vereniging op een zo radicale wijze te beperken. Wat ontbreekt is een geloofwaardige afweging tussen botsende grondrechten. De risicoanalyse van het Hof overtuigt geenszins en is bijna een inversie of een perversie van zijn prudente leer over de ontbinding van politieke partijen. Geenszins wordt een imminent gevaar aangetoond voor de interne autonomie van de Roemeense-orthodoxe Kerk. Ten gronde ziet men al evenmin in hoe uitgerekend een 'dreiging' voor de democratisering van kerkelijke structuren in een democratische samenleving een argument kan opleveren om een vakvereniging niet te registreren.

33. Waar moet de Goede Herder nu heen? De door de Roemeense rechters uitgedokterde oplossing zal evident niet van aard zijn de onvrede die bij de priesters leeft weg te nemen. Het is niet door de barometer stuk te slaan, dat het morgen goed weer wordt. Het is niet omdat de hoge druk niet wordt gemeten, dat zijn bestaan kan worden ontkend. In de negentiende eeuw hebben vakbonden die onder het coalitieverbod te lijden hadden, ervoor geopteerd om een ander type van vereniging op te richten dat een uitstekende dekmantel vormde voor clandestiene syndicale actie. Zij opteerden ervoor om mutualistische kassen van onderlinge bijstand te creëren. De werknemers verzekerden zich op deze wijze formeel tegen risico's die voortvloeiden uit werkloosheid wegens ziekte of gebrek aan werk. Dergelijke ziekenkassen konden perfect gebruikt worden als stakingskassen. Misschien kan een dekmantel als religieuze of culturele vereniging wonderen verrichten? Formeel is ook hier toestemming nodig, maar het wordt verre van evident voor de Roemeens-orthodoxe Kerk om een weigering te motiveren.

34. Strategisch had het aanbeveling verdiend om een collectieve klacht in te leiden bij een meer gespecialiseerd superviserend orgaan dat meer voeling heeft met vakverenigingsvrijheid (bijv. het Freedom of Association Committee van de IAO of het European Committee on Social Rights van de Raad van Europa) vooraleer het collectief of beter de priesters individueel het Hof hadden gevat. Die weg blijft evenwel open staan.

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Europees Hof voor de Rechten van de Mens
9 juli 2013, nr. 35943/10
(Raimondi (President), Lorenzen, Popović, Sajó, Vučinić, Pinto de Albuquerque, Keller)
Noot P. de Morree

Verenigingsvrijheid. Verbod sociale organisatie. Intimidatie op raciale grondslag. Bescherming van de democratie.

[EVRM art. 11]

De klager, Gábor Vona, was voorzitter van de Hungarian Guard Association (hierna: Association). Deze organisatie werd in mei 2007 opgericht door een aantal leden van de rechts-radicale politieke partij Jobbik en had tot doel het beschermen van de Hongaarse tradities en cultuur. In juli 2007 richtte deze Association op haar beurt de Hungarian Guard Movement op (hierna: Movement) om deze bescherming feitelijk op zich te nemen. In 2007 hielden "guardsmen" van de Movement, gekleed in uniformen, demonstraties in diverse dorpen met een grote Romapopulatie. Hierbij riepen ze onder meer op tot de bescherming van "etnische Hongaren" tegen de zogezegde "zigeunercriminaliteit".

In 2008 werd de Association ontbonden door de rechtbank van Boedapest. Volgens de rechtbank bestonden de voornaamste activiteiten van de Association uit de oprichting en het besturen, runnen en financieren van de Movement. De uitspraak had echter alleen gevolgen voor de Association en niet voor de Movement, omdat deze geen zelfstandige rechtspersoonlijkheid bezat en dus niet kon worden ontbonden. Met inachtneming van twee nieuwe demonstraties tegen Roma in 2008, hield dit verbod in hoger beroep stand. Het hof van beroep oordeelde dat de keuze om te demonstreren in dorpen met een grote Romapopulatie niet kon worden gezien als een sociale dialoog, maar slechts als een extreme vorm van meningsuiting. Ook constateerde het hof van beroep een hechter verband tussen de Association en de Movement en breidde het de gevolgen van de uitspraak uit tot een verbod van die laatste. In 2009 bevestigde het Hongaarse hooggerechtshof deze uitspraak.

Voor het EHRM doet Vona een beroep op de verenigingsvrijheid in art. 11 EVRM. Het Hof behandelt allereerst het onderscheid tussen politieke partijen

en andere sociale organisaties. Hoewel ook sociale organisaties een belangrijke rol kunnen spelen in de politiek, verkeren zij hiertoe in een minder bevoorrechte positie dan politieke partijen. Volgens het Hof hoeft de ontbinding van een sociale organisatie daarom aan minder strikte eisen te voldoen. Een staat heeft het recht om preventieve maatregelen te nemen om de democratie tegen dergelijke organisaties te beschermen, indien een voldoende onmiddellijk dreigende aantasting van de rechten van anderen de fundamentele waarden van de democratische samenleving ondermijnt (par. 57). Hoewel de Movement geen geweld heeft gebruikt, gingen de intimiderende demonstraties in kwestie volgens het Hof verder dan een vreedzame en legale uiting van politieke denkbeelden en was sprake van intimidatie op raciale grondslag (par. 66). Bovendien deed het paramilitaire karakter van de demonstraties denken aan de Arrow Cross, de Hongaarse nazibeweging die tussen 1944 en 1945 verantwoordelijk was voor de massavernietiging van Roma in Hongarije. Hoewel het uitdragen van antidemocratische idealen volgens het Hof niet per se voldoende is voor een verbod, gaven de omstandigheden – met name de gecoördineerde en geplande acties van de Movement – voldoende aanleiding voor een dergelijke maatregel (par. 69). De dreiging van de Movement kon bovendien alleen effectief worden geëlimineerd indien de organisatorische steun door de Association werd weggenomen (par. 71). Het Hof acht art. 11 EVRM dan ook niet geschonden.

Vona
tegen
Hongarije

THE LAW

I. Alleged violation of Article 11 of the Convention

32. The applicant complained that the dissolution of the Association amounted to a violation of his right to freedom of association as provided in Article 11 of the Convention, which reads as follows:

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the state."

The Government contested that argument.

A. Admissibility

33. In the Government's view, the application should be dismissed as inadmissible for incompatibility *ratione materiae* with the provisions of the Convention in the light of Article 17, because the Association provided an institutional framework for expressing racial hatred against Jewish and Roma citizens. They called attention to the fact that international human rights monitoring bodies (such as the Advisory Committee of the Framework Convention for the Protection of National Minorities and the European Commission against Racism and Intolerance, see paragraphs 29-30 above) had also raised concerns about the threatening effect of the uniform, insignia and flags used in the Movement's demonstrations.

34. The Government referred to the case-law of the Convention institutions, including the Court's decision in *Garaudy v. France* (decision of 24 June 2003, no. 65831/01, ECHR 2003-IX (extracts)). They recalled that, where the right to freedom of expression had been relied on by applicants to justify the publication of texts that infringed the very spirit of the Convention and the essential values of democracy, the European Commission of Human Rights had had recourse to Article 17 of the Convention, either directly or indirectly, in rejecting their arguments and declaring their applications inadmissible (examples included *J. Glimmerveen and J. Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78 (joined), Commission decision of 11 October 1979, *Decisions and Reports* (DR) 18, p. 187, and *Pierre Marais v. France*, no. 31159/96, Commission decision of 24 June 1996, DR 86, p. 184). In the Government's view, the Court had subsequently confirmed that approach (see *Lehideux and Isorni v. France*, 23 September 1998, §§ 47 and 53, *Reports of Judgments and Decisions* 1998–VII). Moreover, they pointed out that, in a case concerning Article 11 (see *W.P. and Others v. Poland* (dec.), no. 42264/98, 2 September 2004, *Reports* 2004–VII),

the Court had observed that "the general purpose of Article 17 is to prevent totalitarian groups from exploiting in their own interests the principles enunciated by the Convention." Similar conclusions were reached in the cases of *Norwood v. the United Kingdom* ((dec.), no. 23131/03, 16 November 2004, *Reports* 2004–VII) and *Witzsch v. Germany* ((dec.), no. 7485/03, 13 December 2005; compare and contrast *Vajnai v. Hungary*, no. 33629/06, § 25, ECHR 2008).

35. The applicant replied arguing that the activities of the Association did not constitute any abuse of the right to freedom of expression and association, their objective having been the restoration of the rule of law by protecting citizens from criminals. The Association was not involved in any activity aimed at the destruction of any of the rights and freedoms set forth in the Convention.

36. The Court observes at the outset that, unlike the cases cited by the Government involving the right to freedom of expression, the present application concerns the applicant's right to freedom of association – and a quite serious restriction on it, resulting in eliminating the Association's legal existence as such. Therefore, the present application is to be distinguished from those relied on by the Government. In respect of the latter, the Court observes that, particularly in *Garaudy v. France* (cited above) and *Lehideux and Isorni v. France* (cited above), the justification of Nazi-like politics was at stake. Consequently, the finding of an abuse under Article 17 lay in the fact that Article 10 had been relied on by groups with totalitarian motives.

37. In the instant case, however, it has not been argued by the Government that the applicant expressed contempt for the victims of a totalitarian regime (contrast *Witzsch v. Germany* (cited above)) or belonged to a group with totalitarian ambitions. Nor do the elements contained in the case file support such a conclusion. The applicant was, at the material time, the chairman of a registered association, and he complains about the dissolution of that association, together with that of a movement which in the domestic court's view constituted an entity within that association, essentially on account of a demonstration which had not been declared unlawful at the domestic level and had not led to any act of violence. In these circumstances, the Court cannot conclude that the Association's activities were intended to justify or propagate totalitarian oppression serving "totalitarian groups".

38. Those activities, whose compatibility with Article 11 of the Convention will be the subject matter of a review on the merits (compare and contrast *Féret v. Belgium*, no. 15615/07, § 52, 16 July 2009), do not reveal *prima facie* any act aimed at the destruction of any of the rights and freedoms set forth in the Convention (see *Sidiropoulos and Others v. Greece*, 10 July 1998, § 29, *Reports* 1998 IV) or any *prima facie* intention on the applicant's side to provide apology or propaganda for totalitarian views (see *Vajnai*, cited above, §§ 24 to 26). Only when that review is complete will the Court be in a position to decide, in the light of all the circumstances of the case, whether Article 17 of the Convention should be applied (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, § 96, ECHR 2003 II).

39. It follows that, for the Court, the application does not constitute an abuse of the right of petition for the purposes of Article 17 of the Convention. Therefore, it is not incompatible *ratione materiae* with the provisions of the Convention, within the meaning of Article 35 § 3 of the Convention. The Court further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Arguments of the parties

a. The Government

40. The Government maintained that the "Movement" did not have a distinct legal status but was a unit of the Association, created, organised and financed by the latter. Its members had acted in the interests and under the guidance of the Association and paid their membership fees to it. The fact that the Association's charter did not clarify its interior structure could not lead to a conclusion that the Movement was not *de iure* part of the Association. However, even accepting that the Movement had been a distinct entity *de iure*, its *de facto* links to the Association had justified the finding that the Association had overstepped its freedom of expression on account of the Movement's operation. Therefore, the Associ-

ation chaired by the applicant had not been dissolved because of the acts of a distinct entity but by virtue of its own activities.

41. Moreover, the Government were of the opinion that there was no interference with the applicant's freedom of association, since this freedom did not cover the right to associate in order to disseminate racist propaganda. However, even if there had been interference, it was prescribed by law and served the legitimate aims of protecting public safety, the prevention of disorder or crime and the protection of the rights and freedoms of others.

42. Furthermore, the interference was necessary in a democratic society, given the racist and anti-Semitic contents of the demonstrations performed by the Movement and its paramilitary formalities, which were intimidating and traumatising, promoted segregation, increased social tension, and provoked violence. As to the proportionality, dissolution was an appropriate sanction for the propagation of racial discrimination and segregation. It was not even the most severe sanction available, since criminal sanctions could be invoked as well, as an *ultima ratio* against the individuals involved and responsible for the most serious expressions of racial hatred inciting violence.

b. The applicant

43. At the outset, the applicant stressed that contrary to the findings of the domestic courts, the impugned actions of the Movement could not be imputed to the dissolved Association. He disputed that the Movement constituted an integral part of the Association, since the two entities had functioned separately and independently, although in cooperation. He also emphasised that none of the Association's members had participated in the Movement.

44. The applicant contested the Government's argument that the dissolution of the Association had pursued a legitimate aim in the interest of national security or public safety, that is, for the prevention of disorder and crime, and the protection of the rights and freedoms of others, within the meaning of Article 11 § 2 of the Convention. In his view, the courts had failed to establish any instances of actual disorder or a violation of the rights of others. He stressed that the domestic decisions had referred to a merely speculative danger, whose prevention could not be seen as a legitimate aim under the Convention.

45. Furthermore, the applicant alleged that, even assuming the lawfulness of the interference with the rights enshrined under Article 11 of the Convention, the dissolution of the association was neither necessary nor proportionate to the aims pursued. He noted that any interference by the public authorities with the exercise of the right of freedom of association must be in proportion to the seriousness of the impugned conduct, whereas the sanction pronounced by the domestic courts had been excessively severe. Under the Court's case-law, dissolution was reserved for situations in which the activities of an association seriously endangered the very essence of the democratic system, whereas neither the Association's nor the Movement's activities sought or had such an effect. In any event, the relevant domestic law did not foresee any other sanction than dissolution for allegedly unlawful activities of an association, which excluded as such any approach of proportionality.

46. The applicant also pointed out that the exceptions set out in Article 11 § 2 were to be construed narrowly; only convincing and compelling reasons could justify restrictions on freedom of association. However, in the present case, the domestic courts had not adduced sufficient and relevant reasons for the restriction, since they had failed to demonstrate how the activities of the Association were capable of provoking conflicts or either supporting or promoting violence and the destruction of democracy. Indeed, the Association's activities merely aimed to enable a discussion of unresolved social problems, such as the security of vulnerable people and the extraordinary high rate of criminality.

47. Moreover, the applicant drew attention to the Court's case-law considering Article 11 in the light of Article 10. In that context he conceded that the ideas expressed by the Movement might be offending or shocking, but nevertheless did not amount to incitement to hatred or intolerance, and were thus compatible with the principles of pluralism and tolerance within a democratic society.

c. The third party

48. The European Roma Rights Centre submitted that the freedoms guaranteed under Article 11 of the Convention could be restricted in order to

protect the rights and freedoms of minority communities. Making reference *inter alia* to the relevant provisions of the International Convention on the Elimination of All Forms of Racial Discrimination, they argued that organisations which attempted to justify or promote racial hatred and discrimination in any form did not come within the scope of the protection provided by Article 11. The third party further called attention to the fact that minorities, and in particular the Roma enjoyed special protection under Article 14 of the Convention and referred to the emerging international consensus amongst Contracting States of the Council of Europe recognising an obligation to protect their security.

2. The Court's assessment

a. Whether there was an interference

49. The Court notes that the Association chaired by the applicant was dissolved, the effect of which extended to the Movement (see paragraph 15 above). It therefore considers that there has been an interference with the applicant's rights guaranteed under Article 11 of the Convention.

b. Whether the interference was justified

50. Such an interference will constitute a violation of Article 11, unless it was prescribed by law, pursued one or more aims legitimate for the purposes of Article 11 § 2, and was necessary in a democratic society to achieve those aims.

i. "Prescribed by law"

51. The Court observes that the Association, and consequently the Movement, was dissolved in application of section 16(2) d) of Act no. II of 1989 on the Right to Freedom of Association (see paragraph 18 above), including the reference therein to section 2(2) ("prejudice the rights and liberties of others").

It further takes note of the parties' diverging arguments as to whether the domestic court decisions lawfully included the Movement's dissolution in the Association's disbandment.

In this connection, the Court notes that, in reply to the prosecution authorities' factual observations (see in detail in paragraph 11 above), the Budapest Court of Appeal and the Supreme Court held (see paragraphs 15 and 16 above) that the Movement had to be regarded, as a matter of interpreting the domestic law on associations, as an entity having operated within the Association, rather than independently. Those courts observed that the principal activity of the Association was the foundation, operation, guidance and financing of the Movement.

The Court finds no particular element in the case file or the parties' submissions rendering arbitrary this application of the law, the national authorities being better positioned to provide an interpretation of the national law and to assess evidence. In the face of the facts that the creation of the Movement was a project of the Association, that the Movement and the Association shared a bank account, that candidates for membership in the Movement were assessed by the Association, and that the former's uniform could be bought from the latter, the Court does not find the position of those courts unreasonable.

Consequently, the Court is satisfied that the dissolution of the Association on account of the acts of the Movement were "prescribed by law", given the domestic courts' findings as to their relationship.

ii. Legitimate aim

52. The Court considers that the impugned measure can be seen as pursuing the aims of public safety, the prevention of disorder and the protection of the rights of others, all legitimate within the meaning of Article 11 § 2 of the Convention – and this notwithstanding the applicant's allegation that no actual instances of disorder or violation of the rights of others were demonstrated by the domestic courts to have been in place (see paragraph 44 above).

It remains to be ascertained whether it was necessary in a democratic society.

iii. Necessary in a democratic society

α. General principles

53. The general principles enounced in the Court's case-law in this field are summarised in the case of *United Communist Party of Turkey and Others v. Turkey* (30 January 1998, Reports 1998–I) as follows:

"42. The Court reiterates that notwithstanding its autonomous role and particular sphere of application, Article 11 must also be considered in the light of Article 10. The protection of opinions and the freedom to express them is one of the objectives of the freedoms of assembly and association

as enshrined in Article 11 (see, among other authorities, the *Young, James and Webster v. the United Kingdom* judgment of 13 August 1981, Series A no. 44, p. 23, § 57, and the *Vogt v. Germany* judgment of 26 September 1995, Series A no. 323, p. 30, § 64).

43. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy (see paragraph 25 above).

As the Court has said many times, there can be no democracy without pluralism. It is for that reason that freedom of expression as enshrined in Article 10 is applicable, subject to paragraph 2, not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb (see, among many other authorities, the *Vogt* judgment cited above, p. 25, § 52). The fact that their activities form part of a collective exercise of freedom of expression in itself entitles political parties to seek the protection of Articles 10 and 11 of the Convention. ...

45. Democracy is without doubt a fundamental feature of the European public order (see the *Loizidou* judgment cited above, p. 27, § 75). ...

In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is "necessary in a democratic society". The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from "democratic society". Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it. ...

46. Consequently, the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association. In determining whether a necessity within the meaning of Article 11 § 2 exists, the Contracting States have only a limited margin of appreciation, which goes hand in hand with rigorous European supervision embracing both the law and the decisions applying it, including those given by independent courts. The Court has already held that such scrutiny was necessary in a case concerning a Member of Parliament who had been convicted of proffering insults (see the *Castells* judgment cited above, pp. 22–23, § 42); such scrutiny is all the more necessary where an entire political party is dissolved and its leaders banned from carrying on any similar activity in the future.

47. When the Court carries out its scrutiny, its task is not to substitute its own view for that of the relevant national authorities but rather to review under Article 11 the decisions they delivered in the exercise of their discretion. This does not mean that it has to confine itself to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; it must look at the interference complained of in the light of the case as a whole and determine whether it was "proportionate to the legitimate aim pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts (see, mutatis mutandis, the *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 26, § 31)."

54. Further relevant principles are contained in the judgment of *Refah Partisi (the Welfare Party) and Others v. Turkey* (cited above) as follows:

"(γ) The possibility of imposing restrictions, and rigorous European supervision

96. The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State's institutions, of the right to protect those institutions. In this connection, the Court points out that it has previously held that some compromise between the requirements of defending democratic society and individual rights is inherent in the Convention system. For there to be a compromise of that sort any intervention by the authorities must be in accordance with paragraph 2 of Article 11 – a matter which the Court considers below. ...

98. [A] political party may promote a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a

policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds (see *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II, and, mutatis mutandis, the following judgments: *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, nos. 29221/95 and 29225/95, § 97, ECHR 2001-IX, and *Socialist Party and Others v. Turkey*, judgment of 25 May 1998, Reports 1998-III, pp. 1256-57, §§ 46-47).

99. The possibility cannot be excluded that a political party, in pleading the rights enshrined in Article 11 and also in Articles 9 and 10 of the Convention, might attempt to derive therefrom the right to conduct what amounts in practice to activities intended to destroy the rights or freedoms set forth in the Convention and thus bring about the destruction of democracy (see *Communist Party (KPD) v. Germany*, no. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222). In view of the very clear link between the Convention and democracy (see paragraphs 86-89 above), no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole (see, mutatis mutandis, *Petersen v. Germany* (dec.), no. 39793/98, ECHR 2001-XII).

In that context, the Court considers that it is not at all improbable that totalitarian movements, organised in the form of political parties, might do away with democracy, after prospering under the democratic regime, there being examples of this in modern European history. ...

(δ) Imputability to a political party of the acts and speeches of its members

101. The Court further considers that the constitution and programme of a political party cannot be taken into account as the sole criterion for determining its objectives and intentions. The political experience of the Contracting States has shown that in the past political parties with aims contrary to the fundamental principles of democracy have not revealed such aims in their official publications until after taking power. That is why the Court has always pointed out that a party's political programme may conceal objectives and intentions different from the ones it proclaims. To verify that it does not, the content of the programme must be compared with the actions of the party's leaders and the positions they defend. Taken together, these acts and stances may be relevant in proceedings for the dissolution of a political party, provided that as a whole they disclose its aims and intentions ...

(ε) The appropriate timing for dissolution

102. In addition, the Court considers that a State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy for democracy is sufficiently established and imminent. The Court accepts that where the presence of such a danger has been established by the national courts, after detailed scrutiny subjected to rigorous European supervision, a State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime" (see the Chamber's judgment, § 81).

103. The Court takes the view that such a power of preventive intervention on the State's part is also consistent with Contracting Parties' positive obligations under Article 1 of the Convention to secure the rights and freedoms of persons within their jurisdiction. Those obligations relate not only to any interference that may result from acts or omissions imputable to agents of the State or occurring in public establishments but also to interference imputable to private individuals within non-State entities ... A Contracting State may be justified under its positive obligations in imposing on political parties, which are bodies whose *raison d'être* is to accede to power and direct the work of a considerable portion of the State apparatus, the duty to respect and safeguard the rights and freedoms guaranteed by the Convention and the obligation not to put forward a political programme in contradiction with the fundamental principles of democracy.

(ζ) Overall examination

104. In the light of the above considerations, the Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" (see, for example, *Socialist Party and Others*, cited above, p. 1258, § 49) must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently imminent; (ii) whether the acts and speeches of the leaders and members of the political party concerned were imputable to the party as a whole; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society".

105. The overall examination of the above points that the Court must conduct also has to take account of the historical context in which the dissolution ... took place ... in the country concerned to ensure the proper functioning of "democratic society" (see, mutatis mutandis, *Petersen*, cited above)."

55. Moreover, the judgment of *Herri Batasuna and Batasuna v. Spain* (nos. 25803/04 and 25817/04, ECHR-2009) contains further relevant passages:

"79. ... It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds ...

81. ... [A] State may "reasonably forestall the execution of such a policy, which is incompatible with the Convention's provisions, before an attempt is made to implement it through concrete steps that might prejudice civil peace and the country's democratic regime" (see *Refah Partisi*, cited above, § 102). ...

83. [The] Court's overall examination of the question whether the dissolution of a political party on account of a risk of democratic principles being undermined met a "pressing social need" (see, for example, *Socialist Party and Others*, cited above, § 49) must concentrate on the following points: (i) whether there was plausible evidence that the risk to democracy, supposing it had been proved to exist, was sufficiently and reasonably imminent, and (ii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a "democratic society" ..."

β. Application of those principles to the present case

56. The Court points out at the outset that, although the right of creation and operation of political parties falls under the protection of Article 11 of the Convention just as much as that of social organisations, these types of entities are different from each other, amongst other elements, as to the role which they play in the functioning of a democratic society, in that many social organisations contribute to that functioning only in an indirect manner.

In several Member States of the Council of Europe, political parties enjoy a special legal status which facilitates their participation in politics in general and in elections in particular; and they have specific, legally endorsed functions in the electoral process and in the formation of public policies and public opinion.

Social organisations do not normally enjoy such legal privileges and have, in principle, fewer opportunities to influence political decision-making. Many of them do not participate in public political life, though there is no strict separation between the various forms of associations in this respect, and their actual political relevance can be determined only on a case-by-case basis.

Social movements may play an important role in the shaping of politics and policies, but – contrary to political parties – such organisations usually have less legally privileged opportunities to influence the political system. However, given the actual political impact which social organisations and movements have, when any danger to democracy is being assessed, regard must be had to the actual influence of such organisations.

57. In the Court's view, the State is entitled to take preventive measures to protect democracy vis-à-vis such non-party entities as well, if a sufficiently imminent prejudice to the rights of others undermines the fundamental values upon which a democratic society rests and functions. One of such values is the cohabitation of members of so-

ciety without racial segregation, without which a democratic society is inconceivable. The State cannot be required to wait, before intervening, until a political movement takes action to undermine democracy or has recourse to violence. Even if that movement has not made an attempt to seize power and the danger of its policy to democracy is not sufficiently imminent, the State is entitled to act preventively, if it is established that such a movement has started to take concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy (see *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], cited above, § 102).

58. To assess the necessity and proportionality of the measure complained of, the Court notes that the instant case concerns the dissolution of an association and a movement, rather than that of a political party. The responsibilities originating in the particular constitutional role and legal privileges that apply to political parties in many Member States of the Council of Europe may apply in the case of social organisations only to the extent that they do actually have a comparable political influence. On the other hand, the Court is aware that the removal of the legal existence of the Association and the Movement is a sanction of comparable gravity, because it is equal to stripping these groups of the legal, financial and practical advantages normally secured for registered associations in most jurisdictions (see paragraph 18 above). Therefore, the measure in question must be supported by relevant and sufficient reasons, just as much as in the case of dissolution of a political party, although in the case of an association, given its more limited possibilities of national influence, the justification for preventive restrictive measures may be less compelling than in the case of a political party. In view of the difference in the importance for a democracy between a political party and a non-political association, only the former deserves the most compelling scrutiny of the necessity of a restriction on the right to associate (compare *per analogiam* with the level of protection granted to political speech and to speech which does not concern matters of public interest, *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; *Tammer v. Estonia*, no. 41205/98, § 62, ECHR 2001 I). This distinction has to be applied with sufficient flexibility. As to associations with political aims and influence, the level of scrutiny depends on the actual nature and functions of the association in view of the circumstances of the case.

59. The Court observes that the Movement, about whose dissolution the applicant complains, was created by the Association, with the stated purpose of "defending Hungary, defenceless physically, spiritually and intellectually" (see paragraph 8 above). The Movement's subsequent activities involved rallies and demonstrations, the members sporting uniforms and parading in military-like formations. These events were held in various localities of the country, and in particular in villages with large Roma populations, such as Tatárszentgyörgy; and calls were made for the defence of "ethnic Hungarians" against so-called "Gipsy criminality" (see paragraph 10 above). In reaction to this sequence of events, public action was introduced against the Movement and the Association, the essence of which was that the activities of the respondents amounted to racist intimidation of citizens of Roma origin (see paragraph 11 above).

60. In the ensuing judicial proceedings, the courts assessed the links between the two respondents and found convincing evidence that they did not constitute separate entities. In view of the arguments considered in this context, the Court cannot find this conclusion unreasonable or arbitrary (see paragraphs 11, 13, 15, 16 and 51 above).

61. The case resulted in the dissolution of both the Association and the Movement. In essence, the domestic courts found that, even though no actual violence had occurred on account of the respondents' activities, they were liable for having created an anti-Roma atmosphere by verbal and visual demonstrations of power, which amounted to an abuse of the relevant law on associations, ran counter to human dignity and prejudiced the rights of others, that is, those of Roma citizens. In the latter respect, the courts observed that the central theme of the Tatárszentgyörgy rally was "Gipsy criminality" – a racist concept. The courts paid particular attention to the fact that the impugned rallies involved military-like uniforms, commands, salutes and formations as well as armbands reminiscent of Arrow Cross symbols. On appeal, this reasoning was extended to include considerations as to the populations of the villages targeted by the Movement being a "captive audience", because those citizens had not been in a position to avoid the extreme and exclusionary

views communicated by the actions of the Movement. In the courts' view, the latter amounted to creating a public menace by generating social tension and bringing about an atmosphere of impending violence (see paragraphs 15 and 16 above).

62. The Court reiterates that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni v. France*, cited above, § 50). The Court's task is merely to review the decisions they delivered within their margin of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see *Incal v. Turkey*, 9 June 1998, § 48, *Reports* 1998 IV). In the circumstances, the Court cannot find the conclusions of the Hungarian courts unreasonable or arbitrary and it shares the view of those courts that the activities and expressions of the Movement relied on a race-based opposition of the Roma minority to the ethnic Hungarian majority (see paragraph 13 above).

63. The Court has previously held, in the context of Article 10, that ideas or conducts cannot be excluded from the protection provided by the Convention merely because they are capable of creating a feeling of uneasiness in groups of citizens or because some may perceive them as disrespectful (see *Vajnai v. Hungary*, cited above, § 57). It is of the view that similar considerations must apply to freedom of association, in so far as it concerns the association of individuals in order to further ideas less than widely accepted, or even shocking or disturbing. Indeed, unless the impugned association can reasonably be regarded as a hotbed for violence or incarnating a negation of democratic principles, radical measures restricting such fundamental rights as that of freedom of association – and this in the name of protecting democracy – are difficult to reconcile with the spirit of the Convention, which aims at guaranteeing the articulation of political views – even if they are difficult to accept for the authorities or a larger group of citizens and contest the established order of society – through all peaceful and legal means including association and assemblies (see, *mutatis mutandis*, *Güneri and Others v. Turkey*, nos. 42853/98, 43609/98 and 44291/98, § 76, 12 July 2005).

64. That being so, it is to be ascertained whether in the particular case the actions of the Association and the Movement remained within the limits of legal and peaceful activities. In this connection, the Court cannot overlook the fact that their activists carried out several rallies, as in the case of Tatárszentgyörgy, which involved some 200 persons, in a village of approximately 1,800 inhabitants. It is true that no actual violence occurred, although it is not possible to determine in hindsight whether or not this was so by virtue of the presence of the police. These activists were marching in that village wearing military-looking uniforms and ominous armbands, and applying a military-like formation, together with salutes and commands of the same kind.

65. For the Court, such a rally was capable of conveying the message to those present that its organisers had the intention and the ability to have recourse to a paramilitary organisation to achieve their aims, whatever they may be. The paramilitary formation was reminiscent of the Hungarian Nazi (Arrow Cross) movement, which was the backbone of the regime that was responsible amongst other things for the mass extermination of Roma in Hungary. Having regard to the fact that there were established organisational links between the Movement, whose activists were present, and the Association, the Court moreover finds that the intimidating effect of the Tatárszentgyörgy and other rallies must have gained momentum – and indeed, was multiplied – by virtue of being backed up by a registered association benefiting from legal recognition.

66. In the Court's view, the demonstration by political protagonists of their ability and willingness to organise a paramilitary force goes beyond the use of peaceful and legal means of articulating political views. In view of historical experience – such as that of Hungary in the wake of Arrow Cross power – the reliance of an association on paramilitary demonstrations which express racial division and implicitly call for race-based action must have an intimidating effect on members of a racial minority, especially when they are in their homes as a captive audience. For the Court, this exceeds the outer limit of the scope of protection secured by the Convention for expression (see *Vajnai*, loc. cit.) or assemblies, and amounts to intimidation, which is – as was put in the United States Supreme Court's judgment in the *Virginia v. Black* case (see paragraph 31 above) – a true

threat. The State is therefore entitled to protect the right to live without intimidation of the members of the target groups. This is even more so because they were singled out on a racial basis and were intimidated on account of their belonging to an ethnic group. In the Court's view, a paramilitary march goes beyond the mere expression of a disturbing or offensive idea, since the message is accompanied by the physical presence of a threatening group of organised activists. Where an expression is accompanied by conduct, the Court considers that the level of protection generally granted to freedom of expression may be reduced vis-à-vis the important public-order interests related to the conduct. If the conduct associated with expression is intimidating, threatening or interferes with the free exercise or enjoyment by others of any right or privilege provided by the Convention on account of the other's race, these considerations cannot be disregarded even in the context of Articles 10 and 11.

67. In the instant case, the impugned activities quite clearly targeted the Roma minority, purportedly responsible for "Gipsy criminality", and the Court is not convinced by the applicant's arguments that the intention of the dissolved entities was not the singling-out and the intimidation of this vulnerable group (see *Horváth and Kiss v. Hungary*, no. 11146/11, § 102, 29 January 2013). In this connection, the Court recognises the concerns of various international bodies (see paragraphs 26 to 28 above).

68. As the Court has pointed out before (see paragraph 57 above), in such circumstances the authorities cannot be required to await further developments, before intervening for the protection of the rights of others, since the Movement had engaged in taking concrete steps in public life to implement a policy incompatible with the standards of the Convention and democracy.

69. The Court considers that the intimidating character of the rallies in question is preponderant even if the actual assembly had not been banned by the authorities and no violent act or crime occurred. What matters is that the repeated organisation of the rallies (see paragraph 15 above) was capable of intimidating others and therefore of affecting their rights, given notably the location of the parades. In regard of the dissolution of the Association, it is immaterial that the demonstrations, in isolation, were not illegal, and the Court is not called in the present case to determine to what extent the demonstrations amounted to the exercise of the Convention right of assembly. It may only be in the light of the actual conduct of such demonstrations that the real nature and goals of an association become apparent. In the Court's view, a series of rallies organised to keep "Gipsy criminality" at bay by paramilitary parading is capable of implementing a policy of racial segregation. In fact, the intimidating marches can be seen as constituting the first steps in the realisation of a certain "law and order", which is racist in essence.

The Court would point out in this context that if the right to freedom of assembly is repeatedly exercised by way of intimidating marches involving large groups, the State is entitled to take measures restricting the related freedom of association in so far as it is necessary to avert the danger which such large-scale intimidation represents for the functioning of democracy (see paragraph 54 above). Large-scale, co-ordinated intimidation – which is related to the advocacy of racially motivated policies, incompatible with the fundamental values of democracy – may justify State interference with freedom of association, even within the narrow margin of appreciation applicable in the present case. The reason for this is related to the negative consequences that such intimidation has on the political will of the people. While the incidental advocacy of anti-democratic ideas is not enough *per se* for banning a political party in the sense of compelling necessity (see paragraph 53 above) and even less so in the case of an association, which cannot make use of the special status granted to political parties, the entirety of the circumstances, in particular the coordinated and planned actions, may constitute sufficient and relevant reasons for such a measure, especially where other potential forms for the expression of otherwise shocking ideas are not directly affected (see paragraph 71 *in fine* below).

70. In view of the above considerations, the Court is convinced that the arguments adduced by the national authorities were relevant and sufficient to demonstrate that the impugned measure corresponded to a pressing social need.

71. The Court is aware that the disbanding of the Movement and the Association represented quite a drastic measure. However, it is satisfied that the authorities nevertheless chose the least intrusive – indeed, the only reasonable – course of action

to deal with the issue. Moreover, it is to be noted that the domestic authorities had previously called the attention of the Association to the unlawfulness of the Movement's actions, which however resulted only in formal compliance (see paragraph 9 above) to an extent that further rallies took place during the on-going procedure (see paragraph 15 above) (cf. *S.H. and Others v. Austria* [GC], no. 57813/00, § 84, ECHR-2011). In the Court's view, the threat to the rights of others represented by the rallies of the Movement could be effectively eliminated only by removing the organisational backup of the Movement provided by the Association. Had the authorities acquiesced in the continued activities of the Movement and the Association by upholding their legal existence in the privileged form of an entity belonging under the law on associations, the general public might have perceived legitimation on the State's side of this menace. This would have meant that the Association, benefiting from the prerogatives of a legally registered entity, could continue to support the Movement, and thereby the State would have indirectly facilitated the orchestration of its campaign of rallies. Furthermore, the Court notes that no additional sanction was imposed on the Association or the Movement, or their members who were in no way prevented from continuing political activities in other forms (see, *a fortiori, Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], cited above, §§ 133-134). In these circumstances, the Court finds that the measure complained of was not disproportionate to the legitimate aims pursued.

72. The foregoing considerations are sufficient to enable the Court to conclude that there has been no violation of Article 11 of the Convention.

For these reasons, the Court unanimously

1. *Declares* the application admissible;
2. *Holds* that there has been no violation of Article 11 of the Convention;

Concurring opinion of Judge Pinto de Albuquerque

The dissemination of anti-Gypsyism and anti-Semitism by legal persons and the means of reacting to it under the European Convention on Human Rights (the Convention) are the core issues of the *Vona* case. I agree with the Chamber, but I am convinced that the case raises issues of crucial importance which should be addressed. That is the purpose of this opinion.

The international obligation to criminalise dissemination of racism

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)[1] requires States Parties to criminalise six categories of racist misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; (iv) incitement to such acts, (v) financing of racist activities, and (vi) participation in organisations, and also organised and all other propaganda activities, which promote and incite racial discrimination.[2] In addition, the ICERD requires States Parties to declare illegal and prohibit organisations which promote and incite racial discrimination, and be vigilant in proceeding against such organisations at the earliest moment.[3] Since these obligations are mandatory,[4] it does not suffice, for the purposes of article 4 of the Convention, merely to declare acts of racial discrimination punishable

1 The ICERD was adopted on 21 December 1965, and has 176 parties, including Hungary.

2 According to the ICERD, the term "racial discrimination" means any distinction, exclusion, restriction, or preference based on race, colour, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Thus, the universal definition does not make any difference between discrimination based on ethnicity and race.

3 See Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No. 15 (1993) on organised violence based on ethnic origin, paras. 3-6; General Recommendation No. 27 (2000): Discrimination against Roma, para. 12; General Recommendation No. 30 (2004): Discrimination Against Non-Citizens, paras. 11-12; and General Recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 4.

4 See CERD General Recommendation No. 7 (1985): Legislation to eradicate racial discrimination (Art. 4), and General Recommendation No. 15 (1993), cited above, para. 2.

on paper. Rather, criminal laws and other legal provisions prohibiting racial discrimination must also be effectively implemented by the competent national tribunals and other State institutions.[5]
Article 1 (2) of the International Convention on the Suppression and Punishment of the Crime of Apartheid requires States Parties to criminalise apartheid, which includes acts committed by organisations, institutions and individuals for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them, such as the policies and practices of racial segregation and discrimination as practised by the former political regime of South Africa.[6]
Under Article 7(1)(h) of the 1998 ICC Statute,[7] persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds is a crime against humanity subject to the jurisdiction of the ICC, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Acts of harassment, humiliation and psychological abuse of the members of a race, nationality or ethnic group may amount to persecution.[8]
After the 2000 Charter of Fundamental Rights of the European Union prohibited discrimination on any ground such as race, colour, nationality, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, disability, age or sexual orientation, the European Union pursued the repression of dissemination of racism by the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.[9]
According to the Framework Decision, certain forms of conduct which are committed for a racist or xenophobic purpose, including, among others, public incitement to violence or hatred directed against a group of persons or a member of such a group defined on the basis of race, colour, descent, religion or belief, or national or ethnic origin, are to be punishable as criminal offences. Member States must ensure that these crimes are punishable by effective, proportionate and dissuasive penalties, including terms of imprisonment of a maximum of at least one to three years for natural persons and criminal or non-criminal fines for legal persons. In addition, legal persons may be punished by exclusion from entitlement to public benefits or aid, temporary or permanent disqualification from the practice of commercial activities, placement under judicial supervision or a judicial winding-up order.
Following the adoption of a general instrument to combat discrimination, Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms,[10] the Council of Europe established a specific instrument for the punishment of racist and xenophobic expression: the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems, such as dissemination of racist and xenophobic material, racist and xenophobic motivated threat or insult, and denial, gross minimisation, approval or justification of genocide or crimes against humanity.[11] Previously, Committee of Ministers Recommendation No. R(97)20 had already required governments to es-

5 See CERD Communication No. 34/2004, *Gelle v. Denmark*, 6 March 2006, para. 7.3, and Communication No. 48/2010, *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, 4 April 2013, para. 12.3.
6 The Convention was adopted on 30 November 1973, and has 108 States Parties, including Hungary.
7 The Rome Statute has 122 States Parties, including Hungary.
8 See the *Einsatzgruppen Trial*, Trials of war criminals before the Nuremberg Military Tribunals under Control Council Law no. 10, vol. IV, p. 435: "inciting of the population to abuse, maltreat, and slay their fellow citizens... to stir up passion, hate, violence, and destruction among the people themselves, aims at breaking the moral backbone", and more recently, Kvocka et al., IT-98-30/1-A, ICTY judgment of 28 February 2005, paras. 324-325.
9 The Framework Decision is a follow-up to the Joint Action of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia.
10 ETS no. 177, with 18 States Parties.
11 ETS no. 189, with 20 States Parties. For the purposes of this Protocol, racist and xenophobic material means any written material, any image or any other representation of ideas or theories, which advocates, promotes or incites hatred, discrimination or violence, against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.

tablish a sound legal framework consisting of civil, criminal and administrative law provisions on hate speech, which covers all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin. In addition, the European Commission against Racism and Intolerance (ECRI) of the Council of Europe has, since its inception, addressed the activities of certain groups which have an openly anti-Roma and anti-Semitic discourse. In its very first General Policy Recommendation, ECRI suggested the criminalisation of any oral, written, audio-visual and other forms of expression, including the electronic media, inciting to hatred, discrimination or violence against racial, ethnic, national or religious groups or against their members on the grounds that they belong to such a group, as well as the production, the distribution and the storage for distribution of the material in question. Criminal prosecution of offences of a racist or xenophobic nature should be given a high priority and be actively and consistently undertaken. ECRI further advised banning racist organisations where it is considered that this would contribute to the struggle against racism.[12] Noting that Roma suffer throughout Europe from persisting prejudices, ECRI has specifically recommended States to take the appropriate measures to ensure that justice is fully and promptly done in cases concerning violations of the fundamental rights of Roma.[13] More recently, on 1 February 2012, the Committee of Ministers adopted the "Declaration on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe",[14] expressing its deep concern about the rise of anti-Gypsyism, anti-Roma rhetoric and violent attacks against Roma and calling on public authorities at all levels to conduct in a speedy and effective manner the necessary investigations of all crimes committed against Roma and identify any racist motives for such acts. The Committee also welcomed efforts to prevent and condemn extremist organisations inciting or committing such crimes.

In full coherence with these standards, the European Court of Human Rights (the Court) has emphasised the vital importance of combating racial discrimination in all its forms and manifestations, including hate speech or speech aimed at discriminating ethnic groups.[15] Furthermore, the Court has stated that racial violence is a particular affront to human dignity and requires special vigilance and a vigorous reaction from the authorities.[16] The vulnerability of the group against whom discrimination and violence takes place has been a factor in the Court's analysis: for example, the Court has established that people of Roma origin enjoy special protection under Article 14 of the Convention.[17]

12 ECRI General Policy Recommendation No. 1, Combating Racism, Xenophobia, Anti-Semitism and Intolerance, 4 October 1996. General Recommendation No. 7 on national legislation to combat racism and racial discrimination, 13 December 2002, enlarged the prohibition under criminal law to a wide range of acts, including public insults and defamation or threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin, and provided for the criminal liability of legal persons, which should come into play when the offence has been committed on behalf of the legal person by any persons, particularly acting as the organ of the legal person or as its representative. Criminal liability of a legal person should not exclude the criminal liability of natural persons. Legal persons or groups which promote racism should be prohibited, and if necessary, dissolved.

13 ECRI General Policy Recommendation No. 3: Combating racism and intolerance against Roma/Gypsies, 6 March 1998, and General Policy Recommendation No. 13: Combating Anti-Gypsyism and Discrimination Against Roma, 24 June 2011.

14 The term "Roma" used at the Council of Europe refers to Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies.

15 *Jersild v. Denmark*, 23 September 1994, Series A no. 298, § 30; *Soulas and Others v. France*, no. 15948/03, §§ 43-44, 10 July 2008; and *Féret v. Belgium*, no. 15615/07, §§ 69-71, 16 July 2009.

16 *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, § 145, ECHR 2005-VII, and *Timishev v. Russia*, nos. 55762/00 and 55974/00, § 56, ECHR 2005-XII.

17 *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, 13 November 2007, § 181; *Muhoz Diaz v. Spain*, no. 49151/07, 8 December 2009, § 60; and *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, § 44.

Hence, States parties to the Convention have the duty to criminalise speech or any other form of dissemination of racism, xenophobia or ethnic intolerance, prohibit every assembly and dissolve every group, organisation, association or party that promotes them. States have the obligation not only to bring to justice the alleged offenders and empower the victims of racism with an active role in the criminal proceedings, but also to prevent private actors from committing or reiterating the offence. **Such an international positive obligation must be acknowledged, in view of the broad and long-lasting consensus mentioned above, as a principle of customary international law, binding on all States, and a peremptory norm with the effect that no other rule of international or national law may derogate from it.** Therefore, State tolerance of speech, expression or activities of any natural persons, assemblies, groups, organisations, associations or political parties with the purpose of disseminating racism, xenophobia or ethnic intolerance represents a breach of the State Party's obligation.

The dissolution of an association

The dissolution of an association depends on the strict conditions set by Article 11 of the Convention, namely the pursuit of the interests of national security or public safety, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others. Moreover, the interference with freedom of association is only justified if it complies with a two-tier test: the test of necessity and the test of proportionality.[18] In particular, governments, public authorities and public officials must strictly adhere to the principle of content-neutrality when they interfere with freedom of association, refraining from banning associations or reserving different treatment to associations with whose actions or opinions they do not agree.[19]

Normally, associations have multiple statutory goals, some being more important than others. Therefore, it is of the utmost importance to differentiate the primary goals – those without which the association would not have been founded – from the secondary goals, without which the association would have been founded, dissolution being appropriate only where the primary goal of the association is illegal. When an illegal statutory goal can be removed, dissolution is, in principle, not appropriate, and the domestic authorities should give preference to removal of the illegal goal from the deed of foundation.[20]

Nevertheless, an association's goals must be assessed according not only to its deed of foundation, but also to its practice. Sometimes the deed of foundation covers up an illegal practice. The deviation from the association's statutory goals may have occurred *ab initio* or during its subsequent activity. In any case, the statute of the association may not be used as a façade for the pursuit of these deviated goals.[21] Furthermore, the assessment of the association's practice must incorporate its "overall style" (*Gesamtstil*), meaning its symbols, uniforms, formations, salutes, chants and other modes of expression, since the full picture of the association's way of life can reveal an "essential family likeness" (*Wesensverwandschaft*) to other prohibited associations.[22]

18 For a description of these two tests see my separate opinion in *Mouvement Raelien Suisse v. Switzerland* (GC), no. 16354/06, 13 July 2012, whose considerations are applicable *mutatis mutandis* to freedom of association.

19 An example of the principle of freedom to create associations without any previous content-based control was established by the remarkable French Constitutional Council Decision no. 71-44, DC of 16 July 1971, which declared unconstitutional a procedure through which acknowledgment of an association's legal capacity depended on a preliminary verification by a judicial authority of its conformity with the law.

20 See my separate opinion in *Association Rhino and Others v. Switzerland*, no. 48848/07, 11 October 2011.

21 *Refah Partisi (the Welfare Party) and Others v. Turkey* (GC), no. 41340/98, § 101, ECHR 2003-II, and *Association of Citizens Radko & Paunkovski v. the former Yugoslav Republic of Macedonia*, no. 74651/01, § 71, 15 January 2009, and German Federal Administrative Court judgments of 1 September 2010 (the *Heimattreue Deutsche Jugend* judgment) and 19 December 2012 (the *Hilfsorganisation für nationale politische Gefangene* judgment).

22 German Federal Administrative Court judgments of 1 September 2010 and 19 December 2012, cited above, and Austrian Constitutional Court judgment of 16 March 2007.

Associations are responsible for their leaders' and members' actions when these are related to the prosecution of the association's goals.[23] Liability may result from the direction, organisation, financing, or mere tolerance of unlawful actions by their members or third persons when they act on behalf of the association. The ultimate criterion for the imputation of responsibility for actions is the social perception that the association itself in any way participates in or tolerates unlawful actions.[24]

Associations are organised social institutions, with sections, branches and movements. The dissolution of the association involves the cessation of all its activity, including that of its sections, branches or movements. Conversely, the dissolution of a daughter-association may warrant the dissolution of the mother-association, if the former was created or in any way supported by the latter. The same applies evidently to political parties. Different legal personalities must not work as a veil to cover up the essential bonds between associations and political parties which share the same political purposes and pursue the same strategies.[25]

Finally, the thorny question of the timing of the dissolution must be approached with extreme prudence in order to avoid, on the one hand, a precipitated action which would impair the exercise of basic freedoms, and on the other hand, a belated reaction to seriously dangerous conduct. Only when there is a clear and imminent danger to the interests protected under Article 11 (2) may the association be dissolved.[26]

Racism in Hungarian society

It is a fact established by various international monitoring institutions that anti-Roma and anti-Semitic forms of public expression are frequent in Hungarian public life. In its Fourth Report on Hungary, ECRI noted that "there has been a disturbing increase in racism and intolerance in public discourse in Hungary. ... the sense is that the expression of anti-Semitic views is currently on the rise in Hungary".[27] In its Third Opinion on Hungary, the Advisory Committee on the Framework Convention for the Protection of National Minorities found that "Hungary is currently facing a worrying rise in intolerance and racism, chiefly aimed at Roma".[28] Subsequently, the Committee of Ministers approved a Resolution which determined that "In recent years, the Roma have increasingly been victims of displays of intolerance, hostility and racially-motivated violence. Hate speech and racism in public statements, and in certain media, is also increasing, which is of deep concern."[29] Both the UN Human Rights Committee and the United Nations Committee against Torture expressed their concern at the virulent and widespread anti-Roma statements by public figures and the media as well as indications of rising anti-Semitism in Hungary,[30] and at reports of a disproportionately high number of Roma in prisons and ill-treatment of and discrimination against Roma by law enforcement.[31] In his report on Hungary, Githu Muigai, United

23 See my separate opinion in *Mouvement Raelien Suisse*, cited above. Acts committed by the association's members in their private lives, outside the context of the association's activities, cannot be regarded as a relevant and sufficient reason for dissolving the association in question.

24 *Herri Batasuna and Batasuna v. Spain*, nos. 25803/04 and 25817/04, § 88, 30 June 2009, on tacit support of terrorism.

25 For instance, patrolling, observing, following or in any way monitoring the movements of persons of a certain race or ethnic minority with the alleged purpose of maintaining public order (so-called militia or vigilante action) is certainly an inadmissible racist activity, which itself puts in danger public order and safety and the rights of third persons and therefore warrants dissolution of the association that so acts and the political party that supports the association's activity.

26 *Refah Partisi (the Welfare Party) and Others*, cited above, § 104, and *Association of Citizens Radko & Paunkovski*, cited above, § 75. In my view, para. 57 of the present judgment does not follow the *Refah Partisi* standard, since it admits dissolution before an imminent danger to the interests protected by Article 11(2) is proven.

27 Fourth report on Hungary, 24 February 2009, CRI(2009)3, paras. 60-74. The same worries had already been expressed in its Third report on Hungary, 8 June 2004, CRI(2004)25, paras. 58 and 79.

28 ACFC/OP/III(2010)001.

29 CM/ResCMN(2011)13 on the implementation of the Framework Convention for the Protection of National Minorities by Hungary, 6 July 2011.

30 CCPR/C/HUN/CO/5, 16 November 2010, para. 18.

31 CAT/C/HUN/CO/4, 6 February 2007, para. 19.

Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, expressed deep concern at the growth of paramilitary organisations with racist platforms which target Roma.[32]

In sum, racism is today a scourge in Hungarian society, the most vivid example being the fact that vigilante groups continue to hold marches in several villages, throwing objects at the houses of Roma, intimidating Roma residents, chanting anti-Roma slogans and making death threats.[33]

The assessment of the facts of the case under the European standard

The present case is to be analysed in terms of the negative obligations arising from Article 11 of the Convention, since the impugned dissolution is a positive State act of interference with the association's right to legal recognition. Moreover, the association intended to intervene, and did intervene, in the political arena with a message aimed at defending ethnic Hungarians and their traditions, which are matters of general interest. The parades were not held at places or during times connected with traumatic episodes in the history of the respondent State.[34] Having in account these factors, the margin of appreciation of the State is narrow, the Court's supervision of the interference being particularly called for when freedom of association and assembly puts in question the human dignity and the security of a targeted group of persons.

The proportionality test

Now that the applicable assessment criteria have been clarified, the impugned interference must be examined in the light of the case as a whole in order to determine whether it is "proportionate to the legitimate aim pursued" and corresponds to a "pressing social need", that is to say whether the specific reasons given by the national authorities appear "relevant and sufficient".

In the case at hand the members of the Hungarian Guard Movement paraded throughout Hungary and called for the defence of ethnic Hungarians against "Gypsy criminality". Based on section 2 of Act no. II of 1989, as well as the international obligations of the respondent State, the domestic courts considered that these actions were discriminatory in essence, violated the right to liberty and security of the inhabitants of the villages and threatened public order. The domestic courts' reasons are relevant and sufficient.

As a matter of principle, any form of speech which separates the population into "us" and "them", where "them" represent a racial or ethnic group to whom negative characteristics and conduct are attributed, is incompatible with the Convention. The use of the expression "Gypsy crime", which suggests that there is a link between crime and a certain ethnicity, constitutes a racist form of speech intended to fuel feelings of hatred against the targeted ethnic group. This expression reflects a clearly divided view of society into "them", the Roma, perpetrators of crimes, and "us", the "ethnic" Hungarians, the victims of their crimes. Such sweeping generalisations attributing negative behaviour and characteristics are made solely on the basis of the target group's origin and ethnicity. Intolerance and prejudice towards Roma are objectively fanned by statements of this nature. The same can be said for the anti-Semitic utterances made in the parades.

Moreover, the domestic courts considered that the Hungarian Guard Movement was a façade of the applicant association, since the latter had founded, governed and financed the former. Thus, the domestic courts found that the actions of the Movement should be attributed to the applicant association. Here, again the domestic courts' reasons were relevant and sufficient.

In fact, the criminalisation of racist speech and expression, the prohibition of assemblies and the dissolution of associations promoting racism are compatible with freedom of expression, assembly and association. Articles 10 and 11 of the Convention must be interpreted so as to be reconcilable with the customary and peremptory international obligation mentioned above. A holistic approach to these freedoms is called for under international

32 UN Human Rights Council, Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Githu Muigai, 23 April 2012.

33 See, among recent descriptions of the situation made by independent institutions and NGOs, the Council of Europe Commissioner for Human Rights, in his 2012 report "Human rights of Roma and Travellers in Europe", Amnesty International, in its 2011 and 2012 reports, and Human Rights Watch, in its 2013 report "Hungary's Alarming Climate of Intolerance".

34 See my separate opinion in *Faber v. Hungary*, no. 40721/08, 24 July 2012.

human rights law, especially with regard to the applicable restrictions.[35] The exercise of freedom of expression carries special duties, specified in Article 29 (2) of the Universal Declaration of Human Rights (UDHR), among which the obligation not to disseminate racist ideas is of particular importance, and Article 20 (2) of the International Covenant on Civil and Political Rights (ICCPR), according to which any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[36] This prohibition is valid not only for racist expression,[37] but also for assemblies or associations which promote racism.[38] In some cases, the dissemination of racism through speech, assembly or association may even be instrumental in the 'destruction of rights', warranting the application of the provisions contained in Article 30 of the UDHR, Article 5 of the ICCPR and Article 17 of the Convention.[39]

The context of a political debate is evidently irrelevant for the racist nature of speech, assembly or association.[40] Even in this case, freedom of expression, assembly and association must yield to human dignity and the rights of persons whose race, nationality or ethnic origin is attacked. As time went by, it became apparent that the activities of the association presented a clear and imminent danger to public order and the rights of third persons.[41] Thus, dissolution was a proportionate measure in the face of the association's rhetoric and activities, which denied the affected persons the right to respect as human beings and jeopardised their safety and public order.

The test of necessity

Dissolution of an association is the ultimate measure (*ultimum remedium*) taken against a legal person. Before resorting to that drastic measure, the State must envisage other, less intrusive measures, such as prohibiting assemblies, withdrawing public benefits and placement under judicial supervision. In the case before us, the domestic authorities did give the association an opportunity to amend its ways and conform its practice to its statute and the law. Yet the association did not take this opportunity, but reiterated its unlawful activities, paving the way for a more severe reaction of the domestic authorities. There is therefore no contradiction between the dissolution of the association and the official tolerance of its parades during a certain period of time. Once that trial period had passed, the dissolution of the association was the only adequate means to react to the danger it represented to the rights of third persons and public order.

35 *United Communist Party of Turkey v. Turkey* (GC), no. 19392/92, § 42, 30 January 1998; *Ezelin v. France*, no. 11800/85, 26 April 1991, § 37; *Young, James and Webster* judgment of 13 August 1981, Series A no. 44, p. 23, § 57.

36 CERD General Recommendation No. 15 (1993), cited above, para. 4, and CERD Communication No. 43/2008, *Saada Mohamad Adan v. Denmark*, 13 August 2010, para. 7.6, and Communication No. 48/2010, cited above, para. 12.7; UNHCR Communication No. 550/1993, *Faurisson v. France*, 8 November 1996, para. 9.6, and Communication No. 736/1997, *Ross v. Canada*, para. 11.5-11.8.

37 For example, when statements depict foreigners or Roma as inferior, through the generalised attribution of socially unacceptable behaviour or characteristics, freedom of expression cannot prevail over human dignity (German Federal Constitutional Court, decision of 4 February 2010).

38 For example, participants in public assemblies whose advocacy of national, racial or religious hostility constitutes incitement to discrimination, hatred or violence forfeit the protection of their expression rights under the Convention (OSCE/ODIHR-Venice Commission Guidelines on Freedom of Peaceful Assembly, 4 June 2010, para. 96).

39 With regard to Article 10 of the Convention and Article 3 of the first Protocol, see *Glimmerveen and J. Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports (DR) 18, p. 187; *Norwood v. the United Kingdom* (dec.), no. 23131/03, 16 November 2004; *Witzsch v. Germany* (dec.), no. 7485/03, 13 December 2005; and *Lehideux and Isorni v. France*, judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, §§ 47 and 53; and with regard to Article 11, *W.P. and Others v. Poland* (dec.), 2 September 2004, no. 42264/98, Reports 2004-VII, and *Kasymakhunov and Saybatalov v. Russia*, no. 26261/05 and 26377/06, § 113, 14 March 2013.

40 *Féret v. Belgium*, no. 15615/07, §§ 75-76, 16 July 2009. See also CERD Communication No. 34/2004, cited above, para. 7.5, Communication No. 43/2008, cited above, para. 7.6, and Communication No. 48/2010, cited above, 8.4.

41 Referring to such danger, the Hungarian Supreme Court mentioned, in its judgment of 15 December 2009, among others, the events in Fadd on 21 June 2008, and the escalation of threatening declarations exchanged between the association's members and some Roma.

Conclusion

"The Roma are what we strive to be: real Europeans", Günter Grass once said. The association's racist goals and activities ignored that lesson. Having regard to the State's obligation to criminalise the dissemination of racism, xenophobia or ethnic intolerance, prohibit every assembly and dissolve every group, organisation, association or party that promotes them, to the difference between the association's statutory purposes and its practice, and to the existence of a clear and imminent danger resulting from its speech and activities, and after examining the decisions given by the competent authorities in the light of the narrow margin of appreciation applicable to the case, I conclude that the reasons on which the impugned dissolution was based were relevant and sufficient and that the interference did correspond to a pressing social need.

NOOT

1. Het EVRM is in 1950 in het leven geroepen om het vrije en democratische Europa te beschermen tegen een opleving van het totalitarisme (E. Bates, *The Evolution of the European Convention on Human Rights. From its Inception to the Creation of a Permanent Court of Human Rights*, Oxford: Oxford University Press, 2010, p. 6-8). Zowel uit het verdrag zelf als uit de jurisprudentie van het Hof blijkt dat het EVRM is gestoeld op democratische idealen. Niet voor niets verklaarde het Hof in een eerdere uitspraak dat "Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it" (*United Communist Party of Turkey e.a.* t. *Turkije*, EHRM 30 januari 1998 (GK), nr. 19392/92, 5 *NJCM-bulletin* 1999 m.nt. Bellekom, par. 45). Wanneer deze democratie gevaar loopt en hoe tegen dit gevaar moet worden opgetreden zijn vragen die het Hof regelmatig voor zijn kiezen krijgt. In deze jurisprudentie moet telkens een balans worden gevonden tussen bescherming van de democratie aan de ene kant en individuele vrijheid en pluralisme aan de andere kant (*Refah Partisi e.a.* t. *Turkije*, EHRM 13 februari 2003 (GK), nrs. 41340/98, 41342/98, 41343/98 en 41344/98, *NJ* 2005/73 m.nt. Alkema, *AB* 2003/152 m.nt. Kanne, par. 96).

2. Ook in de onderhavige zaak wordt het Hof met deze vraag geconfronteerd. Dit keer gaat het om het gevaar van de Hungarian Guard Movement, een radicaal-rechtse organisatie die anti-Romadenkbeelden verspreidt (alhoewel in het kader van één van de demonstraties van de Movement ook wordt gesproken over antisemitisme; par. 11 en 15, hierboven niet opgenomen). Uit publicaties van diverse internationale mensenrechtenorganisaties, zoals de *Human Rights Committee* van de VN, de *European Commission against Racism and Intolerance* en de *Advisory Committee of the Framework Convention for the Protection of Minorities*, blijkt dat deze zich zorgen maken over de toename van racisme en intolerantie in Hongarije (par. 26-28). Met name de Hungarian Guard en haar anti-Romaopvattingen worden als zeer zorgwekkend ervaren. Als onderdeel van de radicaal-rechtse Hungarian Guard Association, waarvan de klager voorzitter is, komen de "guardsmen" van de Movement op voor de verdediging van Hongarije. In het kader daarvan organiseren zij in 2007 en 2008 demonstraties in dorpen met een grote Romapopulatie, waarbij de leden in paramilitaire formaties door de straten marcheren en uniformen dragen die doen denken aan die van de Arrow Cross, de nationaalsocialistische partij die tussen 1944 en 1945 verantwoordelijk was voor de dood van duizenden Hongaarse joden en Roma. Hierop volgt een verbod van de Hungarian Guard Association, dat uiteindelijk leidt tot een beroep voor het EHRM op de verenigingsvrijheid in art. 11 EVRM.

3. Gelet op de jurisprudentie in vergelijkbare zaken is het niet verrassend dat de Hongaarse regering een beroep doet op art. 17 EVRM. Deze bepaling is specifiek in het verdrag opgenomen om de democratie te beschermen en te voorkomen dat individuen en groepen met totalitaire bedoelingen misbruik kunnen maken van de rechten in het EVRM (Preparatory Work on Article 17 of the European Convention on Human Rights, Strasbourg, DH(57)4). Toepassing van deze bepaling betekent dat een klacht wegens misbruik van verdragsrechten niet-ontvankelijk wordt verklaard. *In casu* stelt de Hongaarse regering zich op het standpunt dat de Association wegens rassenhaat tegen Joden en Roma geen bescherming door de verenigingsvrijheid toekomt. Volgens het Hof is deze bepaling echter niet van toepassing. Anders dan in de door

Hongarije aangehaalde jurisprudentie, ziet het Hof geen reden om aan te nemen dat de Association uit is op het stichten van een totalitaire staat (par. 37-39). Van misbruik van art. 11 EVRM is volgens het Hof geen sprake en de klacht wordt ontvankelijk verklaard. In het verleden oordeelde het Hof nog wel eens dat (rassen)discriminatie misbruik van het EVRM behelsde (*Glimmerveen en Hagenbeek* t. *Nederland*, ECRM 11 oktober 1979 (ontv.besl.), nrs. 8348/78 en 8406/78, *NJ* 1980/525 m.nt. Alkema en *Norwood* t. *Verenigd Koninkrijk*, EHRM 16 november 2004 (ontv.besl.), nr. 23131/03). Bovendien laat het Hof met name in zijn laatste overwegingen nadrukkelijk weten de ideeën van de Association anti-democratisch te vinden. Ook dit was in eerdere zaken nog wel eens aanleiding voor het Hof om een beroep op art. 11 EVRM te kwalificeren als misbruik (*Hizb Ut-Tahrir e.a.* t. *Duitsland*, EHRM 12 juni 2012, nr. 31098/08 «EHRC» 2012/201 m.nt. De Morree). Het Hof lijkt dus niet helemaal consistent in zijn rechtspraak en hanteert wisselende richtsnoeren voor de toepassing van art. 17 EVRM. Zowel in de onderhavige zaak als in een zaak van eerder dit jaar grijpt het Hof juist terug op het oude adagium van art. 17 EVRM: alleen individuen en groepen met totalitaire ideeën die daadwerkelijk een gevaar vormen voor het voortbestaan van de democratie zijn uitgesloten van bescherming door het EVRM (*Kasymakhunov en Saybatalov* t. *Rusland*, EHRM 14 maart 2013, nrs. 26261/05 en 26377/06 «EHRC» 2013/122 m.nt. De Morree). Onduidelijk is echter of dit een nieuwe lijn is van het Hof of juist een weerspiegeling is van een niet geheel uitgekristalliseerde opvatting over de betekenis van art. 17 EVRM.

4. Uiteindelijk draait het in de onderhavige zaak om de vraag of de beperking van de verenigingsvrijheid van de Association noodzakelijk was in een democratische samenleving. Allereerst doet het Hof het verschil tussen politieke partijen en andere sociale organisaties uit de doeken. De algemene beginselen met betrekking tot de verenigingsvrijheid voor politieke partijen zijn door het Hof uitgewerkt in de Turkse zaken *United Communist Party* en *Refah Partisi (United Communist Party of Turkey e.a*, reeds aangehaald, par. 42-47 en *Refah Partisi*, reeds aangehaald, par. 96-105). Hierin benadrukte het Hof dat politieke partijen essentieel zijn voor een goed functionerende en pluralistische democratie. Enkel "convincing and compelling reasons" kunnen een partijverbod rechtvaardigen. Dit neemt echter niet weg dat staten preventieve maatregelen mogen nemen om te voorkomen dat een politieke partij aan de macht komt en een beleid realiseert dat onverenigbaar is met de democratische waarden van het EVRM.

5. In de onderhavige zaak past het Hof deze beginselen toe op een sociale organisatie. Sociale organisaties spelen volgens het Hof in de politiek een andere rol dan politieke partijen en verkeren gewoonlijk in een minder bevoorrechte positie om invloed uit te oefenen op het politieke systeem. Sociale organisaties kunnen echter wel degelijk ook een gevaar vormen voor de democratie (par. 56). Omdat hun politieke invloed echter meer indirect plaatsvindt, hoeft de ontbinding van een sociale organisatie aan minder strikte eisen te voldoen dan een partijverbod. Volgens het Hof moeten in een democratie in beginsel ook organisaties met ideeën die minder geaccepteerd of zelfs "shocking or disturbing" zijn in beginsel worden toegestaan. Zolang een organisatie geen broeinest vormt voor geweld of de ontkenning van democratische beginselen, zijn radicale maatregelen als een verbod met het oog op bescherming van de democratie moeilijk te rijmen met de geest van het verdrag, aldus het Hof. Het verdrag beoogt immers juist ook politieke denkbeelden te beschermen, zelfs als die door de autoriteiten of een meerderheid van de burgers worden afgekeurd (par. 63). Maar wanneer een voldoende onmiddellijke aantasting van de rechten van anderen de fundamentele waarden van de democratische samenleving dreigt te ondermijnen, heeft een staat het recht om preventieve maatregelen te nemen om de democratie tegen dergelijke organisaties te beschermen (par. 57).

6. Het Hof maakt in deze zaak een interessante rechtsvergelijking, waarbij twee zaken die zien op intimidatie en vijandig gedrag in het bijzonder worden uitgelicht. Ondanks de kritiek die vanuit academische hoek klinkt op rechtsvergelijkingen door het Hof, maakt het Hof met enige regelmaat gebruik van deze methode om zijn analyses kracht bij te zetten (H. Senden, *Interpretation of fundamental rights in a multilevel legal system: an analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Cambridge: Intersentia, 2011 en M. Ambrus, "Comparative Law Method in

the Jurisprudence of the European Court of Human Rights in the Light of the Rule of Law", 2 *Erasmus Law Review* 2009 (3), p. 353-370). Met name interessant is de zaak van het Amerikaanse Hooggerechtshof waar het Hof naar verwijst: *Virginia* v. *Black* (538 *U.S.* 343 (2003)). Deze zaak draaide om een kruisverbranding door leden van de Ku Klux Klan in Virginia. Gelet op de historie van de Ku Klux Klan is het verbranden van een kruis volgens het Hooggerechtshof een "symbol of hate", meestal bedoeld om te intimideren (p. 357). Verder concludeert het Hooggerechtshof dat dergelijke intimidatie moet worden gezien als een "true threat", omdat de spreker een bedreiging uit tegen een persoon of groep met de bedoeling het slachtoffer vrees aan te jagen voor geweld of de dood. De vrijheid van meningsuiting in het Eerste Amendement staat volgens het Hooggerechtshof een verbod op dergelijke "true threats" toe (p. 359-360). Hoewel het Hooggerechtshof hier een interessant concept introduceert, is deze Amerikaanse jurisprudentie uiteraard niet geldig in Hongarije of elders binnen Europa. Van een Europese consensus kan op basis van deze vergelijking dus niet worden gesproken. Het Hof kan aan deze rechtsvergelijking daarom slechts inspiratie ontlenen voor een interessante juridische benadering van het onderhavige vraagstuk.

7. Dat doet het Hof in de onderhavige zaak door de intimidatie door de Hungarian Guard Movement te kwalificeren als een "true threat" (par. 66). Hongarije is daarom bevoegd om het recht van Roma om zich veilig te voelen en zonder intimidatie te leven te beschermen. Dat geldt des te meer nu zij vanwege hun lidmaatschap van een bepaalde etnische groep het doelwit waren. De paramilitaire demonstraties van de Movement gaan bovendien volgens het Hof verder dan een vreedzame en legale manier van meningsuiting, omdat de boodschap gepaard ging met de fysieke aanwezigheid van een dreigende groep van georganiseerde activisten (par. 66). Met hun demonstraties hebben de "guardsmen" impliciet opgeroepen tot raciale segregatie en acties tegen een raciale minderheid, wat indruist tegen de democratische waarden die aan het EVRM ten grondslag liggen. Gelet op de rol van de Arrow Cross in het Hongaarse verleden hebben de paramilitaire demonstraties een intimiderend effect, vooral omdat de Roma in hun dorpen als "captive audience" niet aan de demonstratie kunnen ontsnappen (zie voor toepassing van dit concept ook *Vejdeland e.a.* t. *Zweden*, EHRM 9 februari 2012, nr. 1813/07, «EHRC» 2012/85 m.nt. Nieuwenhuis). Grootschalige, gecoördineerde intimidatie, zeker wanneer die raciaal gefundeerd is, rechtvaardigt een staat om in te grijpen in de verenigingsvrijheid van een sociale organisatie vanwege de negatieve gevolgen die deze intimidatie kan hebben op de politieke wil van burgers (par. 69). *In casu* was een (preventief) verbod van de Association volgens het Hof dan ook de enige geschikte reactie.

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Europees Hof voor de Rechten van de Mens
12 juli 2013, nr. 25424/09
(Spielmann (President), Casadevall, Raimondi, Ziemele, Villiger, Berro-Lefèvre, Hajiyev, Björgvinsson, Šikuta, Nicolaou, Sajó, Bianku, Kalaydjieva, De Gaetano, Lemmens, Mahoney, Wojtyczek)
Noot mr. drs. J.H.B. Bemelmans

Onschuldpresumptie. Toepassingsbereik na einde criminal charge. Afwijzing schadevergoeding na herziening. Grote Kamer.

[EVRM art. 6 lid 2]

Klaagster, Lorraine Allen, is op 7 september 2000 door een jury veroordeeld tot een gevangenisstraf van drie jaar wegens doodslag van haar vier maanden oude zoon. Het letsel van het slachtoffer duidde naar toenmalig medisch inzicht op het zogeheten 'shaken-babysyndroom'. Vijf jaar later zijn de medische opvattingen daarover echter in zoverre gewijzigd, dat letsel als dat van het slachtoffer niet langer wordt beschouwd als uitsluitend toe te schrijven aan opzettelijk op het hoofd uitgeoefend geweld. Klaagster wordt op basis van de alternatieve hypothese dat het letsel anders zou zijn ontstaan, ontvangen in haar 'appeal out of time', een soort herzieningsverzoek. De appelrechter dient daarop te beoordelen of de veroordeling van klaagster als 'unsafe' is aan te merken. Deze maatstaf wordt ingekleurd door de vraag of het nieuwe bewijs, indien ter zitting naar voren gebracht, redelijkerwijs tot een ander juryoordeel had