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SUMMARY PROCEDURE BEFORE THE STRASBOURG COURT UNDER ARTICLE 28(1)b OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: JUDICIAL ECONOMY UNDER SCRUTINY

Abstract:

This article critically evaluates the summary procedure introduced by Protocol No. 14 to the European Convention on Human Rights, adopted within the reform of the European Court of Human Rights system. The summary procedure, now set out in Art. 28(1)b of the Convention, was instituted in order to facilitate expediency and to reduce the case load of the Court. This article argues that while judicial economy is a legitimate goal, the summary procedure under Art. 28(1)b has considerable deficiencies that undermine some of the systemic goals and core values of ECHR law. There is a manifest lack of remedies vis-à-vis the choice of the procedure, choice of applicable law, and no appeals against final decisions rendered in the course of the summary procedure. Notably, the concept of “well-established case-law” seems to be neither clear nor reliable, as evidenced in the cases analysed in the article. These cases, which involve the issue of socially-owned property in Serbia, serve to demonstrate some of the significant errors in interpretation and decision-making which can result from application of the summary procedure.

Keywords: reform of the European Court of Human Rights, summary procedure, judicial economy, Article 28(1)b of the ECHR, legal remedies, socially-owned property

INTRODUCTION

Recent reforms of the Strasbourg human rights system were mainly aimed at achieving efficiency in order to resolve the problem of the ever-increasing case load of the European Court of Human Rights (ECtHR or Court).¹ As a result, efficiency and

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¹ Reforms introduced by Protocol 14, adopted in 2004, entered into force on 1 June 2010 (Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the

judicial economy have come to the forefront of the Court's reforms – reforms that have resulted in some novel procedural concepts. One procedure that was devised with the purpose of accelerating ECtHR decision-making is that established in Art. 28(1)b of the European Convention on Human Rights (ECHR or Convention)² which, for the first time, vests the Court's Committees, three-judge formations, with the competence to render a judgment on the merits "if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court." This procedure will hereinafter be referred to as the summary procedure. Such a procedure, as will be illustrated, offers limited remedies against the choice of the procedure itself and the choice of relevant well-established case-law. Pursuant to Art. 43 of the Convention, referral to the Grand Chamber is limited to judgments of the Chambers only, which leaves judgments of the Committees without any appellate remedy. In this sense it renders them similar to judgments of the Grand Chamber.

The purpose of this article is to highlight some strengths and weaknesses of the Court's recently-introduced summary procedure. The authors explore not only the reasons for introducing a summary procedure and the inherent lack of remedies under Art. 28(1)b of the Convention, but also how the Court defines and distils its "well-established case-law." The problems of both the summary character of the procedure and of the doctrine of well-established case-law as applied by Committees will be further discussed on the basis of the Court's case-law, with special reference to cases involving the Republic of

control system of the Convention, opened for signature on 13 May 2004, C.E.T.S. No. 194). However, there was a provisional application of Protocol 14 on the basis of Protocol 14*bis* adopted in May 2009 (Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, 27 May 2009, C.E.T.S. No. 204). Once Protocol 14 entered into force, Protocol 14*bis* ceased to be operative.

Similar reforms are on the way, as announced by Protocols 15 and 16: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 24 June 2013, C.E.T.S. No. 213 (2013), not yet in force; and Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 2 October 2013, C.E.T.S. No. 214 (2013), entered into force on 1 August 2018. Each of these three Protocols have added new conditions governing access to the Court.

² Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 1953) E.T.S. No. 005. Art. 28 (Competence of Committees) provides:

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
 - (a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
 - (b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
2. Decisions and judgments under paragraph 1 shall be final.
3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1(b).

Serbia, given the number of cases resolved under the heading of Art. 28(1)b. As an illustration, out of 194 judgments rendered against Republic of Serbia until February 2019, as many as 49 of them were handed down in a summary procedure, and all 49 were exclusively about social property issues. In other words, circa one quarter of the cases involving Serbia – all of which found the state responsible – were processed using the summary procedure. Even more importantly, there are around 900 applications pending against Serbia in relation to debts of socially-owned companies.³

The cases upon which we focus have exclusively dealt with the socially-owned companies and the state responsibility of Serbia under the ECHR in relation to such companies. This article attempts to demonstrate some misunderstandings manifested by the Court in its rather obscure conclusions on the relationship between social property and state responsibility in these cases. The authors argue that the differences between the cases on social property, as well as some inconsistencies found in these judgments, should not have allowed the Court to treat these decisions as “well-established case-law” triggering the summary procedure under Art. 28(1)b of the Convention. These arguments demonstrate the unreliability of the concept of “well-established case-law” and simultaneously expose the downsides of the summary procedure, but also the detrimental and irreversible effect of the inherent lack of remedies to contest both the choice of the procedure and the choice of the leading cases.

The authors’ position is that despite the efficiency of a summary procedure there are disadvantages that have surfaced in the Court’s case law, as reflected in the cases regarding Serbia. The aim of this article is to clarify the issues discussed in selected cases as well as to open a discussion about the benefits and pitfalls of the procedure under Art. 28(1)b of the Convention, which seem to have largely gone unnoticed so far.

The article begins with an overview of the Art. 28(1)b procedure, together with statistics on the use of this procedure before the Court. This is followed by an analysis of the (lack of) remedies inherent to the summary procedure. The ECtHR cases against Serbia involving social property issues should serve as an illustration of the deficiencies of the summary procedure, and will be focused on the concept of “well-established case-law”, which serves as the main principle of Art. 28(1)b of the Convention.

1. INTRODUCING ART. 28(1)B TO THE SYSTEM OF THE CONVENTION

It has become almost a kind of mantra that the ECtHR is “a victim of its own success”,⁴ resulting in an overwhelming inflow of applications, currently reaching the

³ Press country profile: Serbia, European Court of Human Rights, at 5, available at: http://www.echr.coe.int/Documents/CP_Serbia_ENG.pdf (accessed 30 May 2019).

⁴ L. Turnbull, *A Victim of its Own Success: The Reform of the European Court of Human Rights*, 1(2) *European Public Law* 215 (1995); P.L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40(1) *University of San Francisco Law Review* 1 (2005), at 58; J.A. Carillo Salcedo,

number of 100,000 per year. The main reason for its massive popularity is certainly its success in protecting human rights, undoubtedly making the ECtHR the most effective mechanism for the protection of human rights worldwide. At the same time the reasons for the increase of applications are many: from the increase of the number of Member States and potential applicants during the 1990s to the fact that ECtHR has become a well-known institution in Europe, one that Member States' citizens can resort to when in need, and free of any charge.⁵ Strasbourg has thus become a popular destination for all those wishing to challenge acts of states, and there is a high success rate if applications pass the admissibility test.⁶ While around 95 per cent of applications are declared inadmissible at an early stage,⁷ those that pass the admissibility test have an 85 per cent chance on the merits.⁸ These statistics amply illustrate that while the Court has developed its own protective mechanisms, the chances for applicants' success are quite promising once the Court decides to deal with an application on the merits.

One of the issues that came to the forefront in 2000⁹ was how to efficiently handle the "ever-increasing volume of applications".¹⁰ The political decision of the European Ministerial Conference to solve this problem was followed by a number of other political documents, drafted mainly by the Committee of Ministers and other Council of

The European Convention of Human Rights, in: F. Gómez Isa, K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao: 2006, at 397; L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19(1) *European Journal of International Law* 125 (2008), at 126; K. Boyle, *European Experience: The European Convention on Human Rights*, 40(1) *Victoria University of Wellington Law Review* 167 (2009-2010), at 173; G. de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States*, Bruylant, Brussels: 2010, at 29; L. Wildhaber, *Rethinking the European Court of Human Rights*, in: J. Christoffersen, M.R. Madsen (eds.), *The European Court of Human Rights Between Law and Politics*, Oxford University Press, Oxford: 2011, at 229. The same expression has been used by the Council of Europe: e.g. Council of Europe, *Belgium and the European Court of Human Rights*, available at: <http://www.coe.int/en/web/portal/belgianchairmanship-echr> (accessed 30 May 2019).

⁵ A.Q. Mertsch, *The Reform Measures of ECHR Protocol No. 14 and the Provisional Application of Treaties*, in: P. Merkouris, M. Fitzmaurice (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Martinus Nijhoff Publishers, Leiden: 2013, 36.

⁶ B. Ohms, *The Coming into Force of Protocol No. 14 and the Short but Very Successful Life of Protocol No. 14bis to the ECHR*, *European Yearbook on Human Rights* 207 (2010).

⁷ *Reforming the European Convention on Human Rights, A Work in Progress*, 148, available at: <http://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf> (accessed 30 May 2019).

⁸ Of the total number of judgments delivered in 2017, the Court found at least one violation of the Convention by the respondent state in 85 per cent of the cases. *The ECHR in facts & figures – 2017*, at 4, available at: https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf (accessed 30 May 2019).

⁹ The European Ministerial Conference on Human Rights, held in Rome in November 2000, resulted in the Declaration of the Rome Ministerial Conference on Human Rights: "The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?" available at: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/dh_gdr/Declaration-Rome_en.pdf (accessed 30 May 2019).

¹⁰ European Ministerial Conference on Human Rights, held in Rome, Resolution I "Institutional and functional arrangements for the protection of human rights at national and European level" (CM(2000)172), para. 16.

Europe working bodies charged with developing the original idea.¹¹ One rationale for this undertaking was the estimation that around 70 per cent of admissible cases belong to the group of repetitive cases.¹²

The solution for repetitive cases resulted in two different mechanisms. The first was in the form of a judgment that would serve as the grounds for resolving future cases raising the same issues (so-called “pilot judgments”). The pilot judgment procedure was engineered by the Court in 2004¹³ and inserted in its Rules in 2011.¹⁴ According to Art. 61(1) of the Rules of the ECtHR: “The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications.” This procedure enables the Court to resolve a class of applications by deciding just one case with the same structural or systemic problem.¹⁵ The flexibility of this procedure lies in the possibility for the Court to freeze all related cases for a certain period of time so that the state can provide the structural remedy at the national level.¹⁶ This means that states are expected to set up a system for redress at the national level. Once the Court is satisfied with the way this system functions in practice it may decide to close the pilot judgment

¹¹ *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, Strasbourg, Council of Europe, 27 September 2001, available at: <https://bit.ly/2W7t9ve>. The *Report of the Reflection Group on the Reinforcement of the Human Rights Protection Mechanism* is included in Appendix IV to the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights. *The Court of Human Rights for Europe*, Committee of Minister’s Declaration adopted at its 111th session (6-7 November 2002), available at: <https://bit.ly/2ZtxKtE>. Final activity report of the CDDH *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the declaration adopted by the Committee of Ministers at its 112th session* (14-15 May 2003), available at: <https://bit.ly/2DuK0Ax>. Declaration of the Committee of Ministers: *Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels* (12 May 2004), available at: <https://bit.ly/2XxeoSC> (all accessed 30 May 2019).

¹² Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly on the Draft Protocol No. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 2009, Doc 11879, p. 5, para 6. available at: <https://bit.ly/2ZtmsWd> (accessed 30 May 2019).

¹³ ECtHR, *Broniowski v. Poland* (App. No. 31443/96), Grand Chamber, 22 June 2004. In *Broniowski* the Court, after having found a breach of the Convention in that the applicant did receive compensatory property, also found a structural deficiency in the Polish legal order that denied the same right to a whole class of applicants in the same position. The Court requested that Poland adopt appropriate legal and administrative measures to provide the persons in the same position with an equivalent remedy.

¹⁴ Art. 61 of the Rules of the Court as amended on 21 February 2011.

¹⁵ “The way in which the procedure operates is that when the Court receives a significant number of applications deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, it will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. The resulting judgment will be a pilot judgment” (The Pilot-Judgment Procedure, Information issued by the Registrar of the Court, para. 2, available at: https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf (accessed 30 May 2019)).

¹⁶ See generally D. Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, Hague: 2013.

procedure. Therefore, the Court sets up the leading (pilot) judgment with a suggested remedy for the respondent government to apply to the remaining applications. The second solution for repetitive applications was the summary procedure, designed to be used once the judgment of the Court on similar issues is already in place. This is the procedure discussed in this article.

Therefore, the quest for judicial economy and efficacy of the Court was the background against which Protocol 14 was adopted, as expressly stated in the Protocol 14 preamble:

Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;
Considering, in particular, the need to ensure that the Court can continue to play its preeminent role in protecting human rights in Europe.

An explanatory report to Protocol 14¹⁷ equally makes it clear that structural solutions for repetitive cases was seen as one of the keys for maintaining the effectiveness of the Court system.¹⁸ The Final Activity Report of the CDDH,¹⁹ which was transmitted to Ministers' Deputies a few days before the adoption of Protocol 14, affirms that one of the purposes of Protocol 14 was to introduce "a considerably simplified procedure for dealing with repetitive cases."²⁰ The result was Art. 28, which extended the competence of Committees to decide repetitive cases on the merits on the basis of well-established case-law.²¹ The view was expressed that "[o]f all the debated reform proposals, the introduction of the single-judge formation and the new summary procedure for three-judge Committees are considered to have the greatest and most immediate effect in increasing the Court's case processing capacity."²²

Debates and discussions preceding the adoption of Protocol 14 and its turbulent entry into force²³ were mainly concerned with the Court's efficacy, and warned of

¹⁷ *Explanatory Report to Protocol No. 14*, C.E.T.S. 194 (2004), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f> (accessed 30 May 2019).

¹⁸ *Ibidem*, para. 7.

¹⁹ *Final activity report of the CDDH*, *supra* note 11.

²⁰ *Ibidem*, para. 17.

²¹ "The competence of the committees of three judges is extended to cover repetitive cases. They are empowered to rule, in a simplified procedure, not only on the admissibility but also on the merits of an application, if the underlying question in the case is already the subject of well-established case-law of the Court" (*Explanatory Report to Protocol No. 14*, *supra* note 17, para. 40).

²² H. Keller, A. Fischer, D. Kühne, *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals*, 21 *European Journal of International Law* 1025 (2010), 1034.

²³ The idea for reform that was born in 2000 (Ministerial Conference on Human Rights held in Rome, Resolution I, "Institutional and functional arrangements for the protection of human rights at national and European level" (CM (2000) 172)) resulted in the adoption of Protocol 14 on 13 May 2004, which did not enter into force until 1 June 2010. The reason for this delay was the condition envisaged in Art. 19 of the Protocol 14, which required ratification of all Member States for its entry into force. It was the Russian

dramatic and sombre prospects for the Court if urgent reforms were not undertaken. The amendments brought about by Protocol 14 were mainly aimed at reducing access to the Court with the alleged purpose of preserving its functionality: a new admissibility criterion was introduced, and more options were created for dealing with applications at an early stage. Protocol 14 could thus be seen as the result of forces which had supported the so-called “constitutional character” of the Court even at the expense of individual justice.²⁴ Even those voices that challenged the reforms of the Court as inherently detrimental to its role in meting out individual justice did not much discuss the perils of the newly established procedure in Art. 28, nor the fact that the new provisions left parties without a remedy to challenge decisions adopted by a three-judge formation on the basis of well-established case-law of the Court. In addition, there was no discussion on the meaning of the term “well-established case-law” or the standard to be applied, nor whether there would be any avenues to correct errors made in the course of its application. Given the estimation that as much as 70 per cent of admissible cases are of a repetitive character, there should have been at least an appreciation of the possibility that errors are bound to happen simply due to the huge number of applications that would be decided within the newly-tailored mechanism.

2. STATISTICS

As of 12 February 2019, according to the Court’s database²⁵ there have been 2,645 cases in which the Art. 28(1)b procedure was employed, i.e. in which Committees resolved applications on the merits in the course of the summary procedure. In 2,588 of these cases at least one violation was found, i.e. in roughly 99 per cent of cases a breach was established in the course of the summary procedure. Since this procedural tool has been in use since 22 December 2009,²⁶ this means that so far

Federation that resisted ratification for a long time. In order to accelerate reform of the Court, the Council of Europe moved to adopt Protocol 14*bis* that enabled application of mechanisms set forth in Protocol 14 (namely new competences of a single judge and of a three-judge formation) under more flexible terms for its entry into force: Art. 6 of Protocol 14*bis* required only three ratifications for its entry into force, and Art. 7 allowed for provisional application, i.e. allowed for its application by Member States even without ratification. The whole arrangement was manifestly of a provisional character, given that it ceased to exist after Protocol 14 entered into force, according to its Art. 9 and following the long-awaited Russian ratification.

²⁴ For more on the discussion concerning the constitutional vs. individual justice role of the Court with regard to the reform under Protocol 14, see R. Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights*, in: J. Christoffersen, M.R. Madsen (eds.), *The European Court Of Human Rights Between Law And Politics*, Oxford University Press, Oxford: 2011, 126-130.

²⁵ Available at: <https://bit.ly/2ITGLpV> (accessed 30 May 2019).

²⁶ The first batch of judgments under Art. 28(1)b were ECtHR Committee, *Kressin v. Germany* (App. No. 21061/06), 22 December 2009; *Jesse v. Germany*, (App. No. 10053/08), 22 December 2009. The procedure itself became available after Protocol No. 14*bis*, adopted on 19 May 2009, had entered into force on 1 October 2009.

on average 260 “judgments without procedure” are issued annually. The distribution among countries has not been even: Ukraine, Russia, Greece, Hungary and Turkey have split nearly 1,000 such judgments among themselves. As for the Republic of Serbia, there have been 49 decisions (with multiple applicants) where the summary procedure led to state responsibility under the Convention in relation to socially-owned companies.²⁷

Additionally, the database reveals that as of 12 February 2019 there were 8,027 decisions in which Committees declared applications inadmissible for various reasons on the basis of Art. 28(1)a. While the jurisdiction of Committees to decide on the admissibility of applications has been present in the system even before the reform undertaken by Protocol no. 11,²⁸ the difference now is that Committees’ competence has been expanded to include deciding issues on the merits. The Committees’ decisions on admissibility have always been without the right of appeal, and this feature has been transferred to decisions on the merits in the summary procedure as well.

What is not discernible in the database of the Court is whether the right of the respondent state to contest the concept of “well-established case-law” has been effective. This right is granted by Art. 28(3) to states, but is withheld from applicants. While a number of the Committees’ judgments on the merits disclose that states contested the chosen procedure, there is no reliable data that could show the success rate of such contestations.²⁹

3. REMEDIES UNDER ART. 28(1)B OF THE CONVENTION

The role and relevance of remedies have been well established in both international and national law.³⁰ They ensure the correctability of a decision and the participation of those whose rights and obligations are at stake at either the national or international level. The role they play has earned them the position of not only a human right,³¹ but

²⁷ As of 12 February 2019, there have been total of 194 judgments and Committees’ decisions rendered involving the Republic of Serbia as the respondent.

²⁸ “The committees fulfil the role within the Convention system of disposing of the weakest cases. For example, in 1996 the committees (then of the Commission rather than the Court) dealt with 2,108 of the 2,776 cases declared inadmissible” (cf. P. Leach, *Taking a Case to the European Court of Human Rights*, Blackstone Press Limited, London: 2001, at 30).

²⁹ It seems that it was challenged in approximately one third of cases and that in all of them the challenge was unsuccessful, available at: <https://bit.ly/2DsLdZq> (accessed 30 May 2019).

³⁰ There is a vast body of literature on this subject. Here we shall refer only to a few: D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford: 2015; Ch.F. Amerasinghe, *Local Remedies in International Law*, Cambridge University Press, Cambridge: 2004; Ch.D. Gray, *Judicial Remedies in International Law*, Oxford University Press, Oxford: 1990.

³¹ “In order for a remedy to be effective, a victim must have practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation” (Amnesty International, *Injustice Incorporated*, 2014, 17, available at: <https://www.amnesty.org/download/Documents/8000/pol-1300012014en.pdf> (accessed 30 May 2019)).

also that of a general principle of law.³² While no remedy can guarantee that a decision will be altered or annulled, their existence ensures procedural justice and certainly contributes to transparency and the accuracy of decision-making.³³

The issue of remedies is equally relevant with respect to the summary procedure. While a concern for efficiency led to the creation of a summary procedure, the question is whether this procedural goal is sufficient to outweigh the right to challenge the choice of the Court to opt for the summary procedure. The concept of challenging decisions has usually been addressed within the human rights context and as such is reserved for potential claimants. However, the issue should not be restricted to human rights, given that all parties should equally be entitled to challenge judicial decisions (as is the case with Art. 43(1) of the Convention),³⁴ thus the right to challenge should

As a human right, the right to remedy has been widely recognised across different international human rights instruments: Art. 8 of the 1948 Universal Declaration of Human Rights; Art. 13 of the 1950 European Convention on Human Rights; Art. 6 of the 1965 Convention on the Elimination of Racial Discrimination; Article 2 of the 1966 International Covenant on Civil and Political Rights; Art. 25 of the 1969 American Convention on Human Rights; Art. 1 of the 1980 African Charter on Human and Peoples' Rights; Art. 14 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 39 of the 1989 Convention on the Rights of the Child; and Art. 24 of the 2010 International Convention for the Protection of All Persons from Enforced Disappearance.

"A bedrock principle of contemporary international human rights law is that victims of violations have a right to an 'effective remedy'. Courts have largely treated this requirement as an absolute one and have adopted a set of strong specific remedial rules to implement it in particular situations." (S. Starr, *Rethinking 'Effective Remedies': Remedial Deterrence in International Courts*, 83(3) *New York University Law Review* 693 (2008), at 694).

³² Given the widely accepted definition of the general principles of the law: "For instance, in the arbitration between France and Venezuela in the Antoine Fabiani Case the arbitrator said that he would apply 'the general principles of the law of nations on the denial of justice' and defined those principles as 'the rules common to most legislations or taught by doctrines.'" (G. Gaja, *General Principles of Law*, in: *Max Planck Encyclopedia of Public International Law* (2013), para. 1 (references omitted)).

It is arguable that the right to appeal a judicial decision is strongly embedded in almost all national legal systems and should be binding as a general principle of law on the international plane, unless specifically excluded.

There has been a suggestion to the effect that general procedural principles do exist for international adjudication: R. Kolb, *General Principles of Procedural Law*, in: A. Zimmermann, Ch. Tomuschat, K. Oellers-Frahm, Ch. Tams, T. Thienel (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, Oxford: 2006, 793-835.

As for the EU legal system, see: Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

³³ "The final aspect of neutrality is correctability. The possibility of review of a chamber judgment by the Grand Chamber is a positive point in that sense. Another approach to correctability might be the need to leave room for exceptions. Balancing rights and competing interests may involve generalizations in the underlying assumptions. However, individuals to whom the underlying assumption does not apply may – if no exception is made for their case – remain unsatisfied, not only with respect to the participation aspect of procedural justice, but also with respect to accuracy." (E. Brems, L. Lavrysen, *Procedural Justice in Human Rights Adjudication*, 35(1) *Human Rights Quarterly* 176 (2013), at 187).

³⁴ Art. 43 (Referral to the Grand Chamber) provides: "1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber."

also be addressed from the perspective of respondent states. Needless to say, adequate procedural justice for all fosters the legitimacy of institutions.³⁵ This is why we shall now turn to the remedial options available to both parties to the summary proceedings in order to see whether the remedial structure of the summary procedure meets the minimum requirements of procedural justice.

3.1. Remedies against the selection of the Art. 28(1)b procedure

According to the wording of Art. 28(3) of the ECHR, it is only the High Contracting Party that can contest a summary procedure on the merits for which the Committee has opted.³⁶ The remedial options for two parties in the proceeding are thus quite limited: the applicant does not have any available redress at its disposal, while respondent states do have a remedy but one with an imprecise and limited effect. The option that is at disposal of respondent states is “contestation”. There seems to be an understanding that even the respondent state cannot challenge the summary procedure as such, but rather the concept of “well-established case-law”.³⁷ It is not a plea of inadmissibility as envisaged in Rule 55 of the Rules of Court.³⁸ Neither the Rules nor the Convention clarify the effect of contestation under Art. 28(3). What transpires from the silence of the provisions of applicable procedural rules is that such contestation does not lead to a separate and adversarial procedure. As mentioned above, the available data does not fully disclose the efficiency of this remedial option. If the respondent government contests the choice of the proceeding, the Committee may invite a national judge to sit on the case.³⁹ However, this is left to the discretion of the Committee – according to the Explanatory Report the respondent government “may never veto the use of this procedure, which lies within the committee’s sole competence.”⁴⁰

³⁵ “Procedural fairness ensures the effectiveness of legal proceedings, increases their perceived legitimacy and signals their accuracy and acceptability.” (F. Fontanelli, P. Busco, *The Function of Procedural Justice in International Adjudication*, 15(1) *Law and Practice of International Courts and Tribunals* 1 (2016), at 10).

³⁶ The relevant part of Art. 28(3) reads: “... whether that Party has contested the application of the procedure under paragraph 1(b).”

³⁷ “However, if this modification precludes the defendant State from paralysing, by its opposition, the exercise of the competence *de qua* by the three-judge Committee, it does not prevent, on the contrary, that State from contesting, in addition to the admissibility in general of the application, the existence of ‘well-established’ case-law pertaining to the case, thus resulting in the Chamber dealing with the case if the contestation convinces at least one of the three judges.” (V. Starace, *Modifications Provided by Protocol No. 14 Concerning Proceedings Before the European Court of Human Rights*, 5(1) *The Law and Practice of International Courts and Tribunals* 183 (2006), at 187).

Also: “A Member State may only contest that the case is covered by well-established case-law, but not the applicability of the procedure itself.” (C. Mayer, H. Wutscher, *Are Austrian Courts Obligated to Consider the Jurisprudence of the European Court of Human Rights when Interpreting the ECHR?*, 8(2) *Vienna Journal on International Constitutional Law* 201 (2014), at 204).

³⁸ Rule 55 (Pleas of inadmissibility) provides: “[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application submitted as provided in Rule 51 or 54, as the case may be.”

³⁹ Explanatory Report, *supra* note 17, para. 71. See also Art. 28(3) of the Convention.

⁴⁰ *Ibidem*, para. 69.

While limiting the remedies could be legitimised by the overall aim of the reform to enhance judicial economy, it is still difficult to reconcile the quite strict and unequal limitation of the right to challenge the choice of a summary procedure – which may result in a judgment on the merits – by the principle of efficacy. This aspect of the reform was tackled by Amnesty International, which suggested that both parties should be “provided with sufficient time and opportunity to comment on the admissibility and merits of the case prior to its determination by a three-judge Committee.”⁴¹

3.2. Remedies for challenging the choice of “well-established case-law”

While the Explanatory Report argues that “Parties may, of course, contest the ‘well-established’ character of case-law before the committee”,⁴² what remains unanswered is *how* this contestation is to be pursued. Even if the contestation can presumably be raised in the first response to the Court on its initiative to apply the Art. 28(1)b procedure, it seems that such contestation does not automatically change the exclusive right of the Committee to decide on opting for a summary procedure:

The respondent Party may contest the application of Article 28, paragraph 1.b, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from the applications which have resulted in the well-established case-law. However, it may never veto the use of this procedure, which lies within the committee’s sole competence.⁴³

Although Committees refer to Art. 28(1) contestations as “objections”⁴⁴ it seems that these objections are merely suggestions to the Committees. Decisions under review do not disclose why the Committees dismissed contestations raised by respondent governments.⁴⁵ The only effective tool for removing the Art. 28(1)b procedure altogether is a lack of consensus among the three judges, something which is beyond the reach of parties to the proceeding, or which at best may be the result of persuasive arguments that can only be put forward by the respondent, but not by the applicant.⁴⁶ Applicants

⁴¹ Amnesty International’s *Comments on the Interim Activity Report: Guaranteeing the Long-term Effectiveness of the European Court of Human Rights*, 1 February 2004, at 21, available at: <https://www.amnesty.org/en/documents/ior61/005/2004/en/> (accessed 30 May 2019).

⁴² Explanatory Report, *supra* note 17, para. 68.

⁴³ *Ibidem*, para. 69.

⁴⁴ See e.g. “The Government objected to the examination of the applications by a Committee. After having considered this objection, the Court rejects it” (ECtHR Committee, *Rakić and Sarvan v Serbia* (App. Nos. 47939/11 and 56912/11), 20 October 2015, para. 4). This is a typical phrase used in judgments adopted under the Art. 28 procedure.

⁴⁵ The reasons are never given, as exemplified in the case cited above (*ibidem*).

⁴⁶ “Even when the committee initially intends to apply the procedure provided for in Article 28, paragraph 1.b, it may declare an application inadmissible under Article 28, paragraph 1.a. This may happen, for example, if the respondent Party has persuaded the committee that domestic remedies have not been exhausted” (Explanatory Report, *supra* note 17, para. 69).

“The cases are communicated to the government by the President of the Section (often in groups) on the basis of a very succinct statement of facts with a view to reaching a friendly settlement. The Court does not ask for observations in such cases, but governments retain the right to file observations in appropriate cases.

are fully excluded from influencing the decision to adopt the Art. 28(1)b procedure, including the choice of which decisions constitute “well-established case-law”. Despite this serious procedural drawback, the Committee was still of the opinion that the new procedure “preserves the adversarial character of proceedings.”⁴⁷

3.3. Remedies against final decisions rendered under Art. 28(1)b

What is fundamentally different with respect to Committees’ judgments on the merits, as opposed to such judgments adopted by Chambers, is that the former cannot be challenged via the remedies available under Art. 43 of the Convention, which provides that “[w]ithin a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.” The finality of Committee’s judgments under Art. 28(2) of the Convention puts them on the same footing as judgments of the Grand Chamber, both of which become final without a further remedy.⁴⁸ However, the Grand Chamber, unlike a Committee, is a judicial formation of last resort, essentially entrusted with maintaining the uniformity of interpretations,⁴⁹ so the finality of its judgments seems to be quite a normal way to end a judicial procedure. Therefore, judgments under Art. 28 are final and as such directly forwarded to the Committee of Ministers for further monitoring of their enforcement.

Interestingly, Art. 44 of the ECHR, titled “Final judgments”, refers only to final judgments of the Grand Chamber and Chambers,⁵⁰ but fails to mention the final judgments of Committees. This obviously does not change the fact that the latter are equally final and as enforceable as the former, but it remains unclear why they were not placed in the same provision with other final judgments.

3.4. Some final observations on remedies

There are no genuine remedies for challenging the selection of a summary procedure or Committees’ final decisions, which in turn casts some doubt on the rationale of this legislative reform. Protecting human rights by an outright exclusion of remedies can hardly be reconciled with the object and purpose of the Convention or the concept of procedural fairness.⁵¹ Participants carry an additional burden as they cannot dispute

Where observations are received, they are submitted to the applicant for information only.” (D. Harris et al., *Law of the European Convention on Human Rights*, Oxford University Press, New York: 2018, p. 128).

⁴⁷ Explanatory Report, *supra* note 17, para. 69.

⁴⁸ Art. 44(1) of the ECHR.

⁴⁹ Arts. 30 and 43 of the ECHR.

⁵⁰ Art. 44 of the ECHR (Final judgments) provides:

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43. 3. The final judgment shall be published.

⁵¹ “As a supranational body, the ECtHR needs to address procedural justice at two closely connected levels. First, the Court should be a champion of procedural justice in its own proceedings and judgments.

the Committee's understanding of the issues and/or their nexus to "well-established case-law".

There was undoubtedly a dire risk that case overload would endanger the functioning of the Court and the system. However, the question is whether the total exclusion of remedies – for all three aspects of the summary procedure (i.e. against the selection of the procedure; choice of applicable law; and finality of the decision) – is proportional to the legitimate goal, or eventually puts at risk the legitimacy of the system it aims to preserve. While the drafters of the reform were certainly inspired by the urgent need for judicial economy, the question is whether it should trump even the minimum of procedural justice?

4. ECTHR CASES UNDER SCRUTINY: SOCIALLY-OWNED PROPERTY AND CASES AGAINST SERBIA

The judgments selected for review in this article involve cases against the Republic of Serbia where the issue was the state's responsibility for the debts of socially-owned companies, including those cases in which the ECtHR judgments on socially-owned companies were deemed, under Art. 28(1)b, as falling within the "well-established case-law" concept for a summary procedure in cases involving debts of privately-owned companies.

4.1. Background to socially-owned property

Socially-owned property was a dominant ownership concept in the former socialist Yugoslavia and was closely connected to the model of self-management, i.e. a socialist form of management by employees.⁵² Socially-owned companies had a separate legal personality and were independently responsible for debts incurred in the course of their business. The character of this kind of ownership was specific in many respects. It seems that it indeed possessed a *sui generis* character because socially-owned or social property was neither private nor state property,⁵³ as has been well explained in the academic literature, for example as follows:

In sum, the cumulated prerogatives of the user of a social property do not exactly correspond to a traditional ownership [n]or, for that matter, to any other known right (tenancy, trusteeship... etc.). It may be tempting [to categorize it as] a regular freehold

The Court should deliver procedural justice in order to improve applicants' satisfaction and self-worth, gain compliance, and strengthen its legitimacy. This is all the more important because one can presume that the legitimacy of the Court – the most visible human rights actor in Europe – is inextricably linked to the legitimacy of human rights in Europe." (Brems et al., *supra* note 33, at 185).

⁵² M.E. Coronna, *Self-Management in Yugoslavia*, 8 Kingston Law Review 18 (1978).

⁵³ "UNMIK realized that socially owned property was a legal category of its own nature located somewhere between state and private ownership." (R. Muharremi, *The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially-Owned Enterprises*, 14(7) German Law Journal 889 (2013), at 898).

stripped of the “bare” property (*nuda proprietas* i.e., right of disposal), but the hypothesis of a curtailed ownership must also be set aside: the user of a social property [both enjoys and lacks rights] in every feature of ownership.⁵⁴

One of its key features is that while socially-owned property existed only in the former SFRY, its features have lingered on in certain former republics, such as Serbia, for some time. The European Court of Human Rights expressly recognised this feature:

71. Socially-owned companies, hereinafter “SOC”, as well as “social capital”, are a relict of the former Yugoslav brand of communism and “self-management”.

72. Their current legal status in Serbia is primarily defined by: (i) Articles 392-400v and Article 421a of the Corporations Act 1996 (*Zakon o preduzećima*; published in OG FR Y nos. 29/96, 33/96, 29/97, 59/98, 74/99, 9/01 and 36/02); (ii) Articles 1, 3, 14 and 41b of the Privatisation Act (*Zakon o privatizaciji*; published in OG RS nos. 38/01, 18/03 and 45/05); and (iii) Article 456 of the Corporations Act 2004 (*Zakon o privrednim društvima*; published in OG RS no. 125/04).

73. Based on this legislation, SOC are only those companies which are entirely comprised of social capital (*preduzeća koja u celini posluju društvenim kapitalom*). They are also independent legal entities which are both owned and run by their own employees and can be subjected to regular insolvency proceedings.⁵⁵

This *sui generis* nature of socially-owned property may explain the difficulties with which foreign and international courts have dealt with issues regarding such property. However, it is hard to deny that it has a distinctive character compared to other forms of property. This has been confirmed by former SFRY republics in the course of state succession negotiations and in the *Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia* (SIA).⁵⁶ The SIA deals with both state and private property but does not tackle socially-owned property, which remained outside the scope of the SIA as recommended by the Arbitration Commission within the International Conference on the Former Yugoslavia, as follows:

As for ‘social ownership’, it was held for the most part by ‘associated labour organisations’ – bodies with their own legal personality, operating in a single republic and coming within its exclusive jurisdiction. Their property, debts and archives are not to be divided for purposes of state succession: each successor State exercises its sovereign powers in respect of them.⁵⁷

After the demise of socialism all former SFRY Republics undertook some form of property transformation⁵⁸ in order to extinguish the so-called “social property” through

⁵⁴ K. Medjad, *The Fate of the Yugoslav Model: A Case against Legal Conformity*, 52(1) American Journal of Comparative Law 287 (2004), at 292.

⁵⁵ ECtHR, *Kačapor and Others v. Serbia*, (App. No. 2269/06), 15 January 2008, paras. 71-73.

⁵⁶ Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia, adopted on 29 June 2001, 41(1) ILM (2002), 3-36.

⁵⁷ International Conference on the Former Yugoslavia, Arbitration Commission, “Opinion No. 14”, 32(6) ILM (1993), 1587-1598, at 1594.

⁵⁸ See K. Halverson, *Privatization in the Yugoslav Republics*, 25(6) Journal of World Trade 43 (1991).

“a combination of modalities, including sale by open tender, more restricted purchase by voucher, and restitution of older properties to their pre-nationalisation owners.”⁵⁹ In the case of Serbia the process of privatisation was conducted under a series of privatisation laws, and the one currently in force is the Privatisation Act adopted in 2014.⁶⁰ The income received through the privatisation has been primarily used to cover the debts of former socially-owned companies towards private creditors,⁶¹ while the amount exceeding the debt becomes public revenue.

4.2. The ECtHR and socially-owned property – a misunderstanding from the very beginning: *Kačapor v. Serbia*

Within the ECtHR context, the problem of debts of socially-owned companies and socially-owned property in Serbia has been raised in a number of cases.⁶² One of these issues concerned the responsibility of the state for failure to ensure the enforcement of final judgments rendered in favour of employees – on the basis of unpaid salaries and social contributions – after these socially-owned companies went bankrupt.

The first of these cases was *Kačapor and Others v. Serbia*. Six applicants argued that they were victims of a breach of Art. 6 of the ECHR and of Art. 1 of Protocol I to the ECHR. The reason for their claim was their inability to secure enforcement of final judgments. Domestic judgments were rendered due to the inability of their former employer, a socially-owned company, to pay mandatory social benefits. The non-enforcement of these judgments was the result of several factors: lack of funds in the accounts of the debtor as well as an insolvency proceeding where their claims were inconsistently treated, being confirmed in some instances, challenged in others, and disjoined from the proceeding in others.⁶³ The ECtHR concluded that “the Serbian authorities have failed to take necessary measures in order to enforce the judgments in question.”⁶⁴ This case thus revolved around the enforcement of final judgments and the insolvency procedure. The rationale of the judgment was that the burden placed on the applicants in the course of the insolvency procedure was too heavy because the applicants were not given sufficient procedural guarantees in these proceedings.⁶⁵ While

⁵⁹ R.C. Williams, *Property*, 41 Studies of Transnational Legal Policy 363 (2010), at 383.

⁶⁰ Official Journal of Republic of Serbia, nos. 83/2014, 46/2015, 112/2015, 20/2016.

⁶¹ Art. 41b of the Privatisation Act that was in force 2001-2014 [Zakon o privatizaciji], Official Journal of Republic of Serbia, nos. 38/01, 18/03, 45/05, 123/07, 123/07 i 30/10; Art. 94 of the Privatisation Act in force since 2014, Official Journal of Republic of Serbia, nos. 83/2014, 46/2015, 112/2015, 20/2016.

Arts. 22 and 23 of the Decree on Settlement of Debts of Subjects of Privatisations Toward Creditors [Uredba o načinu i uslovima izmirivanja obaveza subjekata privatizacije prema poveriocima], Official Journal of Republic of Serbia, nos. 45/2007, 108/2007, 127/2007, 60/2008 (Decree on Settlement of Debts).

⁶² As of 12 February 2019 there have been 156 decisions of the ECtHR directly or indirectly involving issues of, or referring to, socially-owned property and socially-owned companies, available at: <https://bit.ly/2IAZ97T> (accessed 30 May 2019).

⁶³ *Kačapor and Others v. Serbia*, paras. 34-55.

⁶⁴ *Ibidem*, para. 116.

⁶⁵ *Ibidem*, paras. 109-116.

the emphasis in the judgment was that “irrespective of whether a debtor is a private or a state-controlled actor, it is up to the state to take all necessary steps to enforce a final court judgment, as well as to, in so doing, ensure the effective participation of its entire apparatus,”⁶⁶ the Court noted in passing – within its discussion on admissibility and the *ratione personae* context – that the state should be held responsible for debts of socially-owned companies.⁶⁷

It is not clear from the Court’s reasoning whether such responsibility is limited to insolvency proceedings involving socially-owned companies or can be extended to all liabilities of socially-owned companies. The Court’s conclusions suffer from ambiguity for a variety of reasons. First, the Court easily resolved the important issue of attribution, but did so within the admissibility context rather than a judgment on the merits; and secondly it did not provide reasons for departing from the general rule of international law regarding attribution. The first error made by the Court seems to be in drawing a parallel between social and state property. However, even taking state property as a starting assumption does not resolve the issue of attribution that easily. Under general international law state ownership as such, without evidence of direct control over the entity with an instruction to not perform international obligations, cannot serve as the grounds for attribution.⁶⁸

⁶⁶ *Ibidem*, para. 108.

⁶⁷ “96. The issue arises therefore whether the State is liable for the outstanding obligations of the debtor, in particular whether it can be held responsible for the non-enforcement of the final judgments rendered in favour of the applicants.

97. The Court notes, in this respect, that the debtor is currently owned by a holding company predominantly comprised of social capital (*see* para. 56 above) and that, as such, it is closely controlled by the Privatisation Agency, itself a State body, as well as the Government (*see* para. 75 above), irrespective of whether any formal privatisation had been attempted in the past.

98. The Court therefore considers that the debtor, despite the fact that it is a separate legal entity, does not enjoy “sufficient institutional and operational independence from the State” to absolve the latter from its responsibility under the Convention (*see, mutatis mutandis*, ECtHR, *Mykhaylenko and Others v. Ukraine* (App. Nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02), 30 November 2004, para. 44).

99. “Accordingly, the Court finds that the applicants’ complaints are compatible *ratione personae* with the provisions of the Convention, and dismisses the Government’s objection in this respect” (*ibidem*, paras. 96-98).

⁶⁸ “The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity’s conduct to the State” (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 5, in: *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in: J. Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, at 100, para. 3).

“The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless

The only legal authority on which the Court relies in *Kačapor* is the *Mykhaylenky v. Ukraine* case, where the issue was quite different. It involved a state-owned company (not socially-owned) for nuclear energy, where the applicants negotiated and were in communication with the Ukrainian Ministry throughout, and where the enforcement proceeding failed because the Ukrainian Ministry refused to issue a specific authorization to the applicants.⁶⁹ Furthermore, in another case the Court clarified its *Mykhaylenky* rationale as follows:

Factors taken into consideration by the Court include the rights conferred on the company, that is, whether those rights are normally reserved for public authorities (see, for instance, *Cooperativa Agricola*, cited above, §§ 18-19, where some State functions were delegated to the debtor company), the nature of its activity, that is, whether the legal entity exercises a public function or is a typical business, and the context in which it is carried out. (...) For instance, in *Mykhalenky and Others* the Court observed that the company had operated in the highly regulated sphere of nuclear energy and conducted its activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control, in that case extending, *inter alia*, to the applicants' terms of employment.⁷⁰

This context could possibly have given rise to state responsibility, but none of these elements existed in *Kačapor* – neither ownership nor any contact with state authorities other than the Central Bank, which is normally involved in all insolvency proceedings when the collection of claims is sought to be done from the accounts of legal entities.

The *Kačapor* case presumably brings together the socially-owned character of the capital of debtors and the malfunctioning of the enforcement and insolvency proceedings so as to create a new ground for state responsibility. Had it been only for the malfunctioning of the procedural system for collecting claims on the basis of final and enforceable judgments, the Court's reference to the functional and structural independence of socially-owned companies⁷¹ and the general authority of the Privatisation Agency over them⁷² (that was not tested against the facts nor was it argued that Privatisation Agency intervened in any manner in the particular case) would be redundant and superfluous, and reliance on *Mykhaylenky* misplaced.

It must be noted that the conditions for attribution to the state of debts of companies in insolvency proceedings have been refined since *Kačapor*, at least with respect to other

they are exercising elements of governmental authority within the meaning of article 5." (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8, p. 112, para. 6).

"In broad synthesis, tribunals have normally given effect to the separate legal personality of separate entities, and recognized that the mere fact that a State has created a separate entity, that it is its owner, or exercises a certain measure of general control over it (for instance by appointing its officers), is normally insufficient in and of itself to justify the attribution of its conduct." (S. Olleson, *Attribution in Investment Treaty Arbitration*, 31(2) ICSID Review – Foreign Investment Law Journal 457 (2016), at 472 (citing various decisions of international tribunals)).

⁶⁹ ECtHR, *Mykhaylenky and Others v. Ukraine* (App. Nos. 35091/02 et al.), 30 November 2004.

⁷⁰ ECtHR, *Liseyeva and Maslov v. Russia* (App. Nos. 39483/05 and 40527/10), 9 October 2014.

⁷¹ *Kačapor v. Serbia*, paras. 96-98.

⁷² *Ibidem*, paras. 71-76.

countries. In *Liseytseva v. Russia*, the Court set out the following conditions for state-owned companies in bankruptcy proceedings:

In assessing whether a company enjoyed sufficient operational and institutional independence from the State, the Court has taken into account a wide range of factors, none of which is determinative on its own. The key criteria used to determine whether the State was indeed responsible for such debts were as follows: the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control).⁷³

Arguably, both *Mykhaylenky* and *Liseytseva* follow the general international law rule on attribution, where "state ownership is only one of the relevant elements in a relatively restrictive test."⁷⁴ In *Liseytseva* the Court was quite sensitive to the general international law test and the criteria that needed to be assessed:

The Court will assess the degree of the State or municipal authorities' actual involvement in the management of the enterprises' assets, including – but not limited to – disposal of the assets, the authorities' conduct in the liquidation and restructuring proceedings, giving binding instructions or other circumstances evidencing the actual degree of State control in a particular case in order to determine the issue of State responsibility for the debts of unitary enterprises. In other words, in order to determine the issue of State responsibility for the debts of unitary enterprises the Court must examine whether and how the extensive powers of control provided for in the domestic law were actually exercised by the authorities in a given case.⁷⁵

Put differently, the discussion of control needs to be not only contextualised but scrutinised in order to assess whether the state used its ownership as a vehicle to effectuate a particular internationally unlawful act. None of these considerations were taken into account in *Kačapor*; therefore there was no search for evidence of the actual degree of state control in the particular case in order to determine the state responsibility for the debts of the enterprise in question.

While the reasons provided in *Kačapor* are regrettably obscure and vague (with only two paragraphs devoted to the Art. 1 of Protocol I analysis leading to its violation),⁷⁶ and not fully conclusive as to the relevance of property to attribution, the *Kačapor* decision has been used by the Court as the legal authority for subsequent cases.⁷⁷ The legitimate

⁷³ *Liseytseva v. Russia*, para. 187 (references omitted).

⁷⁴ B. Mayert, M. Rajavuor, *National Fossil Fuel Companies and Climate Change Mitigation under International Law*, 44(1) *Syracuse Journal of International Law* 55 (2016), at 84 (making this conclusion against the *Mykhaylenky* and *Liseytseva* judgments).

⁷⁵ *Liseytseva v. Russia* (references omitted).

⁷⁶ *Kačapor v. Serbia*, paras. 119, 120.

⁷⁷ E.g. ECtHR, *Marčić and 16 Others v. Serbia* (App. No. 17556/05 et al.), 30 October 2007; *Crnišanić and Others v. Serbia* (App. No. 35835/05 et al.), 13 January 2009; *Rašković and Milunović v. Serbia* (App. Nos. 1789/07 and 28058/07), 31 May 2011; *Adamović v. Serbia* (App. No. 41703/06), 2 October

grounds for State responsibility in *Kačapor* was the malfunctioning of the insolvency proceeding, where creditors' claims were indeed unjustifiably challenged despite the fact that they were confirmed by courts' decisions in the form of *res judicata*.⁷⁸ However, this is where the relevance of *Kačapor* ends, because the property structure of the debtor in the insolvency proceeding did not seem to be an issue at all. It only crept in as an *obiter dictum* that would pervade in later cases where the malfunctioning of insolvency proceedings would not be an issue.

Therefore, it is difficult to reconcile *Kačapor* with both general international law and the Court's own case-law on state property, with which it tends to equalise the concept of socially-owned property.

4.3. *Kačapor* as the “well-established case-law” and summary procedure progenies

Despite these innate deficiencies, *Kačapor* as such was still supposed to be read according to its own terms: debts of socially-owned companies were attributable to the state because of the operational and institutional control of the Privatisation Agency over the socially-owned company, coupled with the length and inefficiency of the insolvency procedure. Accordingly, in the absence of control by the Privatisation Agency or any other state agency directly involved, the *Kačapor* “precedent” would not be applicable. Also, a transformation of a socially-owned to a privately-owned company would equally remove responsibility under the *Kačapor* terms. If the Privatisation Agency was not in control nor was company socially-owned, that would make *Kačapor* even less persuasive as authority.

Yet *Kačapor* served as the “well-established case-law” for the Court to launch the Art. 28(1)b summary procedure in the cases that followed, even though these cases differed from *Kačapor*. For example, in *Klikovac and Others v. Serbia*, the first summary procedure case which relied on *Kačapor* as its basis, the applicants – unlike the applicants in *Kačapor* – did manage to enforce their claims before domestic courts, even if only in part: “[t]he [municipal] court ordered the partial settlement of all creditors in proportion to their claims and the amount obtained through the sale.”⁷⁹ This is not an unusual result for any bankruptcy proceeding, where creditors are usually entitled to settlement of their claims in proportion to the amount obtained through the sale of debtor's property. In addition, in *Klikovac* the proceedings before the Constitutional Court were still pending. Despite the fact that local remedies were not exhausted and that applicants were partially settled as other creditors, contrary to the facts and rationale of *Kačapor* the Committee nevertheless relied on *Kačapor* to establish state responsibility and order the respondent state to “pay the outstanding debt owed to the applicants under the final judgment.”⁸⁰ In the next summary procedure case on socially-owned companies,

2011; *Marinković v. Serbia* (App. No. 5353/11), 22 October 2013; *Petrović v. Serbia* (App. No 40485/08), 15 October 2014.

⁷⁸ *Kačapor v. Serbia*, paras. 44-55.

⁷⁹ ECtHR Committee, *Klikovac and Others v. Serbia* (App. No. 24291/08), 5 March 2013, para. 11.

⁸⁰ *Ibidem*, para. 24.

Stojilković and Others v. Serbia, the claims of the applicants based on domestic judgments were actually fully enforced in domestic proceedings, but the Committee still awarded damages for non-pecuniary loss due to the delayed enforcement procedure (enforcement lasted six years).⁸¹ This Committee's judgment was also based solely on *Kačapor*.

Andjelić, the third case in line, involved 167 applicants. The Committee here relied again on *Kačapor* to find Serbia responsible for the debts of socially-owned companies with the following conclusion:

The Court observes that the judgement at issue concerns the debtor's liabilities incurred in the period between 1 July 2001 and 13 July 2003, when the debtor was a socially-owned company. It is further observed that the privatisation of the debtor was annulled on 8 April 2008, and that the debtor is now completely owned by the State.⁸²

It seems that it was both who incurred the debt and the status of the debtor at the time of the Committee's judgment that mattered in terms of its reliance on *Kačapor*. However, in the *Andjelić* case there was another relevant factor distinguishing it from the previous cases – privatisation. It seems that the Committee tried to go around the privatisation in order to distinguish the debt that was susceptible to attribution, while at the same time clarifying the criteria of attribution in cases of privatisation. It is arguable though that privatisation as such, i.e. transformation to private property owned by a private legal person, made the case sufficiently distinguishable to depart from *Kačapor*. Still, the Committee made an effort to circumvent privatisation and focus on the debt incurred by socially-owned company in order to follow the *Kačapor* line of cases.

4.4. *Kačapor* revisited and extended to private debts: a new summary procedure

In the *Marinković v. Serbia* Chamber judgment, adopted several months after *Andjelić*, the Court adopted different criteria:

The Court is aware that the debtor is no longer a State-controlled entity. What is crucial however is that the domestic judgments rendered in the applicant's favour became final in September 2007 when the debtor operated as a State-controlled entity. In view of that and the Court's case law cited above, the Court finds that the respondent State is directly responsible for the enforcement of the domestic judgements under consideration in this case.⁸³

In *Marinković* case it was the applicant's former employer who owed him salaries and certain social benefits, as confirmed by final judgments. The employer was a socially-owned company that was privatised in 2002 and in private ownership until 2007, when the agreement was terminated due to the default of the buyer.⁸⁴ The debt that was

⁸¹ ECtHR Committee, *Stojilković and Others v. Serbia* (App. No. 36274/08), 5 March 2013.

⁸² ECtHR Committee, *Andjelić and Others v. Serbia* (App. No. 57611/10 et al.), 28 May 2013, para. 32.

⁸³ *Marinković v. Serbia*, para. 40.

⁸⁴ *Ibidem*, paras. 25-27.

incurred originated from the period of the private ownership of the company, but the judgments were rendered and became final during the second period of socially-owned capital of the employer and just before the shares of the employer were again sold to a private company.⁸⁵ More precisely, the Privatisation Agreement was terminated on 17 July 2007 “because the buyer in question had failed to fulfil his contractual obligations,”⁸⁶ whereas the judgments became final on 11, 20 and 22 September 2007 respectively.⁸⁷ The Court again relied on *Kačapor* and concluded as follows: “in such cases the State is directly liable for the debts of State-controlled companies irrespective of the fact whether the company at issue at one point operated as a private entity.”⁸⁸

Therefore, the Court continued to rely on *Kačapor* even in cases where debts were incurred by privately-owned companies during their private ownership of capital. After rendering just one further Chamber judgment – in the *Jovičić and Others v. Serbia* case⁸⁹ – the Court promptly moved again to the summary procedure under Art. 28(1)b.

In *Jovičić and Others v. Serbia* eight applicants claimed damages for violations of Arts. 6 and 13 of the Convention, and Art. 1 of Protocol No. 1 due to the fact that they could not collect the full amount of their claims in insolvency proceedings. They all had enforceable judgments in their favour for unpaid salaries and social contributions that were due to them by the socially-owned company. The local company went through several ownership transformations: before 2002 it was socially-owned, but was privatised at the end of that year. From December 2002 to 17 July 2007 it was a privately-owned company.⁹⁰ During this period of five years – in which its capital was private – the local company performed its activities and executed transactions with full independence and acquired private profit from business transactions. The privatisation was cancelled due to the breach of contractual provisions of the Privatisation Agreement.⁹¹ In other words, during the period of five years there was a contractual relationship between the private person and the Privatisation Agency, which is distinct from operational or institutional control. Following the cancellation of the contract, the majority of the capital reverted to socially-owned status.⁹² The capital that was socially-owned was sold again by the Privatisation Agency in December 2008, when the company again became fully privately-owned.⁹³ Thus the company was in an ownership status other than private for only approximately a year and a half. Then the shares of the company were sold at the stock market and the company thus reverted back to private ownership again.

The majority of the unenforced judgments that constituted the cause of action before the European Court of Human Rights were rendered in the period June-

⁸⁵ *Ibidem*, para. 28.

⁸⁶ *Ibidem*, para. 26.

⁸⁷ *Ibidem*, paras. 10, 14, 18.

⁸⁸ *Ibidem*, para. 39.

⁸⁹ ECtHR, *Jovičić v Serbia* (App. No. 37270/11), 13 January 2015.

⁹⁰ *Ibidem*, paras. 15-16.

⁹¹ *Ibidem*, para. 16.

⁹² *Ibidem*, para. 17.

⁹³ *Ibidem*, para. 18.

September 2006,⁹⁴ i.e. during the period of private ownership. More precisely, as each of the applicants had two or three judgments in their favour, there were a total of 21 judgments that constituted the claim for breach of the Convention.⁹⁵ Out of the 21 judgments, 16 were handed down between June and September 2006, while out of the remaining five there were only two that became final in 2008 before the shares were sold to private company; while three became final in 2009 after sale of the company's shares on the stock market. In July 2010 an insolvency proceeding was opened against the (privately owned) debtor,⁹⁶ which was still ongoing at the time the ECtHR judgment was handed down.⁹⁷

The question arises: How did *Kačapor* and subsequent cases fit the factual matrix of *Jovičić*. If the *Marinković* criterion is applied, i.e. the ownership of the debtor at the time of finality of the domestic judgments, it turns out that only two out of 21 judgments became final during the social ownership of the company, while 19 were rendered when it was privately-owned. In addition, the dates of the judgments (2006) and their description demonstrate that the debts which constituted the cause of action before domestic courts were incurred by the private company, which failed to pay its employees. This factual scenario is thus contrary to the rationale relied upon by the Court in the *Kačapor* and *Andjelić* cases. Finally, at the time of rendering the ECtHR judgment in 2015, the company was again private. In other words, whatever the criteria that were adopted (ownership at the time of domestic judgments, at the time of the ECtHR judgment, or the origin of the debt) they could not lead to state responsibility in *Jovičić* case. It is difficult to square the previous case law of the ECtHR, even on the basis of an extensive reading of *Kačapor* (and its successive progenies) and general rules of international law with the findings of the Court that the respondent state in this case was held responsible for all the debts of a private company.

What seems to be the crucial difference between, on the one hand, *Kačapor* and the line of cases that followed – which dealt solely with the debts of socially-owned companies – and on the other *Marinković* and *Jovičić*, where there was a private debt, is the fact that in the latter cases there was privatisation. The intervening fact of finalised privatisations should be qualified as a matter that distinguishes between the *Kačapor* line of cases and *Jovičić*, because it is the contract-based privatisation which transformed the position of the creditors and excluded the control of the state. The Court simply disregarded the contractual relationship between the buyer and the state, as well as the domestic legal framework and the possibility for creditors to collect their claims from both their company and the buyer (ignoring the fact that in certain cases some debts were fully settled).⁹⁸ For the sake of clarification, it was an upper threshold liability that

⁹⁴ *Ibidem*, Appendix to the Judgment.

⁹⁵ *Ibidem*.

⁹⁶ *Ibidem*, para. 8.

⁹⁷ *Ibidem*, para. 14.

⁹⁸ According to the Decree on Settlement of Debts of Subjects of Privatisation Towards Creditors [Uredba o načinu i uslovima izmirivanja obaveza subjekata privatizacije prema poveriocima], Official Journal of

was applied to the state, as it was held responsible not only for the procedural guarantees applicable in the course of any insolvency proceeding, but for the full amounts granted by the judgments.⁹⁹

It seems that in *Jovičić* the Court too easily and too lightly mixed a very different factual matrix with the one in *Kačapor*, which was distinct from the former in many aspects. While *Kačapor* is itself open to criticism and discussion, the errors made in *Jovičić* can hardly be justified at all – neither by reference to the Court’s case law, and even less by reliance on general international law or national law. The policy repercussions are grave: failed privatisations in which private owners incurred huge debts now loom as a potential public debt, even if the company becomes re-privatised.¹⁰⁰ The Court did not spend much ink on explaining why this should be the case.

This however is not the only repercussion of *Jovičić*, because it turned out that the case which made the questionable link between private debts and state responsibility also served as the “well-established case-law” for the purpose of Art. 28(1)b. In consequence all similar cases were diverted to a summary procedure, which ultimately made this and other rulings permanently irreversible due to the manifest lack of remedies against judgments delivered under Art. 28(1)b.¹⁰¹

Republic of Serbia, nos. 45/2007, 108/2007, 127/2007, 60/2008 (Decree on Settlement of Debts) all creditors were entitled to either register their monetary claims before the privatisation in order to collect them from the purchase price, or alternatively from private creditors; or to abstain from registration of the claims (debt write-off toward the company and the buyer) and submit it later after the privatisation to the privatised company in order to enter into a contract for settlement of the debt. According to the Privatisation Act and the Decree on Settlement of Debts there are two types of creditors: state creditors; and other creditors (Art. 2 of the Decree on Settlement of Debts). Other creditors include all natural and legal persons other than state creditors who may write-off their claims preceding privatisation in order to collect their claims from the purchase price (Art. 2(4) of the Decree on Settlement of Debts). State creditors have to release their claims and can collect them only from the purchase price (Art. 2(3)). The settlement of released debt will be finalised only up to the price received from privatisation and proportionally to other claims (Art. 17(5)).

⁹⁹ “Referring to the given institutional and operational dependence of the (predominantly) socially owned companies from the State, the Court found in *R. Kačapor and others v. Serbia* that the State should be held liable not only for the nonenforcement of judgments that had been rendered against companies (predominantly) comprised of socially owned capital, under Article 6(1) of the Convention, but also for the outstanding obligations of these debtors, under Article 1, Protocol 1 of the Convention. As a result, the Court awards nonpecuniary damages for the failure of State to enforce its final judgments, and at the same time it orders the State to pay from its own funds the sums awarded to the applicants by the given judgments.” (D. Popović, T. Marinković, *Serbia: The emergence of the human rights protection in Serbia under the European Convention on Human Rights: The experience of the first ten years*, in: I. Motoc, I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge University Press, Cambridge: 2016), at 381.

¹⁰⁰ “In 2010, there were approximately 3,570 domestic judgments rendered against socially-owned enterprises in this respect, with an aggregate amount of approximately 2.7 billion RSD (costs and interest not included).” (Serbia Judicial Functional Review, Multi-Donor Trust Fund for Justice Sector Support in Serbia, Report No. 94014-YF World Bank, 2014, at 140, para. 62, available at: <http://www.vk.sud.rs/sites/default/files/attachments/Serbia%20Judicial%20Functional%20Review-Full%20Report.pdf> (accessed 30 May 2019))

¹⁰¹ So far there have been six cases, involving 40 applicants, decided on the basis of *Jovičić* where the issue was the debt of a private company: ECtHR Committee, *Rakić and Sarvan v. Serbia* (App. Nos. 47939/11

5. THE CONCEPT OF “WELL-ESTABLISHED CASE-LAW”: DO WE KNOW IT WHEN WE SEE IT? LESSONS LEARNED FROM SERBIAN CASES

The cases discussed above, such as *Kačapor* and *Jovičić*, demonstrate the unreliability of the concept of “well-established case-law”. In order to understand how the Court decides to rely on a particular case in order to move to the summary procedure, we first need to start with Protocol 14.

In the Explanatory Report to Protocol 14 there is a definition of the “well-established case-law” for the purpose of Art. 28:

‘Well-established case-law’ normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute ‘well-established case-law’, particularly when the Grand Chamber has rendered it.¹⁰²

While this approach seems to imply that consistency should be coupled with several decisions adopted by a Chamber to result in a settled jurisprudence capable of bearing the name of “well-established case-law”, it is nevertheless true that this will be a matter of interpretation.¹⁰³ On the other hand, the Court has used the concept of “well-established case-law” or “established case-law” in various decisions, without any further clarifications.¹⁰⁴ It seems that, at least for the Court, it is a self-evident concept.

Another approach to classifying the Court’s case law for the purpose of Art. 28(1)b of the Convention could be carried out on the basis of the Court’s database (HUDOC). According to the classification offered therein, judgments could be grouped according

and 56912/11), 20 October 2015; *Tomović and 18 Others v. Serbia*, (App. No. 5327/11 et al.), 24 February 2015; *Gavović v. Serbia*, (App. No. 13339/11), 24 February 2015; *Lučić v. Serbia* (App. No. 13344/11), 24 February 2015; *Stoković and 17 Others v. Serbia* (App. No. 75879/14 et al.), 8 March 2016. The total amount of damages awarded on the account of responsibility of state for private debts so far has been around 80,000 EUR with respect to non-pecuniary damage, costs and expenses, which is in addition to amounts that the state was ordered to pay on the basis of national judgments that remained unenforced.

In other cases where *Jovičić* also served as a leading case for summary procedure, such as: ECtHR Committee, *Milenković and Veljković v. Serbia* (App. Nos. 7786/13 and 47972/13), 20 October 2015; *Šerifović and 2 Others v. Serbia* (App. No. 5928/13 et al.), 20 October 2015; *Blagojević and 14 Others v. Serbia* (App. Nos. 61604/10), 20 October 2015, *Koka Hybro Komerc DOO Brojler v. Serbia* (App. No. 59341/0), 14 March 2017, there were ongoing bankruptcy proceedings at the time the ECtHR delivered its judgments. It turned out that in three out of four cases (*Milenković*, *Blagojević*, *Koka Hybro Komerc DOO Brojler v. Serbia*), the bankruptcy proceedings were successfully finalised (available at: for *Blagojević* (<http://www.priv.rs/Arhiva/9534/Prodata-imovina-leskovackih-stecajnih-duznika.shtml>), for *Milenković* (<http://www.priv.rs/Arhiva/11561/Odrzana-prodaja-imovine-stecajnih-duznika-DP-PK.shtml>); for *Koka Hybro Komerc DOO Brojler* (<https://bit.ly/2XgtpN0>) (all accessed 30 May 2019).

¹⁰² Explanatory Report, *supra* note 17, para. 68.

¹⁰³ “Whether case law is well-established or not is obviously a matter of interpretation.” (Keller et al., *supra* note 22, at 1034).

¹⁰⁴ The Court has used the phrase “well-established case-law” in 559 judgments and the expression “established case law” in 1,947 cases. See: <https://bit.ly/2VgXGJR> (accessed 30 May 2019).

to their importance in order to be ranked on one of three levels.¹⁰⁵ The question is which group of decisions might possibly serve as unquestionable rules for future cases. Since level one gathers most important decisions, it could be seen as an instinctive choice, since these decisions “make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State.”¹⁰⁶ However, this still does not represent judgments which resulted from continuous and consistent practice – this seems to be reserved for decisions in the third group, which apply to “existing case-law”.¹⁰⁷ Returning to the case law that was surveyed and analysed above, according to the HUDOC database neither the *Kačapor* nor *Jovičić* cases belong to level one (high importance) decisions. Interestingly, *Kačapor* was classified as a level three (low importance) decision, even though it is arguably the first one which dealt with the debts of socially-owned companies. *Jovičić* also belongs to the same group. Yet both these cases have triggered the Art. 28(1)b procedure, so presumably they are deemed to represent “well-established case-law”.

The purpose of the review of case law involving Serbia and socially-owned companies has been not only to discuss discrepancies in the Court’s reasoning, but also to illustrate inconsistencies which are incompatible with the concept of “well-established case-law”. Yet both the *Kačapor* and *Jovičić* decisions have served as grounds for introducing the summary procedure. While we have disputed the link between *Kačapor* and *Jovičić* due to the character of ownership and the date of finality of judgments in light of the *Marinković* case, the Court nevertheless has proceeded and used both cases as the benchmarks for “well-established case-law”. The problem with this set of cases – which may indicate the risks inherent in the summary procedure itself – is that the choice of the procedure and choice of the relevant case-law is difficult, if not impossible, to challenge or refute.

CONCLUSIONS

Reforms of the ECtHR system were needed in order to save it from the collapse that was imminent due to the growing number of incoming applications. The system deserves salvation due to its unique success and reputation, as it has managed to provide

¹⁰⁵ 1 = High importance – judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular state.

2 = Medium importance – judgments which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law.

3 = Low importance – judgments with little legal interest: those applying existing case-law, friendly settlements and striking-out judgments (unless these have a particular point of interest).

Short Survey of the Main Judgments and Decisions Delivered by the in 2009: Annual Report 2009 of the European Court of Human Rights 73, available at: http://www.echr.coe.int/Documents/Short_Survey_2009_ENG.pdf (accessed 30 May 2019).

¹⁰⁶ *Ibidem*.

¹⁰⁷ *Ibidem*.

effective protection of human rights all across Europe. At the same time however, its salvation should not compromise the basic constitutional principles of the Court's system. In particular, the reforms should not gravely affect the procedural fairness which the system itself wishes to promote. The goal cannot always justify the means employed, especially when sensitive issues of human rights, procedural fairness, and public interest are at stake.

The authors have tried to expose the innate weaknesses of the Court's jurisprudence on socially-owned property in order to illustrate how a low ranking judgment (or two) can easily be transformed into the "well-established case-law", leading to summary procedures without a genuine procedure on the merits and without remedies. Debts of socially-owned companies have thus become a public debt contrary to the general rules of international law and even the Court's own jurisprudence on public and private property. The case law that was borne out of the Art. 28 procedure, as illustrated in the cases involving Serbian socially-owned companies and their debts, demonstrates the risks inherent in the lack of remedies against the choice of relevant law for the case at hand, which can further lead to some significant errors in interpretation and decision-making. This in turn proves that the lack of procedural safeguards can indeed lead to substantive deficiencies.

One of the possible ideas for future reforms of the Court could be the introduction of some form of review mechanism for summary procedures, bearing in mind the importance of having settled jurisprudence, both for the Court and for effective national implementation of the Convention. Given that the Grand Chamber has been vested with power to review judgments of Chambers where the consistency of interpretation might be at stake, it seems appropriate to open the door for a new competence of the Grand Chamber to review Committees' judgments on precisely the same grounds, in order to remedy inconsistencies in interpreting "well-established case-law".