CIVIL CLAIMS AGAINST THE CROWN IN THE WAKE OF THE IRAQ WAR: CROWN ACT OF STATE, LIMITATION UNDER FOREIGN LAW AND LITIGATION FUNDING IN *ALSERAN V MINISTRY OF DEFENCE*

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Abstract: This article notes the High Court judgment in *Alseran v Ministry of Defence* which follows the first full trial of claims for compensation in what is known as the "Iraqi civilian litigation". This article focuses on three aspects of the judgment of importance for civil justice in England: 1) the adoption of a strict interpretation of the Crown act of state doctrine, 2) the claimant-friendly interpretation of the public policy exception to the rule that the issue of limitation in a tortious claim is governed by the foreign applicable law, and 3) Leggatt J's observations which disclose the adverse effect of the changes introduced to the regime of civil litigation costs and funding following the Jackson Report. The first two aspects of the judgment have the potential to exert a considerable impact on cross-border public interest litigation in England. But the potential of the law in this area cannot be fulfilled without a regime of civil litigation costs and funding that enables claimants to bring their claims.

I Introduction

Many claims have recently been brought against the Crown for alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations, in particular those conducted in Iraq and Afghanistan. Wrongs complained of include unlawful arrest and detention, extraordinary rendition, mistreatment, torture, as well as complicity in, and failure to protect from, wrongful acts and omissions of a third party, typically the military and security services of the US.

Several important developments concerning claims of this kind occurred in 2017. In January 2017, the UK Supreme Court handed down three judgments in claims against various government departments and officials for alleged overseas violations of international humanitarian law and human rights standards.[1] These judgments, as well as other recent judgments handed down in claims of this kind, were all given on the basis of assumed facts or limited written evidence. In December 2017, the High Court, through Mr Justice Leggatt, delivered the first judgment in a claim against the

[1] *Rahmatullah v MoD* [2017] UKSC 1, [2017] AC 649; *Mohammed v MoD* [2017] UKSC 2, [2017] AC 821; *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964.

Crown arising out of overseas military operations following full trial in *Alseran v MoD*.[2]

This rich case is of interest for civil justice in England for three reasons. Firstly, it adopts a strict interpretation of the Crown act of state doctrine, thus benefiting claimants who allege to have suffered harm overseas at the hands of British military and security services and wish to bring claims in tort against the Crown in England. Secondly, although the court held that the claims in tort were time-barred under Iraqi law, the discussion of the public policy exception to the rule that the issue of limitation is governed by the foreign applicable law is informative and has the potential to exert a considerable impact on cross-border public interest litigation[3] in England. Thirdly, the judgment in *Alseran* offers an insight into the effect that the changes introduced to the regime of civil litigation costs and funding following the Jackson Report[4] have had on cross-border public interest litigation in England. These aspects of the judgment in *Alseran* are dealt with in three separate sections. But first, the facts, issues and the outcome of the case will be briefly described.

II Facts, Issues and Outcome

Following the invasion and occupation of Iraq, British forces arrested and detained a large number of people. This was done pursuant to powers conferred on British forces under international law at the relevant time, namely international humanitarian law and as a result of a resolution of the United Nations Security Council (No 1546) which authorised internment where this was necessary for imperative reasons of security. Some detainees were civilians who happened to be in the zone of British military and security operations. Many were detained for a long time, often without adequate review of their internment. Some detainees complained of torture and mistreatment either directly at the hands of British soldiers or after being transferred by British soldiers into the custody of the US. As a result, 967 claims were brought in England. This group of claims is known as the "Iraqi civilian litigation". There are currently 632 remaining claims.

In *Alseran*, four of the remaining 632 claims were tried as lead cases. The first case concerned a civilian captured in his home in Basra who claimed to have been

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[2] [2017] EWHC 3289 (QB).

[3] "Cross-border public interest litigation" is used in this article as synonymous to "international civil litigation for human rights violations", which was the term preferred by the former International Law Association committee on international civil litigation and the interests of the public (2006-2012). See http://www.ila-hq.org/index.php/committees. The ILA committee focused on claims brought by victims of alleged violations of human rights standards committed by transnational corporations and individuals. In this article, the term "cross-border public interest litigation" also covers claims brought by victims of alleged wrongs committed overseas by the Crown.

[4] R. Jackson, 'Review of Civil Litigation Costs: Final Report' (December 2009), available at https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf.

unlawfully detained in a British prisoner detention facility in inhuman conditions and battered by British soldiers. The next two cases concerned two civilians captured by coalition forces on board a merchant ship on which they were serving and later transported by British forces to a British prisoner detention facility. The claimants claimed to have been battered and unlawfully detained in inhuman conditions. The fourth case concerned a civilian captured in his home in Basra who was suspected of being involved in terrorist activities. He claimed to have been battered at the time of his capture, after which he was subject to interrogation practices which amounted to inhuman and degrading treatment and unlawfully detained by British soldiers.

As is typical for claims against the Crown which concern the external exercise of governmental authority, the claims in *Alseran* were advanced on two legal bases. The first was the Human Rights Act 1998 (HRA 1998), which implements the European Convention on Human Rights (ECHR) in UK law. The second was the general law of tort. Following an impressively careful and thorough examination of the evidence, Leggatt J held, in a judgment spanning 983 paragraphs or 239 pages of the official report, that the claimants almost completely succeeded with their human rights claims and that the defendant had violated international humanitarian law. With respect to the claims in tort, Leggatt J found the defendant liable under the applicable Iraqi law, but also that the claims were time-barred under that law. All four claimants were awarded damages for the violation of their human rights.

Since this article focuses on the relevance of *Alseran* for civil justice in England, complicated issues raised by the human rights claims will not be explored. Much more important for the present purpose are issues raised in the context of the tortious claims. The first major issue was the Crown act of state doctrine. The 2017 Supreme Court judgment in *Rahmatullah*[5] left open the question whether, for the Crown act of state doctrine to apply, the government's conduct and/or policy in question should be lawful under English domestic law. Leggatt J held that in principle an act can only be a Crown act of state if it has been authorised or ratified by a government policy or decision which is a lawful exercise of the Crown's powers as a matter of English domestic law, thus paving the way for the assessment of the merits of the tortious claims. After examining expert evidence on the content of Iraqi law, Leggatt J found that there was a basis of liability for the unlawful imprisonments and batteries in the Iraqi Civil Code. But he also held that the tortious claims were time-barred under Iraqi law and that giving effect to that law was not contrary to English public policy, primarily because the claimants could still continue to pursue their human rights claims. Leggatt J also made some observations which disclose the adverse effect of the changes introduced to the regime of civil litigation costs and funding following the Jackson Report. Since these three issues are closely connected with access to, and the administration of, justice in England not only in relation to claims against the Crown,

[5] [2017] UKSC 1, [2017] AC 649.

but also in relation to cross-border public interest litigation more broadly, it is justified to examine them in more detail.

III Crown Act of State and Lawfulness of Government's Conduct and Policies

Although of old vintage,[6] the Crown act of state doctrine has not been invoked much in the past 100 years. Following the recent British overseas military and security operations and the allegations of unlawful arrests and detentions, extraordinary renditions and acts of torture and other mistreatment committed by British forces and their allies, the interest in, and the relevance of, this doctrine has increased. Victims of alleged wrongs committed overseas by British military and security services have brought a number of claims in England. The first reaction of the defendant has been to raise the Crown act of state doctrine as a defence to a claim in tort. The Crown act of state doctrine is of importance for civil justice in England. The broader the scope of this doctrine, the less likely it is that victims of alleged wrongs committed overseas by British military and security services will be able to bring successful tortious claims in this country.

The 2017 Supreme Court judgment in *Rahmatullah*[7] provided a welcome clarification of some issues surrounding the Crown act of state doctrine, although many other issues continue to be as murky as ever. It is not the place here to discuss the *Rahmatullah* judgment in depth.[8] Suffice it to note that the Supreme Court was unanimous that the Crown act of State doctrine precludes a claim in tort brought by a foreigner against the government, its servants or agents in respect of certain acts committed abroad pursuant to a deliberate UK policy in the conduct of foreign affairs. One of the questions left open by *Rahmatullah* was whether unlawful arrests and detentions and acts of torture and other mistreatment committed by the Crown could ever be considered as acts of state which would preclude claims in tort against the Crown in respect of such acts. The question is of great importance. If such acts cannot be considered as acts of state, victims of such acts can bring claims in tort against the Crown in England without fear that the Crown act of state doctrine will preclude their claims. A separate question is, if unlawful arrests and detentions and acts of torture and other mistreatment committed by the Crown cannot be considered as acts of state, what standards should be applied in order to determine whether or not a government's act is lawful. These are the questions that Leggatt J dealt with in his judgment in *Alseran*.

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[6] *Buron v Denman* (1848) 2 Exch 167, 154 ER 450.

[7] [2017] UKSC 1, [2017] AC 649.

[8] See A. Dickinson, 'Acts of State and the Frontiers of Private (International) Law' (2018) 14 JPIL 1; C. McLachlan, 'The Foreign Relations Power in the Supreme Court' (2018) 134 LQR 380; E. Smith, 'Acts of State in *Belhaj* and *Rahmatullah*' (2018) 134 LQR 20.

Leggatt J followed a declaration made by the Supreme Court after the judgment in *Rahmatullah*[9] and refused the claimants' argument that the Crown act of state doctrine does not apply to the conduct of military operations overseas that are unlawful in international law and that the invasion of Iraq was such an unlawful operation.[10] The application of the Crown act of state doctrine was held not to depend on establishing that either the allegedly wrongful act or the wider military operation of which the act formed part or the policy decision to engage in that operation was lawful in international law.[11]

The more difficult question was whether the Crown act of state doctrine applies if the conduct and/or policy in question is unlawful as a matter of English domestic law. Leggatt J held that the doctrine does not apply where a particular government policy of a kind which is judicially reviewable is unlawful in English domestic law and therefore outside the scope of the government's legal powers. *Ultra vires* policies and acts have no legal effect and can give rise to the Crown's liability in tort.[12] Torturing and mistreating prisoners or detainees are pertinent examples.[13] Policies authorising such acts are judicially reviewable. Being contrary to international humanitarian law and the HRA 1998, such policies are unlawful under English domestic law[14] and therefore *ultra vires*. Leggatt J gave another example of a policy which would not be protected by the Crown act of state doctrine:

> Likewise, acknowledging that a government decision to engage in a military operation abroad entails the use of lethal force and detention on imperative grounds of security does not require the courts to accept that, for example, such lethal force may be deliberately targeted at civilians or that such detention is permissible when there are no imperative reasons of security capable of justifying it.[15]

In conclusion, Leggatt J held that an act can only be a Crown act of state if it has been authorised or ratified by a government policy or decision which is a lawful exercise of the Crown's powers as a matter of English domestic law.[16]

Leggatt J's judgment is of considerable importance for two reasons. First, it adopts a strict interpretation of the Crown act of state doctrine, thus benefiting claimants who allege to have suffered harm overseas at the hands of British military

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[9] Cited in *Alseran* [2017] EWHC 3289 (QB), [48].
[10] Ibid, [54]-[61].
[11] Ibid, [56].
[12] Ibid, [69]-[71].
[13] Ibid, [71]. The defendant had accepted in *Rahmatullah* that the Crown act of state doctrine could not apply to acts of torture and to the maltreatment of prisoners or detainees: [2017] UKSC 1, [2017] AC 649, [36]. Lady Hale (at [37]) and Lord Sumption (at [96]) accepted that a government policy which is unlawful under English domestic law and therefore *ultra vires* cannot be a Crown act of state; compare [77], where Lord Mance appeared to question the utility of the word "lawful" in this context.
[14] See [2017] EWHC 3289 (QB), [327]-[328].
[15] Ibid, [71].
[16] Ibid, [76].

and security services and wish to bring claims in tort against the Crown in England. This has the potential to increase the accountability of the government in the conduct of foreign affairs and to uphold the rule of law in international relations. Second, Leggatt J's judgment connects in a very direct way private and public law, both domestic and international, legal disciplines traditionally regarded as discrete and with little points of contact.[17] A tortious claim against the Crown which concerns the external exercise of governmental authority can succeed only if the claimant defeats the Crown act of state doctrine which the defendant will raise as a defence. The claimant can do this by demonstrating that the government's policy in question is judicially reviewable, unlawful as a matter of English domestic law and *ultra vires*. One way of demonstrating this is to show that the policy in question is contrary to international humanitarian law and the HRA 1998. It is through this process that a question of tort law and private international law (Is there a tortious claim against the Crown which concerns governmental acts committed abroad?) becomes a question of domestic public law (Is the government's policy in question judicially reviewable and unlawful as a matter of English domestic law and *ultra vires*?), which in turn becomes a question of public international law (Has the government's policy violated international humanitarian law and human rights standards?). Leggatt J held that the defendant had violated international humanitarian law and human rights standards and acted *ultra vires*. Consequently, the defendant would be liable if there was a basis of liability in the applicable Iraqi law and the claim was not time-barred.

IV Statute of Limitation, Choice of Law, Public Policy and Cross-Border Public Interest Litigation

The parties in *Alseran* agreed that the claims in tort were governed by Iraqi law, as the *lex loci delicti*, pursuant to the choice-of-law rules of the Private International Law (Miscellaneous Provisions) Act 1995 (1995 Act).[18] After examining expert evidence on the content of Iraqi law, Leggatt J found that there was a basis of liability in the Iraqi Civil Code for the unlawful imprisonments and batteries committed against the claimants.[19] Leggatt J then turned to the issue of limitation. Before discussing this part of the judgment in *Alseran*, some preliminary matters should be mentioned first.

In English private international law, limitation is treated as a matter of substance rather than as a matter of procedure, and as such is governed by the law determined as applicable pursuant to the relevant choice-of-law rules. This is established by the Foreign Limitation Periods Act 1984 (1984 Act) with respect to

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[17] See B. Hess, 'The Private-Public Divide in International Dispute Resolution' (2017) 388 *Recueil des Cours* 71; A. Mills, *The Confluence of Public and Private International Law* (CUP, 2009); V. Ruiz Abou-Nigm, K. McCall-Smith, D. French (eds), *Linkages and Boundaries in Private and Public International Law* (Hart, 2018).

[18] [2017] EWHC 3289 (QB), [4], [36]. Compare *Sophocleous v SoS for the FCO* [2018] EWHC 19 (QB), appeal pending, noted by U. Grušić (2018) 67 ICLQ.

[19] [2017] EWHC 3289 (QB), [92]-[720].

claims to which European choice-of-law instruments do not apply.[20] This is also provided by the Rome Regulations on the law applicable to contractual and non-contractual obligations[21] with respect to claims that fall within the scope of these instruments.[22]

Since the tortious claims in *Alseran* fell outside the subject-matter scope of Rome II,[23] the law applicable to the issue of limitation was determined pursuant to the 1984 Act. In a nutshell, the Act provides for the application of the foreign applicable law "relating to limitation" in actions and proceedings in England.[24] It clarifies that references to the law of any country relating to limitation are to be construed as "references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings…in the courts of that country" and include "references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period."[25] "Relevant law" is defined as both "the procedural and substantive law" rules of the foreign applicable law.[26] The doctrine of renvoi has no role to play.[27] The Act also provides that the foreign applicable law does not apply to the extent to which it conflicts with English public policy.[28] The public policy doctrine is in particular engaged where the application of the foreign applicable law causes undue hardship to a person who is, or might be made, a party to the action or proceedings.[29]

It should be mentioned here that claims brought by victims of alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations are a species of a broader phenomenon of cross-border public interest litigation. Another important form of cross-border public interest litigation are claims brought by victims of alleged gross violations of human rights standards committed abroad by transnational corporations. Since transnational corporations, like states, have the capacity to commit gross violations of human rights standards, claims brought by victims of overseas wrongs committed by the Crown are in many respects comparable to claims brought

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[20] 1984 Act, s 1. The Act applies in relation to any action or proceedings by or against the Crown as it applies in relation to actions and proceedings to which the Crown is not a party: s 6.
[21] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6; Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.
[22] Rome I, Art 12(1)(d); Rome II, Art 15(h).
[23] Rome II, Art 1(1); Recital 9; Case C-292/05 *Lechouritou v Germany* [2007] ECR I-1519.
[24] 1984 Act, s 1(1)(a).
[25] Ibid, s 4(1)(a).
[26] Ibid, s 4(2).
[27] Ibid, ss 1(5) and 4(2).
[28] Ibid, s 2(1).
[29] Ibid, s 2(2).

by victims of overseas wrongs committed by English-based transnational corporations.

The gestation period of claims brought in England by victims of alleged overseas wrongs committed by the Crown and English-based transnational corporations is long. It is typically much longer than the gestation period of other kinds of cross-border civil claim brought in England. This is for several reasons. The rules on immunity in public international law preclude the bringing of claims against the Crown in foreign courts which concern the exercise of British sovereign power.[30] Furthermore, British overseas military and security operations frequently follow, coincide with, or result in profound changes in the country in which these operations are conducted. This throws additional practical and legal obstacles in the path of victims seeking to commence proceedings in this country.[31] Similarly, parent companies of transnational corporations are able to avoid litigation in host countries by taking advantage of the separate legal personalities of the transnational corporation's constituent parts, their limited liabilities, the territorial jurisdiction of local authorities, and regulatory failures in host countries. Regulatory failures consist in the inability or unwillingness of local authorities to regulate and oversee local activities of transnational corporations because of the host country's socio-economic underdevelopment, low administrative capacity and technical expertise, information asymmetry, fear of driving away foreign investors, corruption, collusion with the corporation and the like.[32] It often takes a long time for victims of alleged overseas wrongs committed by the Crown and English-based transnational corporations to realise that they may be able to get around obstacles to commencing proceedings abroad by bringing their claims in England. This is not to deny that there are practical and legal obstacles inherent in any cross-border civil litigation such as securing adequate legal representation, civil litigation costs and funding, obtaining evidence etc. Such obstacles are, however, greater in cross-border public interest litigation. In cross-border public interest litigation, claimants typically have to rely on legal aid or no-win, no-fee arrangements outside their country of residence. In other kinds of cross-border litigation, claimants are usually either insured (eg traffic accidents, accidents suffered in the course of employment) or are of sufficient means to pursue the litigation (litigation arising out of commercial dealings). Many cross-border public

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[30] *Jurisdictional Immunities of the State (Germany v Italy; Greece intervening)* 2012 ICJ Rep 99; H. Fox and P. Webb, *The Law of State Immunity* (OUP, 3rd edn, 2015), 601-602; A. Sari, 'The Status of Armed Forces in Public International Law: Jurisdiction and Immunity' in A. Orakhelashvili (ed), *Research Handbook on Jurisdiction and Immunities in International Law* (Cheltenham: Edward Elgar, 2015) 319.

[31] See *Al-Jedda v Secretary of State for Defence* [2009] EWHC 397 (QB), referring, at [46], to "a fair amount of confusion in the Iraqi legal system, and it may also be among legislators, about the changes of the past few years". Similarly, *Mohammed v Ministry of Defence* [2014] EWHC 1369 (QB), [64], [69], with respect to the Afghan legal system.

[32] J. Stiglitz, 'Regulating Multinational Corporations' (2008) 23 *American University International Law Review* 451, 474-481.

interest litigations are group actions, which increases the complexity of preparing and conducting litigation.

Because of the long gestation period of claims, the issue of limitation is often crucial in cross-border public interest litigation. In *Alseran*, Leggatt J dealt with a question concerning limitation that is of general importance for cross-border public interest litigation in England. That question was whether at least some practical and legal obstacles that stood in the path of the claimants in this case (other than the rules on immunity in Iraqi law, which the Supreme Court found in *Iraqi Civilians v MoD*[33] not to be of relevance for the purpose of proceedings in England) could result in the suspension, interruption or modification of the limitation period.

Leggatt J held that the limitation period under Iraqi law started to run for three claimants in January 2006 when Leigh Day, a law firm from London which represented claimants in the majority of cross-border public interest litigations in England, began to accept instructions from Iraqi claimants.[34] For the fourth claimant the limitation period started to run in March 2007 when he was released from detention.[35] Since the claims in *Alseran* were brought more than three years after these dates, they were out of time. In particular, Leggatt J found that the fact that "the claimants did not contemplate, and could not reasonably have contemplated, the possibility of bringing a claim for compensation in the English courts or have known how it was possible to bring such a claim until they heard about [an Iraqi who was referring cases to Leigh Day]" did not provide a lawful excuse which suspended the limitation period.[36]

Leggatt J then proceeded to the question whether the application of Iraqi law should be excluded for violating English public policy,[37] which is in particular engaged where the application of the foreign applicable law causes undue hardship to a person who is, or might be made, a party to the action or proceedings.[38] Leggatt J rejected the public policy argument.[39] In doing so, he made the following statement:

> If the consequence of applying the Iraqi limitation law in these circumstances were to leave the claimants without any possible remedy for the injuries they claim to have suffered as a result of the wrongs allegedly done to them by British forces, I am inclined to think that this would amount to undue hardship. However, a very significant factor, in my view, is that the claimants are not

[33] [2016] UKSC 25, [2016] 1 WLR 2001.
[34] [2017] EWHC 3289 (QB), [785].
[35] Ibid, [786].
[36] Ibid, [777].
[37] Foreign Limitation Periods Act 1984, s 2(1).
[38] Ibid, s 2(2).
[39] [2017] EWHC 3289 (QB), [821]-[843], [848].

> confined in this litigation to claims in tort under Iraqi law. They also have parallel claims arising out of the same facts under the UK Human Rights Act.[40]

Although the limitation period under the HRA 1998 is only one year beginning with the date on which the act complained of took place, the court has a wide discretion to impose a longer time limit as it considers equitable having regard to all the circumstances.[41] Having exercised this discretion with respect to the claimants' human right claims,[42] the court decided that the claimants would not suffer undue hardship with respect to their tortious claims:

> In these circumstances the main, if not the only, disadvantage which the claimants will suffer if they are prevented by the Iraqi rules of limitation from pursuing their claims in tort is that, as noted in the final part of this judgment, the levels of damages awarded under the Human Rights Act as compensation for injury other than financial loss tend to be lower than the amounts of damages awarded in corresponding claims in tort. I accept that, for this reason, applying the Iraqi rules of limitation has the result of causing some hardship to the claimants. However, when account is taken of all the relevant circumstances identified above including the length of the delay in bringing these claims, it cannot in my opinion be said that this hardship is disproportionate or excessive.[43]

This part of the judgment in *Alseran* is of considerable importance for two reasons. Both relate to Leggatt J's statement that he would be inclined to think that undue hardship would exist if the consequence of applying the Iraqi limitation law had been to leave the claimants without any possible remedy for the injuries they suffered.[44]

First, had the claimants not had parallel claims arising out of the same facts under the HRA 1998, they would have been left without any possible remedy. Leggatt J's statement suggests that in these circumstances he would have found the existence of undue hardship. There are at least two situations where a claim in tort against the Crown which concern the external exercise of governmental authority may not be accompanied by a parallel claim under the HRA 1998. The first is where the case falls outside the extraterritorial scope of the human rights guaranteed in Britain.[45] Secondly, "the claims under the Human Rights Act are not on all fours with the claims in tort. Thus, not every application of force which constitutes an assault giving rise to liability in tort amounts to inhuman or degrading treatment under article 3 [of

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[40] Ibid, [834].
[41] HRA 1998, s 7(5).
[42] [2017] EWHC 3289 (QB), [849]-[870].
[43] Ibid, [836].
[44] Ibid, [834].
[45] *Banković v Belgium* (2007) 44 EHRR SE5.

ECHR]".[46] Leggatt J's statement suggests that the application of the Iraqi limitation law in these two situations would have violated English public policy.

The second reason why this part of the judgment in *Alseran* is of considerable importance concerns claims brought by victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations. Transnational corporations are often accused of committing gross violations of human rights *standards* against their workers or the people who live in the vicinity of their operations. One of the grounding principles of the United Nations "Guiding Principles on Business and Human Rights" is that business enterprises are required to respect human rights.[47] And yet transnational corporations are not among the addressees of human rights legislation and are not directly bound by it. The conduct of transnational corporations can therefore only give rise to claims in private law, including tort law. Since transnational corporations, like states, have the capacity to commit gross violations of human rights standards, the reasoning of Leggatt J in *Alseran* seems to apply with equal force to claims by victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations. If the consequence of applying the limitation period in the foreign applicable law is to leave such a victim without any possible remedy for the injuries he or she claims to have suffered overseas at the hands of an English-based transnational corporation, and given the unavailability of remedies under the HRA 1998, the reasoning of Leggatt J in *Alseran* lends support to the argument that the application of the limitation period in the foreign applicable law would cause undue hardship to the victim.[48]

If the limitation period in the foreign applicable law is excluded because its application violates English public policy, the consequence of this is that the claim is not time-barred.[49] The public policy exception to the rule that the issue of limitation is governed by the applicable law, as interpreted in *Alseran*, therefore has the potential to exert a considerable impact on cross-border public interest litigation in England in both claims against the Crown and claims against English-based transnational corporations.

V No-win, No-fee Arrangements, Access to Justice and Cross-Border Public Interest Litigation

[46] [2017] EWHC 3289 (QB), [834].

[47] (United Nations, 2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, 1.

[48] *Alseran* was decided too late for this argument to be advanced in the most recent case that dealt with the issue of limitation in the context of claims brought against an English-based transnational corporation, *Vilca v Xstrata Ltd* [2018] EWHC 27 (QB).

[49] [2017] EWHC 3289 (QB), [844]-[847]. See also Law Commission, *Classification of Limitation in Private International Law* (Law Com No 114, 1982), para 4.40.

Following the 2010 Jackson Report,[50] Parliament adopted the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO 2012) and the Civil Procedure Rules were amended. The changes, which entered into force in early 2013, have adversely affected claimants who rely on no-win, no-fee arrangements to fund their claims. This is because any success fee must now be paid by the successful claimant and in personal injury claims is capped at a much lower level than before. The litigation in *Alseran* was commenced after the changes to the regime of civil litigation costs and funding and it offers an insight into their effect on cross-border public interest litigation in England.

Before 2013, the UK had a regime of civil litigation costs and funding that was very favourable for claimants who wanted to commence a major cross-border litigation in this country. Two features of the system, in particular, worked in the favour of such claimants. First, the courts allowed necessary and reasonable costs.[51] Second, unsuccessful defendants were liable to pay not only the successful claimants' costs but also success fees and after-the-event insurance premiums.[52] Since after-the-event insurance premiums were often too paid by the lawyers of claimants who managed to obtain legal representation on a no-win, no-fee basis, such claimants were not exposed to any financial risk. If they were successful, they and their lawyers would obtain damages and recover necessary and reasonable costs, success fees and after-the-event insurance premiums. If they lost the case, after-the-event insurance, the premiums for which were often borne by the claimants' lawyers, covered the risk of having to pay the costs of successful defendants. The changes that followed the Jackson Report overhauled this regime of civil costs and litigation funding. The Civil Procedure Rules now provide that, where the amount of costs is assessed on the standard basis, the court will "only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred".[53] Unsuccessful defendants are no longer liable to pay success fees and, apart from in clinical negligence proceedings, after-the-event insurance premiums.[54] Any success fees are now borne by successful claimants and deducted from damages awarded. Furthermore, in personal injury claims there is a cap on the success fee that a lawyer may charge, which is 25% of general damages for pain, suffering, and loss of amenity and damages for pecuniary loss, other than future pecuniary loss.[55]

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[50] N 4 above.

[51] See the provisions on costs of the Civil Procedure Rules 1998/3132 in the version preceding the post-Jackson Report changes, as interpreted in *Lownds v Home Office* [2002] EWCA Civ 365, [2002] 1 WLR 2450.

[52] See Civil Procedure Rules 1998/3132, r 43.2(k), Courts and Legal Services Act 1990, s 58A(6) and Access to Justice Act 1999, s 29 in the versions preceding the post-Jackson Report changes.

[53] Civil Procedure Rules 1998/3132, r 44.3(2)(a). R 44.3(5) defines "proportionate" costs.

[54] Courts and Legal Services Act 1990, ss 58A(6) and 58C, introduced by LASPO 2012, ss 44, 46.

[55] Conditional Fee Agreements Order 2013/689, Art 5.

In the UK, legal aid is available for, among other things, claims for breach of ECHR rights by public authority.[56] Since victims of alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations typically sue the Crown on two bases, namely under the HRA 1998 and in tort, these victims are eligible for legal aid. The amount of money available through legal aid, however, is limited[57] and may not be enough to cover the rates charged by top expert witnesses and lawyers. That is why any change to no-win, no-fee arrangements that adversely affects victims of alleged wrongs committed overseas by the Crown is likely to have a chilling effect on the bringing of claims by these victims in England.

Another category of claimants commencing major cross-border litigations in England are victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations. This category of claimants is expected to be even more adversely affected by the changes that followed the Jackson Report. The reason for this lies in a development that took place at EU level, namely the adoption of the Rome II Regulation.

Rome II applies to claims brought by victims of alleged gross violations of human rights standards committed abroad by transnational corporations that are within the temporal scope of this Regulation. But Rome II does not apply to claims brought by victims of alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations.[58] These claims remain subject to the choice-of-law rules of the Private International Law (Miscellaneous Provisions) Act 1995. One of the greatest differences between Rome II and the 1995 Act is that under Rome II the assessment of damages is considered to be a matter of substance, governed by the law applicable to the tort,[59] whereas under the 1995 Act the assessment of damages is considered to be a matter of procedure, governed by English law as the law of the forum.[60] Since claims brought by victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations are usually governed by the law of the foreign place where the alleged violations of human rights standards have been committed,[61] which is typically the law of a developing country, the amount of damages available under the foreign applicable law may be considerably lower than under English law.[62] One might contest this argument by pointing out that the

[56] According to LASPO 2012, s 9, legal aid is available for civil legal services in situations listed in Part 1 of Schedule 1. Breach of ECHR rights by public authority is on the list (para 22).
[57] See the Civil Legal Aid (Remuneration) Regulations 2013.
[58] Rome II, Art 1(1); Recital 9; Case C-292/05 *Lechouritou v Germany* [2007] ECR I-1519.
[59] Rome II, Art 15(c).
[60] 1995 Act, s 14(3); *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1; *Cox v Ergo Versicherung AG* [2014] UKSC 22, [2014] AC 1379.
[61] Rome II, Art 4.
[62] This also means that the increase in general damages, a measure that the Jackson Report (n 4), xvii recommended "[i]n order to ensure that claimants are properly compensated for personal injuries, and that the damages awarded to them…are not substantially eaten into by legal fees" will be of no effect

calculation of loss is not jurisdiction specific, since that is a question of fact, not law. It is true that pre-trial pecuniary loss should be calculated in the same way regardless of the applicable law. But general damages, which includes both future pecuniary loss and non-pecuniary loss, may differ depending on the applicable law. For example, in English law damages in a personal injury case are assessed by reference to common law rules and principles, statutory provisions, guidance from decided cases and published guidelines such as the Judicial College Guidelines on the Assessment of General Damages in Personal Injury Cases, now in their 14th edition (2017). The same is true for damages in other kinds of case.[63] General damages in English law are relatively high.[64] In other legal systems, there will be other conventions and practices, such as tariffs, guidelines or formulae, used by foreign judges in the calculation of damages, which the English courts have to take into account when assessing damages under the foreign law which is applicable pursuant to the choice-of-law rules of Rome II.[65] On the other hand, the assessment of damages in claims brought by victims of alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations is always governed by English law regardless of the place where the alleged wrongs have been committed and regardless of where victims reside.[66] The difference in the amount of damages available to the two categories of claimants, together with the facts that any success fees are now paid by the successful claimant and in personal injury claims is capped at a much lower level than before and that legal aid is unavailable for claims which do not involve claims for breach of ECHR rights by public authority,[67] means that taking on the cases of victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations on a no-win, no-fee basis now carries a much greater amount of risk.

Alseran offers an insight into the effect that the changes introduced to the regime of civil litigation costs and funding following the Jackson Report have had on cross-border public interest litigation in England. Leggatt J made the following remark in his judgment:

> Between March 2009 and December 2010 Leigh Day issued some 319 claims in this litigation. A further tranche of 612 claims was issued in March 2013. Since then, with the exception of 10 claims issued on 16 December 2014, no further

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where the claim is governed by a foreign law and will, therefore, not be able to offset the adverse effect of the changes to no-win, no-fee arrangements.

[63] A useful summary is given in *Alseran* [2017] EWHC 3289 (QB), [884]-[894].

[64] According to *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, CA, at 515, the starting point is likely to be about £500 for the first hour of unlawful imprisonment. According to *Vento v Chief Constable of West Yorkshire* [2002] EWCA Civ 1871, [2003] ICR 318, there are three broad bands for compensation to injury for feelings in cases of discriminatory harassment, a top band being between £15,000 and £25,000 for the most serious cases. These amounts have subsequently been uplifted.

[65] *Wall v Mutuelle de Poitiers Assurances* [2014] EWCA Civ 138, [2014] 1 WLR 4263, [21]–[24], [32]–[34], [49]–[51].

[66] See *Alseran* [2017] EWHC 3289 (QB), [896].

[67] Personal injury and intentional torts are not listed in Part 1 of Schedule 1 of LASPO 2012.

> claims have been issued by Leigh Day. One reason for this is that on 1 April 2013 the law changed so that, for claims commenced after that date, the costs which a successful claimant can recover from the defendant no longer include a success fee payable to the claimant's lawyer under a conditional fee agreement.[68]

This should be read together with the observation that "no Iraqi citizen other than the claimants represented by Leigh Day has brought…a claim for compensation against the MOD in the English courts".[69]

If the changes introduced to the regime of civil litigation costs and funding following the Jackson Report have had a chilling effect on the bringing of claims by victims of alleged wrongs committed by British officials, employees and agents in the course of overseas counterterrorism, military and peacekeeping operations, there is reason to suspect that, for the reasons given above, victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations will be even more adversely affected. The changes to the regime of civil litigation costs and funding that followed the Jackson Report have indeed been severely criticised for their adverse effect on victims of alleged gross violations of human rights standards committed abroad by English-based transnational corporations.[70]

One thing, however, is missing from the current debate concerning the impact of the changes to the regime of civil litigation costs and funding on cross-border public interest litigation in England. This is a discussion of whether the present regime accords with the notion of rule of law in England.

In order to answer this question, reference should be made to the recent high-profile judgment of the Supreme Court in *R (on the application of Unison) v Lord Chancellor*.[71] This case concerned a judicial review of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, which introduced fees for bringing claims in employment tribunals. The Supreme Court held that the Order was unlawful and void *ab initio* on the basis, *inter alia*, that it restricted the common law right of access to justice to an extent not authorised by statute. In doing so, the court confirmed that the constitutional right of access to the courts was inherent in the rule of law:

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[68] [2017] EWHC 3289 (QB), [756].
[69] Ibid, [770].
[70] R. Meeran, 'Access to Remedy: The United Kingdom Experience of MNC Tort Litigation for Human Rights Violations' in S. Deva and D. Bilchitz (eds), *Human Rights Obligations of Business: Beyond the Corporate Responsibility to Respect* (CUP, 2013) 378, 396; J. Ruggie, 'Legal Aid Cuts Will Stop Cases Like Trafigura, UN Official Warns', *The Guardian*, 16 Jun 2011; G. Skinner, R. McCorquodale and O. De Schutter (with case studies by A. Lambe), 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013) available at https://www.business-humanrights.org/en/pdf-the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business, 10.
[71] [2017] UKSC 51, [2017] 3 WLR 409.

> The importance of the rule of law is not always understood. Indications of a lack of understanding include the assumption that the administration of justice is merely a public service like any other, that courts and tribunals are providers of services to the "users" who appear before them, and that the provision of those services is of value only to the users themselves and to those who are remunerated for their participation in the proceedings.[72]

The Supreme Court explained that the idea that bringing a claim before a court or a tribunal is a purely private activity, and the related idea that such claims provide no broader social benefit, were demonstrably untenable. Courts and tribunals are not merely the providers of a service which is only of value to users who bring claims before them. The wider societal value of the right of access to the courts includes the knowledge that rights will be enforced and that remedies exist where obligations are not met. The Supreme Court further held that the question whether there was a real risk that fees effectively prevented access to justice had to be decided according to the likely impact of the fees on behaviour in the real world. One of the factors that the court took into account was that the evidence showed that the effect of the Order was "a dramatic and persistent fall"[73] in the number of claims brought in employment tribunals.

Similarly, the English courts, when dealing with cross-border public interest litigation, can be said to provide services of wider societal value. This extends to the knowledge that rights of victims will be enforced and that remedies exist for the violation of obligations imposed on the Crown and English-based transnational corporations. In providing these services, the English courts uphold not only the values and interests of the British society but also truly global values and interests which consist in the protection of human rights standards and, in claims against the Crown, also international humanitarian law.[74] *Alseran* offers evidence that the changes introduced to the regime of civil litigation costs and funding following the Jackson Report had an adverse effect on cross-border public interest litigation in England. The fall in the number of claims mentioned by Leggatt J[75] can indeed be described as "dramatic and persistent" and therefore as possibly disproportionate. If victims of overseas wrongs committed by the Crown and English-based transnational corporations cannot access justice in this country, or indeed in any other country, then, as shown by *Unison*, the rule of law in England is at risk of being seriously undermined.[76]

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[72] Ibid, [66].
[73] Ibid, [39], [91].
[74] On the "planetary perspective" of private international law see H. Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.
[75] [2017] EWHC 3289 (QB), [756], reproduced in text preceding n 67 above.
[76] Lack of effective access to justice in any other country coupled with the inability to access justice in England could arguably also be seen as a violation of the ECHR: *Golder v UK* (1979-80) 1 EHRR 524; *Airey v Ireland* (1979-80) 2 EHRR 305.

This is not to say that foreigners must have unimpeded, fully subsidised right to access English courts for alleged wrongs committed overseas by the Crown and English-based transnational corporations. This is to say that the legitimate claims of these victims to access English courts should be acknowledged and balanced with other competing claims, which by no means is an easy task. There is, however, no evidence in the Jackson report or elsewhere that the claims of these victims have been taken into account. This is unfortunate given the moral strength of the claims of these victims to access English courts, who typically for various practical and legal reasons have no access to alternative fora, and the potential of such claims to increase the accountability of the government and English-based transnational corporations and to uphold international rules of law.

VI Conclusion

The judgment in *Alseran* sends a mixed message. On one hand, although the court held that the claims in tort were time-barred under the foreign applicable law, the judgment should be seen overall as a positive development for cross-border public interest litigation in England because of its strict interpretation of the Crown act of state doctrine and its claimant-friendly interpretation of the public policy exception to the rule that the issue of limitation in a tortious claim is governed by the foreign applicable law. On the other hand, the judgment is a reminder of the fact that the potential of the law in this area cannot be fulfilled without a regime of civil litigation costs and funding that enables claimants to bring their claims. Unfortunately, the regime of civil litigation costs and funding after the changes following the Jackson Report is failing in this respect.