Athens Journal of Law 2024, 10: 1-17
https://doi.org/10.30958/ajl.X-Y-Z

Legal Assessment of the Condition of Recourse to Domestic Judicial Authorities in the Judicial Procedures of the European Court of Human Rights with a view to the Case of Salahuddin Anju and others v. Turkey

By Shaho Jafari[*]

The authoress outlines new welfare models and community enterprises, in the context of the Third Economy, with the aim of defining guidelines and interventions for the promotion of social enterprise and the strengthening of the social and solidarity economy. The Third Economy understands enterprise as an integral part of society and aims to create a new economic model that combines profit and sustainable development in line with the goals set by Agenda 2030. The goal is to define new development paradigms that put people at the centre, heeding the next generation. Sustainability is the file rouge of this study offering a rich review of the literature on the concept of the commons, while illustrating practices that have already been initiated. The essay also discusses the draft law on Community Social Enterprises as a welfare model, and concludes with de iure condendo perspectives.

Keywords: *Welfare; Commons; Third economy; Worker partcipation; Social responsibility.*

Introduction

One of the goals of the United Nations, apart from its main goal, which is to maintain international peace and security, and of course this main goal has undergone changes and evolving during the life of the United Nations,[1] promoting and encouraging respect for human rights and fundamental freedoms regardless of religious, sexual, ethnic, linguistic or religious distinctions.[2] Numerous human rights treaties have been adopted to achieve the United Nations goals of promoting human rights. The most important international human rights instruments adopted by the General Assembly early in the work of the United Nations were the

[*]Ph.D. student of international law, University of Qom (Iran). Researcher of International law in Qom University. Attorney at law in Iranian bar association since 2000. Chairman of Human Rights Commission of Kurdistan Bar Association in 2022.
Email: Jafarishaho@gmail.com.

[1]Article 1(1) of United Nation charter. For more information in this regard see Thakur (2006) at 27-45.

[2]Article 1(3) of United Nations charter. See Mertus (2005) at 17-45.

Universal Declaration of Human Rights,[3] the International Covenant on Civil and Political Rights,[4] and the International Covenant on Economic and Social Rights.[5] In addition to these international efforts, under Chapter VIII of the Charter of the United Nations, which authorises regional arrangements to advance the goals of the United Nations, a number of human rights treaties have been ratified at the regional level, including the European Convention for the Protection of Human Rights and fundamental freedoms (1950),[6] the African Charter on Human Rights and Nations (1981)[7] and the Cairo Declaration on Human Rights in Islam.[8]

This paper addresses the examination of the condition of recourse to domestic authorities in the proceedings of the European Court of Human Rights, a tribunal established in 1959 under the European Convention on Human Rights. Whether the European Court of Human Rights in its review of referral cases is subject to a single procedural and logical interpretation of the provisions of Article 35 of the European Convention on Human Rights or whether it has also taken into account political considerations. The answer to this main question will not be possible, except by examining the cases referred to the Court and with a pragmatic view. The tribunal was established on the initiative of the Council of Europe[9] and all 47 member states of the Council of Europe are members of the tribunal. Sixteen protocols have been added to the European Convention on Human Rights so far. The purpose of the drafters of the Convention, as stated in the preamble of the Convention, is to take the first steps towards the collective implementation of the special rights enshrined in the Universal Declaration of Human Rights.[10] The European Convention on Human Rights can be considered as the first human rights document that provides for a judicial institution to oversee the proper implementation of an international treaty.[11]

---

[3]It was accepted by the General Assembly as Resolution 217 during its third session on 10 December 1948 at the Palais de Chaillot in Paris, France. Of the 58 members of the United Nations at the time, 48 voted in favour, none against, eight abstained, and two did not vote.

[4]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49.

[5]Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 3 January 1976, in accordance with article 27.

[6]Signed 4 November 1950, Location Rome, entry into force 3 September 1953.

[7]The African Charter on Human and Peoples' Rights came into effect on 21 October 1986– in honour of which 21 October was declared "African Human Rights Day"

[8]Adopted in Cairo, Egypt, on 5 August 1990 at Conference of Foreign Ministers, 9–14 Muharram 1411H in the Islamic calendar.

[9]The Council of Europe was established in 1949 and has 47 member states with a population of 820 million. This institution is separate from the European Union. Unlike the European Union, this council does not have the power to enact binding laws, but it does have the power to implement certain treaties concluded by the European states. A clear example is the implementation of the European Convention on Human Rights with the establishment of the European Court of Human Rights. No country has joined the European Union without having already joined the Council of Europe.

[10]See Preamble of European Convention on Human Rights.

[11]Fatemi (2000) at 130-131

The European Convention on Human Rights and mainly its article 35 set out rules for the possibility of bringing an action by individuals, which in fact came into force with the adoption of the Eleventh Additional Protocol to the Convention. The most important condition for going to appeal to the European Court of Human Rights is priory resort to domestic judicial. Individuals should first go to a domestic authority to sue, and if it is determined that the wrongdoer is not productive during the domestic judicial process and will not achieve the desired result, or that despite the possibility of achieving justice, the wrongful government is unwilling to admit that there is violation of human rights and compensation, in this condition, individuals will be able to appeal to the European Court of Human Rights.

It should be noted that the new European Court of Human Rights started its work on 1 November 1998 with the adoption of the Eleventh Protocol and the entry into force of the Protocol on 31 October 1998. The ratification of this protocol has given the European Court of Human Rights the largest territorial jurisdiction with the right of governments and individuals, both nationals and non-nationals, to appeal against the member states of the European Convention on Human Rights which 47 member states in turn have a population of over 800 million. They have placed in themselves.[12] Turkey was the thirteenth member of the Council of Europe joined the Council of Europe on 13 April 1950.[13] Therefore, Turkey was one of the early members of the European Convention on Human Rights and the European Court of Human Rights. It did not accede to the International Covenant on Civil and Political Rights until 2000,[14] according to figures in the European Court of Human Rights, Turkey ranks fourth after Russia, Romania and Ukraine.[15] The country has had many cases in the court so far, and the large number of cases reflects the human rights situation in this country.[16]

Another important point to note about Turkey is the issue of complaints from individuals, which is addressed in Protocol 9 of the European Convention on Human Rights, Turkey acceded to this protocol and on this basis a large number of cases involving complaints from individuals were raised against the Turkish government. The procedure of the European Court of Human Rights in this regard has not been consistent and uniform. The court has in some cases convicted Turkey of human rights abuses, but after the events of 11 September, ruled in favor of dismissing the complaint against Turkey, and the court used some of Turkey's arguments including the fight against terrorism as the basis for its

[12]Rainey, Wicks & Ovey (2000) at 21.
[13]Council of Europe. https://www.coe.int/en/web/portal/turkey
[14]United Nation Human Right. https://indicators.ohchr.org
[15]The issue of human rights is one of the most fundamental and fundamental issues in relation to Turkey's membership in the European Union. It has not yet joined the European Union, and accession negotiations are still ongoing, and it has been one of the countries with the most complaints in the European Court of Human Rights. For further reading in this regard see Aghdaei (2012).
[16]Aktar (2019).

proceedings. In total, about 27,000 cases against Turkey have been rejected by the European Court of Human Rights.[17]

Examining the Condition of Recourse to Internal Authorities by Individuals

The right of individuals to sue governments in regional and international courts has undergone a special process, from the classic form of non-recognition of this right for individuals to the recognition of this right as part of human rights. Article 35 of the European Convention on Human Rights states the following:

> "*The court shall consider the matter only if, in accordance with the accepted principles of international law, all domestic remedies have been exhausted and the applicant has lodged his appeal within six months from the date of the final decision.*"

This condition is a customary rule in international law. The European Court of Human Rights and its Statute, the European Convention on Human Rights, appear to have been influenced by the international law approach in this regard. Therefore, it is necessary to first examine this condition from the perspective of international law, and then to review the case law of the European Court of Human Rights, specifically in the case of the Anjou brothers against Turkey, which is also known as the Roboski case.

Condition of Recourse to Domestic Authorities from the Perspective of International Law

The condition of recourse to domestic authorities in the international legal system is influenced by international jurisprudence, specifically the International Court of Justice, the draft articles on diplomatic protection, the Economic and Social Council resolution, and the doctrine.

With regard to the jurisprudence of the International Court of Justice, this right has been dealt with in various cases and has been specifically recognised in the case of InterHandel as a customary rule of international law.[18] The condition of appealing to domestic authorities in the discussion of diplomatic protection is one of the preconditions for filing a lawsuit in international authorities. However, due to the development of human rights and the entry of these fundamental rights into most academic and legal issues, the condition of appealing to domestic authorities has undergone many changes, so much so that even the International Court of Justice in some cases has not made it necessary to refer to domestic

[17] Ibid.

[18] *Interhandel, Switzerland v. United States of America*, Preliminary objections, Judgment, I.C.J.GL No. 34 [1959] ICJ Rep. 6

authorities. Specifically, in the case of Avena and other Mexicans, which was filed by Mexico against the United States in January 2003. The Court did not require that Mexicans reside in the United States to resort to domestic authorities of US priorly.[19] A more detailed explanation of this ruling is needed in the context of the issue of diplomatic protection, but suffice it to say here that when the Court finds that the United States has violated the rights of Mexicans under Article 36 (b) of the Consular Relations Convention. It ultimately votes that there is no need for resorting to internal authorities, with the specific circumstances and the correlation between government and Mexican law on Article 36 of the Civil Authority.[20]

The draft article on diplomatic protection also mentions referring to domestic authorities as one of the preconditions for filing a lawsuit in international authorities, but in Article 15, it mentions conditions that do not necessarily consider this condition necessary and issues an exemption from observing the condition. Specifically, in the first and second paragraphs of Article 15 of the draft article, it is stipulated that if there is no reasonable domestic compensation for the case or there is an inappropriate delay in the process of compensation for an infringing act attributable to the offending government, It is not necessary to refer to internal authorities.[21]

Therefore, since the International Court of Justice in the case of them and other Mexican national's states that, given the special circumstances, it is not necessary to refer to domestic authorities in this case, it should be interpreted according to Article 15 of the draft articles of the International Law Commission.[22]

Regarding the doctrine and theory of prominent jurists, it should be said that at present, and considering the increasing role of human rights in scientific debates and events, many prominent jurists believe that in cases where human rights violations have occurred by the resident government, Considering the fundamental importance of these rights and their priority over other relations between states and the fundamental commitment of states to fundamental human rights, therefore, the

[19]*Avena and other Mexican Nationals (Mexico v. United States of America),* Judgment I.C.J. Reports 2004, at 12.

[20]52 Mexican nationals were arrested and sentenced to death in nine U.S. states. Mexico, in January 2003, outlines a complaint against the United States at the International Court of Justice in which it alleges that the United States violated the Articles 5 and 36 of the 1963 consular relations with non - interference from the consular support of Articles 5 and 36 of the Convention on Consular Relations (1963). Mexico also asked the court to issue a temporary decree on the eve of the execution of some of its subjects, which on February 3, 2003, ordered an interim order to take measures to prevent the execution of Mexican nationals.

[21]According to Article 15 of Draft articles on Diplomatic Protection, Local remedies do not need to be exhausted where:

(a) there are no reasonably available local remedies to provide effective redress, or the local remedies provide no reasonable possibility of such redress;

(b) there is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) there was no relevant connection between the injured person and the State alleged to be responsible at the date of injury;

(d) the injured person is manifestly precluded from pursuing local remedies; or

(e) the State alleged to be responsible has waived the requirement that local remedies be exhausted.

[22]Amparo (2000) at 268.

condition of referring to domestic authorities in these cases, i.e. cases related to human rights violations, is not necessarily observed.

Therefore, according to the position of international law regarding the condition of referring to domestic authorities by the injured party, the criteria of *availability, effectiveness and reasonable possibility of compensation* (adequacy) in Article 15 of the draft articles on diplomatic protection has been suggested that the mentioned rule should be met in each case and in case of not fulfilling any of the mentioned cases based on the foresaid article, the condition of appealing to internal authorities is not obligatory and the injured party should not be deprived of his lawsuit. In general, from the traditional position of the need to comply with the condition to the new approach of non-compliance with the condition according to the conditions mentioned in the Court's decision and the draft articles on diplomatic support, it seems that this approach in compliance with the condition in The cases referred to the European Court of Human Rights have also been influential, and in a way, Article 35 of the European Convention on Human Rights, which deals with the condition of referring to domestic authorities, has been influenced and assigned by international custom.[23] In such a way that the rights of the victims are respected, especially in cases of human rights violations.[24] Considering the approach of the international law system, it is necessary to review the criteria for accepting lawsuits in the European Court of Human Rights in accepting the lawsuits of individuals, then the performance of the said court in practice will be reviewed and criticised.

General Conditions and Criteria for accepting Claims in the European Court of Human Rights

The European Convention on Human Rights, which is in fact the Statute of the European Court of Human Rights, in its Article 35 states the conditions for the acceptance and consideration of a claim that the claim must comply with the above conditions and if not, it will be rejected. The Fourteenth Protocol, which entered into force on 1 June 2010, adds another condition to the provisions of Article 35 of the Convention, which in fact increases the court's discretion in dismissing claims.

[23]It can be stated that the Permanent Court of International Justice during its lifetime and its successor, the International Court of Justice, until the early 21st century, were subject to the traditional approach to the issue of diplomatic protection in cases, but the Court's approach can be changed from the case of brothers. Lagrand observed in 2001. In the case of the execution of the Lagrand brothers, who were German nationals, the court issued an interim injunction not to execute the death sentence until the final verdict, which was upheld by an Arizona court. In this case, the Court, in addition to its jurisdiction, considered all of Germany's demands to be heard. For further reading in this regard, see Niavarani, Zabihi & Sanaz (2015).

[24]Niavarani, Zabihi & Sanaz (2015) at 12

According to Article 35 (which also amends the Fourteenth Protocol):[25]

> *1. The court shall consider the matter only if, in accordance with the accepted principles of international law, all domestic legal avenues have been exhausted and the applicant has lodged his appeal within six months from the date of the final decision.*
> *2. The court shall not hear any of the claims brought under Article 34 if:*
> *(A) (applicant) is unknown*
> *(B) the subject matter of the case has not previously been heard by a court, or referred to an international investigative or investigative body, unless the petition contains new information and facts.*
> *The court shall reject any petition filed by natural persons pursuant to Article 34 if it finds:*
> *(A) declare a personal application under Article 3 inconsistent with the provisions of the Convention or the protocols relating to it, or find it unfounded or misuse of the right to submit an application. Or*
> *(B) the claimant has not suffered substantial damage, unless in order to respect (respect for) human rights as required by the Convention and its protocols, the petition is considered in its nature and provided that no case should be dismissed for that reason; Which the domestic court has not properly addressed.*
> *The court shall reject at any stage of the proceedings that it finds the application inadmissible under this article.*

A point that should not be overlooked in this regard, according to the amendment to the Eleventh Protocol in recognizing the right of natural persons to go to court and making mandatory the jurisdiction of the court to hear these complaints, is to determine the competent persons to go to court. This issue is addressed in Article 34 of the Convention. This article provides that the court may seek redress from all persons, non-governmental organisations, groups of individuals who claim to be victims of a violation of the rights set forth in the

[25]Article 35 Admissibility criteria 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings

Convention or its protocols by the High Contracting States. The High Contracting States shall not impede the effective exercise of these rights.[26]

The positive innovation of this article is that individuals, regardless of their nationality, have the right to go to court for violation of their rights by member states. In other words, this is a kind of support for groups that are immigrants, refugees or residents of European states that are members of the Convention.[27]

Another point is that the European Court of Human Rights has not necessarily met these conditions in accepting some lawsuits. In other words, the court has not required itself to strictly comply with these conditions in cases where there have been serious human rights violations and domestic authorities have failed to act. As in the case of Turkey, in the complaints of the Kurds living in that country, despite the non-fulfilment of the mentioned conditions, the Court considered accepting the lawsuit and finally condemning Turkey. As in the case of the forced relocation of Kurds living in that country, the court argued that due to the insecurity and vulnerability of the plaintiffs due to forced evictions and the lack of sufficient formal investigation in this regard, the court considered the domestic court investigation into the internal security forces insignificant. Finally, it was not necessary to observe the condition of appealing to internal authorities.[28]

The rules of international law in this regard have not been ineffective in the rulings of the European Court of Human Rights. This effect is in line with the explicit wording of Article 35 of the Convention, which states that the conduct of domestic proceedings must be in accordance with the accepted principles of international law. The principles accepted in international law are also stated in the judicial opinions and specifically in Article 15 of the draft article on diplomatic protection, which was mentioned in the previous section. The European Court of Human Rights has also taken these criteria into account. In other words, according to Article 35 of the Convention, if the rules of international law are not observed in the domestic legal system of a member state, the European Court of Human Rights should not consider the rejection of a claim in the domestic legal system as an excuse to reject the claim. As explained in the case of the forced migration of Kurds living in Turkey.[29] In this case, the court stated that due to the insecurity of the victims and the vulnerability of these people due to forced deportation from their homeland and that no formal investigation has been conducted in this regard, the court did not have a positive outlook for the Turkish domestic court. Compensation has been described as inaccessible in south-eastern Turkey.[30]

In general, the European Court of Human Rights, together with the European Commission of Human Rights, has complied with more than the same rules of

[26]The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.
[27]Fatemi (2000) at 140-139
[28]*Akdıvar and Others v. Turkey (GC),* Application no. 21893/93, ECTHR (16 September 1996).
[29]Ibid.
[30]Kurban (2014) at 18/

international law regarding the mandatory rules that must be observed in the domestic system of countries when referring to the domestic legal system. The availability and feasibility of claiming damages is the first criterion for achieving justice in the internal system of the member states of the European Court of Human Rights. The European Court of Human Rights considers that compensation is available and possible when the victim seeks it without any problems or obstacles. In addition, the above concept can mean that the applicant uses it in special circumstances. In fact, in some cases, the possibility of creating an obstacle to compensation can make it inaccessible.[31]

Another criterion is the effectiveness of compensation. The court considers compensation effective when there is a compensation solution in the domestic legal system of that country and there is a prospect of success in it. In cases where the compensation system is found to be useless, ineffective or unhelpful, in such cases it is not necessary to go through an internal process.[32] The European Court of Human Rights has in some cases rejected objections to the failure of the domestic compensation system, arguing that such a process is ultimately unsuccessful and ineffective.[33] The court may also consider the unjustified delay in hearing a case to be attributed to the ineffectiveness of the internal compensation system.[34]

Another criterion is the adequacy of compensation. Compensation is considered sufficient when the damage to the injured party is compensated in a particular case. In this regard, the European Commission of Human Rights, which has taken similar positions to the European Court of Human Rights in these cases, has stated in a case that compensation for illegal detention should include full compensation and not just the release of the detainee from prison.[35]

In conclusion, it should be noted that the European Court of Human Rights has not been uniform in its observance of the provisions of Article 35 of the Convention. In some of the cases mentioned, he did not accept the defect of the internal system as the reason for rejecting the lawsuit, and in some cases, he accepted the argument of the domestic courts of the countries in the lawsuit and did not accept the lawsuit in his final verdict. The case of Salahuddin Anju and others against Turkey is one of these lawsuits that will be addressed in the next section.

[31]D'Ascoli & Scherr (2007) at 18.
[32]Ibid
[33]See *Johnston and others* v. *Ireland*, App No. 9697/82, Case No 6/1985/92/139, A/112, (1987) 9 EHRR 203, 18th December 1986, ECHR 1986, para. 44. See also *Open Door and Dublin Well Woman* v. *Ireland*, App no 14234/88 (A/246- A), App No. 14235/88, [1992] ECHR 68, para 47 and *Keegan v. Ireland* (Application no. 16969/90) A291 (1994), 18 EHRR 342, at para 39. http://hudoc.echr.coe.int/eng?i=001-57881
[34]See *X v. UK*, case No, 7161/75, 7 DR 100(1976) and *Tomasi v. France*, case No. 12850/87, 46 DR 128(1990)
[35]*Lawless v. Ireland*, Case No, 332/57, in yearbook 2 (1958-1959) at 318.

Turkish Military Operation on December 28, 2011 and the Condition of appealing to Domestic Authorities

The incident of the Turkish military operation on December 28, 2011 was considered by many experts as a purely military mistake and ultimately led to compensation in the form of compensation to the relatives of the incident. Investigating the technical aspects of how the attack is perceived is not merely a military error and seeks to punish the perpetrators.

On December 28, 2011, between the hours of 21:39 - 22:24, the Turkish Air Force bombed ordinary people entering Turkey from the Iraqi border. Thirty-four people, including 17 children, were killed in the incident. Following the deaths of several people in the incident, Salahuddin Onjo and 275 other relatives of the victims sought to sue, but initially did not reach the desired result by referring to the Turkish authorities. This was while the Turkish authorities had announced their readiness to pay the ransom of the victims.

Following this bloody incident, the relatives of the victims of the incident sought a lawsuit and took the path of litigation in the domestic authorities. However, in their opinion, they did not face a convincing answer and they were forced to go to the European Court of Human Rights, where they did not go anywhere. And that condition was not observed in the case, finally rejected the case. The historical course of the incident and the follow-up of the survivors of the incident are important in this regard. While Turkish judicial authorities believed that the military tribunal had jurisdiction to hear the case, the military prosecutor stated that there was no intentional action and therefore no further investigation was needed and that the survivors were forced to bring the case before the Constitutional Court (18). July 2014). The Turkish Constitutional Court, after a year and a half of filing a lawsuit with that authority, finally rejected the case, stating that a series of papers including copies of the votes cast and the exact details of the suspicions had not been sent on time. 276 relatives of the victims referred the case to the European Court of Human Rights, which finally used the same argument of the Turkish Constitutional Court to rule on the rejection of its case.[36]

Evaluating the Performance of the European Court of Human Rights in the Case of the Complaint of Salahuddin Onjo and others against Turkey regarding the Incident of December 11, 2011

Following the killing of 34 civilians who lived on the Turkish-Iraqi border and made a living by moving goods across the border to meet their daily needs, the case was brought before the Turkish authorities. As it was stated, the case was finally settled in the Turkish Constitutional Court due to non-compliance with the form and failure to send a series of papers, including copies of the votes cast and

[36]TIMELINE and Roboski airstrike, available at https://en.wikipedia.org/wiki/Roboski_airstrike

the exact details of the suspects, and some papers that did not seem to be a serious obstacle to the plaintiffs' claim. The announcement was made, while this vote was issued five years after the incident. Procrastination in the Turkish judiciary is obvious in the case. In stating the conditions of exception to domestic referral, many believe that unjustified delay in domestic proceedings is the reason for its ineffectiveness, and therefore the permission to file a lawsuit in international authorities, the sample of which was also stated.[37]

This time, after the failure of the Turkish domestic judiciary,[38] 276 survivors of the incident filed a lawsuit against Turkey in the European Court of Human Rights.[39] Unfortunately, in the European Court of Human Rights, contrary to the previous practice, especially in cases where the subject is a serious violation of human rights and as it concerns Turkey, the court in these cases described the referral to domestic authorities ineffective and Turkey's objection to the court's jurisdiction.[40]

This time, however, the court referred to the condition of recourse to domestic authorities as a precondition for the jurisdiction of the court.

The Court apriority stated that the complaint was under Article 2 and 3 of the Convention, as well as Article 1 of the First Protocol. These articles are about the right to life and the prohibition of torture. Recognizing that merely referring to the Turkish Constitutional Court does not mean that it is possible to compensate for what has happened and that this reference does not mean fulfilling the order of Article 35 of the Convention, The Court in the following, deals with the conditions of the first paragraph of Article 35 of the Convention which has already been scrutinised in detail and It states that the refusal to accept the request due to the fact that it did not comply with the criteria of domestic law is now an established and accepted rule.[41] The Court further states that the time limits laid down in domestic law fall within the scope of Article 35(1) of the Convention and that failure to comply with the time limits laid down in domestic law will result in the application being rejected by the European Court of Human Rights.

The court pointed out that in the office of the Constitutional Court of Turkey,[42] according to the law, a notice was sent to the lawyer of the plaintiffs to

[37]Ibid.

[38]The ruling of the European Court of Human Rights states the process of the case and specifically states the decision of the Turkish military prosecutor that the prosecutor finally concludes that, given that the Turkish military has acted in accordance with Article 24 of the Criminal Code, Also, according to Article 30 of the same law, if it is found that it was not possible to avoid committing an act due to a mistake, then that act is not criminal. Finally, on June 11, 2014, the Turkish military court rejected the lawsuit with two positive votes against one negative.

[39]*Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

[40]*Akdıvar and Others* v. *Turkey* (GC), No. 21893/93, ECTHR (16 September 1996).

[41]*Nold v. Germany*, no 27250/02, § 88, 29 June 2006, and *Maurizio Lucchesi and others v. Italy* (dec.), no 29753/02, 30 August 2011; *Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

[42]Article 47: "1) Individual complaints may be brought directly or through national courts or representations abroad, in accordance with the provisions of the law and the regulations. The formal and substantive conditions of other means of lodging a complaint are determined by the regulations of the Constitutional Court."

complete the documents and the lawyer of the plaintiffs delivered the documents with a delay of two days, which rejected the request. The lawyer for the plaintiffs did not provide any reason for the delay. In order to state the reason for the delay, the plaintiffs' lawyer provided a medical certificate stating that he had been granted a five-day rest period, which was also delayed. In this regard, the court agrees with the opinion of the Turkish Constitutional Court that the lawyer of the plaintiffs did not make any effort to carry out the prescribed procedures.[43]

The court further criticised the refusal to accept the lawyer's medical certificate in the Turkish Constitutional Court and expressed the opinion of the plaintiffs that the decision to reject the medical certificate, which is one of the justified excuses, is at the discretion of the commission representative, Not the Turkish Constitutional Court[44] and the intervention of the said court have violated their rights. According to the relevant Code of Judicial Procedure,[45] the decision to accept or reject a valid excuse is referred to the branch of the Constitutional Court only when a commission consisting of two judges cannot hear the case unanimously. The court continued to accept the ambiguity in the Constitutional Court's ruling, but went on to state that the task of interpreting domestic law rests with domestic institutions, including the domestic court. The role of the European Court of Human Rights in this regard is limited to the compatibility or impact of this interpretation with the European Convention on Human Rights.[46]

Finally, the European Court of Human Rights upheld the decision of the Turkish Constitutional Court, stating that the shortcomings of the case were not remedied within the prescribed time limit, and ruled that the complaint should not be accepted due to the lack of internal proceedings in the case.

The European Court of Human Rights has not been unaffected by political issues. Because the lawsuit of 276 people in the Turkish Constitutional Court was rejected due to not sending a copy of the case file and the performance of the lawyer in this case by sending documents with two days' delay and not announcing a justified excuse in the first place and subsequently sending a medical certificate indicating the need to rest. With a delay, the lawyer's fault has been established. Subsequently, the European Court of Human Rights has ruled without regard to the violation of the articles of the European Convention on Human Rights in this regard, which is specifically Article 2 of the Convention, which is the right to life.

In other words, the right to life of 34 people, has become the victim of the lawyer's failure to comply with Turkey's domestic rules, and the European Court

---

[43]*Selahaddin ENCU against Turkey and 275 other requests*, Application No. 49976/16.

[44]Article 48:

"1) To be declared admissible, the individual application must fulfil the conditions laid down in Articles 45 to 47. (...)

3) A committee decides on the admissibility of the appeal. It can only declare it inadmissible unanimously. In the absence of unanimity, the case is transferred to the sections

[45]Article 47 and 48 of Act No. 6216 establishing the Constitutional Court and its rules of procedure

[46]*Waite and Kennedy* v. *Germany* [GC], No. 26083/94, § 54, ECHR 1999; *Rohlena* v. *Czech Republic* [GC], no 59552/08, § 51, ECHR 2015.

of Human Rights disregard for the catastrophe. Therefore, the legal statute of European court of human rights Has faced a grave challenge.

The European Court of Human Rights ruled in a dual manner on the rejection of the case of December 28, 2011. While in the case of forced Kurdish migration, which was described before, he called the domestic judicial actions of Turkey ineffective and entered the trial and sentencing of Turkey,[47] but this time without the trial of the Turkish judicial authorities only for not completing the documents in the Turkish Constitutional Court, By stating that the interpretation of Turkish domestic law is not one of the tasks of the court and the task of the Court is only to investigate violations of the rights protected by the Convention, it blocked the way for the relatives of the victims and survivors to seek justice. Another issue is that despite the fact that the European Court of Human Rights considered the delay of the trial in the domestic judiciary as ineffective,[48] this time, despite six years of litigation in the Turkish judiciary and the lack of results in this process, it did not consider itself entitled to trial. Despite its judicial independence, the tribunal presented the same arguments of the Turkish Constitutional Court in rejecting the allegations. At the very least, the Court did not consider the plaintiffs of the inadmissibility of the entry of the Constitutional Court in the discussion of the declaration of a justified excuse, which was justified according to the relevant procedure. As a result, it can be said that the European Court of Human Rights' performance in this case is a dual one, far from justice and influenced by the political issues governing Turkey-Europe relations.

Conclusion

From the above, we can see the importance of human rights and its impact on the condition of domestic recourse, both in terms of diplomatic protection and in terms of referring a case to the European Court of Human Rights, which is mentioned in Article 35 of the European Convention on Human Rights. This effect has led to the flexibility of the rule of recourse to domestic authorities in favor of respect for human rights. Even some authors, as stated, believe that the rule or condition of recourse to domestic authorities is merely the obligations of governments to each other and cannot be extended to cases of human rights violations. In other words, assuming that states have obligations to the international community as a whole, breach of those obligations would result in the wrongful state's international responsibility to each state, and this has been accepted in the Barcelona Traction case. Therefore, the rule of appealing to domestic authorities should also go beyond its traditional framework and be interpreted in order to protect the rights of human beings whose human rights have been violated. In addition, the case law of the International Court of Justice in the case of Lagrand and the of case of Avena, as well as the case law of the European Court of Human Rights in the cases referred to, reinforce the hypothesis that the

[47] *Akdıvar and Others* v. *Turkey* (GC), No. 21893/93, ECtHR (16 September 1996).
[48] *X v. UK*, case No, 7161/75, 7 DR 100 (1976).

rule of recourse to domestic authorities should be flexible or even It is not necessary to pay attention in case of severity of human rights violations and the specific circumstances of the case or the number of damages.

Doctrine and jurisprudence, as ancillary or secondary sources of international law, have played a decisive role in this development. This approach in the report of the Special Rapporteurs of the International Law Commission, which reports on the drafting of articles on diplomatic support, have been manifested. These reporters, of which Garcia Amador was the first rapporteur of the International Law Commission on the international responsibility of states, and Benona and John Dugard, have all argued for the need to amend or change the rule of recourse to domestic authorities. The European Court of Human Rights, which oversees compliance with the European Convention on Human Rights, should be at the forefront of this fundamental change in the flexibility of the rule of recourse to domestic authorities, and of course fairness dictates that the essential steps of the court be not forgotten. As mentioned, the court in several cases has not accepted the objections of governments to non-compliance with the rule of recourse to domestic authorities. But the dual and contradictory performance of the said court in the present case cannot be easily forgotten. The case of the December 18, 2011 military operation in Turkey is one of the few cases in which such a right to life of a large number of innocent people has been violated. The extent of the human casualties in this case ruled that the European Court of Human Rights should privilege the human rights protection on the non-substantive's Turkish judiciary rules. It means; failure to send copies of the documents to the plaintiffs' attorneys should not deprive survivors and relatives of access to justice.

Six years of internal proceedings in Turkey seem to be sufficient to prove that there was no hope that the Turkish government's judicial proceedings would be fruitful. Following its previous case law, the European Court of Human Rights should have considered the prolongation of the trial as the reason for the ineffectiveness of the case and strongly defended the European human rights aspirations. But the European Court of Human Rights' failure to hear the case, has put the court on trial for an awakened and altruistic conscience.

References

Aghdaei, H. (2012). " تحلیل نظری الحاق ترکیه به اتحادیه اروپا و موانع پیش رو" [Theoretical analysis of Turkey's accession to the European Union and the obstacles ahead (in Persian)], Volume 42(4).

Aktar, C. (2019). 'Turkey and European rights court – a parting of the ways' at https://ahvalnews.com/echr/turkey-and-european-rights-court-parting-ways

Amparo, S.J.J. (2000*). 'International Responsibility of Governments for Human Rights Violations*' (*Translated* by E. Begzadeh) at Journal of Legal *Research* No. 29-30. of Beheshti University, no. 29-30.

D'Ascoli, S. & K.M. Scherr (2007). 'The Rule of Prior Exhaustion of Local Remedies in the International Law Doctrine and its Application in the Specific Context of Human Rights Protection'. *European University Institute Working Paper LAW No. 2007/02.*

Fatemi, Q.S.M. (2000) "دادگاه جدید اروپایی حقوق بشر" [New European Court of Human Rights (in Persian)], *Legal Journal, Journal of the Office of International Legal Services of the Islamic Republic of Iran*. Twenty-fifth issue, pp. 129-145.

Kurban, D. (2014). 'Europe as an Agent of Change the Role of the European Court of Human Rights and the EU in Turkey's Kurdish Policies'. SWP research Paper. *German Institute for International and Security Affairs.*

Mertus, J. (2005). *The United Nations and Human Rights: A Guide for a New Era*. Psychology Press, Political Science.

Niavarani, S., Zabihi, S. & S. Sanaz (2015) :مطالعه 2006 حمایت دیپلماتیک درقامت یک حق بشری رویه قضایی بین المللی ونقد طرح کمیسیون حقوق بین الملل" [Diplomatic support as a human right: a study of international jurisprudence and review of the Plan of the International Law Commission 2006 (In Persian)]. *Journal of International Police Studies* 22:19-54.

Rainey, B., Wicks, E. & C. Ovey (2000). The European Convention on Human Rights. Oxford University Press

Thakur, R. (2006). *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect*. UK: Cambridge University Press.

Timeline - What Happened in Roboski? 31 December 2012, Monday 12:18 https://web.archive.org/web/20131225103408/http://bianet.org/english/human-rights/143200-timeline-what-happened-in-roboski

Cases

Akdıvar and Others v. *Turkey* (GC), No. 21893/93, ECtHR (16 September 1996).

Avena and other Mexican Nationals (*Mexico* v. *United States of America*), Judgment, I.C.J. Reports 2004, p. 12.

Interhandel, Switzerland v. *United States of America,* Preliminary objections, Judgment, ICJ GL No. 34 [1959] ICJ Rep 6.

Johnston and others v. *Ireland*, App No. 9697/82, Case No 6/1985/92/139, A/112, (1987) 9 EHRR 203, 18th December 1986, ECHR 1986.

Keegan v. Ireland (Application no. 16969/90) A291 (1994), 18 EHRR 342. http://hudoc.echr.coe.int/eng?i=001-57881

Lawless v. *Ireland*, Case No, 332/57, in yearbook 2 (1958-1959).

Maurizio Lucchesi and others v. *Italy* (dec.), No. 29753/02, 30 August 2011.

Nold v. *Germany*, No. 27250/02, § 88, 29 June 2006.

Open Door and Dublin Well Woman v. *Ireland*, App no 14234/88 (A/246- A), App No. 14235/88, [1992] ECHR 68.

Rohlena v. *Czech Republic* [GC], No. 59552/08, § 51, ECHR 2015.

Selahaddin ENCU against Turkey and 275 other requests, Application No. 49976/16.

Tomasi v. *France*, case No. 12850/87, 46 DR 128 (1990).

Waite and Kennedy v. *Germany* [GC], No. 26083/94, § 54, ECHR 1999.

X v. *UK*, case No. 7161/75, 7 DR 100 (1976).