

# The State of Military Justice Reform in Turkey: 2014

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## I. Introduction

### 1. Aim and Objectives

Since the founding of the Republic of Turkey ninety years ago, the Turkish Armed Forces have played a crucial role in the formation of Turkey's political climate and, consequently, its relations with foreign powers. The military has long represented a bastion of secularism against the creeping forces of communism, socialism, Islamism, and all other brands of developing populist movements. Over the last four decades, the military complex has successfully led four coups to topple democratically elected governments.<sup>1</sup> The story is repetitive: the military swoops in, but exits centre stage relatively quickly to let another civilian administration assume power, always maintaining a watchful gaze from stage right.

Turkey's current governing party, the Justice and Development Party (AKP), has implemented a series of reforms via executive, legislative, and judicial decree to quash the military's strong hold on politics, simultaneously ensuring itself a prosperous and long political reign. Included in these reforms are changes that affect the military justice system. As the AKP institutes wide-ranging structural reforms, including commissioning a new constitution to replace the 1980 version enacted under military rule,<sup>2</sup> much of the military justice reform that would otherwise be the source of great political discord has passed with relatively little fanfare or media attention. This creates an unusual dynamic whereby the Turkish military justice system has evolved in a manner consistent with the best global norms at a rate surpassing average military reform measures in other countries.

Measured by the best military justice practices set forth by experts in legal academia and the UN Special Rapporteur for the Independence of Judges and the Judiciary,<sup>3</sup> Turkey still has a long way to go. Still,

<sup>1</sup> See generally G. Jenkins, *Context and Circumstance: The Turkish Military and Politics* (Abingdon, Routledge, 2001).

<sup>2</sup> D. Jones, 'Turkey Begins Drafting New Constitution', *Voice of America*, 10 May 2012, [http://www.voanews.com/content/turkey\\_begins\\_drafting\\_new\\_constitution/539101.html](http://www.voanews.com/content/turkey_begins_drafting_new_constitution/539101.html). Unless indicated otherwise, all urls cited were last accessed on 14 Nov. 2013.

<sup>3</sup> R. L. Abel et al., *Law Professors' Statement on Reform of Military Justice*, 7 June 2013, <http://www.caaflog.com/wp-content/uploads/Law-Professors-Statement.pdf> [hereinafter *Law Professors' Statement*]; G. Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, report to the sixty-eighth session of the General Assembly, UN Doc. A/68/285, 7 Aug. 2013 [hereinafter *Knaul Report*]; and E. Decaux, *Draft Principles Governing the Administration of*

the robust political discussion around the proper place of the military in a democratic system has created a new and fast changing system of military justice that could serve as a model or, at the very least, a case study for similarly situated countries undergoing political struggles between elected civilian and appointed military factions.

This paper will document the current state of military justice in Turkey and identify future avenues of reform, based on the best practices outlined in UN judicial independence special rapporteurs' (Msrs. Knaut and Decaux) reports. Currently, no comprehensive paper exists in English that catalogues the key provisions of Turkish military justice.<sup>4</sup> As such, the developments in Turkey have not been widely disseminated or commented upon by scholars interested in the global state of military justice reform. This paper will allow for further commentary and discussion around the outcomes of military justice reform in a geographical region little-studied in this field.

## 2. The Political Framework — The Military as Gatekeeper to Government

Turkey's military has traditionally been the stronghold of secularism. It is known as the gatekeeper to government because of its prominent and repeated role in overthrowing democratically elected regimes viewed as too revolutionary or too far afield from the strong secular values promoted by the country's founder Atatürk.<sup>5</sup> Since the country's founding by Atatürk, himself a lieutenant colonel, the military has maintained a strong and supportive resource base and public following. It overturns governments that begin to loosen the reins on freedoms of religious expression, including through measures such as opening religious schools across the country or providing financial support to the construction of mosques. It has also intervened to restore a stable political order in times of financial crises or repeated turnover of elected officials.<sup>6</sup> Unlike in other military dictatorships, however, the

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*Justice Through Military Tribunals*, report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights to the sixty-second session of the ECOSOC Commission on Human Rights, UN Doc. E/CN.4/2006/58, 13 Jan. 2006 [hereinafter *Decaux Report*].

<sup>4</sup> Note that most updates on military justice are found in piecemeal media stories that detail individual changes in massive reform packages. The speed at which reforms are proposed and implemented also accounts for the lack of a current comprehensive documentation of reforms.

<sup>5</sup> 'Turkey: Atatürk and the Secular State', *Berkley Center for Religion, Peace & World Affairs at Georgetown University*, <http://berkeleycenter.georgetown.edu/essays/turkey-ataturk-and-the-secular-state>.

<sup>6</sup> See 'Timeline: A History of Turkish Coups', *Al Jazeera*, 4 April 2012, <http://www>.

military in Turkey is quick to withdraw from overt political rule once an administration more in line with what it considers to be the values of the Republic assumes power.<sup>7</sup>

The military maintains its stronghold over the seat of government due to its strength in numbers, finances, and international support. Turkey's army ranks consistently among the top ten most active militaries in the world in terms of personnel and expenditures. With 617.000 members within the active armed forces, the country ranks eighth in the world in terms of troop numbers.<sup>8</sup> The army's massive size may be explained by the country's policy of conscription for all males between the ages of 21 and 41.<sup>9</sup> Spending \$18,2 billion on its military annually, the country ranked fifteenth in military spending in 2012, according to the Stockholm International Peace Research Institute.<sup>10</sup> The budget is not subject to audit by civilian government employees, and the exact spending figures are never released publicly.<sup>11</sup> Although the military's cultural influence on the Turkish populace is not as pervasive today as it was fifty years ago, it continues to be a source of national political acculturation.<sup>12</sup> Military officers also enjoy a higher standard of living than most citizens.<sup>13</sup>

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aljazeera.com/news/europe/2012/04/20124472814687973.html; see also C. Yildirim, 'The Role of the Military in Turkish Politics and European Union Membership Negotiations', *Balkananalysis*, 2 Dec. 2010, <http://www.balkananalysis.com/turkey/2010/12/02/the-role-of-the-military-in-turkish-politics-and-european-union-membership-negotiations/>.

<sup>7</sup> See N. Momayezi, 'Civil-Military Relations in Turkey', Vol. 15 No. 3 *International Journal on World Peace* 1998, pp. 6-11.

<sup>8</sup> 'Largest Military Forces in the World', *Popular Military*, <http://www.popularmilitary.com/largest-military-forces.htm> (last accessed on 20 Oct. 2013).

<sup>9</sup> 'Turkey', in *The World Factbook 2013-14* (Washington DC, Central Intelligence Agency, 2013), <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html>. The mandatory time of conscription was lowered from fifteen to twelve months in a reform measure passed in October 2013, see 'Turkey Cuts Compulsory Military Service', *Al Arabiya*, 21 Oct. 2013, <http://english.alarabiya.net/en/News/middle-east/2013/10/21/Turkey-cuts-compulsory-military-service.html>.

<sup>10</sup> 'SIPRI Military Expenditure Database', Stockholm International Peace Research Institute, [http://www.sipri.org/research/armaments/milex/milex\\_database](http://www.sipri.org/research/armaments/milex/milex_database).

<sup>11</sup> 'Turkey's Army is Mighty in Numbers, Not Weapons', *Taraf* (reprinted in *Al-Monitor*), 10 Sept. 2012, <http://www.al-monitor.com/pulse/security/01/09/turkish-army-personnel-versus-tools.html>.

<sup>12</sup> This is explained by the fact that in the mid-20<sup>th</sup> century the majority of the country lived rural-agrarian lifestyles and the state school system had not yet been standardized. W. Hale, *Turkish Politics and the Military* (New York, Routledge, 1994) pp. 328-29.

<sup>13</sup> *Id.*

In addition to its financial and numerical strengths, joint military exercises and cooperation with Western militaries have given the military a key bargaining chip in foreign relations. Dating back to the Marshall Plan in 1947, the U.S. and Allied nations have buttressed Turkey's military as a means of repressing communist encroachment into southeastern Europe.<sup>14</sup> Just five years after the first of the Marshall Plan's aid was delivered, Turkey joined NATO and has been an active member since its induction.<sup>15</sup> Turkey hosts 24 NATO airbases, including the Izmir Air Station (utilized by the U.S. Air Force in Europe) and the Incirlik Air Base in southeastern Turkey (used primarily by U.S. troops).<sup>16</sup>

An ongoing internal war against the Kurdistan Worker's Party (PKK) — classified as a terrorist group by the U.S., the EU, and over twenty other nations<sup>17</sup> — keeps the military on active duty and a constant presence in political and media outlets. This constant media attention has produced faith in the military for its protection against PKK forces, but has also produced stories chiding acts of disproportionality and tactical blunders such as the Uludere strike of 2011.<sup>18</sup> Media coverage of the latter has elicited additional calls for reform.

## II. Military Reform Under the AKP: Radical Changes

Since the AKP assumed power in 2001 it has initiated a widespread campaign to reform the legal system, from the structure of the courts to the number of Constitutional Court members and sentencing limits. In both 2011 and 2013, members of the AKP floated proposals to abolish the system of military courts altogether, claiming the dual track had no place in a republic that is wedded to democratic norms embodied in an independent civilian judiciary.<sup>19</sup> Members of the AKP have rallied

<sup>14</sup> The Marshall Plan, 22 U.S.C. §§ 1501-1523 (1948) (repealed Aug. 24, 1954).

<sup>15</sup> 'Turkey's Relations with NATO', Republic of Turkey Ministry of Foreign Affairs, 2011, <http://www.mfa.gov.tr/nato.en.mfa>.

<sup>16</sup> 'NATO's Eastern Anchor: 24 NATO Bases in Turkey', Global Research, 14 Feb. 2011, <http://www.globalresearch.ca/nato-s-eastern-anchor-24-nato-bases-in-turkey>.

<sup>17</sup> D. L. Phillips, 'Remove the PKK from the Terror List', *The Huffington Post*, 21 May 2013, [http://www.huffingtonpost.com/david-l-phillips/pkk-terror-group-status\\_b\\_3289311.html](http://www.huffingtonpost.com/david-l-phillips/pkk-terror-group-status_b_3289311.html).

<sup>18</sup> 'Massacre at Uludere', *The Economist*, 9 June 2012, <http://www.economist.com/node/21556616>. The Uludere strike was an event that took place on 28 December 2011. Two Turkish fighter jets fired on a group of villagers, mistakenly taking them for PKK members and as a consequence killing 34 civilians.

<sup>19</sup> 'Bozdag Announces Plans to Revoke Military Courts', *Today's Zaman*, 4 Aug. 2011, <http://www.todayozaman.com/news-252752-bozdag-announces-plans-to-revoke-military-courts.html>; and A. A. Kilic, 'CHP, MHP Put Breaks on AK Party Plan to

against the distended powers of the military, including its unlimited discretion in prosecution, sentencing, and appellate oversight of crimes. These debates have fostered additional public awareness of the uniquely powerful position of Turkey's military courts vis-à-vis other European systems.<sup>20</sup>

Reforms to abolish the dual track system highlight the radicalized nature of the current reform process. In addition, the sheer number of military reform proposals catalogued at the Parliament over the past few years demonstrate the gravity that members of Parliament accord to true military reform.<sup>21</sup> Below are outlined the major reforms that have been passed or debated in conformance with best practices developed by the UN Special Rapporteur for the Independence of Judges and the Judiciary in the Decaux and Knaul Reports,<sup>22</sup> as well as practices developed by leading academics and practitioners.

## 1. Procedural Law

### *A. Independence of Military Judges*

Decaux Principle No. 13 ensures the right to a competent, independent and impartial tribunal.<sup>23</sup> Constant debate persists around the independence and impartiality of military (and civilian) judges in Turkey. Military judges receive the same education as civilian judges and then additional military training after the requisite civilian legal education.<sup>24</sup> However, judges continue to wear military uniforms rather

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Abolish Military Courts', *Today's Zaman*, 1 Aug. 2013, <http://www.todayszaman.com/news-322477-chp-mhp-put-breaks-on-ak-party-plan-to-abolish-military-courts.html>.

<sup>20</sup> See M. E. Yilmaz, 'Turkish Military Courts Fundamentally Differ from Those in Europe', *Today's Zaman*, 5 July 2009, <http://www.todayszaman.com/news-179965-turkish-military-courts-fundamentally-differ-from-those-in-europe.html> (noting most prominently the absence of trials of civilians in European systems and the absence of military members on appellate courts).

<sup>21</sup> For an example of the types of legislation publicized, see *Kanun Teklifi Bilgileri* [Information of Potential Legislation], GRAND NATIONAL ASSEMBLY OF TURKEY, (May 31, 2013), [http://www.tbmm.gov.tr/develop/owa/tasari\\_teklif\\_sd.onerge\\_bilgileri?kanunlar\\_sira\\_no=130996](http://www.tbmm.gov.tr/develop/owa/tasari_teklif_sd.onerge_bilgileri?kanunlar_sira_no=130996).

<sup>22</sup> See *Knaul Report*, *supra* note 3; and *Decaux Report*, *supra* note 3.

<sup>23</sup> *Decaux Report*, *supra* note 3, § 17. This principle comes from the right to a fair and public hearing articulated in Article 10 of the Universal Declaration of Human Rights (UDHR), and Article 14 of the International Covenant on Civil and Political Rights (ICCPR).

<sup>24</sup> Askeri Hakimler Kanunu [Military Judges's Law] (Turk.), Art. 18. For a free English translation see [http://translate.google.com/translate?hl=en&sl=tr&u=http://www.msb.gov.tr/asad/AskeriMevzuat/Kanunlar/as\\_hak\\_k.html&prev/=](http://translate.google.com/translate?hl=en&sl=tr&u=http://www.msb.gov.tr/asad/AskeriMevzuat/Kanunlar/as_hak_k.html&prev/)

than the traditional judges' robes, a custom that has been abandoned in more progressive military justice systems.<sup>25</sup> There exists a prevailing notion that judges in uniform may be perceived as impartial because they are displaying a military rank in a proceeding where one side is the military. This makes the judge appear physically on the side of the prosecution and, on court martial panels, could influence junior members of the panel by virtue of rank and necessary accord of deference.<sup>26</sup> Judges are appointed for terms of no less than four years, which satisfies the minimum requirement advocated by academics in the field.<sup>27</sup> The security of judges' tenure was codified in the 2010 legislative amendments, which revised Article 37 of the Military Judges Code (Law No. 357) to read, "No organ, authority, officer or individual may give orders or instructions to courts or judges relating to the exercise of judicial power and may not send them circular notes or make recommendations or suggestions. Military judges shall not be dismissed."<sup>28</sup> That set of amendments also terminated the promotion of military judges through administrative records, which had been a prejudicial means of promoting certain high-ranking members of the military based on factors other than competency.<sup>29</sup>

Article 18 of the Military Judges Code stipulates that the Minister of National Defense appoints judges, with the consent and approval of the Prime Minister and the President.<sup>30</sup> Judges of the Military Supreme Court are appointed by the President under Article 156 of the Constitution from among three candidates nominated by the Plenary Assembly of

search%3Fq%3Daskeri%2Bhakimler%2Bkanunu%26client%3Dfirefox-a%26hs%3DlpL%26rls%3Dorg.mozilla:en-US:official%26channel%3Dfflb.

<sup>25</sup> M. Y. Aslan, 'Military Criminal Jurisdiction Under Turkish Law', 8th International Military Criminal Law Conference 6-10 June 2007, Budapest, Hungary, p. 7, <http://dergiler.ankara.edu.tr/dergiler/38/262/2339.pdf>.

<sup>26</sup> For a look into the Canadian system's reasoning behind prohibiting military judges from dressing in uniform at hearings, see C. Blatchford, 'What Not to Wear: A Court-martial Case Descends into Goofiness', *The Globe and Mail*, 26 Jan. 2010, <http://www.theglobeandmail.com/news/national/what-not-to-wear-a-court-martial-case-descends-into-goofiness/article4311723/>.

<sup>27</sup> For greater elaboration on the best practices advocated in academia, see E. R. Fidell, 'International Developments in Military Law', Vol. 17 *Canadian Criminal Law Review* 2013, pp. 83-90.

<sup>28</sup> B. Berksoy, *Military, Police, and Intelligence in Turkey: Recent Transformations and Needs for Reform*, (Istanbul, Türkiye Ekonomik ve Sosyal Etüdler Vakfı (TESEV) [Turkish Economic and Social Studies Foundation], June 2013) p. 15, <http://www.tesev.org.tr/assets/publications/file/01082013160934.pdf>.

<sup>29</sup> *Id.*, pp. 14-15.

<sup>30</sup> Askeri Hakimler Kanunu [Military Judges's Law] (Turk.), Art. 16; and Berksoy, *supra* note 28, p. 23.

the Military Supreme Court. This appointment system ensures that the military appoints ranking members who it supports to lead the court system. Or, if there is significant opposition to an appointment from the President, it ensures that he can effectively control nominees to the military courts.

The Supreme Court may also have officers on the bench who are not military judges; they are chosen by the President from a list made by the Chief of General Staff.<sup>31</sup> Without competence in legal decision-making and with extreme loyalty to their superiors, military officers without legal training may risk depriving defendants of a fair trial if they are hand picked by their superiors, as they may rule for reasons other than those affirmed by the objective facts of a case. However, their vote is equal to that of a tenured military judge. As the Knaul Report notes for the case of Peru, the fact that a higher-ranking military member chose members of the Supreme Court of Military Justice sufficed as “enough to call the independence of the military judges into serious question.”<sup>32</sup>

The Knaul Report details other aspects of a judge’s employment that should be determined by law to safeguard the independence of military judges including salary, conditions of service, pension, and age of retirement.<sup>33</sup> Articles 18-21 of the Military Judges Code detail the relevant determinations for all of these categories in line with the aspirations of the Knaul Report.<sup>34</sup> A Constitutional Court ruling in 2010 also stripped commanders of the power to rank military judges’ performance, a metric previously used to determine judges’ promotion and relocation possibilities.<sup>35</sup> This ruling added to the impartiality of the courts and brought evaluation of judges in line with the civilian standard of review by disentangling promotion of judges from evaluation by

<sup>31</sup> ‘The Status in Turkish Legal System’, Askeri Yuksek Idare Mahkemesi [High Military Administrative Court], [http://www.msb.gov.tr/ayim/ayim\\_ana.asp?DILIDNO=2](http://www.msb.gov.tr/ayim/ayim_ana.asp?DILIDNO=2).

<sup>32</sup> *Knaul Report, supra* note 3, § 43 (referencing Inter-Am. Ct. H.R., *Castillo Petruzzi et al. v. Peru*, Series C No. 52, 30 May 1999, Judgment).

<sup>33</sup> *Knaul Report, supra* note 3, § 95.

<sup>34</sup> Askeri Hakimler Kanunu [Military Judges’s Law] (Turk.), Arts. 18-21.

<sup>35</sup> ‘Constitutional Court Ruling Supports Independence of Military Courts’, *Today’s Zaman*, 9 Jan. 2010, <http://www.todayszaman.com/news-198021-constitutional-court-ruling-supports-independence-of-military-courts.html>. The ruling is available only in Turkish: Anayasa Mahkemesi [Constitutional Court], 2006/105 Decision no. 2009/142, 8 Oct. 2009, <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2010/01/20100108-17.htm/20100108.htm&main=http://www.resmigazete.gov.tr/eskiler/2010/01/20100108-17.htm>.

commanders who may have recommended certain cases for disciplinary hearings and had strong opinions on their desired finding or sentence. Still, Turkey does not go as far as the Knaul Report, which would establish an independent authority charged with the selection of military judges.

Three prominent issues remain as hindrances to the impartiality of judges. First, judges and military prosecutors perform their requisite three-year internship in military training together and practice both roles.<sup>36</sup> This creates strong bonds between the military judges and military prosecutors that diminish judges' impartiality.

Second, military judges remain on military bases, and these close living quarters reinforce bonds between judges and prosecutors. A reform package enacted in September 2013 included a proposal to make conscious efforts to set up the military courts in as distant as possible a location from military compounds.<sup>37</sup> This change, recommended since the initial reforms of 2008,<sup>38</sup> has not yet been enacted. Meanwhile, an anonymous military judge in a 2011 report estimated that 90% of the existing thirty-two military courts are located in the same location as their military bases.<sup>39</sup>

Third, until 2010 military courts were composed of two military judges and one non-lawyer officer whose vote counted equally with those of the military judges. A 2012 ECtHR ruling held this composition unconstitutional.<sup>40</sup> The ECtHR ruled not that the lack of

<sup>36</sup> Askeri Hakimler Kanunu [Military Judges Law] (Turk.), Art. 16; and Aslan, *supra* note 25, p. 7.

<sup>37</sup> M. Nayir, 'Askeri mahkemelere sivil reform' [Civilian Reform of Military Courts], *Sabah*, 15 Sept. 2013, <http://www.sabah.com.tr/Gundem/2013/09/15/askeri-mahkemelere-sivil-reform>.

<sup>38</sup> M. Arslan, 'Judicial Reform Also to Reorganize Military Courts', *Today's Zaman*, 10 May 2008, <http://www.todayszaman.com/news-141477-judicial-reform-also-to-reorganize-military-courts.html>. See E. Yavuz, 'Defense Ministry Procrastinates on Military Courts', *Today's Zaman*, 1 Dec. 2009, <http://www.todayszaman.com/news-194239-defense-ministry-procrastinates-on-military-courts.html>. The same reform was also accepted in the reform package of 12 September 2011, but no reports since then confirm or deny if this provision of the package was passed through Parliament. See 'Askeri Mahkemeler Kislâ Disina Cikiyor' [Military Courts Will Leave Bases], *Haber 7*, 20 Mar. 2011, <http://www.haber7.com/guncel/haber/724562-askeri-mahkemeler-kisla-disina-cikiyor>.

<sup>39</sup> L. Kemal, 'Military Judicial System Awaits Reform', *Today's Zaman*, 19 Dec. 2011, [http://www.todayszaman.com/columnistDetail\\_getNewsById.action?newsId=266152](http://www.todayszaman.com/columnistDetail_getNewsById.action?newsId=266152).

<sup>40</sup> See ECtHR, *İbrahim Gürkan v. Turkey*, Appl. No. 10987/10, 3 July 2012, Judgment.

legal qualification was unconstitutional, but rather that “these officers were appointed as judges by their hierarchical superiors and did not enjoy the same constitutional safeguards provided to the other two military judges.”<sup>41</sup> The Turkish law was further amended so that the courts now consist of three military judges. Still, appellate courts like the Military Supreme Court may still have appointed non-legal officers on the bench, making the issue of expertise and judicial independence a persistent problem.

### *B. Jurisdiction of the Courts*

Decaux Principle No. 1 guarantees that the constitution or law shall establish military tribunals, and that courts shall respect the separation of powers. This means that courts must be free from “interference by the executive or the military in the administration of justice.”<sup>42</sup> Jurisdiction of military courts in Turkey rests in the hands of several top military commanders. Article 1 of the Public Law on the Establishment of Military Courts declares that the Minister of Defense, at the request of either the lead troop commander or the chief of a military institution, can establish or close military courts.<sup>43</sup> This unbridled discretion permits cases to go unheard should a court shut down, or for cases to be heard in newly established courts that may be biased in favour of the commander or military chief. In addition, heads of departments are tried in separate chief of staff courts,<sup>44</sup> which may blur the bounds of impartiality and fairness in major trials.

A recent change for the better in the structure of the military justice system was the shift from strictly military command to more civilian oversight. Instead of the Chief of Military Staff overseeing all military courts, they will now be in the hands of the Minister of Defense,

<sup>41</sup> *Id.*, § 19.

<sup>42</sup> *Decaux Report, supra* note 3, § 13. This principle stems from the Basic Principles on the Independence of the Judiciary, adopted by the UN General Assembly in 1985.

<sup>43</sup> Askeri Mahkemeler Kurulusu ve Yargılanma Usulü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 1. For a free English translation see [http://translate.google.com/translate?hl=en&sl=tr&u=http://www.msb.gov.tr/asad/AskeriMevzuat/Kanunlar/as\\_mah\\_k.html&prev=/search%3Fq%3Daskeri%2Bmahkemeler%2Bkurulusu%2Bve%2Byargilama%2Benglish%26client%3Dfirefox-a%26hs%3Di90%26rls%3Dorg.mozilla:en-US:official%26channel%3Dffb%26biw%3D810%26bih%3D636](http://translate.google.com/translate?hl=en&sl=tr&u=http://www.msb.gov.tr/asad/AskeriMevzuat/Kanunlar/as_mah_k.html&prev=/search%3Fq%3Daskeri%2Bmahkemeler%2Bkurulusu%2Bve%2Byargilama%2Benglish%26client%3Dfirefox-a%26hs%3Di90%26rls%3Dorg.mozilla:en-US:official%26channel%3Dffb%26biw%3D810%26bih%3D636). See also ‘Turkey: Law No. 353 of 1963 on Establishment of Military Courts and Tribunal Procedure (Military Criminal Procedure Law)’, UNHCR Refworld Database, 25 Oct. 1963, <http://www.refworld.org/docid/3ae6b4d12c.html>.

<sup>44</sup> Askeri Hakimler Kanunu [Military Judges’ Law] (Turk.), Art. 15.

providing a direct line of supervision accountable to the public.<sup>45</sup> The Minister of Defense also has the power to relocate, abolish, or establish new courts-martial.<sup>46</sup> Still, the Head of the Armed Forces or the Chief of Staff of the Military can, in times of necessity or national emergency, instruct the Minister of Defense to expand or contract the authority of the military courts.<sup>47</sup>

Other proposed changes to streamline the courts' management include unifying the separate court systems of the Navy, Army, and Air Force.<sup>48</sup> This change has not yet been adopted, but has received support from retired military judges. Military judges also encourage supplementary reforms to unify branches of the military courts within the Army itself.<sup>49</sup> Currently, each unit of the military has its own court system without any overarching supervision.

### *C. Power of the Commander*

Commanders in the Turkish military justice system retain enormous control over the trajectory of trials, the decision to prosecute, and the mitigation of sentences, contrary to best practices advocated by leading academics and experts.<sup>50</sup> Commanders or leaders of provincial military institutions can open new investigations into alleged crimes at their discretion.<sup>51</sup> In addition, commanders may pass their investigative powers to independent legal counsel if the commanders choose to abstain from investigation. Recent reform bills have proposed greater independence of the military judge from the scrutiny and discretionary power of the commanding officer.<sup>52</sup> If passed, there will be almost no remaining command influence on military justice. Commanders also

<sup>45</sup> Nayir, *supra* note 37. This responds to complaints that the Chief of General Staff held a position equal to that of the civilian Minister of National Defense when he should have been his inferior. See Berksoy, *supra* note 28, p. 12.

<sup>46</sup> Aslan, *supra* note 25, p. 5.

<sup>47</sup> Askeri Mahkemeler Kurulusu ve Yargilanma Usulü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 26.

<sup>48</sup> Nayir, *supra* note 37.

<sup>49</sup> E. Soncan, 'Retired Military Jurists Lend Full Support to Reform Package', *Today's Zaman*, 31 Mar. 2010, <http://www.todayszaman.com/news-205946-retired-military-jurists-lend-full-support-to-reform-package.html>.

<sup>50</sup> See *Law Professors' Statement*, *supra* note 3, §§ 6-8 (advocating for commanders not to exercise discretionary power in criminal prosecution and for commanders not to hold discretionary power of appellate review and reconsideration).

<sup>51</sup> Askeri Mahkemeler Kurulusu ve Yargilanma Usulü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 8.

<sup>52</sup> Nayir, *supra* note 37. See also 'Askeri Mahkemeler Kısıla Disina Cikiyor', *supra* note 38.

have the power to decide which jurisdiction will prosecute multiple crimes that occur in multiple jurisdictions, if the judges in those jurisdictions cannot agree on which court will see the case.<sup>53</sup> One military judge lamented that — at least informally — commanders are still able to question verdicts rendered by military judges,<sup>54</sup> undermining the independence of the judicial system.

Discretion to open an investigation also ensures that taboo crimes with unsavoury fact patterns will remain outside the justice system. Such cases include the prevalent and poorly understood “suicide” cases. A report by the Defense Minister calculated that between 2005 and 2010, over four hundred soldiers committed suicide while on active duty.<sup>55</sup> Although details on the suicides remain hushed, sources allege that some suicides were due to the unfair treatment of conscientious objectors, but others may have been due to unusual circumstances and, according to family members, may not have been suicides at all.<sup>56</sup> The failure to investigate these potential murder cases removes the possibility of justice from a substantial number of deceased soldiers’ families. The Minister of Defense himself came out in favour of civilianizing the military justice system to ensure proper investigation of these crimes.<sup>57</sup>

#### *D. Trials of Civilians*

Decaux Principle No. 5 mandates that military courts do not have the right to try civilians for any criminal offense.<sup>58</sup> Prior to 2006 Turkish law permitted the peacetime prosecution of civilians in military trials, which gave rise to the European Court of Human Rights case of *Ergin v. Turkey*.<sup>59</sup> Ergin, a newspaper editor, was charged by a military court with the crime of incitement to evade military service because of his

<sup>53</sup> Askeri Mahkemeler Kurulusu ve Yargılmama Usulü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 27.

<sup>54</sup> Kemal, *supra* note 39. Commanders formally retain the right to appeal military court or prosecutors’ decisions.

<sup>55</sup> A. Ayasun, ‘Suspicious Suicides in the Military Bring Legal Reform Debates’, *Today’s Zaman*, 8 Feb. 2012, <http://www.todayszaman.com/news-270861-suspicious-suicides-in-the-military-bring-legal-reform-debates.html>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Decaux Report, supra* note 3, §§ 20-21. This principle comes from the general comment No. 13 on article 14 of the ICCPR, which noted that “[w]hile the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14.” *Id.*, § 20.

<sup>59</sup> ECtHR, *Ergin v. Turkey (no. 6)*, Appl. No. 47533/99, 4 May 2006, Judgment.

publication of an article. The ECtHR found that Turkey had violated the petitioner's rights to freedom of expression and the right to a fair and public hearing.<sup>60</sup> Turkish law was changed that same year such that during peacetime civilians accused of contravention of the Military Criminal Law would be tried in civilian court. Additionally, in response to the ECtHR judgment, a 2010 amendment further limited the military court's jurisdiction to crimes committed by military personnel and only if related to military duties. Crimes against the constitutional order were also shifted to the jurisdiction of civilian courts.<sup>61</sup> However, the personal jurisdiction of the military courts still included crimes committed in special areas on military bases,<sup>62</sup> such as crimes committed by civilian personnel working or living in military compounds.

In December 2012 the Turkish Constitutional Court overruled this final unjust practice towards civilians, conforming to the 56<sup>th</sup> paragraph of the Knaul Report that urges the use of ordinary court systems to try civilians in areas where civil courts remain in operation.<sup>63</sup> The Constitutional Court found that — consistent with rulings by the ECHR and democratic country norms — trying civilian personnel working in military-related offices in military courts violated the right to a fair trial.<sup>64</sup> The court affirmed this decision three months later, in a trial related to prosecution of civilians in Air Force military courts.<sup>65</sup> After the legislature amended the law to reflect this ruling, Turkey succeeded in conforming to the standards articulated in the Knaul Report and the Decaux Principles on military justice reform.

<sup>60</sup> *Id.*

<sup>61</sup> Berksoy, *supra* note 28, p. 8. See also D. Capezza, 'Turkey's Military is a Catalyst for Reform', Vol. 16 Middle East Quarterly 2009, <http://www.meforum.org/2160/turkey-military-catalyst-for-reform>.

<sup>62</sup> Askeri Mahkemeler Kurulusu ve Yargılanma Üsülü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 14.

<sup>63</sup> *Knaul Report*, *supra* note 3, § 56.

<sup>64</sup> 'Sivillerin Askeri Mahkemede Yargılanmasına İlişkin İptal Hukmu' [Trial of Civilians in Military Courts Struck Down], *Gazete 5*, 1 Dec. 2012, <http://www.gazete5.com/haber/sivillerin-askeri-mahkemede-yargilanmasina-iliskiniptal-hukmu-258410>. The Court also found a previous regulation authorizing trial of civilians who commit crimes in partnership with military members unconstitutional. For the full text of the case (available only in Turkish), see *Anayasa Mahkemesi* [Constitutional Court], 2012/45 Decision no. 2012/125, 1 Dec. 2012, <http://www.resmigazete.gov.tr/eskiler/2012/12/20121201-23.htm>.

<sup>65</sup> 'TSK'da çalışan siviller Askeri Mahkemede yargılanmayacak' [Civilians Working With the Armed Forces Will No Longer Be Tried in Military Courts], *Zaman*, 6 Mar. 2013, [http://www.zaman.com.tr/gundem\\_tskda-calisan-siviller-askeri-mahkemede-yargilanmayacak\\_2061665.html](http://www.zaman.com.tr/gundem_tskda-calisan-siviller-askeri-mahkemede-yargilanmayacak_2061665.html).

### E. Subject Matter Jurisdiction

Similar to the previous reform of jurisdiction of military courts for civilian defendants, the Knaul Report's 34<sup>th</sup> paragraph asserts that the "only purpose of military tribunals should be to investigate, prosecute and try matters of a purely military nature committed by military personnel."<sup>66</sup> Amendment 5918 to the Public Law on Military Courts in 2009 brought Turkey's military courts in line with this goal, ensuring that non-military offenses committed by military personnel would be tried in civilian courts.<sup>67</sup> Accordingly, offenses of international human rights law that do not deal directly with military operations should be tried in civilian courts. If the issues are intertwined with offenses charging violations of international humanitarian law, particularly war crimes, they may be presided over by a military tribunal.<sup>68</sup> International humanitarian law charges are overseen by military tribunals, but they may also be discharged by a hybrid or international tribunal.<sup>69</sup>

The amendment to Article 35 of the Turkish Armed Forces Code, criminalizing coup plots and other threats to national security and opening the door for trial of the top military brass in civilian courts, has been the most recent change in military justice to receive significant attention. Previously, Article 35 allowed the army to protect the nation from all threats to national security. This was interpreted by the military as a broad grant of power to use force both externally and internally, including through coups. In 2013 this provision was amended to read, "The Turkish Armed Forces are responsible for protecting the Turkish land against *external* dangers and threats, ensuring the protection and strengthening of the army forces in a deterring way, performing the duties abroad as assigned by the Turkish Parliament, and helping to

<sup>66</sup> *Knaul Report*, *supra* note 3, § 34.

<sup>67</sup> 'Askerlerin Sivil Mahkemede Yargılanması Yürürlükte' [Trial of Soldiers in Civilians Courts To Take Effect], The Independent Communication Network (BIA), 9 July 2009, <http://www.bianet.org/bianet/bianet/115739-askerlerin-sivil-mahkemede-yargilanmasi-yururlukte>.

<sup>68</sup> For more on the interaction between humanitarian law and human rights in armed conflicts, see I. Siatitsa & M. Titberidze, *Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations* (Geneva, Geneva Academy of International Humanitarian Law and Human Rights, 2011), <http://www.geneva-academy.ch/RULAC/pdf/Human-Rights-Law-in-Armed-Conflict.pdf>.

<sup>69</sup> ICRC, 'Customary IHL Rule 158: Prosecution of War Crimes', note 14, [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule158](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule158), *citing to* military manual of Turkey, § 613.

provide international peace.”<sup>70</sup> The code currently mandates trial in civilian courts for conspiracy cases, threats to national security, and organized crime. This means that the formerly lawful Article 35 military actions taken to protect internal security will be prosecuted in civilian courts.<sup>71</sup>

Civilian courts in the past year have ruled on two major cases charging hundreds of military officers with the crimes of conspiracy and plotting to foment unrest in the Ergenekon and Balyoz (Sledgehammer) trials.<sup>72</sup> Prosecution of these crimes in civilian courts has enormous consequences, and indicates a severe disjunction between military and civilian judges’ ability to prosecute military personnel. For example, in the Şemdinli case,<sup>73</sup> civilian courts sentenced military personnel to thirty-nine years in prison, whereas in the initial hearing at a military court the same defendants were released without charges.<sup>74</sup> The most recent reform package would have moved crimes committed during domestic national security operations by the military back to trial in military courts, which was the state of affairs before 2010. Parliament did not adopt this suggestion.<sup>75</sup> Still, the subject matter jurisdiction of military courts remains a hotly contested issue, and the law is very likely to change with future administrations.

#### F. Sentencing

An interesting provision of the Turkish military justice system is the power to postpone sentencing or trial of certain crimes until completion of a soldier’s military service. Article 19 of the Establishment of Military Courts Law states that crimes committed before compulsory military

<sup>70</sup> Türk Silahlı Kuvvetleri İç Hizmet Kanunu [Turkish Armed Forces Internal Service Law] (Turk.), Art. 35 (emphasis added).

<sup>71</sup> ‘Turkey Military Court Law Passed’, *BBC News*, 9 July 2009, <http://news.bbc.co.uk/2/hi/8142257.stm>.

<sup>72</sup> See F. Bilgin, ‘Sledgehammer (Balyoz): How Turkey Averted a Coup in 2003’, *The Washington Review of Turkish & Eurasian Affairs* July 2010, <http://www.thewashingtonreview.org/articles/sledgehammer.html>.

<sup>73</sup> The Şemdinli case involved allegations against two Turkish gendarmerie officers accused of bombing a bookshop owned by a convicted former Kurdistan Workers’ Party (PKK) member in the town of Şemdinli, in Southeastern Turkey. See ‘Judge Hears Witnesses in Şemdinli Case’, *Hürriyet Daily News*, 3 May 2006, <http://www.hurriyetdailynews.com/default.aspx?pageid=438&n=judge-hears-witnesses-in-semdinli-case-2006-05-03>.

<sup>74</sup> B. A. Demirbas, ‘Judicial Reform Opens New Era in Civilian-Military Relations’, *Today’s Zaman*, 10 July 2009, <http://www.todayszaman.com/news-180441-judicial-reform-opens-new-era-in-civilian-military-relations.html>.

<sup>75</sup> Nayir, *supra* note 37.

service with a maximum punishment of less than two years may be postponed until after the completion of service.<sup>76</sup> Deferral is subject to commander approval, meaning that the commander wields great power over the status of potential recruits with outstanding pre-enlistment criminal offenses. The option of postponement only exists for petty crimes, not serious crimes, but there may still be a cost to having alleged criminals serve in the military. Indeed, this policy is quite different from many of Turkey's more State-friendly policies on criminal punishment.

Similarly, a recent amendment to the military penal code states that prosecution for crimes committed during military service may be postponed until the completion of service or, at the military judge's discretion, punishment may be commuted to alternative sentencing such as monetary payment.<sup>77</sup> The judge's discretion to lighten sentences may help the military's operations run smoothly and benefit soldiers accused of minor offenses. Yet, the discretion may also encourage commanders who would otherwise send cases to the military courts to punish under summary trial should a commander not want to take retribution into his own hands, or should he not want to grant his soldier the possibility of a lesser sentence. This provision also promotes uniformity among judicial systems — the mechanisms for alternative punishment bring the military system in line with the civilian courts' rules on alternative sentencing under Turkish Penal Code Article 49.<sup>78</sup>

### *G. Summary Trials*

For lesser offenses, Article 165 of Law No. 1632 on the Military Penal Code grants military superiors the authority to impose sentences of imprisonment.<sup>79</sup> The maximum sentence according to the available list of crimes punishable by summary trial is two months.<sup>80</sup> As these decisions are not reviewable by an appellate court without the voluntary

<sup>76</sup> Askeri Mahkemeler Kurulusu ve Yargılanma Üsülü Kanunu [Law on the Establishment of Military Courts and Administration] (Turk.), Art. 19.

<sup>77</sup> 'Askeri Ceza Kanunu'nda Hangi Hükümler İptal Edildi' [Which Provisions Were Struck from the Military Penal Code], Anadolu Ajansı, 23 Jan. 2013, [www.memurlar.net/haber/331603/](http://www.memurlar.net/haber/331603/).

<sup>78</sup> Türk Ceza Kanunu [Turkish Penal Code], Art. 49. Uniformity of procedures across judicial systems is important for consistency of adjudication and as an indicator of fair trial guarantees. See *Law Professors' Statement*, *supra* note 3, § 5 (noting the idea of setting up a new judicial system can be wasteful, confusing, and counter-productive if not thoroughly contemplated).

<sup>79</sup> Berksoy, *supra* note 28, p. 28.

<sup>80</sup> Aslan, *supra* note 25, p. 13. Other punishments include the issuance of a written warning, reduction in pay, cancellation of off-duty privileges, additional military service, and on-base quarantine.

reference of a case file by a commanding officer, and as they carry severe penalties, this summary trial system is a violation of basic rights to a fair trial guaranteed by the Decaux Principle No. 15.<sup>81</sup> The 2011 ECtHR case of *Ersin Pulatli v. Turkey* determined that the systemic lack of a right to judicial review for summary trials by commanding officers in Turkey breached Pulatli's rights to liberty and security.<sup>82</sup> Although the court found that the most appropriate form of redress would be for Turkey to incorporate judicial review into its Law No. 1602 of the Supreme Military Administrative Court Act, this reform has not yet been implemented.

Disciplinary tribunals are composed of military personnel who do not have a legal education. Commanders choose which military personnel will serve on the tribunals for a one-year period. This raises questions of fairness given the fact that commanders may punish a breach themselves or send the case file to a disciplinary tribunal.<sup>83</sup> If there is no meaningful distinction between the commander's decision and the disciplinary tribunal's decision because the tribunal is comprised of officers who share the sentiments of the commander, the dual track of punishment becomes meaningless.

At worst, the dual track system is even discriminatory, as the disciplinary tribunal may hand down a greater sentence than a sole commander may for punishment of the same offense.<sup>84</sup> Line officers *should* consult with legal advisers before issuing sentences, but they are not required to do so.<sup>85</sup> The government has not released data that would help to promote transparency, such as statistics on the number of summary punishments per year or per contingent.

#### *H. The Public Nature of Hearings*

Decaux Principle No. 14, on the right to a public hearing<sup>86</sup>, promotes the broader goal of transparency in military justice systems. According to one scholar familiar with Turkish military justice, all proceedings in military criminal courts are theoretically open to the public.<sup>87</sup> It remains unclear to what extent this holds true in practice, however. In addition,

<sup>81</sup> See *Decaux Report*, *supra* note 3, §§ 51-53. This principle derives from article 14 of the ICCPR, and Article 75 of Additional Protocol I to the Geneva Conventions.

<sup>82</sup> ECtHR, *Pulatli v. Turkey*, Appl. No. 38665/07, 26 Apr. 2011, Judgment

<sup>83</sup> Aslan, *supra* note 25, pp. 12-13.

<sup>84</sup> *Id.*, p. 16.

<sup>85</sup> *Id.*, p. 15.

<sup>86</sup> *Decaux Report*, *supra* note 3, §§ 49-50.

<sup>87</sup> Aslan, *supra* note 25, p. 8.

meetings of the Supreme Military Council (YAŞ), which decides promotions, retirements, and dismissals in the military command, remain closed to the public. Until recently, these appointment and dismissal processes also contained no right of appeal. Although these are not criminal cases, it is problematic that their proceedings remain closed to the members of the military whose positions are affected by the hearings. Without knowing reasons for promotions or dismissals, it is difficult for officers to contest the YAŞ's decisions.

YAŞ decisions related to discharge may now be brought to the Constitutional Court for review, although decisions on promotion and retirement are still non-appealable, as are all other decisions of the YAŞ board.<sup>88</sup> One positive development in 2013 was the decision to appoint civilian press secretaries to conduct public relations, rather than the former policy of using military personnel. Military personnel often used their public platform to comment more on the political agenda of the day than military developments.<sup>89</sup>

Transparency also remains insufficient, particularly given the ease with which information could be disseminated via the Internet. The High Military Administrative Court operates a website that has a database of some decisions of the Court, but these decisions are not updated regularly and include only a limited number of cases.<sup>90</sup> Lower military court decisions are not posted or accessible on the Internet.

## 2. Substantive Law

### *A. Determination of Conscientious Objection*

Decaux Principle No. 6 states that an independent and impartial civilian court should determine conscientious objector status.<sup>91</sup> The idea is that a civilian court, outside of the system of compulsory service, would be more fair and equitable in its determination of valid conscientious objection claims. By stipulating the appropriate manner to evaluate claims of conscientious objection, the principles are already one step

<sup>88</sup> Berksoy, *supra* note 28, p. 23.

<sup>89</sup> 'Turkish Armed Forces to Recruit Civilian Political Advisers, Press Secretaries', *Today's Zaman*, 31 Oct. 2013, <http://www.todayszaman.com/news-330208-turkish-armed-forces-to-recruit-civilian-political-advisers-press-secretaries.html>. The army has also decided to appoint civilian political advisers for similar reasons of cementing the separation line between government and military affairs.

<sup>90</sup> See the website for the Askeri Yuksek Idare Mahkemesi [High military administrative court] [http://www.msb.gov.tr/ayim/Ayim\\_kararlar.asp](http://www.msb.gov.tr/ayim/Ayim_kararlar.asp).

<sup>91</sup> *Decaux Report*, *supra* note 3, §§ 22-25. This principle comes from the Commission on Human Rights resolutions 1998/77 and 2004/35.

ahead of the Turkish system. Conscientious objection is not recognized as a valid reason for exemption from military service or for removal to a non-combat position during conscription. Still, in a small fraction of cases certain Jehovah's witnesses have been allowed to substitute the compulsory service requirement with non-combat duties.<sup>92</sup>

The treatment of conscientious objectors continues to be the most blatant violation of both human rights and military justice guarantees in Turkey. The ECtHR has recognized the right to conscientious objection as a protected right since 2011, including in several cases against Turkey.<sup>93</sup> The right has also been recognized under Article 19 of the International Covenant on Civil and Political Rights, under UN Commission on Human Rights Resolution 1998/77, and under Article 18 of the Universal Declaration of Human Rights.<sup>94</sup> The UNHCR has even released reports recommending countries grant refugee status on the grounds of conscientious objection for certain Turkish asylum seekers.<sup>95</sup>

The main opposition parties in Parliament (The Republican People's Party (CHP) and the Nationalist Movement Party (MHP)) continue to press for recognition of conscientious objection in the new draft Constitution. In at least two recent provincial court cases, courts have shown a modicum of deference to the idea of conscientious objection. The provincial courts followed ECtHR jurisprudence to conclude that defendants had the right to alternative means of fulfilling their compulsory service because of their self-identified conscientious objector status.<sup>96</sup>

<sup>92</sup> The Netherlands: Ministry of Foreign Affairs, *Turkey/Military Service*, July 2001, pp. 45, 52, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=467010bd2> [hereinafter *Turkey/Military Service*].

<sup>93</sup> See e.g., I. Cinmen, 'Landmark Ruling on «Conscientious Objection»', 23 Nov. 2011, <http://bianet.org/bianet/freedom-of-expression/134227-landmark-ruling-on-conscientious-objection> (discussing the case of Jehovah's Witness Yunus Ercep). See also *Atasoy and Sarkut v. Turkey*, CCPR/C/104/D/1853-1854/2008, UN Human Rights Committee (HRC), 29 Mar. 2012 (ruling in two cases against Turkey by the UN Human Rights Committee and their related decisions at the ECtHR); and ECtHR, *Feti Demirtas v. Turkey*, Appl. No. 5260/07, 17 Jan. 2012, Judgment (the case of Jehovah's Witness Feti Demirtas).

<sup>94</sup> M. Stolwijk, *The Right to Conscientious Objection in Europe: A Review of the Current Situation: Turkey* (Brussels, Quaker Council for European Affairs, 2005), <http://www.refworld.org/pdfid/42b141794.pdf>, pp. 70-73.

<sup>95</sup> *Turkey/Military Service*, *supra* note 92, p. 59.

<sup>96</sup> M. Yildirim, 'Turkey: Selective Progress on Conscientious Objection', *JW News*, 7 May 2012, <http://www.tdgnews.it/en/2012/05/turkey-selective-progress-on-conscientious-objection/>.

Furthermore, Article 318 of the Armed Forces Code criminalizes speaking publicly in favour of the right to conscientious objection as the crime of “alienating the people from the armed forces.”<sup>97</sup> Removal of this provision was an issue in the 2013 judicial reform package, but negotiations ultimately broke down.<sup>98</sup> However, the provision was amended in March 2013 to penalize only statements that “encourage and inspire people to desert or not to participate in military service.”<sup>99</sup> Debate over conscientious objection in Turkey will continue to animate legislative and executive reform deliberations for the foreseeable future.

### *B. Prosecution of Serious Human Rights Violations by Civilian Courts*

The serious human rights violations encompassed by Decaux Principle No. 9<sup>100</sup> include those defined by the Office of the High Commissioner for Human Rights (OHCHR) — “extrajudicial, summary or arbitrary executions, torture and similar cruel inhuman or degrading treatment, slavery, and enforced disappearance, including gender-specific instances of those offences.”<sup>101</sup> The International Convention for the Protection of All Persons from Enforced Disappearance also requires States to try persons accused of enforced disappearance in civilian courts.

The Turkish military justice system does not contain special provisions for trial of these crimes in civilian courts, nor has Turkey ratified this international convention on enforced disappearances.<sup>102</sup> However, the Turkish military code removes commanders’ discretionary investigative powers and gives them to military prosecutors for these crimes. If the case requires prolonged imprisonment or involves serious crimes, such as those included in the definition of serious human rights violations, military prosecutors may open a case file without the typical investigation order required by commanders.<sup>103</sup>

<sup>97</sup> H. Eissenstat, ‘Armenia, Azerbaijan, and Turkey: Odd Men Out on Conscientious Objection’, Amnesty International, 15 May 2013, <http://blog.amnestyusa.org/europe/armenia-azerbaijan-and-turkey-odd-men-out-on-conscientious-objection/>.

<sup>98</sup> ‘Turkey’s Judicial Reform Falls Short on Conscientious Objection: EU Commissioner’, Hurriyet Daily News, 12 Apr. 2013, <http://www.hurriyetdailynews.com/turkeys-judicial-reform-falls-short-on-conscientious-objection-eu-commissioner.aspx?pageID=238&nid=44843>.

<sup>99</sup> ‘Turkey: Strengthen Law Reform Bill’, Human Rights Watch, 25 Mar. 2013, <http://www.hrw.org/news/2013/03/25/turkey-strengthen-law-reform-bill>.

<sup>100</sup> *Decaux Report*, *supra* note 3, §§ 32-35.

<sup>101</sup> UN Commissioner for Human Rights, ‘Rule of Law Tools for Post-Conflict States: Amnesties’, HR/PUB/09/1 21, 2009.

<sup>102</sup> International Convention for the Protection of All Persons from Enforced Disappearance, UNGA Res. 61/177, New York, 20 Dec. 2006, *U.N.T.S.* vol. 2715.

<sup>103</sup> Aslan, *supra* note 25, p. 4.

Until recently, statutes of limitation on serious human rights violations such as torture, murder, and enforced disappearances prevented even military prosecutors from investigating these crimes, many of which were perpetrated by security officials in the 1980s and 1990s. An amendment to Article 94 of the Turkish Penal Code repealed the statute of limitation for torture in 2013, allowing for investigation into allegations of torture irrespective of the time of their commission. This positive development may allow for investigation into serious crimes previously swept under the rug, which would then ideally be prosecuted in a civilian court in accordance with the Decaux Principles. This would ensure that complex cases involving very grave and politically and diplomatically charged issues be tried in regularly-constituted courts, which deal with cases involving those sorts of crimes on a more routine basis.<sup>104</sup> Unfortunately, the 20-year statute of limitations for the other serious human rights violations such as killings and disappearances has not been extended.<sup>105</sup>

### C. Prosecution of Minors

Decaux Principle No. 7 states that military courts should not prosecute minors under the age of 18.<sup>106</sup> Turkey complies with Decaux Principle No. 7. Compulsory service begins at age 21 and elective service begins at 19.<sup>107</sup> With the 2012 Turkish Constitutional Court's decision finding the practice of trying civilian personnel working on military bases in military courts unconstitutional,<sup>108</sup> there is no longer anyone under the age of 18 eligible for prosecution by courts-martial. In the extremely rare case where a foreign minor would be held and charged for violations of war crimes in Turkey, the minor would be charged in a Specially Authorized Heavy Penal Court, which handles all cases alleging war crimes, terrorism charges, and narcotics trafficking. These courts fall under the aegis of the Code of Criminal Procedure, which governs the entire civilian penal system.<sup>109</sup>

<sup>104</sup> *Decaux Report*, *supra* note 3, §§ 32-35.

<sup>105</sup> 'Turkey: Strengthen Law Reform Bill', *supra* note 99; and Human Rights Watch, *January 2013 Legal Opinion Submitted to Minister of Justice of Turkey*, 25 Mar. 2013, <http://www.hrw.org/node/114435>.

<sup>106</sup> *Decaux Report*, *supra* note 3, § 26. This principle comes from Articles 40 and 37(d) of the Convention on the Rights of the Child.

<sup>107</sup> *Turkey/Military Service*, *supra* note 92, p. 10.

<sup>108</sup> See *supra* section II.1.D Trials of Civilians.

<sup>109</sup> G. H. Jenkins, 'The Snake That Doesn't Touch Me: Turkey's Special Authority Courts', Vol. 5 *Turkey Analyst* 5 Mar. 2012.

### *D. Non-Imposition of the Death Penalty in Military Cases*

Decaux Principle No. 19 insists on the unlawful nature of sentencing the death penalty in military courts,<sup>110</sup> consistent with most international observers' view that the death penalty should be abolished in civilian courts as well.<sup>111</sup> Turkey outlawed the death penalty in 2004 in a series of reforms designed to bring the country's system more in line with EU membership requirements.<sup>112</sup> Therefore, Turkey fulfils Decaux Principle No. 19.

### *E. Martial Law*

Decaux Principle No. 3 states that in times of crisis, martial law or special regimes should not be substituted for ordinary courts "in derogation from ordinary law".<sup>113</sup> Turkey's 2006 amendment refraining from trial of civilians in military courts does not apply in a state of martial law, which runs counter to the Decaux Principles. As for special regimes, Turkey has a history of special security courts that are inconsistent with the principles of a uniform system of military and civilian justice. Special courts convened for the prosecution of terror-related offenses were abolished in 2012 by an amendment to Article 74 of the Anti-Terrorism Law. Cases formerly under the jurisdiction of the special courts were transferred to the civilian Courts of Serious Crimes.<sup>114</sup> The reform measure was consistent with similar reforms taken

<sup>110</sup> *Decaux Report, supra* note 3, §§ 61-63.

<sup>111</sup> See Council of Europe, 'Abolition of the Death Penalty', Meeting document from Dimension Implementation Conference HDIM.IO/0121/12, 26 Sept. 2012, <http://www.osce.org/odihr/94246> (listing international treaties that abolish the death penalty); and Amnesty International, 'Death Penalty: Ratification of International Treaties', <http://www.amnesty.org/en/death-penalty/ratification-of-international-treaties> (describing four treaties that provide for the abolition of the death penalty including the Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol to the American Convention on Human Rights, Protocol No. 6 to the European Convention on Human Rights, and Protocol No. 13 to the European Convention on Human Rights).

<sup>112</sup> 'Turkey Agrees Death Penalty Ban', *BBC News*, 9 Jan. 2004, <http://news.bbc.co.uk/2/hi/europe/3384667.stm>. See the Ocalan case, *infra* note 116 and section II.2.E. Martial Law, for an example of the application of this positive reform.

<sup>113</sup> *Decaux Report, supra* note 3, § 16. This principle was introduced to take account of situations of internal crisis within the meaning of article 4 of the ICCPR, when martial law or similar exceptional regimes are declared.

<sup>114</sup> 'Turkish Parliament Abolishes Special Courts', *Hurriyet Daily News*, 2 July 2012, <http://www.hurriyetdailynews.com/turkish-parliament-abolishes-special-courts.aspx?pageID=238&nID=24507&NewsCatID=338>. This reform also increased independent oversight of prosecutions by removing a clause that formerly mandated Prime Ministerial approval to investigate alleged crimes committed by any public

to prosecute all national security related crimes in civilian courts such as the amendment to Article 35 of the Turkish Penal Code that allowed for the civilian trial of the *Ergenekon* and *Balyoz* cases.<sup>115</sup>

The move to abolish state security courts came at the end of a reform that gained momentum during the trial of Abdullah Öcalan, leader of the PKK. Öcalan was captured in Kenya and extradited to Turkey in February 1999. He was charged with treason and “attempting to divide the country.”<sup>116</sup> Öcalan’s trial in a special security court, presided over by a three-panel bench comprised of one military judge and two non-legal officers, drew international criticism for its irregular composition and undue military influence. As a consequence, the Turkish Parliament voted to amend the constitution to remove military judges from security courts by a vote of 423-40 during the course of the Öcalan trial.<sup>117</sup> Öcalan was eventually sentenced to the death penalty,<sup>118</sup> which was then commuted to life imprisonment when Turkey abolished the death penalty in 2004.<sup>119</sup>

Six years after the trial, during which time the Turkish military held Öcalan in solitary confinement on an island off the coast of Istanbul, the ECHR ruled that Öcalan had been denied the right to a fair trial.<sup>120</sup> The ECtHR held that the establishment of a special court, the use of a military judge, and the lack of procedural rights afforded to the defendant were all in violation of the European Convention on Human Rights.<sup>121</sup> The saga of the Öcalan trial did not, practically speaking, change Öcalan’s criminal conviction.<sup>122</sup> He remains to this day exiled on Imrali Island,

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officer appointed by the Prime Minister. This class of persons included nearly all of the top ranking officials in the National Security Organization (MIT in Turkish).

<sup>115</sup> Türk Ceza Kanunu [Turkish Penal Code], Art. 35.

<sup>116</sup> Abdullah Ocalan Davasi [Abdullah Ocalan Case], Decision by the 2nd State Security Court of Turkey, 29 June 1999, available at <http://savicibey55.wordpress.com/2006/12/16/ankara-2-nolu-devlet-guvenlik-mahkemesinin-karari-ocalan-davasi/>; and ‘Öcalan Charged with Treason’, *BBC News*, 23 Feb. 1999, <http://news.bbc.co.uk/2/hi/europe/284608.stm>.

<sup>117</sup> ‘Military Judge Removed from Öcalan Court’, *Lubbock Avalanche-Journal*, 19 June 1999, [http://lubbockonline.com/stories/061999/wor\\_0619990017.shtml](http://lubbockonline.com/stories/061999/wor_0619990017.shtml).

<sup>118</sup> *Id.*

<sup>119</sup> ‘Turkey Agrees Death Penalty Ban’, *supra* note 112.

<sup>120</sup> J. Gorvett, ‘EU Court Rules Öcalan Trial Unfair’, *Al Jazeera*, 13 May 2005, <http://www.aljazeera.com/archive/2005/05/2008410135153456639.html>.

<sup>121</sup> ECtHR (Grand Chamber), *Öcalan v. Turkey*, Appl. No. 46221/99, 12 May 2005, Judgment.

<sup>122</sup> Öcalan’s request for a re-trial was denied by Turkish authorities, and the denial was upheld by the ECtHR in its subsequent finding that the issue was inadmissible. According to the ECtHR, Turkey’s re-examination of the Öcalan

off the coast of Istanbul, serving a life sentence.<sup>123</sup> Yet the trial brought about positive change and public awareness of the illegal status of state security courts, helping to bring them in line with international norms.

### *F. Loss of Citizenship*

Turks who are found guilty of evading military service by residing abroad, including conscientious objectors, may lose their citizenship. Public records show thousands of Turks were stripped of their citizenship during the 1990s.<sup>124</sup> Loss of citizenship without inquiry into a person's legal status in other nations violates Article 15 of the Universal Declaration of Human Rights, which states, "Everyone has the right to a nationality."<sup>125</sup> More current information on the rate of removal of citizenship for conscientious objectors or public campaigns to bring awareness to this issue could not be found.

### **III. Conclusion: Potential for Meaningful Change**

An evaluation of the most recent military justice reforms in Turkey highlights the impressive change effectuated in a relatively short time. In the past decade State security courts have been abolished, non-legal military officers no longer sit on courts-martial panels, commanders' power of referral and sentencing has been decreased, promotion of military judges has been synchronized with civilian standards, and military courts are no longer competent to try civilians. On the other hand, such an evaluation exposes pro-military policies that remain in need of reform: notably, the command-centric appellate and summary trial procedures, the right to conscientious objection, and the independence of military judges from prosecutors and commanders. In August 2013, all four service commanders who lead the Supreme Military Council (YAŞ) were replaced in a closed session of the council.<sup>126</sup> The YAŞ oversees all military operations and decides all appointments, promotions, and

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case by the Istanbul Assize Court after the 2005 ECtHR ruling fulfilled Turkey's remedial obligations. See ECtHR, *Öcalan v. Turkey*, Appl. No. 5980/07, 6 July 2010, Decision as to the admissibility.

<sup>123</sup> For a recent update on Ocalan and his efforts to negotiate a peace deal with the AKP on behalf of the PKK, see D. Dombey, 'Turkey: The Prisoner on Imrali', *Financial Times*, 27 Feb. 2013, <http://www.ft.com/cms/s/0/6ebb2ff6-7f42-11e2-89ed-00144feabdc0.html#axzz2rFUbIpQy>.

<sup>124</sup> *Turkey/Military Service*, *supra* note 92, pp. 39-40.

<sup>125</sup> Universal Declaration of Human Rights, UNGA Res. 217A (III), U.N. Doc. A/810, 10 December 1948, Art. 15.

<sup>126</sup> L. Kemal, 'No Excuse Not to Implement Military Reforms', *Today's Zaman*, 5 Aug. 2013, [http://www.todayszaman.com/columnistDetail\\_getNewsById.action?newsId=322841](http://www.todayszaman.com/columnistDetail_getNewsById.action?newsId=322841).

dismissals. This change in the composition of the Council may stimulate more liberal and democratic changes to the military court system that could benefit defendants and encourage more transparent processes.

Several issues referred to in the Decaux Principles remain open for further exploration in the Turkish context. Examples include the ability to prosecute retirees, the application of principles of international humanitarian law (such as non-discrimination), the courts' treatment of prisoners of war in wartime, or the access of victims to hearings. Other remaining issues include the rights of the accused, for which one would also need to scrutinize the Turkish civilian legal system to see which rights may not be guaranteed. Finally, some principles not discussed here are protected by informal measures in Turkey, such as Decaux Principle No. 20's suggestion for periodic systemic review. While not mandated by law, the current Parliament's fixation on military reform<sup>127</sup> has ensured such review is carried out in the most exacting way possible, although this may be temporary. A change in the civilian administration may cause the Parliament to shift its focus to a less demanding scrutiny of the military courts.

It is difficult to evaluate the lasting effects of the past decade's extreme military reforms without conceding that the AKP willingly initiated the reforms with the specific political aim of consolidating its own administration's power base. The AKP, in an effort to stymie any opposition from political parties and the military, has succeeded in conforming Turkey's military justice system to more internationally recognized standards precisely so it can itself abuse civilian political power and have a monopoly on state control. Still, the fact that there have been no major uprisings or protests against the incremental reforms suggests their acceptance by the public as the new normal. In addition, several of the changes were instituted at the behest of the ECtHR and liberal voices from European countries with scaled-down military justice programs. Such changes initiated in a calculated manner, rather than as a result of internal strife that captured the media's attention for a limited time, bode well for the reforms' potential staying power. The underlying impetus for reform — allies and international courts — may ensure the reforms' longevity.

Turkey's military reforms exemplify how much can be accomplished when the executive branch and the legislature are both intent on bringing more accountability and justice to the military structure. Given the

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<sup>127</sup> See *supra* note 19.

dramatic changes that Turkish military justice has seen, international observers will want to keep close watch to see if the reforms have staying power and whether they will have any impact — positive or negative — on military operational effectiveness.

**Summary — The State of Military Justice Reform in Turkey: 2014**

Questions of how to best reform national military justice systems remain a subject of prominent political debate. Turkey presents an interesting case study. While Turkey has been criticized for its failures to pass more liberal and democratic laws, particularly with respect to the protection of basic freedoms, a tacit revolution in military justice has been largely overlooked by international observers. This paper will document the major reforms to the Turkish military justice system over the past five years, evaluate the progress Turkey has made, and suggest avenues for improvement. It will explain the ideal standards for military justice as laid out in two Reports by the UN Special Rapporteur for the Independence of the Judiciary. Turkey's increased civilian oversight of its military courts is unique and unprecedented for a country whose military remains on active duty with internal terrorist threats. With no noticeable decline in operational effectiveness, Turkey's reform program demonstrates that uniformly administering justice does not come at the cost of sacrificing national security or defence.

**Résumé — L'état de la réforme de la justice militaire en Turquie : 2014**

Les questions concernant la question comment réformer au mieux les systèmes de justice militaire nationale restent un sujet de débat politique important aux niveaux interne et international. La Turquie représente un cas pratique intéressant. Alors que la Turquie a été critiquée pour la non-adoption de lois plus libérales et démocratiques, en particulier en ce qui concerne la protection des droits fondamentaux, une révolution tacite dans la justice militaire a été largement négligée par les observateurs internationaux. Cet article va documenter les réformes majeures du système de la justice militaire au cours des cinq dernières années, évaluer les progrès que la Turquie a réalisés, et suggérer des voies d'amélioration. Il va expliquer les normes idéales pour la justice militaire, tels qu'exposées par les deux rapports du Rapporteur spécial des Nations Unies pour l'indépendance judiciaire. La surveillance civile accrue des tribunaux militaires en Turquie est unique et sans précédent pour un pays où la force militaire est maintenue pour faire face aux menaces terroristes internationales. Sans causer de déclin apparent dans les opérations effectives, la réforme des programmes de la Turquie démontre que limiter le pouvoir des tribunaux militaires et administrer uniformément la justice n'a pas pour conséquence de sacrifier la sécurité où la défense nationale.

## **Samenvatting — De stand van de hervorming van militaire justitie in Turkije: 2014**

Zowel op internationaal als nationaal vlak is het vraagstuk van de hervorming van nationale systemen van militaire justitie politiek een heet hangijzer. Turkije vormt in dit opzicht een interessante casus. Hoewel er kritiek geleverd is op Turkije wegens het niet-aannemen van meer liberale en democratische wetten, vooral qua bescherming van fundamentele vrijheden, heeft een stille revolutie in de militaire justitie plaatsgevonden die aan internationale waarnemers grotendeels is voorbijgegaan. Dit artikel brengt de belangrijke wijzigingen aan het Turkse systeem van militaire justitie van de voorbije vijf jaar in kaart, maakt een evaluatie van de vooruitgang die Turkije heeft geboekt, en formuleert suggesties ter verbetering. De ideale standaarden voor militaire justitie zullen worden behandeld, zoals uiteengezet in twee Rapporten van de Speciale VN-Rapporteur voor de Onafhankelijkheid van de Rechterlijke Macht. De toename van civiel toezicht op militaire rechtscolleges geldt als uniek en ongekend voor een land dat zijn leger in actieve dienst houdt, gelet op de interne terroristische bedreigingen. Zonder merkbare daling in operationele efficiëntie heeft Turkije met zijn hervormingsprogramma aangetoond dat het intomen van de macht van onafhankelijke militaire rechtscolleges en de uniforme rechtsbedeling niet ten koste hoeven te gaan van nationale veiligheid of defensie.

## **Zusammenfassung — Der Stand der Reform der Militärjustiz in der Türkei: 2014**

Die Frage, wie das nationale Militärjustizsystem am besten zu reformieren ist, bleibt ein wichtiger Gegenstand politischer Diskussionen sowohl auf nationaler als auch auf internationaler Ebene. Die Türkei stellt ein interessantes Anschauungsobjekt zur Verfügung. Während die Türkei für ihr Versagen, liberalere und demokratische Gesetze zu schaffen, kritisiert worden ist, dies hauptsächlich hinsichtlich des Schutzes der Grundfreiheiten, wurde die stille Revolution bei der Militärjustiz von den internationalen Beobachtern weitgehend übersehen. Diese Arbeit wird die grundlegenden Reformen des türkischen Militärjustizsystems während der letzten fünf Jahre aufzeigen, die Fortschritte, welche die Türkei gemacht hat, beurteilen, und Wege zur Verbesserung vorschlagen. Dabei werden die Idealvorstellungen für die Militärjustiz erläutert werden, wie sie von zwei Berichten des UNO-Sonderberichterstatters für die Unabhängigkeit der Justiz dargelegt worden sind. Die verstärkte zivile Aufsicht über die Militärgerichte in der Türkei ist einzigartig und

beispiellos für ein Land, deren Militär nach wie vor im aktiven Dienst gegen die interne Bedrohung durch Terroristen steht. Ohne erkennbare Einbussen in der operationellen Effizienz hat das Reformprogramm der Türkei gezeigt, dass die Beschränkung der Unabhängigkeit der Militärgerichte und eine einheitliche Justizverwaltung keine Auswirkung auf die nationale Sicherheit oder die Verteidigung hat.

### **Riassunto — Lo stato della riforma della giustizia militare in Turchia: 2014**

Gli interrogativi su come meglio riformare i sistemi giudiziari militari nazionali rimangono un argomento di primo piano nel dibattito politico nazionale e internazionale. La Turchia offre in questo senso un interessante caso di studio. Mentre la Turchia è stata criticata per il fallimento dell'approvazione di leggi più liberali e democratiche, soprattutto per quanto riguarda la tutela delle libertà fondamentali, invece una tacita rivoluzione nella sua giustizia militare è stata in gran parte trascurata dai suoi osservatori internazionali. Il presente articolo documenta le principali riforme avvenute nel sistema della giustizia militare turca nel corso degli ultimi cinque anni, valuta i progressi fatti dalla Turchia e propone delle prospettive di miglioramento. Inoltre illustra gli standard ideali per la giustizia militare, come stabiliti nei due Rapporti del relatore speciale delle Nazioni Unite per l'indipendenza dei giudici e degli avvocati. L'aumento, da parte della Turchia, del controllo civile sui tribunali militari è unico e senza precedenti per un paese in cui i militari restano in servizio attivo contro le minacce terroristiche interne. Senza alcuna evidente diminuzione dell'efficacia operativa, il programma di riforma turco dimostra che l'incanalamento del potere dei tribunali militari indipendenti ed un'amministrazione uniforme della giustizia non comportano necessariamente il sacrificio della sicurezza o della difesa nazionali.

### **Resumen — Estado de la reforma de la justicia militar en Turquía: 2014**

Cuestiones como las relativas a la mejor manera posible de llevar a cabo una reforma de la justicia militar pertenecen al más alto debate político tanto nacional como internacional. Turquía representa, en ese aspecto, un importante caso práctico. Mientras que a Turquía se le podría reprochar no haber promulgado leyes más democráticas y liberales, particularmente en lo que atañe a la protección de los derechos fundamentales, sin embargo, los observadores internacionales parecen ignorar la revolución tácita que se ha producido en el ámbito de la

justicia militar. El presente artículo aborda las principales reformas acometidas en la justicia militar turca durante los últimos cinco años, evalúa el progreso experimentado por Turquía y sugiere alternativas para su perfeccionamiento. En este sentido, son traídos a colación los estándares establecidos para la justicia militar tal y como constan en los dos Informes de la Relatora Especial de las Naciones Unidas para la Independencia Judicial. El creciente grado de control que existe en Turquía por parte del poder civil sobre los tribunales militares es único y sin precedentes para un país cuyas fuerzas armadas permanecen en alerta constante ante la amenaza terrorista procedente del interior. Sin que se haya producido merma aparente a la eficacia operacional de estas, el programa de reformas llevado a cabo en Turquía demuestra que la supremacía de la independencia judicial y la administración uniforme de la justicia no conlleva necesariamente el sacrificio de la seguridad nacional o de la defensa.