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# IBA Interns' Newsletter

SPRING 2026





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## Privatised governance: investor-state dispute settlements' impacts on public water policy

### Water security and international investment regimes

Nearly two-thirds of the global population experiences water scarcity for at least one month each year<sup>1</sup>, while one in four people worldwide lack access to safely managed drinking water.<sup>2</sup> The convergence of climate change, state policy and industrial activity has intensified pressures on already fragile water systems. In response, water regulation has emerged as an essential instrument for improving water security. Yet, although water governance is among the more politically sensitive forms of public authority, it increasingly operates under the influence of investor-state dispute settlement (ISDS), and more specifically, under the shadow of regulatory chill.

States typically enter into international investment treaties (IITs) under the assumption that investment protections will attract foreign direct investment (FDI), promote sustainable economic development and generate benefits that outweigh associated costs.<sup>3</sup> Proponents of IITs further argue that such treaties depoliticise disputes between investors and host states.<sup>4</sup> However, empirical evidence suggests that IITs have a limited impact on FDI flows, while raising serious questions regarding their contribution to depoliticisation and the rule of law.<sup>5</sup>

A central provision in many IITs is the obligation to compensate investors for direct or indirect expropriation, defined as one or a series of governmental measures that substantially deprive investors of the value of their investment.<sup>6</sup> Through ISDS mechanisms, foreign investors may initiate arbitration directly against host states for alleged treaty breaches, without exhausting domestic remedies. This procedural asymmetry contrasts with international human rights regimes, where claimants are ordinarily required to exhaust local remedies before accessing international adjudication.

ISDS significantly affects states' regulatory autonomy because IITs provide internationally enforceable protections for private investors' economic interests. Additionally, the fragmented nature of thousands of bilateral treaties renders systemic reform difficult. Investors have brought forth claims challenging climate measures, strengthened environmental regulation, efforts to promote domestic development and regulation of essential public services, including water. As of February 2026, 1,440 treaty-based ISDS cases had been registered globally, with 59 of these cases concerning water supply and sanitation services.<sup>7</sup> The broader number is likely higher when disputes involving water-intensive sectors such as agriculture, mining and construction are considered.<sup>8</sup>

Regulatory chill occurs when states delay, weaken or refrain from adopting public interest regulation due to concerns over potential ISDS claims and associated financial liability.<sup>9</sup> Scholars further observe that investment treaty obligations are often internalised by policymakers during regulatory design.<sup>10</sup> This article argues that the structural features of ISDS contribute to regulatory chill in the water sector, discouraging governments from adopting or enforcing measures necessary to secure equitable and sustainable access.

### The architecture of ISDS

ISDS was originally conceived to protect investors from arbitrary expropriation. However, its normative expansion has broadened the scope of protected interests. Central to this development is the standard of Fair and Equitable Treatment (FET), frequently described as an inherently flexible and vague provision.<sup>11</sup> In *Genin v Estonia*, the tribunal suggested that a breach would require wilful neglect of duty, insufficiency of action far below international standards or subjective bad faith.<sup>12</sup> Yet subsequent

jurisprudence has interpreted FET more expansively, particularly through the doctrine of 'legitimate expectations'. Investors increasingly argue that regulatory change (especially where it affects pricing structures or contractual stability) threatens expectations protected under investment treaties.<sup>13</sup> A further mechanism is indirect expropriation, encompassing measures that substantially deprive investors of the economic value of their investment without a formal transfer of title.<sup>14</sup> When combined, FET, legitimate expectations and indirect expropriation create a legal environment in which ordinary regulatory evolutions may be framed as treaty violations.

Perceived breaches of any of these principles in an ISDS can lead to costly legal battles for host states, leading to major compensatory risks, with some countries' legal fees and compensation awards amounting to several percentage points of their own country's GD.<sup>15</sup> For states facing fiscal constraints, such exposure materially affects regulatory decision-making. It is within this context that the boundary between sovereign prerogative and compensable breach becomes blurred, generating conditions conducive to regulatory chill.

### Regulatory chill and water regulation

Regulatory chill is particularly salient in long-term water concession arrangements, where tariff structures, cost-recovery mechanisms and service obligations are contractually entrenched. When these arrangements are reinforced through IIT protections, future policy flexibility may be constrained. The Argentine economic crisis of 2001 to 2002 illustrates this dynamic. Following currency devaluation and severe recession, the Government froze utility tariffs to protect consumers from dramatic price increases.<sup>16</sup> While constitutionally grounded in public welfare concerns, these measures triggered numerous ISDS claims.

In *Suez, Sociedad General de Aguas de Barcelona and Vivendi v Argentina*, for example, foreign investors challenged Argentina's emergency measures, arguing that the tariff freeze violated FET and could be considered conduct capable of generating substantial liability.<sup>17</sup> Although tribunals recognised the severity of the crisis, they nevertheless treated regulatory intervention as conduct capable of generating substantial liability. Similarly, in *Azurix Corp v Argentina*, the tribunal found

that regulatory instability in a provincial water concession breached the FET standard.<sup>18</sup> It concluded that Argentina had failed to accord fair and equitable treatment, full protection and security, and had adopted arbitrary measures impairing the investment. These decisions reinforced the notion that even crisis-driven adjustments to essential service provision may be interpreted as compensable treaty violations.

Together, these cases demonstrate how regulatory chill may arise not only from adverse awards but from anticipatory calculations of risk. Constitutionally grounded efforts to prioritise affordability were weighed against the prospect of international liability.

### From liability to anticipatory restraint on the human right to water

Both of the Argentinian crisis-era disputes highlight concerns for future governance. Regulatory chill does not depend on sustained successful claims by private investors, but rather on anticipatory legal and compensatory risks. As such, when tribunals interpret fair and equitable treatment as a means of protecting established tariff expectations, policy makers internalise the possible financial risks of future arbitration. In public service sectors such as water, where tariff reform, affordability measures and infrastructure obligations require ongoing adjustment, policy-making is increasingly attuned to the risk of premature avoidance of threats from possible ISDS.

These dynamics carry profound implications for the human right to water, recognised under international human rights law and embedded in many domestic constitutional frameworks.<sup>19</sup> Yet ISDS mechanisms frame regulatory adjustments as potential treaty breaches. The asymmetry is stark: investors have access to enforceable international remedies, while affected communities must rely primarily on domestic public law. Importantly, the 'anticipatory restraint' features of regulatory chill, such as delayed tariff reforms and postponed environmental policies, can compromise water security for local communities. In this way, ISDS risks transforming domestic public law obligations into disputes over private economic expectations.



### Conclusion: regulation in the shadow of arbitration

ISDS shapes not only contractual disputes but the broader terrain of public governance. By attaching significant financial consequences to regulatory evolution, it contributes to regulatory chill in politically sensitive sectors such as water. As water constitutes both an essential public good and a recognised human right, the tension between private investment protection and public law obligations becomes particularly acute. While reform initiatives – including proposals for a multilateral investment court – seek to recalibrate the system,<sup>20</sup> policymakers continue to regulate in the shadow of arbitration.

Addressing regulatory chill requires rebalancing investment protection with constitutional and human rights commitments. Without such recalibration, the protection of legitimate public interests like affordability, environmental sustainability, and universal access risks being subordinated to expansive interpretations of investor entitlement.

#### Notes

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### Ashley Sebastian



## Justice for the 'supreme international crime': why Ukraine's special tribunal is closing international law's biggest loophole

At Nuremberg in 1946, the Allied prosecutors identified the crime of aggression as the 'supreme international crime' because it 'contains within itself the accumulated evil' of all the war crimes and atrocities that follow.<sup>1</sup> Nearly 80 years later, that 'supreme crime' has become international law's most glaring blind spot. The powerful can invade with

near impunity. Until now.

On 25 June 2025, Ukraine and the Council of Europe signed a treaty establishing the Special Tribunal for the Crime of Aggression against Ukraine – the first international tribunal for aggression created independently of the UN Security Council (UNSC).<sup>2</sup> It is a landmark moment that could reshape how international law holds the most powerful states accountable.

## The impunity gap

Despite Nuremberg's recognition of aggression as the foundational war crime, it became what scholars call international criminal law's 'unfinished business'.

When the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) were established in the 1990s, they conspicuously lacked jurisdiction over aggression.<sup>3</sup> Instead, their statutes focused on individual criminal responsibility for specific atrocities. While the International Criminal Court (ICC) listed the crime of aggression in the 1998 Rome Statute, jurisdiction remained inactive for two decades.<sup>4</sup> It was not until 2018, following the adoption of Kampala Amendments in 2010, that the ICC could prosecute these crimes.<sup>5</sup> Articles 8 bis, 15 bis and 15 ter defined the crime of aggression and authorised the ICC to prosecute leaders for unlawful use of armed force; however, it imposed severe limitations on its ability to do so.

The ICC can only prosecute aggression when both the aggressor and victim states are parties to the Rome Statute, or when the UNSC refers the case.<sup>6</sup> This creates an impossible situation: the states most capable of waging aggressive war such as the permanent UNSC members such as Russia, China and the US can simply veto any referral against them. In essence, they have built themselves a legal escape hatch.

Russia's invasion of Ukraine exposed this gap with brutal clarity. Neither Russia nor Ukraine ratified the Kampala Amendments. Additionally, Russia's UNSC veto makes a UN referral impossible. Thus, for the 'supreme international crime', there was no court with jurisdiction.

## An unprecedented solution

The Special Tribunal represents a creative workaround to this jurisdictional straitjacket. Established through a regional agreement between Ukraine and the Council of Europe – bypassing the UNSC entirely – it aims to prosecute senior Russian political and military leaders for the decision to invade.<sup>7</sup>

This marks a conceptual advance. The tribunal distinguishes between the *leadership crime* (the decision to wage war) and the *conduct crimes* (atrocities committed during the war). The Special Tribunal focuses on the decision-makers who launched the invasion in the first place, sending the message that

territorial conquest by force is impermissible under international law.

## The compromises

### *The head of state problem*

The Special Tribunal embodies a fundamental tension between legal principle and practical reality. Articles 4(2) and 23(4) establish that official position provides no defence and functional immunity does not apply, thereby creating a legal record that the invasion was criminal from the outset. Yet Article 23(5) requires that indictments against the 'Troika' (heads of state, government and foreign ministers) be suspended until they leave office.<sup>8</sup> This creates a troubling paradox. While the statute strips away *functional immunity* (the claim that official acts are beyond prosecution), it preserves *personal immunity* for the 'Troika' while in office. The indictment can be drafted, the evidence compiled, the legal status of their actions declared criminal; however, no arrest warrant can be issued.

Critics argue that this undermines the tribunal's deterrent effect. If a leader knows they are safe if they cling to power, what incentive do they have to step down? In authoritarian regimes where leaders rule for life, temporary immunity becomes permanent immunity in practice. But this compromise was essential to securing diplomatic support. According to the Asser Institute, Article 23(5) emerged from a joint paper by Germany and the US and was necessary to get the tribunal created at all.<sup>9</sup> Without it, there would be no mechanism for accountability – even for the many senior officials who do not fall within the Troika.

### *Trials in absentia*

Unlike the ICTY, the STCA can conduct full trials *in absentia*, where the interests of justice require their presence.<sup>11</sup> The Yugoslavia tribunal never held *in absentia* trials, instead, it used Rule 61<sup>12</sup> hearings: public proceedings where prosecutors presented evidence to reconfirm indictments and issue international arrest warrants, but no verdict was rendered and no sentence imposed.

For the Special Tribunal, Article 28 of the statute allows for *in absentia* proceedings, provided they include procedural protections, including mandatory legal counsel to represent the accused's rights and



interests. Defendants tried in their absence also retain the right to demand reopening of proceedings upon later appearing before the Special Tribunal, provided they have not waived this right or accepted the original verdict.

This addresses an unavoidable reality. While Russian officials are unlikely to voluntarily submit to prosecution, *in absentia* trials ensure that victims do not have to wait indefinitely for justice by establishing a historical record and maintain international pressure.

### What is at stake

Since the 1648 Treaty of Westphalia, powerful states have faced minimal accountability for wars of territorial conquest.<sup>13</sup> International humanitarian law regulates *how* wars are fought – prohibiting torture, protecting civilians and banning certain weapons. But aggression law regulates *whether* wars can be fought at all. By creating a mechanism to prosecute that decision independently of the UNSC, the tribunal challenges a dangerous precedent that permanent members can wage wars of conquest without facing individual criminal responsibility.

If Russia's invasion is allowed to stand without accountability for the 'supreme crime', it sends a message to every authoritarian leader with territorial ambitions that international law is for the weak. However, the current failure to prosecute aggression would only seek to normalise Russia's blatant violations of territorial sovereignty and render Article 2 of the UN Charter effectively obsolete. Article 2, the foundational principle of the post-Second World War order, prohibits the threat or use of force against the territorial integrity or political independence of any state.<sup>14</sup>

### Looking forward

As of mid-2025, an international coalition of senior legal experts from 40 states, known as the 'Core Group', has actively worked on the legal instruments to establish a Special Tribunal for the Crime of Aggression against Ukraine. The next step is securing ratification from enough Council of Europe member states to bring it into force through an enlarged partial agreement – a mechanism that allows willing states to proceed without requiring unanimous consent.

To date, the US has not given an affirmative

response regarding its participation.<sup>15</sup> In the face of declining US involvement, European countries understand that difficult funding decisions lie ahead as they assume most financial, humanitarian and military support responsibilities for Ukraine.<sup>16</sup> Critics will point to the tribunal's limitations – no arrest warrants for sitting leaders, trials without the accused and uncertain enforcement.

But the alternative is even worse. Without the tribunal, the crime of aggression against Ukraine goes unprosecuted entirely. The Special Tribunal might not deliver perfect justice. It may not put Putin in a cell. But it establishes something critically important – that powerful states cannot simply veto accountability for the supreme international crime.

That principle, painstakingly built since Nuremberg, is worth defending – even through imperfect mechanisms, and even through difficult compromises. The Special Tribunal is a bend, not a break. But in international law, that may be the best we can hope for.

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# The Marshall Islands v UK: a dissection of gendered nuclear discourse

Rubaa Khan



In 2016, the Marshall Islands initiated proceedings against the UK alleging breaches of Article VI of the Nuclear Non-Proliferation Treaty (NPT) provisions and customary international obligations. The claim was based on the UK's failure to pursue negotiations in good faith towards the cessation of the nuclear arms race.<sup>1</sup> Contextually, the Marshall Islands served as a US nuclear testing base from 1946–1958, during which the US detonated 67 bombs across 29 atolls.<sup>2</sup> By the late 1970s, the US had buried over three million cubic feet of radioactive debris under a concrete dome. Despite its construction, vast areas of land remain contaminated, and the dome is at risk of collapsing due to rising sea levels. Toxic waste pollutes the islands' primary sources of food and water. As a result, three generations of Marshallese, especially women, have suffered debilitating health issues.<sup>3</sup>

The Marshall Islands alleged that the UK was not acting in 'good faith' to disarm.<sup>4</sup> The UK challenged the Court's jurisdiction, claiming that no dispute existed under the Article 36(2) criteria.<sup>5</sup> The Court accepted this objection holding that a dispute requires 'positively opposed views' on the performance of a legal obligation, which a respondent must be aware of, established through a subjective awareness test. A dispute exists where the respondent is 'aware' that their views were positively opposed by the applicant. The Court ruled that the UK was not sufficiently aware of the Marshall Islands' claim of dispute. The Marshall Islands relied on a General Assembly statement in 2013 urging all nuclear weapons states to intensify disarmament efforts as evidence of dispute.<sup>6</sup> The Court dismissed this, concluding that the representation lacked clarity and direct reference to the UK. Although the judgment



acknowledged the Islands 'history of extensive suffering', this could not override jurisdictional criteria.<sup>7</sup>

The Court applies a more stringent interpretation of 'dispute' than the objective determination test used in previous case law. This jurisprudential shift has been described as a barrier to justice for 'the whole of humankind'.<sup>8</sup> The excessively formalistic interpretation lacks consideration for the substantive impact of nuclear production and its impact on marginalised communities. The case is situated within a wider architecture of international security discourse that privileges masculinised attitudes of strength, state interest, rationality and defence within the sphere of nuclear testing. Gendered language and rhetoric frames weapons as symbols of national prestige. Feminists argue that such rhetoric decentres diplomatic, non-violent alternatives to security.<sup>9</sup> In 2015, the disarmament forum RevCon comprised 73.5 per cent men and 26.5 per cent women.<sup>10</sup> Similar proportions were commonplace in the 2017 prohibition negotiations.<sup>11</sup> Although humanitarian efforts aim to amplify victim's voices, the cultural psychological sentiment around weapons personifies states as gendered subjects, rendering decision-making spaces hierarchical and asymmetrically representative in nature. Nuclear testing induces a differentiated physical impact upon women, who experience biological vulnerabilities to ionising radiation with a 50 per cent higher risk of damage to reproductive tissue.<sup>12</sup> Nerje Joseph's was the last survivor of Rongelap Island.<sup>13</sup> Her miscarriages, skin burns, thyroid cancer and hair loss illustrate the detrimental inter-generational effects of testing. Regional psychosocial stigma around abortion and birth defects, along with displacement trauma experienced by women, creates a distinct gendered experience caused by nuclear testing. Marshallese women experienced sociocultural loss as they matriarchally inherit land.<sup>14</sup> Post displacement, women were cut off from their inherited ancestral lands and lost facets of their identity through their handicrafts and income producing supplies.

Under Article 38(1)(d), the teachings of highly qualified publicists are subsidiary means for determining the rules of law.<sup>15</sup> The feminist reading advocates for the inclusion of a multiplicity of subjectivities and contestations in the Court. Evidence from women's rights NGOs, environmental

and health reports and Marshallese testimony ought to be recognised as legal opposition. The UK's conduct supports the argument that it was aware of Marshall Island's 'positively opposed' views. Its national report for the 2010 NPT Review conference and statements in the Conference on the Humanitarian Impact of nuclear weapons acknowledged the environmental impacts of nuclear testing.<sup>16</sup> Between 1952 and 1991, the UK conducted 98 nuclear tests in colonised territories, causing long term radioactive harm, displacement of indigenous communities and environmental damage. The United Nations Association of the UK (UNA-UK) and International Atomic Energy Agency (IAEA) have repeatedly urged the UK to recognise these impacts.<sup>17</sup> The UK's participation in disarmament fora and explicit recognition of the harms of nuclear testing, reasonably satisfy the dispute requirement.

This article opines that the Marshall Islands retains the capacity to claim reparations for the UK's failure to negotiate disarmament and hopes that victim centred discourse develops through transnational networks such as the International Campaign to Abolish Nuclear Weapons (ICAN).<sup>18</sup> By reframing debates away from abstract deterrence theory, this report envisages a space that dismantles paternalistic legal barriers, legitimises pluralised platforms and reimagines a reality that renders visible the humanitarian impact of nuclear testing.<sup>19</sup>

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## Masculinities and gender-based violence, post-conflict realities in Bosnia and Herzegovina

**W**hile the Dayton Peace Agreement (1995) formally ended the Bosnian War, the settlement represented a coerced compromise that left deep-rooted political divisions and structural fragilities.<sup>1</sup> In post-conflict societies, violence rarely disappears with the end of armed hostilities; in the case of Bosnia and Herzegovina, it shifted into private and domestic spheres where gendered power relations and militarised masculinities continue to shape social and institutional dynamics.<sup>2</sup>

Therefore, understanding sexual and gender-based violence (SGBV) requires examining the social construction of masculinities as a legacy of historical gender inequalities resulting in male dominance and discriminatory practices hindering women's empowerment.<sup>3</sup> Prevailing gender norms and expectations of male authority remain influential among men and boys, which legitimise gender division of labour and maintain the use of violence against women and girls as a tool of socialisation.

This article seeks to determine the role played by masculinities shaped by war on gender-based violence in Bosnia and Herzegovina. It first examines the wartime construction and post-conflict reproduction of militarised and patriarchal masculinities; prior to exploring contemporary gender-based violence and emerging transformative masculinities as a potential way of change.

### War, patriarchal masculinities and the normalisation of violence

Far from constituting a mere historical parenthesis, armed conflicts act as a powerful catalyst for militarised and patriarchal forms of masculinities, in which virility is often understood as domination and the recourse to violence. As power structures collapse and traditional provider roles become unsustainable, post-conflict societies experience an embedded crisis of gender identity. Masculinity refers to the socially constructed set of behaviours, roles and attributes<sup>4</sup> associated with male identity, which individuals are taught through gendered socialisation from the earliest stages of life. In the context of Bosnia and Herzegovina, the armed conflict that took place between 1992 and 1995 contributed to the consolidation of militarised masculinities, in which men were expected to embody the roles of warriors and defenders of the nation. This non-neutral gender conception of armed conflicts not only strengthens but also radicalises male representations, valorising violence within masculine identity and framing aggression as a legitimate means of asserting retribution, honour and status. As a result, the conception of militarised virility was elevated to the status of a widespread social norm.<sup>5</sup> Moreover, sexual violence, targeting both women and men, not only causes physical harm, it also

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attacks gender identity and undermines socially constructed expectations of strength and invulnerability. Male survivors of wartime sexual violence remain largely invisible due to stigma and dominant norms portraying men as perpetrators rather than victims.<sup>6</sup> Ideals of masculinity, especially those emphasising emotional restraint and toughness, contribute to this silence and under-recognition.

These dynamics reflect what is understood as *patriarchal masculinities*, referring to the set of beliefs and practices that portray masculinity as inherently superior to femininity, legitimising domination and control, as well as normalising violence in order to maintain gender hierarchies.<sup>7</sup> Gender socialisation processes reproduce the social construction of these norms; boys are taught from an early age that masculinity represents authority, emotional control and heterosexual success. Family structures, schools, peers, media and military institutions participate in the conveyance of these gender biases, where practices such as bullying and military hazing become tools to reprimand those who deviate from dominant social norms.<sup>8</sup>

In this sense, the war contributed to the internalisation of hegemonic discourses of masculinity and identity construction in the Bosnian post-conflict society.<sup>9</sup> Structural stressors, that is, economic insecurity and unemployment, result in the incapacity for men to fulfil socially expected roles and aggravate the existing gender crises. The interaction between unresolved trauma, social marginalisation and patriarchal expectations may shift the masculine necessity to reassert authority within the intimate sphere.<sup>10</sup>

### **Sexual and gender-based violence in post-conflict Bosnia: structural persistence and transformative agenda**

Although Bosnia and Herzegovina ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence,<sup>11</sup> also known as the Istanbul Convention, in November 2013, gender-based violence (GBV) remains a pervasive feature of post-conflict society and reflects the enduring influence of patriarchal masculinities; impacting particularly the lives of women and girls. Many cases of domestic abuse remain unreported due to stigma, fear and social normalisation, thereby

contributing to persistently high rates of femicide.<sup>12</sup> Survivors' testimonies further reveal patterns of coercive control, isolation and institutional failure, where victims face significant barriers to seeking protection. Violence is embedded within intimate relationships and sustained by silence as a survival strategy.<sup>13</sup>

Operating across multiple levels, that is, internal, interpersonal, institutional and ideological,<sup>14</sup> SGBV functions not merely as individual acts of violence but as a broader mechanism that maintains gender inequality and reinforces male dominance. The state's complex and decentralised political system has resulted in fragmented legal frameworks and uneven enforcement of protection measures across entities, increasing the risk of secondary victimisation of survivors. The weak recognition of victims and their limited access to services such as legal aid and psychosocial support<sup>15</sup> further undermine their right to effective remedies.<sup>16</sup> Such institutional shortcomings actively reproduce patriarchal power structures by failing to protect victims and hold perpetrators accountable efficiently.

Despite these hurdles, the promotion of transformative masculinities challenges traditional norms grounded in domination and emphasises equality as well as shared power within households and society at large.<sup>17</sup> Engaging men and boys in prevention initiatives, including education and community programmes, may encourage men to actively participate in the promotion of gender justice and to reduce the tolerance for violence by reshaping masculinities and increasing awareness. By creating spaces for critical reflection on gender roles, initiatives such as the *Young Men Initiative*<sup>18</sup> contribute to redefining manliness beyond patriarchal expectations. At the institutional level, international actors such as the Organisation for Security and Co-operation in Europe (OSCE) have supported parliamentary reforms and enhanced coordination mechanisms, eg, the Agency for Gender Equality of Bosnia and Herzegovina<sup>19</sup> and the Gender Centre of the Federation of Bosnia and Herzegovina,<sup>20</sup> aimed at strengthening responses to GBV.<sup>21</sup>

### **Conclusion**

Masculinities in Bosnia and Herzegovina illustrate a continuum from wartime militarisation to embedded post-conflict

patriarchal norms that sustain gender-based violence. As both a legacy of conflict and an evolving social framework, hegemonic masculinities continue to shape power relations and legitimise violent behaviour. These dynamics are reinforced by institutional limitations and socioeconomic pressures, which perpetuate marginalisation, inequalities and limit effective protection for victims.

Nevertheless, the emergence of transformative masculinities underscores the social construct of gender norms and, therefore, their openness to redefinition. Thus, addressing gender-based violence in post-conflict contexts requires both legal reform and significant transformation of gender identities.

#### Notes

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## Some reflections on *in absentia* trials at the Special Tribunal for the Crime of Aggression Against Ukraine

The Special Tribunal for the Crime of Aggression against Ukraine (STCA) is spearheading efforts to hold Russian leaders responsible for invading Ukrainian sovereign territory in 2022.<sup>1</sup> Created by way of an agreement between Ukraine and the Council of Europe,<sup>2</sup> the STCA will – once operational – mark the first crimes of aggression which have been supranationally prosecuted<sup>3</sup> since the Nuremberg/Tokyo trials.<sup>4</sup> While the Tribunal is years away from exercising its jurisdiction,<sup>5</sup> this is an opportune moment to dissect the adjudicative features of its legal framework. The following contribution examines one such peculiarity: the STCA's explicit statutory authority to conduct proceedings without the participation of those it indicts, known as trials *in absentia*.<sup>6</sup> Failing regime change, the Tribunal is unlikely to have Putin or his aides in custody,<sup>7</sup> meaning that the STCA's first trials will fall within this category. This piece details how the discretion to hold trials *in absentia* will play out in this institutional context.

The STCA's embrace of trials *in absentia* is contained in Article 28 of its Statute.<sup>8</sup> It structures this judicial power into two scenarios. The first, as per Article 28(1)(a), requires an 'unequivocal waiver' by the defendant of his right to be present at trial. This reflects the language of human rights case law on the scope of procedural fairness.<sup>9</sup> It is also consonant with the underlying reason for embedding the right of presence within the right to a fair trial,<sup>10</sup> as it protects against unilateral exclusions from judicial processes that implicate an individual's freedoms, and whose personal involvement therein could be tied to the presentation of an effective defence.<sup>11</sup> While the adopted standard is conceptually lower than an express waiver, Article 28(1)(a) clarifies that the Tribunal cannot impute an intentionality to the defendant's absence *per se*. Rather, there must be evidence indicating that he was actually informed of the opportunity to participate in the trial but evinced a

desire not to. Accordingly, a substantial burden of due diligence will be borne by the prosecution in obtaining and adducing factual material pointing to the defendant's full awareness of the criminal case against them, and their voluntary decision not to appear. Two additional observations may be made. For one, this provision captures the unlikely scenario where a defendant absconds during their trial, should they escape or be granted leave from custody. It also encompasses situations where they continuously disrupt the proceedings.

The second possible means of staging an *in absentia* trial at the STCA, under Article 28(1)(b), requires that all 'reasonable steps' be exhausted to secure the defendant's appearance, and inform them of the relevant charges and consequences of non-attendance. This provision essentially replicates Article 61(2)(b) of the Rome Statute, concerning *in absentia* confirmation of indictment hearings.<sup>12</sup> In considering the article, the STCA may have recourse to recent ICC jurisprudence on the latter provision.<sup>13</sup> But as confirmation hearings are qualitatively different from trial proceedings, involving a lower evidentiary threshold and being unconcerned with determining criminal culpability, the Tribunal would likely apply a more exacting standard.<sup>14</sup> For instance, judges could specify that the measures taken be 'overwhelming' in their totality, or such that it is 'inconceivable' that the defendant could have remained ignorant of the charges against them.<sup>15</sup> Relevant precedents suggest that the analytical focus here is not on the successfulness, but the adequacy of the efforts taken to secure attendance and notify the defendant. This is to be gauged 'irrespective of [whether] those actions [...] led to the intended result'.<sup>16</sup> Possible examples are innumerable but could involve leveraging diplomatic channels and multilateral fora to serve the indictment or request that the defendant's country of residence/nationality surrender them to the Tribunal. Possible notification measures include large-scale

traditional and social media campaigns; extensive radio and television coverage in the defendant's country of residence/nationality; and online publication of the indictment and request for the defendant's attendance. These would be legitimate, albeit inexhaustive, ways of fulfilling Article 28(1)(b).

Since this second basis does not stipulate affirmative proof that the defendant was notified of the relevant charges, it at first blush appears to offer a means of circumventing the strictures of having to establish a waiver – thereby negating the need to invoke Article 28(1)(a) altogether. This calls into question the fairness and thus legitimacy of any trial held on such a footing.<sup>17</sup> Thankfully, Article 28(2)-(3) appears designed to ameliorate such potential due process risks.<sup>18</sup> This introduces three minimum procedural safeguards that the Tribunal 'shall ensure' for the defendant in every *in absentia* trial: actual and adequate notification, the right to legal counsel and an unfettered right to a retrial. The notification requirement's effect is to confine the holding of a trial *in absentia* under Article 28(1)(b) to cases where it is proven that the defendant is aware he stands to be prosecuted, but no evidence can be presented that he has freely exercised his right of presence by *not* participating. It thus ensures that the Tribunal is not held hostage by a defendant looking to evade or thwart its anti-impunity functions.<sup>19</sup> In the event that a defendant later appearing before the Tribunal claims to have been involuntarily absent then the entitlement to a retrial would revive his procedural rights and rectify any harm done thereto.<sup>20</sup>

Article 28(1) clarifies that, even if the established facts comply with subsection (a) or (b), an additional criterion must be satisfied: an *in absentia* trial must be required by the 'interests of justice'. This terminology can be traced to the Nuremberg Tribunal.<sup>21</sup> It also finds expression in the Rome Statute, albeit regarding decisions on whether to initiate an investigation/prosecution.<sup>22</sup> The formulation there is such that it is presumptively *against* the interests of justice to suspend ICC operations. Conversely, the Tribunal is likely to regard it as presumptively *in* the interests of justice to halt proceedings until the defendant appears.

Unfortunately, there is a jurisprudential dearth on this concept's meaning. Being open-textured, it could be said to direct the Tribunal examine all factors militating

in favour or against stipulating the defendant's presence. These might include judicial economy and the need for swift justice; the reason for the absence; and the level of alleged criminal culpability. In parallel, determining what is in the interests of justice might draw the Tribunal's attention to considering that justice is owed not only to the defendant but to other stakeholders alike.<sup>23</sup> This could call for the STCA to evaluate 'whether and how [a trial] best addresses the needs of those it should act for',<sup>24</sup> such as by offering victims an opportunity to be heard, the possibility of reparations and an authoritative historical record, as provided by a judicial determination of the facts; or more systemically, by reinforcing the international rule of law. It could also entail a proportionality analysis, requiring that prima facie interferences with fair trial rights, as well as the inability to impose a custodial sentence, be both necessary and justified given the non-retributive objectives objectives pursued an *in absentia* trial. Whatever the case, the STCA represents a unique opportunity for judges to expound on a notion the content of which has remained elusive for 80 years.

#### Notes

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- 2 Iryna Mudra, Anton Korynevych and Mark Ellis, 'From Commitment to Action: The Next Steps in Holding Russia's Leaders Accountable for the Crime of Aggression Against Ukraine' (*Just Security*, 18 February 2026) [www.justsecurity.org/131731/russia-leaders-accountable-crimes-aggression-ukraine/](http://www.justsecurity.org/131731/russia-leaders-accountable-crimes-aggression-ukraine/) accessed 16 April 2026.
- 3 Albeit this time as a 'hybrid' or 'internationalised' body fusing international and Ukrainian domestic law elements. Previous examples of such mechanisms include the Special Tribunal for Lebanon (STL), the Special Court of Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Serious Crimes Panels in the District Court of Dili in East Timor.
- 4 Then termed 'crimes against peace': IMT Charter Art 6(a).
- 5 The Tribunal adheres to a financial model, underpinned by the Enlarged Partial Agreement, that is still awaiting at least 16 state accessions (if not, in practical terms, more) before it can enter into force. Moreover, with the Tribunal's implementation being divided into three distinct phases, of which the possibility of trials *in absentia* arises only at the final stage, the pursuit of accountability



- here will be long indeed: Mudra, Korynevych and Ellis, 'From Commitment to Action: The Next Steps in Holding Russia's Leaders Accountable for the Crime of Aggression Against Ukraine' (*Just Security*, 18 February 2026). For more information on the Tribunal, see Council of Europe, *Special Tribunal for the Crime of Aggression against Ukraine* [www.coe.int/en/web/special-tribunal-ukraine](http://www.coe.int/en/web/special-tribunal-ukraine) accessed 16 April 2026.
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  - 10 Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford: OUP, 2020) p 448.
  - 11 *The Prosecutor v Nahimana et al* Appeals Chamber, 28 November 2007, ICTR-99-52-A at [107].
  - 12 And to a lesser degree, Art 22 of the STL – the only other post-Nuremberg tribunal to be explicitly empowered to hold trials *in absentia*.
  - 13 *The Prosecutor v Joseph Kony* Pre-Trial Chamber III, 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*' 29 October 2024, ICC-02/04/01/05.
  - 14 *Professor v Ayyash et al* Appeals Chamber, 'Decision on Defence appeals against Trial Chamber's Decision on reconsideration of the trial in absentia Decision' 1 November 2012, STL-11-01/PT/AC/A126.1 at [33].
  - 15 *The Prosecutor v Hassan Merhi* Trial Chamber, 'Decision to hold trial in absentia' 20 December 2013, STL-13-04/TC at [100].
  - 16 *The Prosecutor v Joseph Kony* Pre-Trial Chamber III, 'Decision on the criteria for holding confirmation of charges proceedings *in absentia*' 29 October 2024, ICC-02/04/01/05 at [63].
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  - 20 *Colozza v Italy* App no 9024/80 (ECtHR, 12 February 1985) at [29].
  - 21 IMT Charter Art 12.
  - 22 Rome Statute Art 53(1)(c) and 53(2)(c).
  - 23 Ryan Perry, 'The absconding accused and the ICC: An examination on the legitimacy and capacity of the International Criminal Court to hold in absentia trials' (2021) 5 PKIGJJ 36.
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