

Handout 4.1

Key legal provisions

Article 14 (1) of the International Covenant on Civil and Political Rights:

All persons shall be equal before the courts and tribunals. **In the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.** The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Article 7 (1) of the African Charter on Human and Peoples' Rights:

Every individual shall have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
- (b) The right to be presumed innocent until proved guilty by a competent court or tribunal;
- (c) The right to defence, including the right to be defended by counsel of his choice;
- (d) The right to be tried within a reasonable time by an impartial court or tribunal.

Article 8 (1) of the American Convention on Human Rights:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a **competent, independent, and impartial tribunal, previously established by law**, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Article 6 (1) of the European Convention on Human Rights:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time **by an independent and impartial tribunal established by law**. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 40 (1) and (2) of the Rome Statute of the International Criminal Court:

1. The judges shall be **independent** in the performance of their functions.
2. Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.

Article 67 (1) of the Rome Statute of the International Criminal Court:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing **conducted impartially**, ...

Principle 1 of the Basic Principles on the Independence of the Judiciary:

The **independence** of the Judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the Judiciary.

Principle 3 of the Basic Principles on the Independence of the Judiciary:

The Judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Principle 4 of the Basic Principles on the Independence of the Judiciary:

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the Judiciary, in accordance with the law.

Principle 7 of the Basic Principles on the Independence of the Judiciary:

It is the duty of each Member State to provide adequate resources to enable the Judiciary to properly perform its functions.

Key legal provisions on military tribunals

Principle 5 of the Basic Principles on the Independence of the Judiciary:

Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

Human Rights Committee, general comment No. 32 (2007) on article 14: right to equality before courts and tribunals and to a fair trial:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized, civilian or military. The Committee notes the existence, in many countries, of military or special courts which try civilians. While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e., limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials (citations omitted).

Article 16 (2) of the Declaration on the Protection of all Persons from Enforced Disappearance:

They [the alleged authors of a crime of enforced disappearance] shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.

Article IX to the Inter-American Convention on Forced Disappearance of Persons:

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.

Principle L of the Principles and guidelines on the right to a fair trial and legal assistance in Africa:

- (a) The only purpose of Military Courts shall be to determine offences of a purely military nature committed by military personnel.
- (b) While exercising this function, Military Courts are required to respect fair trial standards enunciated in the African Charter and in these guidelines.
- (c) Military courts should not in any circumstances whatsoever have jurisdiction over civilians. Similarly, Special Tribunals should not try offences which fall within the jurisdiction of regular courts.