnel, who can be ignored for present purposes).

13. Under ICCA s 52, it is also an offence against the law of England and Wales to engage in "conduct ancillary to" an act to which s 52 applies, namely an act which would be either a s 51 or a s 52 offence if it was committed in England and Wales. Again, the ancillary conduct must consist of or include an act committed either within the jurisdiction or by a UK national or resident. Ancillary conduct means conduct which would constitute an ancillary offence if the relevant offence was committed in England and Wales.

14. Ancillary offences are defined by ICCA s 55. I do not think we need be concerned in the present context with incitement, attempt, conspiracy, assisting offenders or concealing offences. That leaves (see ss 55(1)(a) and 55(2)) conduct which, if committed in England and Wales, would be punishable under s 8 of the Accessories and Abettors Act 1861, namely aiding, abetting, counselling or procuring the commission of an offence. In modern language, this is usually expressed as either assisting or

encouraging the commission of an offence – again, encouragement can be left aside for these purposes.

15. In substance, this can be summarised by saying that it is a criminal offence to do something in England which assists the commission of genocide, a crime against humanity, or a war crime, regardless of where the assisted act occurs. Further, if there is a criminal act of assistance, it is also criminal to assist that assistance.

16. Accordingly, the questions which would arise in relation to any alleged criminality on the part of an administering authority or an individual would be as follows (perhaps more accurately, these are the elements which a prosecutor would have to prove beyond reasonable doubt):

    (i) Has something been done (by Israel or its agents, if one focuses on the complaints made by the current letter) which amounts to genocide, a crime against humanity or a war crime?

    (ii) If so, did the authority or the individual assist that act? Alternatively, did they assist someone else's act of assistance, and would that person's act have been criminal if committed in England and Wales?

    (iii) If so, did the authority or the individual have the necessary *mens rea*?

17. I shall consider these elements in turn.

Commission of a substantive ICCA offence

18. There has been immense controversy over the last year (and indeed before) as to whether Israel has committed or continues to commit the kind of offences to which ICCA applies. There are undoubtedly what I would seek neutrally to characterise as informed and coherent assertions that it has.

For example, it is well known that the Prosecutor of the International Criminal Court has applied for an arrest warrant against the Israeli Prime Minister and Minister of Defence, on the basis that there are reasonable grounds to believe that war crimes or crimes against humanity have been committed. Again, the 12 June 2024 report of the Independent International Commission of Inquiry established by the UN Human Rights Council concluded (at paragraph 97) that in Israel's military operations in Gaza it had "committed war crimes, crimes against humanity and violations of IHL [international humanitarian law] and IHRL [international human rights law]."

19. As against that, Israel itself denies the commission of such offences, and there have been critiques, both legally and factually, of the allegations made, from sources which again include what I would characterise as informed and coherent commentators. Simply by way of example, the organisation UK Lawyers for Israel has published or provided links to various such critiques.

20. There exists a huge volume of other commentary on these matters, academic and non-academic, from a range of sources which are to various degrees objective or partisan, and expressing a range of views. So far as I am aware, there is currently no relevant ruling from any domestic court or any international court or judicial tribunal. The International Court of Justice ("ICJ") issued an important advisory opinion on 19 July 2024 in which it concluded that various of the policies and practices of Israel in relation to the occupied Palestinian territories were contrary to international law, but that opinion was not concerned one way or the other with the offences to which ICCA applies (and it was focused primarily on the longer-term situation in the occupied territories, rather than on the immediate situation in Gaza to which current allegations of criminal conduct mainly relate).

21. One important point to make is that in ordinary day to day affairs it should not normally be too difficult for a person (who knows or is deemed to know

the law) to understand whether something which is happening, or may be about to happen, constitutes or is likely to constitute the commission of a crime. But the application of the law on war crimes in particular may involve, and in this context probably does involve, the application of concepts of proportionality, of discriminate or indiscriminate action, and the principle of self-defence. These all call for the exercise of judgment, and that judgment needs to be applied to the facts of what is happening in a confused zone of conflict, facts which are frequently hotly disputed. Additionally, the ICCA crimes are only committed if the perpetrator has the intent and knowledge specified in ICCA s 66, meaning that in this context it is effectively necessary to enquire into the state of mind of a foreign government and its agents.

22. It is perfectly obvious that an LGPS administering authority is, to put it mildly, not well placed to know whether ICCA crimes have in fact been committed or are likely to be committed in the future. Even if it were to conduct or commission significant investigatory work, which might be thought a questionable use of pension fund resources, and is certainly not something positively required by the criminal law, the authority might very well be left in a state of considerable uncertainty.

23. Authorities will probably be aware of the policy paper published by the Foreign, Commonwealth & Development Office on 2 September 2024, which explained the basis for the government's recent decision[1] to refuse certain statutory export licences on the ground that there was a "clear risk that the items might be used to commit or facilitate a serious violation of international humanitarian law". But not all violations of IHL are ICCA offences. The statement is focused on what it concludes is a breach of Israel's duties as (in the FCDO's view) an occupying power, and/or to allow the free passage of humanitarian relief by others, and its failure to respond

[1] I note for completeness that UK Lawyers for Israel has apparently threatened to seek judicial review of this decision.

satisfactorily to credible claims of the mistreatment of detainees (in terms of sufficiency of investigation, and access for the Red Cross). The fact that there have been, in the FCDO's view, these breaches or apparent breaches does not carry the necessary implication that ICCA offences have been committed by or on behalf of Israel. What the FCDO statement says about the conduct of hostilities is that there is "cause for concern" about Israel's attitude and approach. It then continues:

> "Despite the mass casualties of the conflict, it has not been possible to reach a determinative judgment on allegations regarding Israel's conduct of hostilities. This is in part due to the opaque and contested information environment in Gaza and the challenges of accessing the specific and sensitive information necessary from Israel, such as intended targets and anticipated civilian harm. This is further complicated by credible reports that Hamas embeds itself in a tightly concentrated civilian population and in civilian infrastructure."

24. Against this background, it seems to me that the only realistic view to be taken from an administering authority perspective is that Israel and its agents might or might not currently be committing ICCA offences. That such offences are being committed is not a merely fanciful possibility, but it is certainly not obvious that they are, or even highly likely. I doubt that an administering authority without some special and unusual knowledge of the relevant facts could even sensibly say whether the existence of offences is more or less probable than not. I shall return below to what implications this has for the question of *mens rea*.

25. The known factual position in relation to the commission of the alleged offences might of course change in the future. For example, one or more individuals might be charged or convicted before the ICC[2]; or there might be some other authoritative judicial ruling; or a consensus of authoritative opinion might emerge to the extent that a person who committed the

[2] The fact that a crime had been committed in the past would not, of course, automatically mean that similar crimes were likely in the future – that would all depend upon what was found to have occurred, and how far that appeared to be part of a course of conduct which was still continuing.

necessary *actus reus* could be said to be at least reckless as to whether what their assistance was facilitating was a war crime.

Assistance

26. In order to assist in the commission of an offence, it is necessary that there should be some "connecting link" between the act of assistance and the commission of the offence. However, it is not necessary that the assistance should have caused the commission of the crime, in the sense of it being proved that but for the assistance the crime would not have been committed: see *R v Stringer* [2012] QB 160 at [48].

27. *Stringer* also notes at [51-52] that what degree of assistance is required is a "common sense" question for the jury on particular facts, and that sometimes any assistance provided is "so distanced in time, place or circumstances" from the conduct of the principal offender that it would be unjust to regard the latter's act as being done with the defendant's assistance. The Supreme Court judgment in *R v Jogee* [2017] AC 387 at [12] puts it this way:

> ". . . there may be cases where anything said or done by [D] has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether [D's] conduct was so distanced in time, place or circumstances from the conduct of [P] that it would not be realistic to regard [P's] offence as encouraged or assisted by it."

28. It is not straightforward to translate these principles into the context where the alleged principal offender is in effect a state, and the alleged assistance consists of financial investment which directly or indirectly helps the state to carry on the offending activity. However, there is some assistance to be gained from *R (Islamic Human Rights Commission) v Civil Aviation Authority, Foreign & Commonwealth Office and Ministry of Defence* [2006]

EWHC 2465 (Admin) ("*IHRC*"), a case with a not dissimilar factual background to the present problem.

29. In *IHRC*, permission to apply for judicial review was refused at a renewal hearing (although one at which there appears to have been fairly full argument and a reserved judgment) because the claim was held to fall a "very long way" short of being arguable. The claimant sought to prevent the use of British airports and airspace for the transport of military equipment for use by Israel in what is usually known as the 2006 Lebanon War (when Israeli forces launched attacks into southern Lebanon in response to Hezbollah rocket attacks). The transport was being effected by US air freight companies, and the flights transited through the UK. The basis of the argument was that granting the necessary authorisations amounted to a criminal offence, either under the Geneva Conventions Act 1957 or under ICCA. The claimant's case, as summarised at [30], was that regardless of how any particular munitions in any particular cargo might be used, the effect of the flights was to "provide military assistance to a war being carried on in a way which involved disproportionate and indiscriminate bombing of civilians." So the basic nature of the complaint was not very different from that made in the Peers letter.

30. The main reason given by Ouseley J for refusing permission in *IHRC* was that the claimant had failed to identify any "directing mind" individuals who were said to have the necessary *mens rea*, and that it was inappropriate to use judicial review proceedings as a means of carrying out an investigation into the legality of Israel's conduct in international law, although the court recognised that such issues might indeed need to be investigated in the event of a prosecution. The judge also said at [36] that it was inappropriate to resort to judicial review, rather than prosecution, in support of the criminal law "unless the offence is clear and it cannot be prevented in the usual way through criminal prosecution" – whatever else might be said,

according to the judge, it was certainly not clear that offences had been committed.

31. More significantly for present purposes, Ouseley J commented at [35] that it was "far from clear" that the grant of authorisations could amount to aiding and abetting an offence:

> "Those would be actions much more remote than those which led to the murder conviction [in *R v Bryce* [2004] 2 CrAppR 35 – where the defendant had driven a hitman to a location near the victim's house]. The analogy would be with the person who might have put the petrol in the motor bike or car which carried the criminals. It is far from clear that the criminal law could possibly extend that far. It would at least have to be shown that the individual, because this is an offence that is committed by individuals because it involves a guilty mind, knew of the destination of the cargoes and that the use of the cargoes would be likely to be disproportionate in the public international law sense or in some illegal attack. It would then have to be shown that the munitions in question were so used. It would be a very considerable extension of the criminal law to say that lawfully used munitions and weapons could not be supplied to a belligerent without aiding and abetting a substantive offence, simply because of the general conduct of the war using other munitions which would thereby be aided or encouraged."

32. These comments were not, I think, part of the *ratio decidendi* of *IHRC*, and nor would the case be a binding precedent even if they were. It may also be the case that some of Ouseley J's comments, perhaps influenced by his general views of the weakness and inappropriateness of the overall challenge, go somewhat further than is really justifiable. Nonetheless, the thrust of what he said is as good an indicator as one has of how a jury might be directed, or how it might be expected to react, or indeed of whether the case would be regarded as fit to be left to a jury. At an earlier stage, this would feed into the application of the evidential test when the CPS came to consider whether that was satisfied[3].

[3] That would obviously occur, as part of the Full Code Test, if the CPS was itself considering whether to initiate a prosecution. As I understand it, the CPS will also apply the Full Code Test if asked to take over a private prosecution either to continue or to stop it. I deal further below with the statutory consents that would be required for prosecution.

33. It will be noted that the potential assistance in this case is at least one stage, and perhaps more than one stage, further removed from the (assumed) offences than the alleged assistance was in *IHRC*. There, the suggestion was that the transported munitions were being supplied for the general purposes of a war in which at least some munitions were being or were likely to be used in ways constituting an offence; and that the authorisations were what allowed the munitions to reach Israel. Here, the allegations about the war are much the same. But the supplies to which the Peers letter refers are, in many cases, ones which might be characterised as supportive of the Israeli war effort, but are not items which would actually be used in the commission of war crimes (if any). Further, the complaint here is not of supplying those items, or even (as in *IHRC*) of doing something directly in relation to those items – rather, it is of investing in the companies which produce the items. I imagine that in many cases the LGPS fund will not even have invested directly in the relevant companies: rather, it will have invested in some collective investment scheme or undertaking which itself holds the company's shares or bonds.

34. The linkage with the alleged offences here, in other words, is a very remote one. I have not identified any case, whether in a context similar to this one or not, in which such an indirect and tangential connection with a crime has been the foundation for a person to be convicted of assisting that crime.

35. There is also a question as to whether investing in a company by purchasing shares in it, certainly if one is talking about minority interests in a publicly quoted company, really constitutes assistance to that company in its activities. Usually the purchase of shares in an already established and capitalised company simply means that one shareholder is replaced by another, without any direct impact on the company's activities. Of course the share price is a function of demand for the shares, and companies will normally wish to see their share price increase as one means of delivering value for existing shareholders, so in that sense the company benefits from

equity investment: but to describe that as assisting (or, for that matter, encouraging) its activities strikes me as artificial at best.

36. My Instructions do draw attention to the fact that the government of Israel, like other national governments, from time to time issues bonds. They point, for example, to a March 2024 bond sale which press reports expected to be for large volumes given the country's "significant funding needs". Without doubt Israel's current funding needs will have been significantly increased by its military operations in Gaza (and now in Lebanon): I have read, for example, that the government's 2023 borrowing requirement doubled following the 7 October attacks. Nonetheless, the same March 2024 press reports make clear that those bond proceeds were to be used for general budgetary purposes. Even if an administering authority were the actual purchaser of such a bond (as opposed to being an investor in a fund which might purchase such bonds), I doubt that it could be said thereby to be assisting the conduct of the war, let alone assisting the commission of criminal offences which might be committed during that war. There might be more room for argument if a particular bond issue was specifically to finance military operations in Gaza, but that does not seem to be what happens in practice.

37. So, whilst at one level the ultimate answer to all such questions is that assistance is a matter of fact and degree for a jury, the case on assistance in the present context seems so weak that it is hard to imagine a prosecution ever getting off the ground.

38. As noted at paragraphs 13 and 15 above, it is an offence under ICCA not only to assist the commission of substantive ICCA offences, but also to assist someone who commits the offence of assisting (or would do if acting in England and Wales). Whilst this potentially removes one level of remoteness from the equation, I am still extremely sceptical (especially for the reasons given at paragraph 35 above) that one assists the activities of a company merely by investing in it; and there will be in most cases be real

questions as to whether the company's activity is itself proximate enough to any war crimes for that activity to be "conduct ancillary" under ICCA.

39. Thus far I have made the assumption that one is talking about a new investment made by the relevant LGPS fund which could potentially be classified as an act of assistance. But to a large extent the Peers letter is focused upon existing investments, and is concerned to urge divestment from them. Although English law does sometimes impose criminal liability for omissions, usually in circumstances where there is some independent legal duty to take action, or where the omission is a negligent or deliberate failure to rectify a danger created by the defendant's own action, liability for omissions is not the norm. I think it is very difficult to see that failing to dispose of an investment could ever be an act of assistance, even if one postulates a case in which making the equivalent investment for the first time would be such an act.

Mens rea

40. Where the alleged accessory is a corporation rather than an individual (which would be the position if an attempt was made to prosecute an administering authority), the question will be whether the *actus reus*, or at any rate some necessary element of it, was carried out by a person who had the necessary *mens rea* and is to be treated as the "directing mind and will" of the corporation for the purpose of such acts: see e.g. *Serious Fraud Office v Barclays plc* [2020] 1 CrAppR 28.

41. As to what that required *mens rea* actually is, the mental state for accessory liability is not a straightforward topic[4]. However, in the light of the Supreme Court decision in *R v Jogee* [2017] AC 387, and other established authority including *R v Bryce* [2004] 2 CrAppR 35, the following propositions relevant to this case can be formulated (I refer to the person who commits the

[4] I should point out that, under the Rome Statute itself, article 25(3) limits liability for aiding and abetting to cases in which the defendant acts "for the purpose of facilitating the commission of such a crime." However, ICCA does not reproduce this narrow test of *mens rea*.

substantive offence as P, and to the defendant who is accused of the secondary, accessory offence as D):

(i) The act constituting the assistance must be done intentionally by D (i.e. deliberately rather than accidentally).

(ii) However, D need not have the desire or motive that P should commit the crime (if I supply a weapon to someone who proposes to rob a bank, it does not matter whether I want him to rob the bank, or whether I am just interested in getting money for the gun).

(iii) D must have knowledge of the essential facts which are necessary for P's conduct to be criminal, including P's own intent where that is an element of the offence (although D need not know that the law is such as to make P's act criminal). In *Jogee*, the Supreme Court referred to this as knowledge of "any existing facts". Smith, Hogan & Ormerod, *Criminal Law* (16th edition) at page 213 endorses the view of Professor Jeremy Horder that, given that P's conduct will take place in the future:

> ". . . the Supreme Court must have meant . . . that what matters is whether D knows that, when P acts on D's assistance or encouragement, the facts making P's act criminal will exist at that later time."

Smith, Hogan & Ormerod also suggests that the better view is that, following *Jogee*, it is actual knowledge and not mere recklessness that is required, although there are earlier cases which have not been explicitly overruled, and which suggest that it is enough if D knows that the relevant fact "probably" exists or will exist.

(iv) D must also know that his act is capable of assisting P's crime, and he must appreciate that there is at least a real possibility that P will in fact do the act which constitutes the offence.

(v) If P's crime might take a number of forms, D does not need to know the specific form which the crime will take, so long as P's actual offence is within the range of possible offences in relation to which the accessory had the necessary intention.

42. It is the knowledge requirement set out at paragraph 41(iii) above which seems to me, at least as matters stand, to represent a clear barrier to accessory liability in this case, even if (contrary to my view) any alleged assistance was not too remote to found the offence. I do not see how the confused and conflicting information currently in the readily accessible public domain (see paragraphs 18 to 24 above) could lead to the conclusion that an administering authority would know that, if Israel made use in the conflict of items supplied by companies in which the authority had invested, it would do so in a way which was criminal, or with the mental element required by ICCA s 66. Even if it was sufficient to know merely that these things were probable, I doubt that the test would be passed here.

43. If the suggested offence by the administering authority was one of "assisting an assistor" (see paragraph 38 above), it would become even harder to prove the necessary *mens rea*. In that scenario, the administering authority would still need to know the facts which mean that Israel's conduct would be criminal. But additionally the administering authority would have to know enough about the assistor's role and its state of knowledge to conclude that it was (at least) probably committing an offence. Whilst that cannot be ruled out in theory, it strikes me as very unlikely in practice.

Conclusions on criminal liability under ICCA

44. Whether Israel and its agents have committed and are committing offences, such as war crimes, to which ICCA applies may be a debateable question. But there are two reasons why, even if that is the position, it is very unlikely indeed that any investments by an administering authority would amount to an ancillary conduct offence under ICCA. The first is that such

investments will, at least in any normal case which I can envisage, be too remote from and tangentially connected with any war crimes to constitute assistance with their commission. The second is that, certainly as matters stand, it is very unlikely that an administering authority or anyone acting on its behalf would have the necessary *mens rea*. Those points apply to making new investments: it is still less likely that a failure to dispose of existing investments could amount to an offence.

45. Although it is apparent that there is an increasing level of interest around in the world in the potential criminal liability of commercial corporations and their officers for assisting or encouraging activity caught by the Rome Statute of the ICC (by no means only in the context of conflict in the Middle East), I am not aware that any serious attempt has ever been made to prosecute in a context similar to the present one. There is an ongoing trial in Sweden (*Lundin and Schneiter* – the Lundin Oil case) which has received considerable attention, and in which two senior executives are being prosecuted for aiding and abetting alleged war crimes by the Sudanese government. But the facts of that case are strikingly different from what is under discussion here. The allegation, effectively, is that Lundin Oil had a concession to exploit oil in a certain area of Sudan where rebel militia groups were active, requested or demanded that the government take steps to bring the militia activity under control so that oil extraction could proceed in safety, and knew that this was being done in a way which involved systematic attacks against civilians and their property. The company's alleged involvement in the alleged offences, that is to say, is vastly more direct than anything alleged against most of what the Peers letter refers to as the "complicit companies", let alone those who are merely investors in those companies.

Other offences

46. It does not seem to me at all likely that, if there was no ancillary conduct offence under ICCA, an administering authority could instead be guilty of

an offence under ss 44 to 46 of the Serious Crime Act 2007. The broad effect of those provisions is to criminalise the assistance and encouragement of crime, even in cases in which secondary liability cannot arise because no offence is in fact committed. But they all require either a belief that the act done will encourage or assist the commission of an offence, or an intention to encourage or assist which cannot (see s 44(2)) be taken to exist merely because the encouragement or assistance was a foreseeable consequence of the act done.

47. Are there any potential substantive offences other than those created by ICCA which change the picture materially? The Peers letter refers to ss 1, 15, 17 and 19 of the Terrorism Act 2000 ("TA2000"). Section 1 does not itself create an offence: it defines "terrorism" for the purposes of the Act, and I shall need to return in a moment to whether the actions of the state of Israel could fall within that definition.

48. TA2000 s 19 can be put aside as irrelevant. It requires disclosure to the police when a person believes or suspects that particular offences have been committed, if that suspicion or belief is based upon information coming to the person's attention in the course of a trade, profession, business or employment. I can see no reason why an administering authority should have any such suspicion or belief, and even if it did, any relevant information appears to be in the public domain and not something discovered by the administering authority in its capacity as such (even if one assumes that the discharge of administering authority functions amounts to a "business" for these purposes).

49. TA2000 s 15 (headed "Fund-raising") creates a number of offences, of which the most relevant seems to that under s 15(3), the offence of providing money or other property, knowing or with reasonable cause to suspect that it will or may be used for the purposes of terrorism. "Providing", by s 15(4), covers giving, lending, and otherwise making available, whether or not for consideration. The implication of the drafting

is clearly that money is something which can in principle be used for the purposes of terrorism, presumably where some terrorist organisation is provided with the money to enable it to buy supplies and carry on activities. But even if actions of the state of Israel amounted to terrorism, simply to invest in companies which supply to Israel surely cannot amount to the provision of money (or other property) which is so used. The money invested, even if it is "provided" to the company (which itself seems doubtful), is not provided to Israel itself.

50. A somewhat less unnatural way of seeking to bring relevant investment activities within TA2000 would be via s 17. A s 17 offence is committed if a person:

> "enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and . . . he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."

51. I imagine that the author of the Peers letter would argue that Israel's actions in Gaza fall within the TA2000 s 1 definition of terrorism because they endanger lives and cause serious damage to property, and have the purpose of "advancing a political, religious, racial or ideological cause", and that because they involve the use of firearms and explosives (see s 1(3)) it is unnecessary to show that the purpose of the acts is to intimidate a section of the public. The argument would then no doubt be that investing in one of the companies supplying equipment or munitions to Israel[5] amounts to entering into an arrangement as a result of which property is made available to Israel.

52. It is certainly true that, by virtue of TA2000 s 1(4), actions and impacts outside the United Kingdom can be caught by the definition of terrorism. It is also true that, if the definition of terrorism was satisfied here, then (since

[5] That is not what all of the "complicit companies" are in fact said to do, but since I think that the argument is wrong even in relation to such companies, it is unnecessary to consider how far the argument might extend if it was valid.

the relevant information about events in Gaza is in the public domain) the "reasonable cause to suspect" test would presumably be satisfied. Nonetheless, there are three reasons why I think that any argument such as I have outlined in the preceding paragraph would be unsound.

53. First, although the concept of an "arrangement" in s 17 is, no doubt deliberately, not a hard-edged one, so that an arrangement might take many forms, it does seem to me that there must be some linkage between the arrangement and the making available of the property which goes beyond simple causal connection. Put another way, it should be sensibly possible to describe the parties to the arrangement as "arranging" for that supply. Otherwise the offence created would be so broad and nebulous, in my view, as to offend against ordinary principles of interpretation of penal statutes. Even though aspects of the context are different, there is some analogy to be drawn with *Bowman v Fels* [2005] 1 WLR 3083, where a similarly worded provision in anti-money laundering legislation was held not to extend to the ordinary conduct of litigation – to adapt what the Court of Appeal suggested there at [62-63], if Parliament had intended that the ordinary making of investments in a company might constitute an "arrangement" for that company to carry on its trading activities, it is hard to imagine that the legislation would not have included further detail as to when that would or would not be the case, especially given the objective nature of the "reasonable cause to suspect" test. See also *R v Zafar* [2008] QB 810 at [29].

54. Secondly, even if a genuine investment counted as an "arrangement" for this purpose, I doubt that in ordinary circumstances a supply by a company could be said to be the "result" of investment in that company (cf. paragraph 35 above).

55. Thirdly, I am very dubious that action taken by a foreign government with a view to combating persons whom it regards as an internal or external threat to the state and its territory should be regarded as "advancing a

political, religious, racial or ideological cause" within the meaning of TA2000 s 1. This is not to pass any comment or judgment, one way or another, upon the policies or methods of the government of Israel. Rather, it is to suggest that there is a distinction to be drawn between pursuit by a state of what it perceives as the interests of the state, as such, and the pursuit of a "cause". The fact that all governments will in some sense themselves have a political character (and perhaps a religious, racial or ideological one as well) is not to the point. Again, if s 1 had been capable of criminalising the supply of equipment to a foreign government, potentially a friendly government, it is hard to imagine that Parliament would not have defined more carefully the circumstances in which that would or would not be the case.

56. I do not think that what I have just said is inconsistent either with the fact that there is no "just cause" exception to the TA2000 (see *R v F* [2007] QB 960), or with the (provisional) view expressed by Elisabeth Laing J in *Begg v HM Treasury* [2017] EWHC 3329 (Admin) at [31] as to an act being capable of having a terrorist purpose even though done in (perceived) self-defence, or with the Supreme Court decision in *R v Gul* [2014] AC 1260 that TA2000 terrorism can include military attacks in the context of a non-international armed conflict. The issue for the Supreme Court in *Gul* was specifically defined in terms of attacks by a "non-state" armed group, and whilst the Court emphasised the breadth of the TA2000 s 1 definition, there is no hint in the judgment or in the arguments that it might extend to actions by the state itself. Whilst there has been some academic and extra-judicial discussion of the potential criminal liability of state forces operating abroad, I am not aware that there has been any serious suggestion that the legislation might catch the sort of state actions under consideration here.

57. Finally, the Peers letter makes various references to international law. However, whilst crimes exist in public international law, and historically it appears that the English courts have sometimes been prepared to develop

the common law in line with international law in this respect, there is no automatic assimilation of domestic criminal law with international law. It is now for Parliament, not for the courts through development of the common law, to create new offences: see the House of Lords' decision in *R v Jones* [2007] 1 AC 136, especially at [27-29], [60 and 62] and [101-102].

58. In *Jones* it was thought to be well arguable that war crimes fell into the category which had historically been accepted into domestic common law. However, it seems plain that the extent to which war crimes or any secondary actions in relation to them are criminalised in English law is now governed by ICCA. Other established international law crimes (such as piracy) are simply not relevant in the present case.

59. Accordingly, I conclude that an administering authority in these circumstances has no potential criminal liability under the TA2000, nor for any other non-ICCA offence.

Consent to prosecution

60. Prosecutions under ICCA require the consent of the Attorney General: see ICCA s 53(3). Prosecutions for the relevant offences under TA2000 require the consent of the DPP under s 117(2), and in the present contest such consent could probably only be given with the permission of the Attorney, by virtue of s 117(2A).

61. The stated policy of the Crown Prosecution Service, in cases where DPP consent is necessary and sought for a private prosecution, is to apply the normal evidential and public interest tests, and to prosecute itself where they are satisfied, and to refuse consent where they are not.

62. I would be astonished if consent was forthcoming in current circumstances for a prosecution of an administering authority or its members or officers.

Obligations arising in public law

63. I now turn to the different topic of whether, if an administering authority's investments could be regarded as providing some form of support or assistance for Israel's current course of conduct towards Gaza, or the Palestinian people and territories more generally, that might be regarded as a breach of the authority's public law obligations. I repeat (see paragraph 6 above) that in this Opinion I am concerned only with potential *obligations* to disinvest or refrain from investment.

64. English law adheres to the dualist theory of international treaties – that is to say, that when the Crown concludes a treaty in the exercise of prerogative powers, that in itself has no impact upon domestic law. Legislation will be required before the treaty provisions, or equivalent statutory provisions, are enforceable in the national courts. See *R (Miller) v Secretary of State for Exiting the European Union* [2023] 1 WLR 2011 at [55-57]. Similarly, customary international law can no longer be regarded as an automatic source of domestic law rights and obligations, although here there may be a presumption that the common law should develop in line with international law: see *R (Freedom and Justice Party) v Secretary of State for Foreign & Commonwealth Affairs* [2019] QB 1075 at [113-123].

65. This is not to say that international law has no influence on the domestic courts. It may be relevant, for example, when deciding how an ambiguous statutory provision should be construed; or in influencing the incremental development of the common law; or in giving detailed content to the generally expressed rights in the ECHR as incorporated through the Human Rights Act 1998. But none of these possibilities represent a free-standing source of obligations.

66. Further, in *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 Lord Reed JSC made it clear at [90-91] that international law obligations could not be introduced into domestic public law by the back

door[6], by inviting the court to hold that an authority had misunderstood the nature of those obligations and had thereby misdirected itself in law, or failed to have regard to a relevant consideration – save perhaps in a case where the authority had demonstrated an intention to act in whatever way international law required, but had demonstrably got that requirement wrong. See also *R (Friends of the Earth Ltd) v Secretary of State for International Trade* [2023] 1 WLR 2011.

67. If that is true even where the defendant is an organ of central government, and therefore (at least in a non-technical sense) the party which has undertaken any relevant treaty obligations, it must be all the more true if the defendant is a local authority having no functions in relation to the conclusion of international treaties. In *R (Tilley) v Vale of Glamorgan Council* [2016] EWHC 2272 (Admin), Lewis J at [75] and [78] held in effect that a local authority was only bound to have regard to the provisions of a treaty if that was what the applicable domestic legislation expressly or impliedly required it to do.

68. To the extent that the Peers letter suggests that local authorities are under some sort of general positive obligation to uphold international law, that is plainly wrong. Nor, in the light of the discussion above, can I see any rule or provision of domestic law which might plausibly fall to be interpreted one way or another in order to give effect to a particular international law obligation of relevance here.

69. Indeed, it is not even clear what specific international law obligation is being relied upon by the Peers letter. Leaving aside the Rome Statute which I have already in effect discussed, and the Nuremberg Code (whose relevance here is not explained), the only reference in the letter to an identifiable provision or rule of international law is to Article 41 of the UN Charter. Article 41, read with Article 39, empowers the Security Council to decide

[6] For an analogous approach in private law, see *The Law Debenture Trust Corpn plc v Ukraine* [2024] AC 411 at [159-167].

what measures (not involving the use of armed force) are to be taken to maintain or restore international peace and security, and to call upon the UN members to apply such measures.

70. It is clear that Security Council resolutions do not have automatic binding effect in the United Kingdom. Quite apart from the general principles discussed above, that is the whole reason why s 1 of the United Nations Act 1946 provides for the making of Orders in Council to enable Article 41 measures to be effectively applied.

71. In the ICJ's advisory opinion of 19 July 2024 (see paragraph 20 above), the Court discussed at paragraphs 273 to 279 "the legal consequences of Israel's internationally wrongful acts in the Occupied Palestinian Territory as regards other States". It identified certain of those breaches as being of obligations *erga omnes*, i.e. ones owed to the international community as a whole, and held that whilst the "modalities" of required action were for the General Assembly and the Security Council, all states must co-operate with the UN to put those modalities into effect. Having identified various relevant resolutions, the Court summarised the obligations of member states at [278-279]. For present purposes one should note in particular what was said about obligations: to abstain from entering economic or trade dealings with Israel which might entrench its unlawful presence in the occupied territories; to take steps to prevent trade or investment relations assisting in the maintenance of the illegal situation created there; and not to render aid or assistance in maintaining the situation created by Israel's illegal presence in the occupied territories.

72. On 18 September 2024 the General Assembly passed a resolution in response to the ICJ's advisory opinion. Amongst other points, this called upon member states to fulfil their obligations, set out in terms similar to those used in the opinion. More specifically, paragraph 5 of the resolution called upon member states:

"(a) To take steps to ensure that their nationals, and companies and entities under their jurisdiction, as well as their authorities, do not act in any way that would entail recognition or provide aid or assistance in maintaining the situation created by Israel's illegal presence in the Occupied Palestinian Territory;

(b) To take steps towards ceasing the importation of any products originating in the Israeli settlements, as well as the provision or transfer of arms, munitions and related equipment to Israel, the occupying Power, in all cases where there are reasonable grounds to suspect that they may be used in the Occupied Palestinian Territory;

(c) To implement sanctions, including travel bans and asset freezes, against natural and legal persons engaged in the maintenance of Israel's unlawful presence in the Occupied Palestinian Territory, including in relation to settler violence . . ."

73. No doubt both the advisory opinion and this resolution will be welcomed by those who want to see the sort of disinvestment contemplated by the Peers letter. But in my view, whatever their political significance, they do not operate to impose any relevant domestic law obligations upon administering authorities or their members and officers. Quite apart from the fact that the terms of the resolution do not, at least directly, address the issue of investment in companies which behave in particular ways, neither an ICJ advisory opinion nor a General Assembly (as opposed to Security Council) resolution has binding force in international law. Further, even if they were binding in international law, that would not mean that they automatically became part of domestic law, for the reasons already discussed. Finally, the resolution is, plainly, addressed to UN member states as such, just as the advisory opinion is concerned with the obligations of such states.

74. It is therefore clear that international law does not impose any enforceable legal obligation upon administering authorities, or their members and personnel, to disinvest from or refrain from making particular investments. Further, even to say that the ICJ opinion, the resolutions referred to in it, or the 18 September 2024 resolution, were matters to which administering authorities were obliged to have regard (i.e. mandatory relevant

considerations, looked at in *Wednesbury* terms) would not in my view be correct. Approaching the matter in the way suggested by *Tilley*, above, I see nothing in the Public Service Pensions Scheme Act 2013 ("PSPA" - under which the LGPS is established), or in the regulations establishing and governing the LGPS, from which such a requirement could be derived.

75. In fact, the position is the other way round. Under PSPA s 3 and Schedule 3 paragraph 12(a), there is an express power for scheme regulations to include provision for the giving of guidance or directions by the responsible authority (i.e. the Secretary of State):

> "including guidance or directions on investment decisions which it is not proper for the scheme manager [i.e. the administering authority] to make in light of UK foreign and defence policy"

76. These words were added by amendment, by the Public Service Pensions and Judicial Offices Act 2022. They were designed to reverse the decision of the Supreme Court in *R (Palestine Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774, which had held that there was no such power. It is evident that the Secretary of State could now[7] impose upon administering authorities the obligation to refrain from particular investments, or to have regard to the position in international law before making investment decisions, or indeed not to have regard to such matters. But no such steps have so far been taken. Where the responsible authority has elected not to exercise an express power conferred by Parliament so as to impose particular obligations upon administering authorities, it is not for the courts to do so by way of developing those authorities' general public law obligations.

77. I would not attach any particular significance one way or another to the fact that the previous government introduced an Economic Activity of Public

[7] Whether the Secretary of State could do that immediately by way of directions or mandatory "guidance", or whether she would first have to amend the Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016, is debateable, but is not the point for present purposes.

Bodies (Overseas Matters) Bill, which was lost when Parliament was dissolved earlier this year, save to note that the Bill was controversial, and the existence of political controversy about these matters perhaps emphasises that it would not be appropriate for the courts to refashion the law themselves.

CONCLUSIONS

78. This Opinion is concerned with the suggestion that it would be unlawful for administering authorities to invest, or continue to invest, LGPS funds in undertakings engaged in certain activities with a bearing upon Israel's conduct in and in relation to Gaza or the other Palestinian territories.

79. In my view, any such suggestion is incorrect.

80. As to suggested criminal liability of administering authorities or their officers or members, I consider that any attempted prosecution would be misconceived, because:

(i) Merely to make an ordinary investment in a company will not in normal circumstances amount to assistance in that company's activities. Still less will it amount to assistance in the commission of the criminal acts (if any) of a person to whom that company supplies goods and services as part of its business. Therefore the *actus reus* of any "ancillary conduct" offence under the International Criminal Court Act 2001 is not established even for new investments (let alone the mere continuation of existing investments).

(ii) Although closer to the line, I think that the conclusion about assistance would be the same even if an LGPS fund were to invest directly in Israeli government bonds, unless perhaps the proceeds of the bond issue were specifically earmarked for the activity said

to involve the commission of an ICCA offence (such as a war crime).

(iii) Further, whilst the position might change in the future, I do not consider that on the information currently available to administering authorities (by which I mean the information readily accessible in the public domain) it is possible to say that Israel is committing ICCA offences. The position is simply uncertain. Therefore I do not consider that the administering authority (or individuals comprising its directing mind) would have the necessary *mens rea* to commit the ICCA ancillary conduct offence.

(iv) For similar reasons to those set out in (i) above, I do not consider that to make such investments amounts to becoming concerned in an "arrangement" for the purposes of s 17 of the Terrorism Act 2000. Nor do I think that the actions of a foreign government, in pursuit of the perceived interests of the state which it governs, amount to terrorism within the meaning of TA2000.

(v) I do not see any other plausible basis for criminal liability here, whether by way of other TA2000 offences or otherwise. I would also be extremely surprised if the Attorney General or DPP were to consent to a prosecution, which is required under ICCA and under the TA2000.

81. It may be that actions by Israel are in breach of international law in certain respects (indeed, the International Court of Justice has so held in its advisory opinion), and there may be international law obligations which rest upon states as to how they should respond to such breaches, although the precise nature and extent of any such obligations is no doubt highly debateable. But what matters for the purposes of this Opinion is that it is in my view clear that local authorities, in their capacity as administering

authorities, are not subject to obligations imposed directly by international law. Nor, in my opinion, is there any public law obligation to have regard to such matters.

82. This Opinion is not about the extent to which, or the circumstances in which, administering authorities might be entitled (rather than obliged) to have regard to any such matters. I shall be dealing with that topic as part of further, more general advice.

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11KBW

8 October 2024

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IN THE MATTER OF
THE LOCAL GOVERNMENT
PENSION SCHEME

AND IN THE MATTER OF
EVENTS CONCERNING GAZA

OPINION

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