



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF JURIŠIĆ v. CROATIA (No. 2)

(Application no. 8000/21)

JUDGMENT

Art 8 • Positive obligations • Family life • Continued non-enforcement of judicial decisions granting applicant contact rights with son, not due to authorities' lack of diligence • Number of steps taken by authorities to enable contact, in line with best interests of the child, and mainly failing due to parents' conduct • Art 46 • Court examination in present case confined to new period and new domestic court decisions, following previous finding of an Art 8 violation

STRASBOURG

7 July 2022

FINAL

07/10/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Jurišić v. Croatia (No. 2),

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Marko Bošnjak, *President*,

Péter Paczolay,

Alena Poláčková,

Erik Wennerström,

Raffaele Sabato,

Lorraine Schembri Orland,

Davor Derenčinović, *judges*,

and Liv Tigerstedt, *Deputy Section Registrar*,

Having regard to:

the application (no. 8000/21) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Croatian national, Mr Stjepan Jurišić (“the applicant”), on 25 January 2021;

the decision to give notice of the application to the Croatian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 7 June 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. In its judgment in *Jurišić v. Croatia* ([Committee], no. 29419/17, 16 January 2020), the Court found a violation of Article 8 of the Convention on account of non-enforcement of judicial decisions granting the applicant contact rights with his son. The execution of that judgment is still pending before the Committee of Ministers. The present case concerns the applicant’s prolonged inability to have contact with his son.

THE FACTS

2. The applicant was born in 1970 and lives in Sesvetski Kraljevec. He was represented by Mr H. Čačić, a lawyer practising in Bjelovar.

3. The Government were represented by their Agent, Ms Š. Stažnik.

4. The background to the case may be summarised as follows.

5. In its judgment in *Jurišić v. Croatia* ([Committee], no. 29419/17, 16 January 2020), the Court found a violation of Article 8 of the Convention on account of non-enforcement of judicial decisions granting the applicant contact rights with his son, I.R., born in 2006. The execution of that judgment is still pending before the Committee of Ministers.

6. In 2021 the applicant lodged a fresh application with the Court, claiming that a subsequent decision adopted in his case, and his continued

inability to have contact with his son, had resulted in a fresh breach of his Convention rights.

7. The relevant facts, pertaining to the subsequent period (see *Jurišić*, cited above, § 53), may be summarised as follows.

I. FIRST SET OF ENFORCEMENT PROCEEDINGS

8. In the context of enforcement proceedings concerning contact between the applicant and I.R., as set out in the final court decision of 14 May 2010, according to which the applicant was to see I.R. every other weekend and part of the school holidays (see *Jurišić*, cited above, § 15), on 20 May 2019 the court heard a psychiatrist, J.G., who had been treating the child for four years. J.G. stated that subjecting the child to another expert evaluation, as had been ordered by the appellate court (see *Jurišić*, cited above, § 49), or hearing him in court would have further negative consequences for him. He suggested that the applicant and I.R. meet several times in his office so as to commence building a trusting relationship. The applicant refused this proposal, stating that he did not trust J.G. because he was biased and was “manipulating the child”. Such a proposal had been acceptable to the court but since the applicant refused it, the court had no power to order such meetings because it could not amend the final enforcement order.

9. On 29 January 2020 the Slavonski Brod Municipal Court (*Općinski sud u Slavonskom Brodu*) terminated the enforcement of the final court decision for the second time (for the first termination decision see *Jurišić*, cited above, § 48). Instead of obtaining a new expert evaluation, the court relied on an expert report of a psychologist, J.B., dated 6 September 2018, produced in relation to both parents and the child for the purposes of parallel criminal proceedings against the mother. That report found, as did all other experts in the case, that gradual contact between the applicant and the child would be more appropriate, and that the use of coercion in order to enforce the applicant’s contact rights as determined in an outdated enforcement order from 2010 would be counterproductive and would further traumatise the child. The court found that, because of the impossibility of enforcing the contact rights in the manner which had been determined in the decision of 14 May 2010, and the parties’ refusal to reach another agreement, and since the court in the enforcement proceedings had not had the authority to amend the final enforcement order, it had to discontinue the enforcement as the decision was impossible to enforce. In doing so, the court stressed that in the proceedings to amend the contact rights that were already ongoing (see paragraphs 11 and onwards below), the court would be in the position to precisely define the place, time and manner of contact, as well as the obligations of the parents with a view to developing an emotional closeness between the applicant and the child.

10. The applicant's appeal against that decision was dismissed by the Zagreb County Court (*Županijski sud u Zagrebu*) on 17 June 2020, and a constitutional complaint made by him was declared inadmissible by the Constitutional Court (*Ustavni sud Republike Hrvatske*) on 21 October 2020.

II. FRESH CONTACT PROCEEDINGS

11. Meanwhile, in a fresh set of contact proceedings instituted in 2019 by the child's mother, M.R., the Slavonski Brod Municipal Court appointed a guardian *ad litem* for the child. Having spoken to I.R., the guardian informed the court that the child "was willing to give his father one final chance to meet at Dr J.G.'s office, where he would have the chance to show that he was nice". The applicant did not accept that proposal.

12. The relevant Social Welfare Centre proposed that the applicant and his son meet every Friday in a neutral location and without the presence of the mother.

13. On 2 November 2020 the court issued a fresh contact order, determining supervised weekly contact between the applicant and his son in a neutral location, in line with the Centre's proposal. According to the court's decision, once that contact had become continuous and after a relationship of trust had been established, it was to take place every other weekend and during part of the school holidays. The relevant part of the court's decision reads as follows:

"It is evident from the parties' testimony, [and] the relevant documents in the case file ... that a number of proceedings have been conducted between the parties, arising from the fact that the mother ... did not enable [the applicant] any contact with his son, that despite being entrusted with the custody of I.R. ... she did not do anything to enable I.R. to become closer to [the applicant], nor has she ... accepted professional help which was offered to her throughout the proceedings. On the contrary, she did not answer the Centre's calls, [and] she caused delays in the proceedings with the aim of preventing their enforcement ...

On the other hand, [the applicant] for his part does not accept the fact that the child has such problems that he required medical help, moreover he calls into question the competence of the expert and of the child's medical diagnosis by the doctors who are treating his son. He not only questions the competence of the doctors and experts who have been appointed in the enforcement, criminal and non-contentious proceedings, but he also points out the lack of professionalism of all the court and Social Welfare Centre staff and insists on establishing contact [with the child] in the manner and place which is suitable for him. In [previous] proceedings ... [a doctor and a psychologist] have already recommended gradual familiarisation between the father and the son, without an abrupt separation of the child from the mother. Given the child's physical and psychological state, his psychotherapist, Dr J.G., called for establishing a gradual closeness between the father and the child, and offered his assistance in realising such contact, inviting the parents to his office (to which [the applicant] never consented). Further medical documentation also recommends the building of a gradual relationship between the father and the child.

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It is apparent from the parties' testimony and their analysis that no contact between the father and the child has ever taken place; that court decisions regulating the manner of such contact have been obstructed to the extent that the child was accompanied to the contact appointments by police officers and Centre's staff; that I.R.'s parents communicated exclusively through the court; that they never established a successful dialogue as regards their child's needs; and that during the father's visits to pick up the child and during communication between the parents, threats were uttered regardless of the fact that the child was present, and despite the fact that both parents were well aware that such conduct produced direct consequences on the physical and psychological well-being of their child.

The parties' testimony indicates that both of them are exclusively directed at realising their own rights as parents of I.R. Their conduct ... is exclusively determined with the aim of proving the existence of their rights as parents. Both parents' testimony was aimed at depicting the other parent as a person who was intolerant towards the child. Their statements are thus limited to justifying their own actions, stating that they meant well, whereby they both forget that their actions directly violate the right of their child to have both parents, and his right to have contact with and care from the parent with whom he does not live.

In other words, contact with the parent with whom a child does not live is the right of the child and not the parent; such contact is determined in the interest and for the benefit of the child and his entire physical and psychological development.

However, the actions of both parents, which are contrary to the interests of their own child, are preventing his proper development, because neither of them is allowing the child to think outside of the context of the parent with whom he is currently staying. This is particularly so because, in the midst of their dissatisfaction and their unresolved relationship, the parents are preventing the child from fulfilling his potential and from developing properly. The parents' relationship has resulted in their violating their child's rights by contact being obstructed, not by the institutions who make the decisions, but by the parents themselves.

Therefore, the institutions have not prevented contact, on the contrary, they have undertaken all necessary steps in order to protect the rights and interests of I.R., and those rights of the child are being protected in relation to his parents who are violating his rights, thereby ignoring the warnings of the institutions and experts (denigrated by both parties) and jeopardising the health of their own child by the behaviour of not only one, but both of them.

The foregoing is particularly visible from a number of decisions aimed at temporarily establishing dialogue and a consensus. However, none of those decisions was suitable and no agreement has ever been realised.

This kind of relationship between the parties only indicates their lack of interest and their laxity towards the rights of their child, because it is obvious that they both consider that those decisions were adopted because of the two of them and their rights, in other words each considers that the decisions were aimed at himself or herself. A very passive attitude is evident in both parents towards the rights of the child and his well-being, as is conscious and intentional manipulation by both parents with the aim of prolonging this and other sets of proceedings, which directly, consciously and deliberately influences the rights of the child.

It is important to stress that the Family Act bases the relationship between parents and children on the legal standard of 'the best interests of the child' and the responsibility of the parents in line with the Convention on the Rights of the Child. Obstruction of

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contact is surely a violation of I.R.'s rights. The mother's actions, by which she tries to completely isolate the child from his father, directly affect the rights of their child and cannot be justified by any concern or care for the child, because they are not that. Wrongful actions cannot be justified by good intentions because the court has not established in these proceedings that such intentions existed at all. This case is also one of the mother's attempts to legally prevent any contact between the father and the child, through the length of the proceedings and the lack of a final decision, all of which is finally a violation of the rights of the child, the custody of whom she has been entrusted with.

The mother has refused professional help from the Centre's staff ... she has prevented that Centre's staff from carrying out expert supervision of the family, and she has failed to respond to their invitations to take the child to psychological interviews, all of which confirms that she has undertaken all possible action in order to obstruct any sort of contact between the father and the child.

The child's father, on the other hand, during attempts at contact, and at times when he has seen that the child has refused to come with him, insists on and invites the police and psychologists ... Whenever he and the mother disagreed about any issue, including whether a certain toy was good for the child, he would call the police, which action, along with verbal conflicts with the mother, have caused and continue to cause the child to fear any such meeting of his parents, who are unable to agree in a mature way or to agree through normal dialogue any question relating to the child's needs. Furthermore, the [applicant's] approach towards the child's medical condition, which he denies, as well as his attitude to, and ignoring of, the expert opinions that have been obtained, is, on the one hand, a refusal by the father to accept that his son has medical issues and, at the same time, also affects his lack of preparation when addressing the child in situations when he is able to do so, as a result of which something intended as a joke is understood by the child as an insult and mockery. As a consequence, the child has become even more distant from his father and has confirmed his attitude towards him and his opinion of him.

Although the child's medical problems escalated during the enforcement proceedings, further traumatising of the child has resulted in I.R. having fears caused by his father and by separation from his mother; irrespective of whether those fears are justified, they exist and they affect the health of the child, which is why he must be treated. Although during the enforcement proceedings ... Dr J.G. had already proposed helping the child and his parents, and had proposed that they could all come to his office ..., [the applicant] refused and continues to refuse to cooperate with that doctor during these proceedings, considering him biased because he had given statements in previous proceedings, ignoring the fact that he has been treating I.R. for a number of years and that the doctor in his testimony only and always spoke in the best interests of the child.

...

This court could not accept M.R.'s proposal ... However, during the proceedings, I.R. has been alienated from his father ... The child's mother has to accept the fact that she needs to allow the child contact with his father for his own development ... Proper physical, emotional, intellectual, social and moral development of the child requires stability and constant support of the family and the environment. This is why it is important to ensure that children of separated parents have contact and a continued relationship with both parents ... All of the foregoing is pointed out so as to stress that any manipulation of the child or the institutions directly harms the child and his welfare; in cases where the parents do not wish to understand their role in the development and the life of their child, the child protection services have to do so ... Parents should not

be allowed to obtain protection of their interests ... at the expense of the best interests of the child.

In such situations, when the parents are not acting maturely and do not pay heed to the child's emotional needs, as in the present case, the child grows up insecure, he is afraid to love one parent or show love towards one parent in the presence of the other, whereas in reality the child longs for a good relationship with the other parent as well ... I.R.'s statements to the psychologist and his guardian indicate precisely that he is fighting with the desire to be with his father and have contact with him, while at the same time trying not to lose his mother's affection ... A child willing to 'give another chance' to his father is not a child who does not wish to have any contact, or a child who is afraid of his father or who is unsure of what he wants. I.R. is not unsure, he is an excellent student with friends at school and extracurricular activities. It is his parents who are unsure and who are using the child as a tool for resolving their difficult relationship ..."

14. On appeal by both parties, on 10 May 2021 the Zagreb County Court upheld the first-instance decision, which thereby became final.

III. SECOND SET OF ENFORCEMENT PROCEEDINGS

15. Following the above-mentioned new contact order, on 2 and 9 January 2021 the applicant went to the child's home with a representative of the Centre. The first time that they announced their presence, nobody opened the door, and the second time, I.R. answered the door and refused any contact with the applicant.

16. On 25 June 2021 the mother, M.R., brought the child to meet the applicant in accordance with the new contact order. The applicant and M.R. began arguing and the child left the premises, stating that he was fourteen years old, that his opinion mattered and that he did not wish to be there.

17. At the next scheduled contact appointment on 2 July 2021, the parents again argued and accused each other of abusing the child. I.R. protested, stating that nobody should be able to force him to do something that he did not want to do. The applicant replied to him that his mother would end up in prison for not allowing him to see his son. The child then left the room. According to the official report of the meeting, throughout that time the applicant was standing with crossed arms, not looking at the child or trying to make contact with him, and was focused on the Centre's employees, requesting them to help him to exercise his rights.

18. At the next scheduled contact appointment on 7 July 2021, the child immediately said that he did not wish to have contact with his father who, according to him, had abused him when he was younger.

19. On 20 and 27 August 2021 the child refused to speak to the father or to explain why he did not wish to have any contact with him.

20. On 8 September 2021 the applicant did not attend the scheduled contact session. The contact supervisor suggested to the child that he write a letter to his father expressing his emotions.

IV. CRIMINAL PROCEEDINGS

21. On 15 July 2020 the Slavonski Brod Municipal Court found M.R. guilty of obstructing the applicant's contact with his son between December 2015 and August 2016 and sentenced her to a suspended prison sentence of ten months. That judgment was upheld on appeal.

22. On 23 September 2021 the Slavonski Brod Municipal Court found M.R. guilty of obstructing the applicant's contact with his son between April and June 2015 and sentenced her to a suspended prison sentence of nine months.

23. Between April 2019 and February 2021, the Centre lodged three further criminal complaints against M.R. for the non-enforcement of decisions relating to the protection of children for three further periods, from October 2018 and February 2021. Those criminal proceedings are still ongoing.

RELEVANT LEGAL FRAMEWORK

24. The relevant provisions of domestic law in force at the material time are set out in *K.B. and Others v. Croatia* (no. 36216/13, §§ 96 and 101-06, 14 March 2017).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that, despite all the fresh decisions in his case, he had still not had regular contact with his son, in breach of Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

1. *The parties' submissions*

26. The Government submitted that the present application entirely related to the execution of the Court's earlier judgment of 16 January 2020, which was within the exclusive competence of the Committee of Ministers. No new proceedings having been instituted in the case since the

Court's initial judgment, the termination of the first enforcement order and the adoption of a new one had merely formed part of the measures undertaken by the domestic authorities in the process of execution of the Court's initial judgment. Those measures were regularly monitored by the Committee of Ministers and their examination by the Court thus fell outside of its competence *ratione materiae*.

27. The Government further submitted that in cases such as that of the applicant, where there were justified specific reasons which prevented applicants from having contact with their children, the Committee of Ministers was not precluded from closing the execution process, thereby implying that the State had fulfilled its obligations under Article 46 of the Convention, and that further measures were either impossible or unnecessary.

28. The applicant maintained that his application had not exclusively been brought in relation to the respondent State's failure to execute the Court's judgment of 16 January 2020. In the meantime, new decisions had been adopted which further violated his rights under the Convention. Specifically, the enforcement of an earlier final and enforceable court order regulating his contact with his son was unlawfully terminated and a fresh contact order had been adopted.

2. The Court's assessment

29. The question of compliance by the High Contracting Parties with the Court's judgments falls outside its jurisdiction if it is not raised in the context of the "infringement procedure" provided for in Article 46 §§ 4 and 5 of the Convention (see *The United Macedonian Organisation Ilinden – PIRIN and Others v. Bulgaria* (no. 2), nos. 41561/07 and 20972/08, § 56, 18 October 2011). Under Article 46 § 2, the Committee of Ministers is vested with the powers to supervise the execution of the Court's judgments and evaluate the measures taken by respondent States. However, the Committee of Ministers' role in the sphere of execution of the Court's judgments does not prevent the Court from examining a fresh application concerning measures taken by a respondent State in execution of a judgment if that application contains relevant new information relating to issues undecided by the initial judgment (see *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 61-63, ECHR 2009).

30. The relevant general principles in this area were summarised in *Moreira Ferreira v. Portugal* (no. 2) ([GC], no. 19867/12, §§ 47-48, ECHR 2017 (extracts)), and *Egmez v. Cyprus* ((dec.), no. 12214/07, §§ 48-56, 18 September 2012). The Court would stress that, in the specific context of a continuing violation of a Convention right following adoption of a judgment in which the Court has found a violation of that right during a certain period of time, it is not unusual for the Court to examine a second application concerning a violation of that right in the subsequent period (see, among other authorities, *Ivanțoc and Others v. Moldova and Russia*,

no. 23687/05, §§ 93-96, 15 November 2011, regarding continuing detention; *Wasserman v. Russia* (no. 2), no. 21071/05, §§ 36-37, 10 April 2008, as to the non-enforcement of a domestic judgment; and *Rongoni v. Italy*, no. 44531/98, § 13, 25 October 2001, concerning length of proceedings). In such cases the ‘new issue’ results from the continuation of the violation that formed the basis of the Court’s initial decision. The examination by the Court, however, is confined to the new periods concerned and any new complaints invoked in this respect (see, for example, *Ivanțoc and Others*, cited above).

31. Turning to the present case, the Court notes that in its judgment of 16 January 2020 the Court found a violation of the applicant’s rights guaranteed under Article 8 of the Convention on account of the continued non-enforcement of a domestic court order regulating his contact with his son. In view of the above case-law (see paragraph 30 above, in particular *Egmez*, cited above, § 53), in the specific context of a continuing violation of an applicant’s rights, it would not be unusual for the Court to examine a second application concerning a violation of that right in the subsequent period.

32. In addition, following the adoption of the Court’s judgment of 16 January 2020 new decisions were adopted by the domestic authorities, namely the decision of 29 January 2020 terminating the enforcement of a previous contact order, and the new contact order of 2 November 2020. The applicant expressly complained about those new domestic decisions, in which the national courts proceeded to examine new developments in the parties’ situation, new expert opinions, and had regard to the child’s increased age and his wishes when they carried out a new balancing of interests. These decisions thus constitute new facts, which the Court has the jurisdiction to examine (compare *Moreira Ferreira* (no. 2), cited above, § 47; *V.D. v. Croatia* (no. 2), no. 19421/15, § 51, 15 November 2018; *Egmez*, cited above, § 52; and *Liu v. Russia* (no. 2), no. 29157/09, §§ 61-68, 26 July 2011).

33. In such circumstances, the Court considers that the ‘new issue’ in this case has resulted from the continuation of the violation that formed the basis of the Court’s initial judgment of 16 January 2020, as well as from the new domestic court decisions in the case. The examination by the Court in the present case, however, will be confined solely to this new period and the new decisions concerned (see, for example, *Ivanțoc and Others*, cited above).

34. Consequently, the Government’s preliminary objection must be dismissed.

35. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits*1. The parties' submissions*

36. The applicant maintained that the termination of the enforcement proceedings concerning the enforcement order of 14 May 2010 had been unlawful and contrary to his interests and the best interests of the child, which were to benefit from the care of both parents. Moreover, the new contact order had been vague and unenforceable as it did not specify the time period for which the applicant would have contact for two hours every Friday, nor when such contact could become more frequent. M.R. was still refusing any form of contact between him and the child and her refusal remained unpunished by the relevant authorities.

37. The applicant also strongly denied the Government's suggestion that he had been in part responsible for the fact that no contact was taking place between him and his son. He explained that the psychiatrist, J.G., had considered him abusive from the outset, although he had never been abusive or violent towards the child. He was also the only expert in the case who had considered that enforcing a final court contact order had not been necessary. In his view, J.G. was biased, and he did not wish to meet the child in his office in the presence of M.R.

38. The Government maintained that, following the Court's first judgment in the applicant's case, the domestic authorities had removed two fundamental obstacles to the establishment of contact between the applicant and his son. Firstly, by discontinuing the enforcement of the 2010 decision, they had prevented additional trauma to the child by further attempts at forcible removal. The reasons for that discontinuation had been the child's continuous refusal of contact, and his physical and verbal aggression and signs of stressed behaviour. All the experts in the case had therefore concluded that it had been in the child's best interests that his contact with the applicant develop gradually. Secondly, the amendment of the 2010 enforcement order had introduced precisely such a gradual contact between the applicant and his son, where the child was to feel safe, while respecting his views and the applicant's wishes. In the Government's view, that order had created the preconditions for the establishment of meaningful contact.

39. The Government further pointed out the active involvement of the relevant authorities, in particular the Social Welfare Centre and its employees, in the attempts to establish contact and find a compromise between the parents. The Centre had also lodged additional criminal complaints against M.R. The child's guardian *ad litem* had enabled him to be heard in the domestic proceedings. In view of the above, the authorities had invested considerable efforts in making contact between the applicant and his son possible.

40. The Government pointed out that the applicant had refused any possibility of a compromise agreement on the manner, time and place of

contact with his son, in particular by refusing to meet in J.G.'s office, despite the child's wishes. Moreover, between February and July 2020, and between February and April 2021, the applicant had made no attempt to establish contact with the child. The Government concluded that the State could not be held liable for the lack of willingness on the applicant's part to reach a compromise at the request of his own child.

2. *The Court's assessment*

41. As already stated, the present case concerns the continued non-enforcement of judicial decisions whereby the applicant had been granted contact rights with his son (see paragraph 31 above). As established in its previous judgment of 16 January 2020, the applicant had been unable to have any meaningful contact with his son practically since birth (see *Jurišić*, cited above, § 109). However, for reasons explained above (see paragraph 31), in the present case the Court's task consists in examining whether in the additional period which falls within the Court's competence *ratione materiae* – that is to say, from January 2020 onwards – the domestic authorities took all necessary steps that could reasonably be demanded in the specific circumstances of the case to facilitate contact between the applicant and his son.

42. The relevant principles regarding the State's positive obligation under Article 8 of the Convention in cases concerning enforcement of contact rights have been summarised in *Ribić v. Croatia* (no. 27148/12, §§ 88-89 and 92-95, 2 April 2015), and *K.B. and Others v. Croatia* (no. 36216/13, §§ 143-44, 14 March 2017). The Court would stress that in this type of case the adequacy of the measures taken is to be judged by the swiftness of their implementation, as the passage of time could have irremediable consequences for relations between the applicant and his son and might result in a *de facto* determination of the matter (see *Ribić*, cited above, § 93).

43. The Court has also held that in cases such as the present one, where children resist contact with one parent, Article 8 of the Convention requires States to try to identify the causes of such resistance and address them accordingly (see *K.B. and Others v. Croatia*, cited above, § 144). It is an obligation of means, not of result, and may require preparatory or phased measures (see *Ribić*, cited above, § 94). The cooperation and understanding of all concerned will always be an important ingredient (*ibid.*). However, since the authorities must do their utmost to facilitate such cooperation, the positive obligations under Article 8 require them to take measures to reconcile the conflicting interests, keeping in mind the best interests of the child as a primary consideration (see *Ribić*, § 94, and *K.B. and Others v. Croatia*, § 144, both cited above).

44. The Court would further reiterate that the right of a child to express his or her own views should not be interpreted as effectively giving an unconditional veto power to children without any other factors being

considered and an examination being carried out to determine their best interests (see *K.B. and Others v. Croatia*, cited above, § 143). Were a court to base its decision on the views of children who are palpably unable to form and articulate an opinion as to their wishes – for example, because of a loyalty conflict and/or their exposure to the alienating behaviour of one parent – such a decision could run contrary to Article 8 of the Convention (*ibid.*).

45. Turning to the present case, the Court notes that immediately after the Court's first judgment in the case, the domestic courts terminated the enforcement of the judgment of 14 May 2010 as it was impossible to enforce. Specifically, that judgment had granted the applicant ample contact with his son, including every other weekend, but no kind of enforcement had been productive, including coercive measures. The experts therefore unanimously concluded that imposing such ample contact between the applicant and his son, who had been estranged from him, was not in the child's best interests. Instead, they proposed that contact between the applicant and I.R. be introduced gradually. The Court notes in this connection that the domestic courts, in a well-reasoned judgment, clearly explained the reasons for their decision, which the Court sees no reason to disagree with.

46. In November 2020 the relevant court adopted a fresh contact order, which was aimed at gradually re-establishing the contact between the applicant and his son (see paragraph 13 above). Again, in a well-reasoned decision, the court examined the family situation as a whole, noting the parents' very poor relationship and their failure to cooperate. Whereas M.R. had no intention whatsoever of cooperating with the social services, the applicant was also rather insistent on his demands, instead of being attentive to the child's wishes. The Court notes in particular that, despite the child's express wish to meet in the office of the psychiatrist, J.G., who had treated him for a number of years, the applicant repeatedly refused to do so (see paragraphs 8 and 11 above). Despite any negative opinion the applicant may have had of J.G., it is difficult for the Court to accept such an unaccommodating attitude of the applicant in the circumstances, who seemed to have been more motivated by the idea of enforcing his own rights than by the best interests of the child.

47. Moreover, the Court cannot but note that the applicant remained uncooperative during several attempts to realise the contact as determined by the court's decision of 2 November 2020. In particular, it notes that during a contact meeting held on 2 July 2021, the applicant told I.R. that his mother would go to prison, after which the child refused further contact with him and left the premises (see paragraph 17 above). In addition, on 26 June 2021 the applicant fought with M.R. in front of the child, which also caused him to leave the meeting (see paragraph 16 above).

48. The Court is aware of the fact that contact disputes are by their very nature extremely sensitive for all the parties concerned, and it is not necessarily an easy task for the domestic authorities to ensure enforcement of

a court order where one or both parents' behaviour is far from constructive (see *Krasicki v. Poland*, no. 17254/11, § 90, 15 April 2014). The domestic authorities' task in the present case has been made particularly difficult by the negative attitude of M.R. and the fact that the child refused to meet with his father. However, the Court notes that during the period which falls within its competence, the domestic authorities undertook a number of steps towards enabling the applicant's contact with his son. They adopted a new contact schedule, in line with the established best interests of the child, and organised a number of attempts at such contact, which mainly failed owing to the conduct of both parents. They also found M.R. guilty of obstructing the applicant's contact with his son in two sets of criminal proceedings, and lodged three further criminal complaints against her in that respect (see paragraphs 21-23 above). Bearing in mind that the positive obligations of the State in cases of this sort are ones of means and not of result, and in the light of the applicant's own questionable conduct as explained above, the Court does not consider that the failure to enforce the contact order may be attributed to a lack of diligence on the part of the relevant authorities (compare *Gobec v. Slovenia*, no. 7233/04, § 152, 3 October 2013).

49. It follows that there has been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares*, by a majority, the application admissible;
2. *Holds*, unanimously, that there has been no violation of Article 8 of the Convention;

Done in English, and notified in writing on 7 July 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Liv Tigerstedt
Deputy Registrar

Marko Bošnjak
President

JURIŠIĆ v. CROATIA (No. 2) JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Schembri Orland;
- (b) joint dissenting opinion of Judges Poláček, Wennerström and Sabato.

M.B.
L.T.

CONCURRING OPINION OF JUDGE SCHEMBRI ORLAND

1. I was among the majority in finding the application admissible and also in finding that there was no violation of Article 8 of the Convention in this particular case.

2. The facts as presented echo an all too familiar scenario in custody and contact sagas. In the first set of proceedings, which I will refer to as *Jurišić (no. 1)*¹, the applicant was found to have suffered a violation of Article 8 of the Convention due to the non-enforcement of three contact orders. In practice, the applicant was effectively impeded from having any meaningful contact with his son over a prolonged period owing, generally, to what could only be seen as the total impotence of the domestic legal system to enforce its own contact orders.²

3. In its first judgment, the Chamber considered that the inordinate delay in the enforcement of the contact order of 14 May 2010 had violated the applicant's right to respect for his family life³ and concluded that the domestic authorities had not taken the necessary steps to facilitate the reunion between the applicant and his son that could have reasonably been expected of them. This had resulted in a *de facto* determination of the matter at issue as the applicant had seen his son only sporadically since he was born.

4. One cannot but observe that this case spans a decade of rebukes, frustration, and obstructionism perpetrated by the recalcitrant custodial parent (the mother in this case), with little to no regard for the best interests of the child, compounded by delays and the general inertia of the courts and State authorities in securing the enforcement of their own orders. One marvels at the inability of family courts and the domestic legal system to actively respond to what is clearly contempt of their own authority in such a scenario. The parental alienation perpetrated by the mother was complete, as evidenced by the child's assertion that his father had abused him⁴, when the facts show that this was physically impossible.

¹ *Jurišić v. Croatia* [Committee], no. 29419/17, 16 January 2020.

² *Jurišić (no. 1)* referred to three contact orders, each covering specific periods of time (ibid., §§ 8, 15 and 61). The first contact order was issued on 19 June 2007, only a month after the applicant applied to the court and while I.R. was still a baby. This order was never properly enforced. In 2009, once I.R. was older, the applicant sought an amendment of the court's first contact order and his request was granted on 14 May 2010, allowing him to spend every other weekend with his son. However, the ensuing enforcement of that decision was particularly lengthy and was still ongoing, more than nine years later at the time of the first judgment. The third order was given on 26 June 2012.

³ More precisely, his right to enjoy a meaningful relationship with his child.

⁴ See paragraph 18 of the judgment in the present case.

The present application

5. The present complaint addresses both the decision of 29 January 2020 terminating the enforcement of the May 2010 contact order, and the new contact order of 2 November 2020.

6. The Chamber agreed that these facts represented a fresh application, rather than a continuing violation within the competence of the Committee of Ministers, considering that in giving the aforementioned orders, the national courts had proceeded to examine new developments in the parties' situation and new expert opinions, and had had regard to the child's increased age and his wishes when they had carried out a new balancing of interests. These decisions thus constituted new facts, which the Court had the jurisdiction to examine.

The passage of time and contact orders

7. There is, in a way, a legal dilemma where a continuing violation occurs in the context of custody or contact proceedings. Unlike continuing delays in judicial proceedings, or delays in securing the release of victims of unlawful detention, for example, the enforcement of a court judgment finding a violation of a contact order(s) cannot simply be put into effect without a further assessment, owing to the passage of time. Instead, the restoration or introduction of contact necessitates further consideration of the child's best interests, which are always central to such an evaluation.

8. The child is the unwilling participant in these proceedings, which are not strictly adversarial but tripartite, since the interests of the parents are balanced and weighed with reference to the interests of the child, represented often by a guardian *ad litem* (as in this case) or by the family court judge. These interests are evaluated at the time of the order, and are, by virtue of their very nature, to be determined *rebus sic stantibus*. Whilst the ultimate aim is to introduce, maintain and enforce meaningful contact between the parent and child, the practical arrangements of that contact must necessarily reflect the situation prevailing at that particular time. The child's age, maturity and volition come to play an increased role with the passage of time.

9. Lest this be seen as condoning serial contempt of court, I must clarify that the refusal or manifest reluctance of the child (or young adult) to see the father on the latter's own terms must be given due consideration by the courts irrespective of the path travelled to the court. Children have a voice, and the older and more mature they are, the more significant and decisive are their wishes in the context of custody and contact proceedings. In this case, the child's age meant that he needed to be sufficiently involved in decisions which directly affected him. The enforcement of contact orders, furthermore, becomes exponentially more problematic because the contact order is imposed on the custodial parent and not on the child for obvious reasons. The

impact of the passage of time in such cases has been often recognised by the Court.⁵ In this situation, the duty of the domestic authorities is to facilitate contact, and to take such meaningful steps as can reasonably be demanded in the particular circumstances of each case by drawing the two opposing forces (father and child) closer and enabling a safe environment for the child, even if, and indeed despite the fact that, the child’s perceptions are moulded by years of parental alienation.

10. The question before the Court, therefore, is to determine whether the authorities have satisfied their positive obligations in this regard, having due consideration to the best interests of the child at the time of the fresh proceedings.⁶

Termination of the enforcement of the order of 14 May 2010

11. The enforcement of the order of 14 May 2010 was terminated on 29 January 2020 because the court deemed it to be unenforceable. Reference was made to fresh proceedings to amend the contact rights, in which the court would have the authority to regulate contact. This reasoning on the part of the domestic courts cannot be faulted. The court relied on the opinion of an expert, a psychiatrist who had been familiar with the case for a number of years. The applicant gave no reason to justify his refusal to cooperate other than his lack of trust in this expert, without further substantiation of that opinion.

The new contact order of 2 November 2020

12. This order provided for weekly supervised contact between the applicant and the son in a neutral location based on the wishes expressed by the child to the guardian *ad litem*. The court intended this to be a temporary situation which would pave the way to a gradual increase in contact.

⁵ As was stated in *P.F. v. Poland* (no. 2210/12, § 56, 16 September 2014): “Another important factor in proceedings concerning children is that time takes on a particular significance, because there is always a danger that any procedural delay will result in the *de facto* determination of the issue before the court (see *W. v. the United Kingdom*, 8 July 1987, §§ 62-64, Series A no. 121).”

⁶ The Court has repeatedly held that in matters relating to child custody the interests of the child are of paramount importance. The child’s best interests must be the primary consideration (see, to that effect, *Gnahoré v. France*, no. 40031/98, § 59, ECHR 2000-IX) and may, depending on their nature and seriousness, override those of the parents (see *Sahin v. Germany* [GC], no. 30943/96, § 66, ECHR 2003-VIII). In particular, a parent cannot be entitled under Article 8 of the Convention to have measures taken which would harm the child’s health and development (see *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 169, ECHR 2000-VIII, and *P., C. and S. v. the United Kingdom*, no. 56547/00, § 117, ECHR 2002-VI).

13. In arriving at that conclusion, upheld on appeal, the domestic court referred to the acrimonious approach of both parents, and their lack of cooperation with the institutions, as well as their disregard for the best interests of their son. The court *inter alia* chastised the mother for isolating her son from the father and attempting to legally prevent contact between the applicant and his son. The applicant also earned the court's criticism for his approach to the child's medical condition and to the opinion of the experts appointed in the case.

14. The contact plan ordered by the court was clearly intended to set in motion steps which could lead to more meaningful contact between the applicant and his son. Unfortunately, attempts to put the contact order into effect failed in the main because of the son's determination not to see his father and because of the – not altogether unsurprising – reactions of the father.

Positive obligations under Article 8 and the best interests of the child – no unconditional veto

15. There is no doubt that the continuous and prolonged non-enforcement of the earlier contact orders were instrumental in obstructing a meaningful family relationship between father and son. However, although such situations may give the family courts the impression of treading water, the past breach by the mother and the courts' failures cannot of themselves be sufficient to warrant an absolutist approach to fresh contact orders. In this respect the State is obliged to safeguard the best interests of the child. On the other hand, the child's views are pertinent but do not necessarily override or veto the parent's interests, especially in having regular contact with the child (see, *mutatis mutandis*, *Raw and Others v. France*, no. 10131/11, § 94, 7 March 2013).

16. In the present case, the Court considered that the decision of the domestic court was well reasoned in both instances. Whilst not impinging on its previous judgment where the respondent State was found to have violated the Convention, the current judgment is circumscribed by the new facts which formed the subject matter of the case and which required a fresh analysis.

17. The lesson to be drawn from this case is that great vigilance is required of the domestic courts to be proactive in their enforcement of contact orders and parental rights, if necessary and where appropriate, with the surgical use of effective sanctions, particularly where the child becomes a victim of parental alienation. This is in itself essential to further the child's best interests and the child's right to eventually enjoy a meaningful relationship with both parents.

JOINT DISSENTING OPINION OF JUDGES POLÁČKOVÁ, WENNERSTRÖM AND SABATO

INTRODUCTION

1. We regret that we cannot share the majority’s opinion that the application is admissible. We consider rather that the Court has no jurisdiction and that the application is inadmissible *ratione materiae*.

2. As the majority rightly observe in paragraph 5 of the judgment in the present case (hereinafter referred to – for the sake of brevity – as “*Jurišić (no. 2)*”), its background is to be found in the Court’s previous judgment in *Jurišić v. Croatia* ([Committee], no. 29419/17, 16 January 2020 – from now on, for clarity’s sake, “*Jurišić (no. 1)*”).

3. In *Jurišić (no. 1)* the Court found a violation of Article 8 of the Convention since domestic judicial decisions granting the applicant, who was not entitled to custody, contact rights with his son had remained unenforced (for details and references, see paragraph 8 of *Jurišić (no. 2)*).

4. After *Jurišić (no. 1)*, Croatia’s courts held – for reasons that need not be commented on here – that it was impossible for them to enforce the domestic final decision of 14 May 2010, which constituted the core of the State’s international obligation in the light of *Jurišić (no. 1)*. The domestic proceedings were thus terminated (see paragraphs 8-10 of *Jurišić (no. 2)*). It was at this point the child’s mother who instituted a fresh set of proceedings resulting in a new contact order (see paragraphs 11-14), which likewise was not enforced domestically (see paragraphs 15-20).

5. What appears most important to us for the assessment of the legal implications of the present case is that – as again the majority correctly note in the same paragraph 5 of *Jurišić (no. 2)* – supervision of the execution of *Jurišić (no. 1)* is still pending, as of the date of the Chamber’s deliberations, before the Committee of Ministers, which at its 1411th meeting (September 2021 - DH) examined the Action Plan dated 11 June 2021 submitted by the Government.

COMPETENCE OF THE COURT IN FOLLOW-UP CASES AS AN EXCEPTION TO THE SUPERVISORY ROLE OF THE COMMITTEE OF MINISTERS

6. On the basis of the above background, it is possible for us to argue that we respectfully disagree with the majority’s finding that the application is admissible.

7. As is spelled out very clearly in paragraphs 32 and 33 of *Jurišić (no. 2)*, the majority found that, since the applicant had expressly complained about the two “new domestic decisions” (the order of 29 January 2020 terminating the enforcement of the initial contact order, and the new contact order of

2 November 2020), which – in the majority’s view – “constitute[d] new facts”, and since there was a “continuation of the violation that formed the basis of the Court’s initial judgment”, which – again in the majority’s view – could be considered a “new issue” for the finding of a fresh violation, “the Court ha[d] the jurisdiction to examine” the application, but “confined solely to this new period and the new decisions concerned”.

8. The majority thus identified the application as apt to be regarded as an admissible so-called “follow-up” case under the Court’s case-law.

9. We should point out in this connection that the Court’s case-law has stated that the Court’s judgments are in principle declaratory and that, by Article 46 of the Convention, the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers, and the Court being unable to assume any role in this dialogue. As a result, the Court usually refuses to examine complaints concerning the failure by States to execute its judgments, declaring such complaints inadmissible *ratione materiae* (see, most recently, *Teresa Jordan v. the United Kingdom* [Committee] (dec.), no. 48066/21, §§ 12-17, 31 May 2022).

10. As an exception to the above principle, the Court has, however, found that it had the competence to entertain complaints in what appear to be three categories of follow-up cases in which “new facts” emerged, namely:

- (a) cases involving a “fresh examination”, that is, where the authorities had carried out a “fresh domestic examination” of the matter disclosing “new facts” by way of implementation of one of the Court’s judgments, whether by reopening the proceedings or through the initiation of an entirely new set of domestic proceedings;
- (b) cases of a “continuing violation”, that is, in the specific context of “a continuing violation of a Convention right” following the adoption of a judgment in which the Court had found a violation of that right over a certain period of time, so that it was possible for the Court to examine a second application concerning, as “new facts”, a violation of that right in the subsequent period (for example, in cases of “continuing detention” and “length of proceedings”);
- (c) cases of “misinterpretation”, that is, where there were allegations of a “misinterpretation of the Court’s judgment to be enforced domestically” (in principle, in the context of the reopening of proceedings), which might constitute “new facts” as an autonomous breach of Article 6 § 1 and Article 46 § 1 of the Convention.

11. In the above circumstances the powers assigned to the Committee of Ministers by Article 46 to supervise the execution of the Court’s judgments and evaluate the measures taken by States under this Article will not be encroached on where the Court has to deal with relevant “new information” in the context of a fresh application.

12. The above principles result from the Court’s rulings in recent times in, among other authorities, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) ([GC], no. 32772/02, ECHR 2009), *United Macedonian Organisation Ilinden - PIRIN and Others v. Bulgaria* (no. 2), (nos. 41561/07 and 20972/08, 18 October 2011), *Egmez v. Cyprus* ((dec.), no. 12214/07, 18 September 2012) and *Bochan v. Ukraine* (no. 2) ([GC], no. 22251/08, ECHR 2015). They have been summarised most recently in *Moreira Ferreira v. Portugal* (no. 2) ([GC], no. 19867/12, §§ 47-48, 11 July 2017).⁷

⁷ It should be noted that in *Moreira Ferreira* (no. 2), unlike, for example, in *Verein gegen Tierfabriken* (no. 2), the Grand Chamber concluded that the “new facts” could also consist of decisions by the domestic courts refusing to reopen national proceedings if they had conducted a re-examination on the merits of a number of aspects of the disputed issue. The Grand Chamber, however, held that there had been no misinterpretation of the Court’s previous judgment, and that reopening did not appear to be the only way to execute it. As for the aspect we are most concerned with, the Grand Chamber concluded that the supervision procedure in respect of the execution of the judgment which was still pending before the Committee of Ministers did not prevent the Court from considering a new application, in so far as it included new aspects which had not been determined in the initial judgment.

For the reasons stated below in this note, we need not question, in the present context, the approach of the Grand Chamber in *Moreira Ferreira* (no. 2), but we associate ourselves with the critical analysis made by our colleagues Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølborg and O’Leary in their joint dissenting opinion annexed to that judgment, also bearing in mind that a similar association has been made by Judges Eicke, Kucsko-Stadlmayer and Schukking in their joint separate opinion annexed to the judgment in *Tsonyo Tsonev v. Bulgaria* (no. 4) (no. 35623/11, 6 April 2021). At any rate we think that the above-mentioned dissenting judges in *Moreira-Ferreira* (no. 2) developed a very strong argument resulting in the consideration that “a refusal by the domestic authorities to reopen proceedings following a judgment finding a violation of Article 6 § 1 as delivered by the Court cannot be described as a new fact” (see paragraph 7 of the dissenting opinion).

Our present opinion does not need to take a stance on this subject since in *Jurišić* (no. 2) there is no allegation of a misinterpretation of the Court’s previous judgment, the reopening took place, but the fresh domestic set of proceedings was terminated and a new set of proceedings was started: as we try to explain in detail in the present opinion, what matters for us is that the activities taking place at domestic level were more apparent than real, and they resulted in mere passivity on the part of the domestic authorities.

In *Jurišić* (no. 2), however, as in *Moreira Ferreira* (no. 2) and unlike in *Tsonyo Tsonev* (no. 4), supervision of the execution of the initial judgment is still pending before the Committee of Ministers (see paragraph 5 of the present opinion). This leads us to clarify that we consider – along with the dissenting judges in both *Moreira Ferreira* (no. 2) and *Tsonyo Tsonev* (no. 4) – that, in the relevant situations, the Court should have no jurisdiction regardless of whether execution is still pending or has been closed. Having said this, for the purposes of the present opinion there is no need for us to examine the further, interesting distinction introduced by the dissenting judges in *Tsonyo Tsonev* (no. 4) (namely that the *Moreira Ferreira* (no. 2) rule on jurisdiction could not at any rate be applied if the Committee of Ministers had closed the execution process, a situation not occurring in *Jurišić* (no. 2)).

CAN A “CONTINUING VIOLATION” COEXIST WITH A “FRESH EXAMINATION”?

13. We consider that the situation in the present case does not fit into any of the categories that the Court’s case-law has developed in order to accept some follow-up cases as admissible.

14. We will avoid dwelling on whether the present case falls into the category of “misinterpretation” of the Court’s initial judgment, a category indicated under (c) in paragraph 10 of this opinion, which from the structural point of view appears as a form of “fresh examination” entailing specific peculiarities. Indeed, the majority in *Jurišić (no. 2)* do not include any reasoning referring to a possible domestic judicial misinterpretation of *Jurišić (no. 1)* (see, as a recent example of a finding of “misinterpretation”, *Serrano Contreras v. Spain (no. 2)*, no. 2236/19, 26 October 2021).

15. The majority, indeed, seem to rely jointly (see paragraph 33 of *Jurišić (no. 2)*) on categories (a) and (b) listed in paragraph 10 of this opinion, that is to say, those involving a “fresh domestic examination” of the case and a “continuing violation” for a period of time subsequent to the one initially examined by the Court.

16. We respectfully consider that the two categories employed by the majority are mutually exclusive: either the previous violation continues, or a new violation ensues from a fresh domestic examination of the case, and *tertium non datur*.

WAS THERE A FRESH EXAMINATION OF THE CASE DISCLOSING NEW FACTS?

17. Regardless of the above considerations concerning the observance of the principle of non-contradiction in *Jurišić (no. 2)*, we consider that the “fresh examination of the case” by the domestic judiciary does not disclose any “new facts”.⁸

18. As we have mentioned in paragraphs 4 and 7 of this opinion, the majority consider that the first of the two “new ... decisions” taken by the domestic courts was the order of 29 January 2020 terminating the enforcement of the initial contact order, on the basis that it was impossible for them to enforce it.

19. We cannot avoid remarking that the applicant, in essence, had complained about the merely apparent – but not genuine – reopening of those proceedings, which had previously led to a similar termination: the new termination was confirmation that the Croatian authorities still refused to

⁸ See, for a clear specification that a fresh domestic examination must disclose “new facts” in order to be relevant to the admissibility of a follow-up case, *Xanthi Turkish Union and Others v. Greece* and *Ayşe Galip v. Greece*, nos. 55557/12 and 73646/13 (dec.), 10 December 2015, especially §§ 27 and 32.

enforce the domestic final decision of 14 May 2010, which was the basis of the finding of a violation in *Jurišić (no. 1)*. The applicant indeed sought the finding of a new violation on the basis of that refusal.

20. While we can thus concede that – from the formal point of view – there was a “fresh examination” of the case, which also entailed hearing an expert, it is undisputed that the majority themselves did not identify in such a “fresh examination” the requisite elements to find a new violation of the Convention. Rather, they found that there was no violation (and, on the basis of the standard practice of the Court, we had to find the same, along with them, once our position on admissibility came out as being supported only by a minority – see point 2 of the operative part of *Jurišić (no. 2)*).

21. Therefore, the issue arises: can the Court, by way of accepting a follow-up application allegedly based on a “fresh examination” of the case which, according to the applicant, constituted a new violation, end up with a judgment on the merits finding no violation?⁹

22. In our view, while appearing to abide by the Court’s case-law on “fresh examinations”, the majority have, in this instance, conferred on the Court the Committee of Ministers’ tasks under Article 46 § 2 of the Convention and pronounced a sort of “revision” of the Court’s previous judgment (outside the strict limitations laid down by the present Rule 80 of the Rules of Court).

23. We further consider that new facts that are not such as to entail new violations can be freely submitted by the “injured party” (that is, the original applicant before the Court) under Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements (adopted by the Committee of Ministers on 10 May 2006 at its 964th meeting and amended on 18 January 2017 at its 1275th meeting). Indeed, Rule 9 § 1 provides that “the Committee of Ministers shall consider any communication from the injured party with regard to ... the taking of individual measures”. Rule 8 § 2 (b) also refers to “information and documents ... provided to the Committee of Ministers ... by the injured party”, which are in principle accessible even to the public pursuant to the same Rule.

24. The practice of the Committee of Ministers shows that the flow of information of this kind is indeed very relevant, and that the Committee also adopts decisions (in which, according to the usual wording, it “declares, having examined the measures taken by the respondent state ..., that it has exercised its functions under Article 46, paragraph 2, of the Convention in these cases and decides to close [their] examination”) when the measures taken, as resulting from the information submitted, are such that they do not literally implement the judgment of the Court, for good reasons that emerge subsequently to the judgment but are nevertheless valid for the Committee to

⁹ See the previous footnote as to the situation, similar in a way but different in other respects, in *Moreira Ferreira (no. 2)* (cited above).

consider that supervision can be closed (see, for an example of the closure of supervision of cases without full implementation of contact orders, Resolution CM/ResDH(2019)121, which mentions in its fifth recital that contact between applicants and their children has only been re-established in some cases, while the situation of other applicants has been reassessed by the national courts “in the light of the Court’s judgments”, and children of other applicants have meanwhile come of age).¹⁰

25. In full accordance with the above, when applications are lodged as follow-up cases to previous judgments, if the admissibility criteria are not met, there would be nothing to prevent the Court, through its Registry, from informing the applicant and transferring the files to the Committee of Ministers, so that the information could be treated as communications pursuant to the above-mentioned Rule 9 of the Rules of the Committee of Ministers.

26. Of course, it may well be that the new facts, whether submitted directly by the injured party or through the intermediary of the Court, are recognised by the Committee of Ministers as not being an obstacle to closing its supervision of execution; or, alternatively, as disclosing reasons not justifying the closure of the execution procedure, which will then continue. Under some circumstances, the Court could maintain its own jurisdiction in the light of *Moreira Ferreira (no. 2)* (cited above).¹¹

27. In exceptional cases, the Committee of Ministers may resort – with or without new facts having been communicated to it – to the infringement proceedings provided for under Article 46 § 4 of the Convention.

28. It is worth noting that this is what happened following the recent Interim Resolution CM/ResDH(2022)21 of 2 February 2022, by which the Committee of Ministers referred a case to the Court to determine whether Türkiye had failed to fulfil its obligation to implement the Court’s judgment in *Kavala v. Turkey* (no. 28749/18, 10 December 2019): the view that the applicant is still to be released from detention on the basis of that judgment is disputed by the Turkish authorities, which allege that the detention is now based on “fresh” proceedings on different charges, a view that the Committee of Ministers rejected (see Appendix to the Interim Resolution cited above).

29. To conclude on this issue, it appears to us that there existed a well-oiled mechanism, based on several gears that allowed:

- the Committee of Ministers, in the performance of its supervisory function, to examine new facts (also in the context of a “fresh examination” in domestic proceedings) *vis-à-vis* their relevance to the execution procedure;
- the Committee of Ministers, in principle, to close its supervision, even for reasons justifying incomplete execution of the judgment, on the basis of new facts;

¹⁰ In *Tsonyo Tsonov v. Bulgaria (no. 4)* (see footnote 1 above) the Court examined a situation in which the Committee of Ministers had closed the execution procedure.

¹¹ We have already expressed our reservations about this concept in footnote 1 above.

- the Committee of Ministers to assess in any other case the relevance of the new facts in order to proceed with its supervision;
- the Committee of Ministers, in exceptional cases, to initiate the infringement procedure pursuant to Article 46 § 4 of the Convention, with or without new facts having been communicated to it;
- the Court – in discharging its declaratory function – to assess only some types of new facts, apt to constitute new violations and as such falling outside the scope of supervision of the execution of the previous judgment.

The well-oiled gears described above are now unfortunately stuck because of the approach taken in *Jurišić (no. 2)*, which jams the clock, superimposing an unprecedented role of the Court on that of the Committee of Ministers, as it substantially “closes” the execution of a previous judgment on the basis of new facts consisting only of passivity on the part of the national authorities.

30. Most of the above could be reiterated, *mutatis mutandis*, concerning the other set of proceedings that the majority considered “fresh” in view of the admissibility of the follow-up application: we refer to the proceedings that ended with a new order, again “aimed at re-establishing the contact between the applicant and his son” (see paragraph 46 of *Jurišić (no. 2)*, referring also to paragraph 13 of the judgment).

31. We would remark that this set of proceedings:

- was instituted by the child’s mother, and thus it was not on the initiative of the respondent State that further reopening was attempted to remedy the termination order of 29 January 2020;
- had not ended before the fresh application to the Court by the father; indeed, the information that the majority provide in paragraphs 15-20 of the judgment indicates that there was no enforcement of the new contact order.

32. In this situation, it is very hard to say that anything in this set of proceedings could be considered such as to constitute “new facts”, as it only discloses the ongoing resistance of mother and child to any contact between the latter and the applicant. The applicant – we should mention it again – sought the finding of a new violation on the basis of that state of affairs, whereas the finding by the majority that the follow-up application was admissible led to a finding of no violation, equivalent – as we have already mentioned – to a revision of the previous judgment.

WAS THERE A CONTINUING VIOLATION?

33. Our views would not be complete if we omitted to remark once more that the majority consider that there was – in addition to a “fresh examination” of the case by the domestic judges disclosing “new facts” – a “continuation of the violation that formed the basis of the Court’s initial judgment” (see paragraph 33 of *Jurišić (no. 2)*). We will deal with this aspect separately, since – as we have already said – in our humble view a continuing violation

cannot coexist with a fresh domestic examination of the case (see paragraphs 13-16 of this opinion).

34. Turning to the issue as to whether there was such a continuing situation, firstly we note that the Court’s case-law is rather clear in the sense that a “continuation of a violation” – referring to the terminology used by the majority – may be relevant to allow the Court to find a follow-up application admissible only in cases of an “act having a continuing character” (a “continuing violation” *stricto sensu*) and not in cases of an “instantaneous acts the effects of which continue subsequently”. The distinctions between these two types of situations have been explored by the Court in a number of different respects, including its jurisdiction *ratione temporis* and the six-month (now four-month) rule. It is even more relevant that such a distinction has long emerged in the work that other international bodies, along with scholars, have conducted in the area of the intertemporal application of international law, that is to say, the succession of international norms, especially in the context of State responsibility for wrongful acts.¹² We are now called upon to employ the concepts in question, as defined by the above-mentioned line of case-law of the Court, in the context of the present case.

35. We consider that the notion of “continuing violation” poses several issues when the breach of the Convention consists – as in the present case – of an omission by the respondent State, since not all conduct entailing an omission will end up amounting to a continuing violation.

36. That being said, we are, however, ready to concede that in *Jurišić (no. 1)* the breach of the international obligation as it sprang out of the declaratory judgment of the Court – namely the obligation to enforce a domestic judicial decision concerning contact rights in respect of a child – may be viewed as a continuation of the violation.

¹² The drafters of this opinion have chosen to use the terminology enshrined in Draft Article 24 (“Time of the breach of an international obligation”) submitted by Roberto Ago, Special Rapporteur, in the Seventh Report to the International Law Commission (ILC) on State responsibility, *Yearbook of the ILC*, 1978, Document A/CN.4/307, vol. I (1), p. 52.

In 2001 the ILC adopted a different version of those Articles, which became known as the Articles on Responsibility of States for Internationally Wrongful Acts (“the ARSIWA”), *Yearbook of the ILC*, 2001, Document A/56/10, vol. II (2), pp. 59 et seq.

Article 14 of the ARSIWA (“Extension in time of the breach of an international obligation”) refers, in paragraph 1, to a difference between acts having and not having “a continuing character ... even if its effects continue”. Article 14 § 2 provides: “The breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation.”

The specific concept of “continuing” violations of human rights has been explored in legal literature. As for case-law, the Court has adopted different notions of “continuing situation”; it may here suffice to mention that the Court referred to the ARSIWA in *Ilgar Mammadov v. Azerbaijan (infringement proceedings)* [GC], no. 15172/13, §§ 81-88, 29 May 2019; also, in that judgment (*ibid.*, § 151) the Grand Chamber clarified that States’ obligations under Article 46 of the Convention “reflect the principles of international law” of the ARSIWA.

37. But secondly, we must clarify that in our view – just as we argued with reference to the concept of “fresh examination” – the crux lies not in the recognition in the present case of a “continuation of the violation”, but in the identification in such continuation of the elements that allow a follow-up application to be declared admissible. Indeed, a continuation of the violation until full enforcement occurs in most of the cases in which the Court delivers a judgment with certain findings. Yet the Court is not flooded with follow-up applications! Only some of these applications must be viewed as admissible.

38. In our opinion, if one looks closely at the case-law, one can discern the requisite distinctive features of those “continuations of violations” that make follow-up applications admissible. Indeed, continuing violations have to date been found in situations – as mentioned in paragraph 30 of *Jurišić (no. 2)* – regarding the continuation of detention found to be in breach of the Convention, or ongoing proceedings whose duration had already been found unreasonable when the initial application was lodged with the Court. In these situations, it is rather clear that a new violation can be acknowledged.

39. Less clarity is to be found in the situation – also referred to in the above-mentioned paragraph 30 of *Jurišić (no. 2)* – examined in, for example, *Wasserman v. Russia (no. 2)* (no. 21071/05, 10 April 2008), concerning the non-enforcement of a judgment debt in the applicant’s favour, which had been found to be in breach of the Convention, and had been protracted after the Court’s judgment, in the absence of an effective domestic remedy to secure enforcement (only compensation had been obtained). Although, under Article 46 § 2, the Committee of Ministers had not yet completed its supervision of the execution of the previous judgment and the Court acknowledged that it had no jurisdiction to review the measures adopted by the Russian authorities, the Court considered that it could, nevertheless, take stock of subsequent factual developments and assert its competence to examine the applicant’s complaints concerning the further period of non-enforcement. Rulings similar to that in *Wasserman* can be occasionally traced in other judgments of the Court (see, for example, another case concerning the same respondent State, *Timofeyev v. Russia*, no. 58263/00, 23 October 2003).

40. It appears to us that the majority in *Jurišić (no. 2)* are clearly inspired by *Wasserman*. Notwithstanding the fact that *Wasserman* was undoubtedly a precedent, we must respectfully express our reservations about the principle stated in that judgment, and we are glad that – before *Jurišić (no. 2)* – there appear to have been very few other precedents of the Court going in the same direction.

41. Since we have tried to show that, although the majority make an effort (in our view, a contradictory one, as we have already noted) to base their finding on the occurrence of both the category of a “fresh examination” and that of a “continuation of the violation”, and that the existence of relevant new factual developments – required in both categories in order for the

application to be admissible – is more apparent than real, it is important for us to emphasise that the essential finding with which we disagree is the *Wasserman* approach to the notion of “continuing violation”: in our view, the Court’s case-law – in the future or in a possible referral of the present case to the Grand Chamber – should clarify that the identification of a continuing violation based on *Wasserman*, now that the majority in *Jurišić (no. 2)* have shared this approach, is highly problematic and should be disavowed.

42. In a nutshell, we consider that – in a *Wasserman*-like approach – the new facts consist of the mere persistence of non-enforcement of the Court’s previous judgment. The conduct of the respondent State is mere passivity, and Article 46 of the Convention, in our modest view, allows a possible distinction to be drawn between the previously mentioned situations of continuing detention or ongoing unreasonably long judicial proceedings – which constitute relevant additional factual developments – and mere passivity, which, according to our interpretation of Article 46, is to be addressed solely by the Committee of Ministers.

43. Thirdly, in the light of our discussion in paragraphs 22-32 of this opinion, we consider that, should the *Wasserman* approach be followed in general, it would be left to the applicants’ discretion to decide whether to submit their observations to the Committee of Ministers, as information relevant for the assessment of non-execution, or to reapply to the Court. This again would give rise to numerous problems of coordination between the Committee of Ministers and the Court, especially in the case of possibly diverging findings, as we have already tried to highlight above from another point of view.

44. What is more worrying, as we have also already mentioned, is that we anticipate that as a result of the majority’s approach in *Jurišić (no. 2)* the Court’s caseload would definitely increase, and the precious flow of follow-up information to the Committee of Ministers (see paragraph 25 of this opinion) could instead meet obstacles.

CONCLUSION

45. We fear, on the basis of the above considerations expressing our respectful dissent with the majority’s approach, that their determination as to the admissibility of the application dangerously affects – and restricts the scope of – the principle that compliance by the High Contracting Parties with the Court’s judgments falls outside its jurisdiction, unless it is raised in the context of the “infringement procedure” provided for in Article 46 §§ 4 and 5 of the Convention, a principle which the majority solemnly place as a general one in paragraph 29 of the judgment, before going into the application of the principle to the present case in a manner that nevertheless – as we suggest – *in concreto* disavows the same principle. We hope that this can soon be rectified.