The main substantive weakness of the *Delfi* judgment is the Court's failure to take the lead in suggesting how governments should protect personal privacy from anonymous Internet comments. The Court confined itself to holding the measures put in place by AS Delfi to be insufficient (para. 87). Although the Court has indicated that the Internet may require its own policies, it has not explained what that means. The concept of a structural problem would have allowed the Court to apply the pilot judgment principle[19] and thereby to advise Estonia on how best to observe its international obligations regarding libelous anonymous comments on the Internet. But the preconditions for this procedure have not yet been met; there are simply too few pertinent judgments and pending applications. Until the time for such advice, the Court has implied that vigilance is called for and has left it to the Internet portals to regulate their conduct on comments and exercise restraint.

In simple language, the debate about protecting privacy in the Internet setting—especially with a view to anonymous comments—has reached the following understandings: the standards are the same for Internet portals as for the traditional media, but there is no consensus on how to implement these standards or even if implemented, whether they can be effective. The Court seems to accept that comprehensive legal regulation of the Internet may not be possible. Perhaps law ends at the door of electronic reality.

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European Convention on Human Rights—right of access to court—foreign state immunity from civil proceedings—foreign official immunity from civil proceedings—torture outside the forum state

JONES v. UNITED KINGDOM. Application Nos. 34356/06 & 40528/06. *At* http://hudoc.echr.coe.int. European Court of Human Rights, January 14, 2014.

In this judgment,[1] a chamber of the European Court of Human Rights (Court) found that the grant of immunity by the United Kingdom (UK) to the Kingdom of Saudi Arabia in a civil suit for torture brought by Ronald Jones, and to named Saudi officials in civil suits for torture brought by Jones and three other individuals, did not interfere disproportionately with their right of access to court under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).[2]

The first application arose out of Jones's alleged unlawful detention and torture in Riyadh during a sixty-seven day period in 2001. After his release, Jones, a British citizen, returned to the United Kingdom suffering from severe injuries and post-traumatic stress disorder. In May 2002, he brought suit against the Ministry of Interior of the Kingdom of Saudi Arabia and his alleged torturer, Lt. Col. Abdul Aziz. A master of the High Court held that Saudi Arabia was

[19] Mart Susi, *The Definition of a 'Structural Problem' in the Case-Law of the European Court of Human Rights Since 2010,* 2012 GER. Y.B. INT'L L. 385.

[1] Jones v. United Kingdom, App. Nos. 34356/06 & 40528/06 (Eur. Ct. H.R. Jan. 14, 2014) [hereinafter Judgment]. Judgments of the Court cited herein are available at http://hudoc.echr.coe.int.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6, Nov. 4, 1950, ETS No. 5, 213 UNTS 222, *available at* http://www.echr.coe.int.

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entitled to immunity under section 1(1) of the UK State Immunity Act, which provides that "[a] State is immune from the jurisdiction of the courts of the United Kingdom" except as specifically provided in the Act.[3] The master refused permission to allow service on Colonel Aziz outside the jurisdiction on the ground that Aziz was also entitled to immunity under the Act.

The second application stemmed from the arrests in Riyadh, in December 2000, of Alexander Mitchell, a British citizen, and William Sampson, a dual British-Canadian citizen, and in February 2001, of Leslie Walker, a British citizen. All three allege that they were subjected to sustained and systematic torture at the hands of Saudi officials. Upon their release in August 2003, the three returned to the United Kingdom, where medical evaluations documented injuries consistent with their allegations. In July 2004, they commenced proceedings in the High Court against two Saudi police officers, a colonel in the Ministry of Interior who was deputy governor of the prison in which they were confined, and the head of the Ministry of Interior. The same master of the High Court who had denied Jones's request to serve Colonel Aziz outside the jurisdiction followed his prior decision with regard to these defendants.

The plaintiffs in *Jones* and *Mitchell* appealed, and their cases were joined. In October 2004, the Court of Appeal held that Saudi Arabia was entitled to immunity under the State Immunity Act, but that the state's immunity did not automatically shield the individual defendants from civil proceedings for torture.[4] Jones appealed the decision regarding Saudi Arabia, and Saudi Arabia appealed the decision regarding the individual defendants. In June 2006, the House of Lords held that the Act affords the state and its officials immunity from civil proceedings for torture, and that such immunity is consistent with both customary international law and the United Kingdom's obligations under Article 6 of the European Convention.[5] The claimants in both cases promptly lodged applications with the European Court of Human Rights, and the Court issued its long-awaited judgment in January 2014.

The judgment regarding Saudi Arabia's immunity follows the Court's 2001 decision in *Al-Adsani v. United Kingdom*, where the Grand Chamber found, by a vote of 9-8, that the United Kingdom's grant of immunity *ratione personae* to the state of Kuwait for alleged acts of torture did not violate the European Convention.[6] The Court in *Al-Adsani* began with the premise that "Article 6 §1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court."[7] In assessing limitations on this right, the Court reasoned that "measures taken by a High Contracting Party which reflect generally recognised rules of public international law on State immunity cannot in principle be regarded as imposing a disproportionate restriction on the right of access to a court."[8] The Court concluded that "[t]he 1978 Act, which grants immunity to States in respect of personal injury claims unless the damage was caused within the United Kingdom, is not inconsistent with those limitations generally accepted by the community of nations as part of the doctrine of State immunity."[9]

[3] State Immunity Act, 1978, c. 33.

[4] Jones v. Ministry of Interior al-Mamlaka al-Arabiya as Saudiya, [2004] EWCA (Civ) 1394, [2005] Q.B. 699. The British decisions cited herein are available at http://www.bailii.org.

[5] Jones v. Ministry of Interior al-Mamlaka al-Arabiya as Saudiya, [2006] UKHL 26, [2007] 1 A.C. 270.

[6] Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. 79, para. 63.

[7] *Id.*, para. 52.

[8] *Id.*, para. 56.

[9] *Id.*, para. 66.

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The Court in *Jones* observed that the United Kingdom's grant of immunity to Saudi Arabia for torture was "identical in material facts to the complaint made in *Al-Adsani*" (para. 196). Although the Court was not "formally bound" by the narrow majority's 2001 decision, the interests of legal certainty counseled in favor of following this precedent or else relinquishing the case to the Grand Chamber (para. 194). Having decided not to relinquish the case (para. 195), the Court understood the "sole question" to be whether, by the time of the House of Lords' 2006 decision affirming Saudi Arabia's immunity, there had been "an evolution in the accepted international standards as regards the existence of a torture exception to the doctrine of State immunity" that would render the decision at odds with "generally recognised rules of public international law" (para. 196). The Court treated the International Court of Justice's 2012 decision in *Germany v. Italy* as "authoritative" for the proposition that at that time "no *jus cogens* exception to State immunity had yet crystallised" under customary international law (para. 198).[10] It thus held, by 6-1, that granting immunity to Saudi Arabia for torture in 2006 had not violated Article 6.

The Court also decided to apply "the general approach set out in *Al-Adsani*" by the European Court in 2001 to the grant of individual immunity by the House of Lords in 2006 (para. 199), even though the analysis in *Al-Adsani* had been "limited to State immunity and did not concern the compatibility of extending it to named State officials with the right of access to court" (diss. op., Kalaydjieva, J.).[11] The *Jones* Court did not treat the distinction between a state's immunity *ratione personae* and an official's immunity *ratione materiae* as meaningful, expressing concern about the possibility of circumventing the immunity of a state by suing its officials. The majority thus adopted the view that the rules governing the attribution of an official's conduct to the state for the purposes of state responsibility also define the parameters of that official's immunity *ratione materiae* from civil suit (para. 203).

The *Jones* Court emphasized that immunity *ratione materiae* extends to individuals only "where the impugned acts were carried out in the course of their official duties" (para. 205). The question then became whether torture could be carried out in the course of an individual's official duties for the purposes of immunity from civil claims. Twenty-one member states of the Council of Europe had responded to inquiries by the United Kingdom on their practice regarding immunity in civil proceedings for torture, but "[n]one had considered the specific situation of State officials" (para. 110).[12] Moreover, "[i]nternational law instruments and materials on State immunity give limited attention to the question of immunity for State officials for acts of torture" (para. 209). The Court detected "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials" (para. 213) but opined that "[t]he weight of authority at [the] international and national level" supported granting state immunity "in principle" to "acts undertaken on behalf of the State" (para. 204). Somewhat incongruously, the Court

[10] Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 ICJ REP. 99 (Feb. 3).

[11] Similarly, in *Germany v. Italy*, the International Court of Justice emphasized that it was "addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case." *Id.* at 139, para. 91.

[12] *See also* Judgment, para. 210.

found both that state practice "is still in a state of flux" (para. 213) and that it would be inappropriate to hold that "the grant of immunity in the present case did not reflect generally recognised rules of public international law" (para. 212).

Dissenting Judge Zdravka Kalaydjieva, like the dissenting judges in *Al-Adsani*, found the requirement of national criminal prosecution for torture and the absence of criminal immunity difficult to reconcile with the grant of civil immunity for the same conduct—a puzzle that, the Court agreed, "no doubt requires some further reflection in the context of judicial decisions on immunity or activities of international law bodies" (para. 212). But given its determination that "[t]he findings of the House of Lords were neither manifestly erroneous nor arbitrary" (para. 214), the Court held that the grant of individual immunity in *Jones* did not amount to an unjustified restriction on the applicants' access to a court (para. 215).

* * * *

The result in *Jones* is consistent with the "attribution theory" of immunity *ratione materiae*, which advocates symmetry between the attribution of conduct to the state for the purposes of state responsibility and the ability of states to shield lower-level officials and former officials (who do not enjoy immunity *ratione personae*) from proceedings in foreign courts. The attribution theory is rooted in the classical view of international law as law between states. Under a strict version of this theory, individual officials are mere instruments of the state, and the state alone bears legal responsibility for their acts. This view certainly applies to acts such as receiving a subpoena in one's official capacity on behalf of a state[13] and conducting certain commercial transactions.[14] These acts bear little resemblance to those alleged in *Jones*.

Treating individual officials as indistinguishable from the state, and defining the "State" as including "representatives of the State acting in that capacity,"[15] makes sense when the individual's acts are attributable *solely* to the state. Individuals, however, can also incur personal responsibility for acts performed with actual or apparent state authority.[16] As the Nuremberg Principles made clear, "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment."[17] The attribution theory precludes foreign courts (as opposed to the courts of the official's own country or international courts) from enforcing international law norms that apply to individuals, absent a waiver of

[13] Prosecutor v. Blaškić, Case No. IT-95-14, Appeals Judgment on Request for Review of Decision of 18 July 1997, para. 38 (Int'l Crim. Trib. for Former Yugoslavia Oct. 29, 1997), *at* http://www.icty.org.

[14] As Lady Hazel Fox has observed, courts cannot exercise jurisdiction over foreign officials in suits for commercial transactions "not because the official is immune . . . but because the law attributes responsibility to the State and not to the official." Hazel Fox, *Imputability and Immunity as Separate Concepts: The Removal of Immunity from Civil Proceedings Relating to the Commission of an International Crime*, *in* INTERNATIONAL LAW AND POWER: PERSPECTIVES OF LEGAL ORDER AND JUSTICE 165, 173 (Kaiyan Homi Kaikobad & Michael Bohlander eds., 2009).

[15] *See* United Nations Convention on Jurisdictional Immunities of States and Their Property, Art. 2(1)(b)(iv), GA Res. 59/38, annex (Dec. 2, 2004), 44 ILM 803 (2005) (not yet in force).

[16] The articles on state responsibility take a broad approach to attribution but specify in Article 58 that this approach is "without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State." Draft Articles on Responsibility of States for Internationally Wrongful Acts and Commentaries, Art. 58, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, [2001] 2 Y.B. Int'l L. Comm'n 30, 142, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

[17] Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Principle I, *in* Report of the International Law Commission on Its Second Session, para. 97, [1950] 2 Y.B. Int'l L. Comm'n 374, UN Doc. A/CN.4/34.

immunity by the official's home state. It does so in the name of continuity with precedent even though, long before Nuremberg, common law courts differentiated between individual immunity and state immunity, even in civil suits.[18]

In *Al-Adsani*, Kuwait did not appeal the High Court's decision to allow Al-Adsani's claims of torture against three named individuals to go forward, meaning that subsequent litigation focused solely on state immunity *ratione personae*.[19] The analysis of individual immunity *ratione materiae* in *Jones* turned largely on whether civil proceedings against an individual for torture "indirectly implead" the state. The House of Lords had previously reasoned in *Pinochet III*, which involved extradition, that in criminal proceedings for torture "the issue was the respondent's personal responsibility, not that of Chile" (para. 55).[20] The European Court in *Jones* noted, but did not resolve, the question whether this reasoning also held true in civil proceedings. Instead, the Court determined, as noted above, that, since the findings of the Law Lords were "neither manifestly erroneous nor arbitrary," the grant of both state and individual immunity did not violate Article 6 (paras. 214–15).

In view of the Grand Chamber's close vote on state immunity *ratione personae* thirteen years ago in *Al-Adsani*, and the current "state of flux" of practice regarding individual immunity *ratione materiae* (para. 213), one might have expected the Court to relinquish the case to the Grand Chamber, as Judge Ledi Bianku's concurrence urged,[21] or at least to hear oral argument, as the applicants had requested (para. 6). It did neither. Its written opinion summarizes international instruments and decisions from other tribunals but fails fundamentally to engage with them. For example, it does not consider the difference between suits brought against foreign officials in their personal capacity and suits brought against foreign officials in their official capacity. While the state might be the real party in interest in the latter, it might not necessarily be so in the former, in which damages are sought solely from the official's own pocket.[22] The Court's opinion does not explain why criminal proceedings against a foreign official should be treated differently from civil proceedings for the same conduct. It also fails to delve into the paradox that the use of actual or apparent state authority to inflict harm is often precisely what makes an official's conduct a matter of international, rather than purely domestic, law. The attribution theory, however, precludes domestic enforcement of international norms if an individual engaged in wrongful conduct under color of foreign law. It is difficult not to share dissenting Judge Kalaydjieva's characterization of the majority's findings as "somewhat declaratory" (diss. op., Kalaydjieva, J.).

As a practical matter, observers might look to the European Court's decision as a broad endorsement of the attribution theory, but this interpretation would be misconceived. The Court does not seem to have viewed its opinion as the final word on foreign official immunity.

[18] Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012).

[19] Al-Adsani v. United Kingdom, *supra* note 6, paras. 14–15.

[20] Regina v. Bow Street Metropolitan Stipendiary Magistrate, *ex parte* Pinochet Ugarte, [1999] UKHL 17, [2000] 1 A.C. 147 (*Pinochet III*).

[21] Judge Bianku indicated that he had joined the majority's opinion "with great hesitation." He would have preferred to relinquish the case to the Grand Chamber "to consider whether *Al-Adsani* still remains good law," given its narrow majority and the "very significant developments" in the intervening thirteen years. Judgment, Concurring Opinion of Judge Bianku.

[22] Samantar v. Yousuf, 560 U.S. 305, 325 (2010).

By agreeing that states enjoy a "margin of appreciation" regarding the right of access (para. 186), the Court avoided the need to engage in the very type of in-depth analysis and "reflection" that it acknowledged was still "require[d]" regarding the relationship between civil and criminal immunity, and the question whether torture can be committed in an "official capacity" for immunity purposes (para. 212). The Court's failure to engage in such an analysis lessens the persuasiveness of its conclusions.

Finding that the UK State Immunity Act did not violate Article 6 in these circumstances is different from holding that customary international law requires immunity *ratione materiae* in civil suits for torture. The Court did not have to make a definitive finding regarding the content of customary international law, and its analysis explicitly anticipates further developments in this area by noting ongoing litigation in the United States,[23] a case pending before the Supreme Court of Canada, and continued work by the International Law Commission (para. 213).[24] Despite framing its holding in terms of consistency between the grant of official immunity and "generally recognised rules of public international law" (para. 215), the Court took pains to emphasize the evolving and indeterminate nature of these rules given the variety of state practice and *opinio juris*.

The *Jones* decision should be taken for what it is, namely, a refusal to allow applicants to use the European Convention to invalidate provisions of applicable state immunity acts in civil proceedings. This reasoning has limited applicability elsewhere. Notably, state immunity acts such as those in the United Kingdom and Canada explicitly exclude criminal proceedings; if they did not, the attribution theory would wreak havoc with the complementarity regime for the enforcement of international criminal law, under which national prosecutions are accorded primacy even where the forum state is not the defendant's state of nationality.[25] States will ultimately have to reckon with the disjunction between the global emphasis on individual accountability for international crimes and the ways that state immunity acts focused primarily on codifying the restrictive theory of sovereign immunity may end up shielding individual officials from legal consequences for universally proscribed conduct.

Granting immunity *ratione materiae* to foreign officials in civil suits for torture may create gaps in enforcement and deterrence, run afoul of a state's obligations under some recent interpretations of Article 14 of the Convention Against Torture (paras. 66–67),[26] and conflict with an emerging emphasis on the right to redress (para. 68). Granting jurisdiction over absent

[23] In the United States, the immunity *ratione materiae* of foreign officials is governed by the common law, *see id.*, unless they are covered by the Diplomatic Relations Act.

[24] Islamic Republic of Iran v. Hashemi, 2012 QCCA 1449 (Can. Que. C.A.), *at* http://canlii.ca/t/fsc3n. Leave to appeal was granted *sub nom.* Estate of Kazemi v. Islamic Republic of Iran (S.C.C. Mar. 7, 2013) (No. 35034). International Law Commission, Immunity of State Officials from Foreign Criminal Jurisdiction, *at* http://legal.un.org/ilc/guide/4_2.htm (containing various materials on the subject). The Institute of International Law considered the issue of individual immunity *ratione materiae* in both civil and criminal proceedings and resolved that "[n]o immunity from jurisdiction other than personal immunity [*ratione personae*] in accordance with international law applies with regard to international crimes." Institute of International Law, Naples Session, Resolution on the Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in Case of International Crimes, Art. III(1) (2009), *at* http://www.idi-iil.org.

[25] Rome Statute of the International Criminal Court, Art. 17(1), July 17, 1998, 2187 UNTS 3.

[26] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14, Dec. 10, 1984, S. TREATY DOC. NO. 20-100 (1988), 1465 UNTS 85 (providing that state parties must ensure that victims of torture obtain redress and have an enforceable right to fair and adequate compensation); Committee Against Torture, General Comment No. 3: Implementation of Article 14 by States Parties, UN Doc. CAT/C/GC/3 (Nov. 19, 2012).

defendants may cause friction in diplomatic relations without materially advancing the goal of accountability, and failing to respect established norms of immunity *ratione personae* may interfere excessively with states' ability to conduct such relations. More narrowly tailored jurisdictional regimes, combined with appropriate, but not overly expansive, immunities, can help serve the dual goals of preserving stability in international relations and imposing consequences for international crimes. The Court's decision in *Jones* fails to offer meaningful guidance on how to achieve this balance.

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Arbitration—Indus Waters Treaty—treaty interpretation—negotiating history—Vienna Convention on the Law of Treaties—mitigating environmental harm

IN RE INDUS WATERS KISHENGANGA ARBITRATION (Pakistan v. India). Partial Award. *At* http://www.pca-cpa.org.
Arbitral Tribunal, February 18, 2013.

IN RE INDUS WATERS KISHENGANGA ARBITRATION (Pakistan v. India). Final Award. *At* http://www.pca-cpa.org.
Arbitral Tribunal, December 20, 2013.

In skillfully crafted unanimous awards in February 2013 and December 2013,[1] a distinguished seven-member tribunal constituted under the 1960 Indus Waters Treaty (Treaty)[2] and supported by the Permanent Court of Arbitration as secretariat, resolved significant disputes involving India's development of a hydroelectric plant in India-administered Kashmir and India's operation of this and other future plants. In the initial partial award, the tribunal found that the project is consistent with the Treaty but that the Treaty barred India's preferred method for controlling sediment in reservoirs. In its final award, the tribunal specified the minimum downstream flows that India must maintain. The case, the first arbitration instituted under the Treaty, involved a challenging array of engineering, environmental, and treaty interpretation issues.

The rivers of the Indus system rise in India and Nepal and flow into Pakistan. Following protracted negotiations, India, Pakistan, and the World Bank[3] concluded the Treaty in September 1960 to allocate and regulate the two countries' use of the rivers' waters. In May 2010,

[1] *In re* Indus Waters Kishenganga Arbitration (Pak. v. India), Partial Award (Arb. Trib. Feb. 18, 2013), *at* http://www.pca-cpa.org [hereinafter Partial Award]; *In re* Indus Waters Kishenganga Arbitration (Pak. v. India), Final Award (Arb. Trib. Dec. 20, 2013), *at* http://www.pca-cpa.org [hereinafter Final Award].

[2] Indus Waters Treaty, India-Pak.-Int'l Bank Reconstruction & Dev., Sept. 19, 1960, 419 UNTS 125 [hereinafter Treaty]. The Treaty appears as an addendum to the Partial Award.

[3] The tribunal emphasized the World Bank's central role in the "conception, mediation, negotiation, drafting and financing of the Indus Waters Treaty, an instrument critical to the life and well-being of hundreds of millions of people of India and Pakistan." Partial Award, para. 358.

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