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Europees Hof voor de Rechten van de Mens
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(Spielmann (President), Villiger, Jungwiert, Zupančič, Power-Forde, Nußberger, Potocki)
Noot P. de Morree

Verenigingsvrijheid. Verbod islamitische politieke vereniging. Verbod misbruik van verdragsrechten. Ontvankelijkheidsbeslissing.

[EVRM art. 11, 17]

Hizb Ut-Tahrir, Arabisch voor de Partij van de Bevrijding, is een internationale politieke vereniging die pleit voor het omverwerpen van de huidige regeringen van moslimlanden en hun vereniging in één islamitische staat, geregeld door de islamitische shariawetgeving. De vereniging heeft een kleine club trouwe volgers in het Midden-Oosten en kent een toenemende populariteit onder moslims in West-Europa. In Duitsland is de vereniging sinds de jaren zestig actief en heeft zij inmiddels ongeveer 200 volgers.

Op 10 januari 2003 verbood de Duitse bondsminister voor Binnenlandse Zaken, Otto Schily (SPD), de activiteiten van Hizb Ut-Tahrir op Duits grondgebied. Volgens de minister waren de activiteiten van de vereniging in de BRD gericht tegen het beginsel van internationale verstandhouding (Gedanken der Völkerverständigung) zoals bedoeld in art. 9 par. 2 Grundgesetz (GG). Art. 9 GG garandeert de vrijheid van vereniging. Op basis van de tweede paragraaf van deze bepaling kunnen verenigingen wier doelen of activiteiten in strijd zijn met dit beginsel worden verboden. De minister baseerde zijn besluit op een boek geschreven door de oprichter van de vereniging en een aantal publicaties van de vereniging in het verenigingsblad "Explizit", pamfletten, posters en publicaties op de website van Hizb Ut-Tahrir, waarin het bestaansrecht van de staat Israël wordt ontkend en wordt opgeroepen tot het uitroeien van Joden. De minister beschuldigde de vereniging ervan voorstander te zijn van een 'actieve jihad'; de vereniging beperkt zich volgens de minister niet tot vreedzame middelen om haar doelen te bereiken, maar roept op tot een gewapende strijd tegen Israël, Joden en de regeringen van islamitische staten.

In de daaropvolgende rechterlijke procedure sloot het Duitse Bundesverwaltungsgericht zich aan bij het oordeel van de minister. Ook het Bundesverwaltungsgericht was van oordeel dat de vereniging had opgeroepen tot een gewelddadige eliminatie van Israël en de vernietiging van personen en dus een vreedzame oplossing van het Midden-Oosten-conflict tegenwerkte. Volgens het Bundesverwaltungsgericht was het verbod van de activiteiten van de vereniging proportioneel en genoot Hizb Ut-Tahrir geen speciale bescherming onder het GG als religieuze of filosofische gemeenschap. In 2006 ging Hizb Ut-Tahrir in beroep bij het Bundesverfassungsgericht en stelde dat het verbod disproportioneel was en een schending betekende van haar recht op religieuze verenigingsvrijheid (religiöse Vereinigungsfreiheit) zoals bedoeld in art. 4 par. 1 GG. Art. 9 par. 2 GG was volgens de vereniging in casu niet van toepassing. Eind 2007 verklaarde het Bundesverfassungsgericht de klacht van de vereniging niet-ontvankelijk omdat de vereniging geen geregistreerd adres had in Duitsland of een andere EU-lidstaat.

Voor het Hof in Straatsburg doet Hizb Ut-Tahrir onder andere een beroep op de verenigingsvrijheid van art. 11 EVRM. De vereniging wordt in de procedure bijgestaan door zestien leden en volgers. Aangezien zij echter niet op nationaal niveau hebben geprocedeerd, verklaart het Hof hun klacht niet-ontvankelijk wegens het niet uitputten van de nationale rechtsmiddelen.

Het Hof begint zijn inhoudelijke beoordeling met een verwijzing naar zijn jurisprudentie omtrent de misbruikclausule van art. 17 EVRM. Het Hof bevestigt dat Hizb Ut-Tahrir oproept tot de gewelddadige vernietiging van Israël en het vermoorden van zijn inwoners. Daarmee poogt de vereniging af te wijken van de werkelijke bedoeling van art. 11 EVRM door dit recht in te zetten voor doeleinden die duidelijk indruisen tegen de waarden van het verdrag, met name de belofte van de vreedzame oplossing van internationale conflicten en de onschendbaarheid van het menselijk leven. Het Hof concludeert daarom dat Hizb Ut-Tahrir, gelet op het bepaalde in art. 17 EVRM, niet mag profiteren van de bescherming van art. 11 EVRM.

Hizb Ut-Tahrir e.a.
tegen
Duitsland

The Law

I. Complaints lodged by the second to seventeenth applicant

36. Relying on Articles 6, 9, 10, 11, 13 and 14 of the Convention, the applicants nos. 2 – 17 complained about the ban imposed on the first applicant's activities and about the unfairness of the subsequent court proceedings. They further complained under Article 1 of Protocol No. 1 to the Convention about the confiscation of their assets.

A. Submissions by the Government

37. According to the Government, the individual applicants had failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They pointed out that applicant no. 13 was not even named in the written action before the Federal Administrative Court and that there were indications that he appeared under various names, which in itself raised a question under Article 35 § 2 (a) of the Convention.

38. The applicants nos. 2-12 and 14-17 had failed to exhaust domestic remedies as they had failed to have recourse to the Federal Constitutional Court. Although the constitutional complaint was an extraordinary remedy, the Federal Constitutional Court strictly scrutinised the public acts challenged by any such admissible complaint, using fundamental rights standards similar to those embodied in the Convention.

39. The individual applicants had not been prevented from availing themselves of this remedy in the instant case. During the oral hearing on 21 January 2004 the Federal Administrative Court indicated to the applicants' counsel that, under the established case-law of the Federal Administrative Court (see paragraph 34, above), individual members of an association were not entitled to lodge an application against the banning order. The court gave this indication in order to give legal hearing to the applicants and, where appropriate, to afford them the opportunity to save further costs by withdrawing their application. The applicants nos. 2-12 and 14-17 were afforded more than a month to consider, together with their counsel, their reaction to this indication. Firstly, they could have tried to persuade the court to alter its case-law and eventually have lodged a constitutional complaint against any decision of the Federal Administrative Court declaring their application inadmissible. Even though some of the applicants could not rely on Article 9 of the Basic Law, which was reserved to German nationals, they could claim an interference with the general freedom to act enshrined in Article 2 § 1 of the Basic Law. While that Article might offer a somewhat lower standard of protection in comparison with Article 9 of the Basic Law, it certainly made available a review by the Federal Constitutional Court of the need for and suitability of the interference.

40. The Government further submitted that it would originally also have been possible for the individual applicants to lodge a constitutional complaint directly against the banning order. Instead, the applicants, who were represented by counsel, evidently took the strategic decision to concentrate fully on the first applicant's proceedings, and hence forfeited the path both to the Federal Constitutional Court and to the Court.

41. By way of an alternative, the Government submitted that the applicants nos. 2 – 17 had failed to lodge their motion with the Court within the six months' time-limit following the issue of the banning order of the Federal Ministry of Justice, which constituted the final national ruling for them.

B. Submissions by the applicants

42. The applicants submitted that applicant no. 13 lodged the application with the Federal Administrative Court under a different name, which was due to the different naming conventions in Arabic and German documents.

43. The individual applicants further submitted that they withdrew their motion before the Federal Administrative Court following that court's oral directions to the effect that their claims were inadmissible and in view of the fact that the Federal Administrative Court had declared the first applicant's motion admissible. They pointed out that their position would have been protected if the German courts had overturned the first applicant's prohibition, as the first applicant's interests and those of its individual members were effectively aligned. On appeal before the Federal Constitutional Court, that court *de facto* reversed the decision of the Federal Administrative Court and

ruled the challenge brought by the first applicant inadmissible. Had the Federal Administrative Court taken this stance, the individual applicants would not have withdrawn their complaints, but would have proceeded to have them determined.
44. Under the Court's case law, an applicant was not obliged to pursue domestic remedies where there were no reasonable prospects of success. In the instant case, the Federal Administrative Court had directed the applicants nos. 2-17 that continuing their legal challenge would be futile and that they would be at risk of an adverse costs' order. By pursuing the first applicant's appeal in isolation, the individual applicants were pursuing the remedy, which the Federal Administrative Court had directed to be their appropriate way of redress. The Government's submissions were, therefore, entirely inconsistent with the Court's jurisprudence to the effect that Contracting Parties should be precluded from relying on futile remedies to prevent access to supervisory jurisdiction.
45. The applicants nos. 2 to 17 had no opportunity to assert their Convention rights before the domestic courts. Since the assertion of the rights of the individual members were nonetheless intimately bound up with the challenge brought by the first applicant, it was appropriate for the individual applicants to await the outcome of the first applicant's challenge before the constitutional court before making their application to the Court.
46. The individual applicants further submitted that it appeared from the Government's submissions that none of the proposed courses of action would have had reasonable prospect of success. Thus, the Government submitted that the applicants should have proceeded with a manifestly inadmissible action before the Federal Administrative Court in order to make a complaint to the Federal Constitutional Court in order to avail themselves of a remedy that afforded them an admittedly inferior level of protection.
47. The applicants finally submitted that they complied with the six months' time-limit as the lack of a remedy constituted a continuing violation of their rights.

C. Assessment by the Court

48. The Court reiterates that the purpose of Article 35 § 1 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to it. Thus, the complaint to be submitted to the Court must first have been made to the appropriate national courts, at least in substance, in accordance with the formal requirements of domestic law and within the prescribed time limits. Nevertheless, the only remedies that must be exhausted are those that are effective and capable of redressing the alleged violation (see, among many other authorities, *Remli v. France*, 23 April 1996, § 33, *Reports* 1996-II, and *Paksas v. Lithuania* [GC], no. 34932/04, § 45, 6 January 2011).
49. More specifically, the only remedies which Article 35 § 1 of the Convention requires being exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (see, for example, *Selmouni v. France* [GC], no. 25803/94, § 75, ECHR 1999-V). It is incumbent on the Government claiming non exhaustion to convince the Court that the remedy was an effective one available in theory and in practice at the relevant time. However, once this burden of proof has been discharged, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports* 1996-IV; *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI and *Mooren v. Germany* [GC], no. 11364/03, § 118, 9 July 2009).
50. The Court further recalls its case-law to the effect that a complaint to the Federal Constitutional Court — other than in cases concerning the excessive length of proceedings — is an effective remedy capable of providing redress for a violation of Convention rights (compare *Haase v. Germany*, no. 11057/02, § 63, ECHR 2004 III (extracts); *Mork v. Germany*, nos. 31047/04 and 43386/08, §§ 38-39, 9 June 2011; *Popovic v. Germany*, no. 34236/06, § 41, 13 January 2011 and — with regard to the exception for complaints about the excessive lenght of proceedings — *Rumpf v. Germany*, no. 46344/06, § 51, 2 September 2010, and the case-law cited therein). This principle is

not called into question by the fact that the Federal Constitutional Court might examine a complaint about a violation of the right to freedom of association lodged by the applicants under the more general right of freedom to act enshrined in Article 2 (1) of the Basic Law.

51. Turning to the circumstances of the instant case, the Court notes that the applicants nos. 2 – 17, who were represented by counsel throughout the domestic proceedings, lodged their applications against the prohibition order with the Federal Administrative Court jointly with the first applicant. On 21 January 2004 the Federal Administrative Court declared the first applicant's complaint admissible and orally expressed the opinion that it considered the applications lodged by the remaining applicants to be inadmissible. Following this indication, on 3 February 2004 the applicants nos. 2 – 17 withdrew their applications before the Federal Administrative Court. Consequently, the applicants nos. 2 - 17 did not pursue their proceedings before the Federal Administrative Court, and did not lodge a complaint with the Federal Constitutional Court.

52. The Court does not consider that the individual applicants had been prevented from further pursuing the proceedings before the domestic courts. As regards the argument that the individual applicants had merely followed the instructions given by the Federal Administrative Court, the Court observes, at the outset, that the applicants had been instructed by counsel throughout the proceedings and had been given sufficient time to consider the legal consequences of their procedural actions. The Court further notes that the instructions given by the Federal Administrative Court had not been misleading, but reflected that court's established case-law and only concerned the proceedings before that court. The applicants did not submit that they had been exposed to any undue pressure to withdraw their complaints; the risk to bear the costs of the proceedings in case the applications were declared inadmissible being inherent in all court proceedings. Furthermore, there is no indication that the applicants would have been prevented from challenging the case-law of the Federal Administrative Court and, eventually, lodging a constitutional complaint against any decision on admissibility.

53. As to the individual applicants' argument that they relied on the Federal Administrative Court's decision to declare the first applicant's application admissible – a decision which, according to the applicants, had been later on overturned by the Federal Constitutional Court — the Court observes, at the outset, that the Federal Administrative Court's admissibility decision exclusively concerned the first applicant's application before that court. It did not contain any prognosis as to the possible outcome of a constitutional complaint which the first applicant might lodge after the termination of the administrative court proceedings. The Court further observes that the Federal Administrative Court fully examined the merits of the first applicant's challenge against the prohibition order. Conversely, the Federal Constitutional Court did not rule on the admissibility of the original challenge before the Federal Administrative Court, but confined itself to stating that the first applicant could not claim a violation of its constitutional rights before that court. It follows that the Federal Constitutional Court's ruling cannot be said to have overturned the Federal Administrative Court's decision on admissibility.

54. Under these circumstances, the Court considers that the individual applicants have not established that there existed any special circumstances absolving them from the requirement of pursuing their action before the Federal Administrative Court and of lodging a constitutional complaint.

55. It follows that the complaints lodged by the applicants no. 2-17 must be rejected under Article 35 §§ 1 and 4 of the Convention for non exhaustion of domestic remedies.

II. Complaints lodged by the first applicant

A. Six months' time-limit

56. According to the Government, the first applicant failed to comply with the six-months' time-limit, which started to run for the first applicant with the judgment of the Federal Administrative Court of 25 January 2006. The constitutional complaint subsequently filed by the first applicant was recognisably not an effective remedy, as it was clearly inadmissible in light of Article 19 § 3 of the Basic Law. Under the Court's established case law, such a remedy was unable to stay the running of the six-months' time limit.

57. The first applicant contested this argument.

58. The Court recalls that the six months' time limit imposed by Article 35 § 1 of the Convention requires applicants to lodge their applications

within six months of the final decision in the process of exhaustion of domestic remedies. Only remedies which are normal and effective are required to be taken. The test to be applied in evaluating compliance with the six-months' rule is whether an applicant has attempted to lodge "misconceived applications to bodies or institutions which have no power or competence to offer effective redress" for his or her complaints (see, for example, *Fernie v. the United Kingdom* (dec.), no. 14881/04, 5 January 2006, and *Beiere v. Latvia*, no. 30954/05, § 28, 29 November 2011).

59. Turning to the circumstances of the present case, the Court observes that the Federal Administrative Court, in its court order dated 8 August 2005 and in its judgment dated 25 January 2006, examined the merits of the first applicant's complaints under Articles 4 and 9 of the Basic Law (see paragraph 32, above), without raising the issue whether the first applicant, having regard to its capacity as a foreign association, might be excluded by Article 19 § 3 from relying on these constitutional rights. Under these circumstances, the Court does not consider that the constitutional complaint, in which the applicant relied on the same constitutional rights previously examined by the Federal Administrative Court, could a priori be regarded as a "misconceived application". Therefore, in the particular circumstances of the case, the Court considers that the process of the exhaustion of domestic remedies with regard to the applicant's complaints culminated in the final decision which the Federal Constitutional Court issued on 27 December 2007, which was served on the first applicant's counsel on 18 January 2008. It follows that the first applicant has to be regarded as having complied with the six-month rule.

B. Alleged violation of Article 11 of the Convention

60. The first applicant complained that the ban imposed on its activities violated its right to freedom of association, guaranteed by Article 11 of the Convention, which provides:

"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."

1. Submissions by the Government

61. The Government considered that the interference with the first applicant's rights were justified under paragraph 2 of Article 11. The Ban was in accordance with the relevant provisions of the Law on Association in conjunction with Article 9 § 2 of the Basic Law.

62. According to the Government, the conditions laid down in the domestic law for the banning of the first applicant's activities were met. The first applicant was seriously opposed to the notion of international understanding, because it quite openly disputed the right of Israel to exist, and hence opposed any peaceful settlement of the Middle East conflict. It further favoured the use of violence as a means to enforce its political and religious aims. This could be documented by means of a large number of documents, which the Federal Administrative Court had listed in detail and evaluated thoroughly.

63. The prerequisite laid down in the domestic law that an association had to be in opposition to the "notion of international understanding" (Article 9 § 2 of the Basic Law) was sufficiently clearly determined in that it included associations which were opposed to the right of existence and the security of a foreign State and called for its elimination by force. As a reaction to the aggressive policy pursued by the National Socialist regime, the Basic Law imposed an obligation on the German authorities actively to promote peace whenever international security was in danger. This included actions against pro-war propaganda of private associations. No less than denying the Holocaust, such violent propaganda constituted an abuse of rights under the Convention (Article 17 of the Convention). In this context, the Government considered that it also had to be taken into account that the first applicant ultimately wished to abolish the rights and freedoms of the Convention by establishing the worldwide dominance of the *Caliphate* and *Sharia*.

64. The Government further considered that the ban was necessary in a democratic society in the interest of public security, public order and the right and freedoms of others. Public security within the meaning of the Convention, seen in the context of the 4th recital of the preamble, according to which human rights and fundamental freedoms constitute the basis of world peace, also included international security and world peace. Public order in Germany also included the special relationship with Israel. The Government underlined in this context its special commitment to the security of the State of Israel.

65. As the Federal Administrative Court had stated in detail, there were no less intrusive means to avert the danger to the security of Israel emanating from the first applicant. The Federal Administrative Court had particularly pointed out that the "liberation of Palestine" from dominance by the State of Israel constituted one of the main concerns of the association and of all of its members. The imposition of a ban relating only to anti Israeli propaganda would not have been as effective as one would certainly have had to anticipate that the first applicant would simply agitate against Israel less openly. This applied all the more given that the first applicant was organised on a conspiratorial basis.

66. The Government finally submitted that, in accordance with Article 16 of the Convention, interference with the first applicant's rights under Article 11 of the Convention was at best subject to a restricted review. They pointed out that the first applicant was a foreign association which was headquartered outside Germany and whose activities were also directed from abroad.

2. Submissions by the first applicant

67. The first applicant contested these arguments. It submitted, in particular, that it did not take any violent actions against Israel, did not accept violence to achieve its religious and political objectives and did not pursue anti-Semitic propaganda. The *Explizit* magazine was not the mouthpiece of the association and the first applicant could not be held accountable for any views expressed therein. Furthermore, the first applicant did not reject the Convention and did not operate on a "conspiratorial" basis.

68. According to the applicant, the reasons put forward by the Government could not justify an interference with its rights under Article 11. The protection of "international understanding" was not defined with sufficient legal certainty and did not constitute a ground of justification recognised under paragraph 2 of Article 11. The Government had failed to demonstrate that there was any threat to the public order or security within Germany itself. Even assuming that Contracting Parties could take steps to protect the public security of other States such as Israel, the Government had failed to provide any substantiated evidence that the applicants posed any real threat to the public order or security of Israel or Europe as a whole.

69. There was no indication that the rights and freedoms of Israelis were violated by the exercise of the applicant's right of association. On the contrary, the State of Israel allowed prominent members of the first applicant publicly to deliver speeches and openly to take part in demonstrations in the first applicant's name. Neither did the first applicant's activities cause any risk or damage to Germany's international relations. In any event, the measure taken was disproportionate.

70. According to the applicant, the factual basis relied upon by the Government was incorrect. In particular, while it was true that the first applicant disputed the lawfulness of the formation and activities of the State of Israel, there was no foundation for the suggestion that it necessarily opposed "any peaceful settlement of the Middle East conflict". The first applicant did not "favour force as a means to enforce its political and religious goals". On the contrary, the first applicant refused in principle any violent means to achieve its objectives. The first applicant's "support of those who took actions pursuant to legitimate, proportionate self-defence against violent and unlawful acts in Palestine [was] no different from other groups of individuals defending themselves in a military conflict." In a statement dated 18 July 2011, which the applicants submitted with their observations in reply to the Government's submissions, the second applicant explained his statement made at the Technical University in Berlin (see paragraph 21, above) as follows:

"This lecture was given by me and was in response to the Jenin Massacre. It was about the development of Israel since its creation in 1948. Following that lecture, a journalist asked me about suicide missions and immediately asked me about children getting killed in these operations. I answered this question in the way suggested but I didn't

mean that children should be killed as asserted by Germany. The correct answer is that children cannot be targeted in any way and this includes in Israel. The Islamic law states clearly that killing of children in any war zone should be avoided.
In my answer I sought to emphasise that there will be times in the context of conflict that actions which result in the death of civilians may be lawful or, in Islamic terms, "permissible". Where, as in Palestine, an occupying state acting unlawfully has put civilians and children into an area of conflict there is a risk that harm may come to them. If that happens it will not, necessarily and of itself, make the self-defence unlawful. Deliberately targeting civilians, or acting in a disproportionate manner falls outside the context of legitimate self-defence and would be unlawful and impermissible.
For those reasons, I consider that my views as to what is lawful or permissible, are in essence no different from what may be lawful or permissible in any armed conflict in accordance with established principles of international law: there may, unfortunately, be civilian casualties within any conflict but they may be caused by one side or the other deliberately and improperly bringing civilians into the region of danger. Even then, they should be avoided if at all possible to do so in a way that is consistent with legitimate self-defence."
71. Furthermore, the first applicant contested that the Government could rely on Article 16 – which had, under the case-law of the Court, to be construed narrowly – or on Article 17. In this respect, the first applicant submitted, in particular, that it did not search to gain political power or to achieve any political aims inside Germany or in Europe, that it sought to establish a *Caliphate* that included the establishment of equal rights for citizens including minorities, an independent judiciary and a system of political parties and that it did not advocate the use of violence as a means of achieving its aims.

3. Assessment by the Court

72. The Court reiterates its case-law on Article 17 of the Convention as summarised in the judgment in the case of *Paksas*, cited above, §§ 87-88:
"87. The Court reiterates, firstly, that "the purpose of Article 17, in so far as it refers to groups or to individuals, is to make it impossible for them to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention; ... therefore, no person may be able to take advantage of the provisions of the Convention to perform acts aimed at destroying the aforesaid rights and freedoms ..." (see *Lawless v. Ireland*, 1 July 1961, § 7, pp. 45-46, Series A no. 3). Since the general purpose of Article 17 is, in other words, to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated in the Convention (see *W.P. and Others v. Poland* (dec.), no. 42264/98, ECHR 2004-VII, and *Norwood v. the United Kingdom*, no. 23131/03, ECHR 2004-XI), this Article is applicable only on an exceptional basis and in extreme cases, as indeed is illustrated by the Court's case law.
88. The Court has held, in particular, that a "remark directed against the Convention's underlying values" is removed from the protection of Article 10 by Article 17 (see *Lehideux and Isorni v. France*, 23 September 1998, § 53, Reports 1998-VII, and *Garaudy v. France* (dec.), no. 65831/01, ECHR 2003-IX). Thus, in *Garaudy* (ibid.), which concerned, in particular, the conviction for denial of crimes against humanity of the author of a book that systematically denied such crimes perpetrated by the Nazis against the Jewish community, the Court found the applicant's Article 10 complaint incompatible *ratione materiae* with the provisions of the Convention. It based that conclusion on the observation that the main content and general tenor of the applicant's book, and thus its aim, were markedly revisionist and therefore ran counter to the fundamental values of the Convention and of democracy, namely justice and peace, and inferred from that observation that he had attempted to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were contrary to the text and spirit of the Convention (see also *Witzsch v. Germany* (dec.), no. 4785/03, 13 December 2005). The Court reached the same conclusion in, for example, *Norwood* ((dec.), cited above) and *Pavel Ivanov v. Russia* ((dec.), no. 35222/04, 20 February 2007), which concerned the use of freedom of expression for Islamophobic and anti-Semitic purposes respectively. In *Orban and Others v. France* (no. 20985/05, § 35, 15 January 2005) it noted that statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions likewise amounted to deflect-

ing Article 10 from its real purpose. In the same vein, the Court has held that Article 17 of the Convention prevented the founders of an association whose memorandum of association had anti-Semitic connotations from relying on the right to freedom of association under Article 11 of the Convention to challenge its prohibition, noting in particular that the applicants were essentially seeking to employ that Article as a basis under the Convention for a right to engage in activities contrary to the text and spirit of the Convention (see *W.P. and Others*, cited above)."

73. Turning to the circumstances of the instant case, the Court observes that the Federal Administrative Court, having carefully analysed a substantial number of written statements published in magazine articles, flyers and transcripts of public statements made by the second applicant, concluded that the first applicant did not only deny the State of Israel's right to exist, but called for the violent destruction of this State and for the banishment and killing of its inhabitants. The Federal Administrative Court further considered that the propagation of these aims was one of the first applicant's main concerns. The Court observes that this assessment was not only based on articles published in the magazine "*Explizit*" – for which the first applicant denies responsibility – but also on a number of articles undisputably published by the first applicant and on two public statements made by the second applicant, who acts as the first applicant's representative in the instant proceedings. The Court notes, in particular, that the second applicant, in the above mentionned statements, repeatedly justified suicide attacks in which civilians were killed in Israel and that neither the first nor the second applicant distanced themselves from this stance during the proceedings before the Court (compare, in particular, paragraphs 21 and 70, above).

74. Having regard to the above, the Court considers that the first applicant attempts to deflect Article 11 of the Convention from its real purpose by employing this right for ends which are clearly contrary to the values of the Convention, notably the committment to the peaceful settlement of international conflicts and to the sanctity of human life. Consequently, the Court finds that, by reason of Article 17 of the Convention, the first applicant may not benefit from the protection afforded by Article 11 of the Convention.

75. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

C. Alleged violation of Articles 9 and 10 of the Convention

76. The first applicant further complained that the prohibition order violated its rights to freedom of religion and to freedom of expression under Articles 9 and 10 of the Convention, which read as follows:

Article 9

"1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."

Article 10

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

77. The Government submitted that the applicant had failed to exhaust domestic remedies, as it had failed to complain about a violation of its right to freedom of expression before the domestic courts. The applicant contested that argument.

78. Even assuming exhaustion of domestic remedies with regard to the complaint under Article 10 of the Convention, the Court, having regard to the conclusions reached with regard to the complaint under Article 11 (see paragraph 74, above), considers that these complaints are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

D. Alleged violation of Article 1 of Protocol No. 1 of the Convention

79. The first applicant complained that the confiscation of its assets violated its right to the peaceful enjoyment of its possessions under Article 1 of Protocol No. 1 of the Convention, which provides:
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

80. The Government submitted that the applicant had not raised this complaint before the domestic courts and had thus failed to exhaust domestic remedies. The applicant contested that argument.

81. The Court notes that the first applicant has not established that it has complained about a violation of its property rights before the domestic courts. In any event, the Court considers that the confiscation of the first applicant's assets constitutes a secondary effect of the prohibition order. Having regard to its assessment of the first applicant's complaint under Article 11, the court considers that the applicant's complaint does not disclose any appearance of a violation of the right set out in Article 1 of Protocol No. 1 to the Convention. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

E. Alleged violation of Articles 6 and 14 of the Convention

82. The first applicant complained about the alleged unfairness and discriminatory nature of the proceedings before the domestic courts, relying on Articles 6 and 14 of the Convention, which read, insofar as relevant:
"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."
"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

83. The Government submitted that the prohibition order was a classical measure under police law in the exercise of national sovereignty. The confiscation of assets was to be regarded as an incidental consequence of that order which did not bring the proceedings within the scope of Article 6 of the Convention (the Government referred to the case of *Yazar and Others v. Turkey*, nos. 22723/93, 22724/93 and 22725/93, §§ 63 *et seq.*, ECHR 2002 II).

84. The first applicant submitted that the prohibition order was directly decisive of its financial interests. In contrast to the circumstances in the *Yazar* case, the German authorities were granted a discretionary power under the Associations Act to order the confiscation of the applicant's asset. Consequently, the Constitutional Court's decision was directly decisive of the applicants' private law rights.

85. The Court observes, at the outset, that Article 17 of the Convention does not bar an applicant from relying on his or her procedural rights under Article 6 of the Convention (compare *Lawless v. Ireland (no. 3)*, 1 July 1961, pp. 45-46, § 7, Series A no. 3). The Court further observes that Article 6 § 1 under its civil limb is only applicable if the proceedings concerned a "dispute" over a "civil right". The Court reiterates that it has previously found that a dispute over a political party's right to continue its political activities concerned a political right *par excellence* and as such did not qualify for protection under Article 6 § 1 of the Convention (see *Refah Partisi (the Welfare Party) and Others v. Turkey* (dec.), nos. 41340/98, 41342/98, 41343/98 and 41344/98, 3 October 2000

and *Yazar and Others*, cited above, §§ 66-67). Notwithstanding the fact that the applicant's political activities are, according to the applicant's submissions, religiously motivated, the Court considers this principle to be applicable in the instant case. It is true that the prohibition order also contained a confiscation clause and that on that account a dispute could have arisen over a pecuniary right, and hence a civil right within the meaning of Article 6 § 1 of the Convention. However, the first applicant did not establish that it complained about the confiscation of its assets before the domestic courts. Accordingly, the "dispute" in question did not in any way concern the first applicant's right to the peaceful enjoyment of its possessions. Accordingly, Article 6 of the Convention is not applicable in the instant case.

Having regard to its strictly accessory nature (*Prince Hans-Adam II of Liechtenstein v. Germany* [GC], no. 42527/98, §§ 33 et seq.), ECHR 2001 VIII) the same applies to Article 14 of the Convention.

86. It follows that the complaints raised by the first applicant under Articles 6 and 14 are incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

F. Alleged violation of Articles 13 and 14 of the Convention

87. The first applicant complained about having been deprived of an effective remedy against the prohibition order and about having been denied access to such remedy on discriminatory grounds. He relied on Article 13 in conjunction with Article 14 of the Convention, which read as follows:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

88. The Government contested that argument.

89. The Court has found above (see §§ 74, above) that the first applicant was precluded by Article 17 of the Convention from relying on its Convention rights with respect to the prohibition order. It follows that the applicant cannot arguably claim a violation of a Convention right in this respect.

90. It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court by a majority

Declares the application inadmissible.

NOOT

1. Zaken waarin het Hof art. 17 EVRM toepast om een klager niet-ontvankelijk te verklaren zijn schaars, maar hier is er weer een. Bij mijn weten is art. 17 EVRM slechts acht keer eerder op een dergelijke manier toegepast sinds de inwerkingtreding van het Verdrag. De laatste zaak waarin het Hof oordeelde dat de klager had gehandeld in strijd met art. 17 EVRM en daarom niet-ontvankelijk werd verklaard dateert uit 2007 (*Pavel Ivanov* t. *Rusland*, EHRM 20 februari 2007 (ontv.besl.), nr. 35222/04, «EHRC» 2007/68).

2. Art. 17 EVRM verbiedt misbruik van de rechten en vrijheden in het Verdrag. Dit misbruik zou kunnen worden gedefinieerd als het inroepen van verdragsrechten en -vrijheden ter rechtvaardiging van activiteiten die als doel hebben de rechten en vrijheden die in het Verdrag zijn vermeld teniet te doen. Art. 17 EVRM is dan ook in die zin uniek dat het de enige bepaling is in het verdrag die zich tevens richt tot burgers en hun een verplichting oplegt (P. van Dijk e.a. (red.), *Theory and practice of the European Convention on Human Rights*, vierde druk, Antwerpen/Oxford: Intersentia 2006, p. 1085). Doel van de bepaling is, kort gezegd, te voorkomen dat individuen of groepen met totalitaire bedoelingen de rechten en vrijheden in het Verdrag in hun eigen belang exploiteren, zo blijkt reeds uit één van de eerste procedures over deze bepaling (*Lawless* t. *Ierland*, EHRM 1 juli 1961, nr. 332/57, par. 7). Groepen en individuen die zich richten tegen de fundamentele waarden die ten grondslag liggen aan het verdrag genieten daarom geen bescherming van het EVRM. Er is een aantal si-

tuaties waarin het Hof heeft geoordeeld dat een individu of groep misbruik heeft gemaakt van een verdragsrecht, te weten het ontkennen van de Holocaust of het rechtvaardigen van het nazibeleid (*Garaudy* t. *Frankrijk*, EHRM 24 juni 2003 (ontv.besl.), nr. 65831/01, «EHRC» 2003/69; *Witzsch* t. *Duitsland*, EHRM 15 december 2005 (ontv.besl.), nr. 7485/03), antisemitisme (*Schimanek* t. *Oostenrijk*, EHRM 1 februari 2000 (ontv.besl.), nr. 32307/96; *Pavel Ivanov* t. *Rusland*, EHRM 20 februari 2007 (ontv.besl.), nr. 35222/04, «EHRC» 2007/68) en sommige vormen van hate speech (*Norwood* t. *Verenigd Koninkrijk*, EHRM 16 november 2004 (ontv.besl.), nr. 23131/03; *Glimmerveen en Hagenbeek* t. *Nederland*, ECieRM 11 oktober 1979, nr. 8348/78 & 8406/78, NJ 1980, 525). Gelet op de periode waarin het EVRM tot stand kwam en de vrees voor een mogelijke opleving van het nationaalsocialisme en het fascisme is het niet verwonderlijk dat het Hof art. 17 EVRM bij voorkeur toepast in zaken die betrekking hebben op antisemitisme en het ontkennen van de Holocaust. Doelstelling van het opstellen van het EVRM was immers om de verschrikkingen van de Tweede Wereldoorlog in de toekomst te voorkomen.

3. In de meerderheid van de gevallen waarin het Hof misbruik constateert, gaat het om misbruik van de vrijheid van meningsuiting in art. 10 EVRM. In de onderhavige zaak, inzake een verbod van de activiteiten van de islamitische vereniging Hizb Ut-Tahrir, gaat het echter in de eerste plaats om misbruik van de vrijheid van vereniging in art. 11 EVRM. Nu is dat niet zo vreemd, aangezien in zaken zoals deze de vrijheid van vereniging en de vrijheid van meningsuiting dicht tegen elkaar aan liggen. Het verbod van Hizb Ut-Tahrir lijkt immers juist te zijn gebaseerd op diverse publicaties en uitlatingen van de leiders van de vereniging. In eerdere, vergelijkbare zaken behandelde het Hof art. 11 EVRM dan ook wel eens in het licht van art. 10 EVRM (zie bijvoorbeeld *United Communist Party of Turkey e.a.* t. *Turkije*, EHRM 30 januari 1998, nr. 19392/92, par. 42). Maar in de deze procedure ligt de nadruk dus op de verenigingsvrijheid. In het verleden is overigens wel vaker een beroep van een politieke vereniging op art. 11 EVRM door het Hof in verband gebracht met art. 17 EVRM. Zo kon een politieke partij met antisemitische sentimenten volgens het Hof geen aanspraak maken op de verenigingsvrijheid (*W.P. e.a.* t. *Polen*, EHRM 2 september 2004 (ontv.besl.), nr. 42264/98). Maar een vereniging die is gestoeld op de islam was nog niet eerder door het Hof beticht van misbruik van de verenigingsvrijheid.

4. In dit geval was het de Duitse regering die in haar betoog voor het Hof reeds refereerde aan art. 17 EVRM. Oorlogspropaganda, zoals Hizb Ut-Tahrir verkondigt, was volgens de Duitse regering net zo goed te kwalificeren als misbruik van verdragsrechten als het ontkennen van de Holocaust (par. 63). Niet in alle zaken waarin het Hof art. 17 EVRM toepast gebeurt dit overigens op verzoek van de partijen. Soms past het Hof art. 17 EVRM ook ambtshalve toe (bv. *Pavel Ivanov* t. *Rusland*, EHRM 20 februari 2007 (ontv.besl.), nr. 35222/04, «EHRC» 2007/68). Uit de jurisprudentie is echter niet duidelijk af te leiden wanneer en op basis waarvan het Hof de keuze maakt art. 17 EVRM toe te passen.

5. De Duitse regering heeft voor het Hof de betekenis van art. 9 par. 2 Grundgesetz (GG) en het beginsel van internationale verstandhouding (*den Gedanken der Völkerverständigung*) benadrukt. Dit beginsel is een reactie op de agressieve politiek van Duitsland tijdens het naziregime en geeft uitdrukking aan de belofte van Duitsland zich in te zetten voor een duurzame vredespolitiek met uitsluiting van oorlog als middel voor internationale conflictoplossing. Dit uitgangspunt is tevens uitdrukkelijk vastgelegd in art. 26 par. 1 GG dat stelt dat handelingen die erop gericht zijn het vreedzame samenleven van volkeren te verstoren, in het bijzonder handelingen die oorlog propageren, onconstitutioneel zijn en bestraft dienen te worden. Hieronder vallen met name geschriften waarin oorlog wordt verheerlijkt of rassenhaat wordt gepropageerd (Steinmetz, in: *Münchener Kommentar zum StGB* 2, aufl. 2012, par. 86, rn. 12). Dit veronderstelt een verplichting voor Duitse autoriteiten om actief bij te dragen aan het bevorderen van vrede wanneer de internationale veiligheid in het geding is. Dit houdt volgens de Duitse regering ook in dat actie moet worden ondernomen tegen de oorlogspropaganda van particuliere verenigingen (par. 63). Daarom heeft zij de activiteiten van Hizb U-Tahrir op Duits grondgebied verboden.

6. Voor het Straatsburgse Hof verzet Hizb Ut-Tahrir zich tegen dit verbod en doet dus onder meer een beroep op de vrijheid van vereniging van art. 11 EVRM. Het Hof sluit zich aan bij de argumentatie van de Duitse regering en ziet in het beginsel van internationale verstandhouding reden om het Duitse verbod toelaatbaar te achten. Volgens het Hof probeert Hizb Ut-Tahrir af te wijken van de werkelijke bedoeling van art. 11 EVRM door dit recht in te roepen voor doelen die overduidelijk ingaan tegen de waarden van het verdrag, met name de belofte van een vreedzame oplossing van internationale conflicten en de eerbiedwaardigheid van het menselijk leven. Door het aanzetten tot een gewelddadige jihad tegen Israël en de Israëli heeft Hizb Ut-Tahrir volgens het Hof gehandeld in strijd met de waarden van het EVRM. In eerdere jurisprudentie van het Hof kwam het belang van een vreedzame conflictoplossing al eens naar voren als uitgangspunt van het verdrag. Een van de belangrijkste aspecten van de democratie, die een leidend beginsel vormt voor de interpretatie van het verdrag, is namelijk volgens het Hof de mogelijkheid die zij biedt om kwesties op te lossen door middel van dialoog in plaats van geweld. Hier betrof het echter steeds het oplossen van interne politieke conflicten (zie o.a. *United Communist Party of Turkey e.a.* t. *Turkije*, EHRM 30 januari 1998, nr. 19392/92, par. 57 en *Herri Batasuna & Batasuna* t. *Spanje*, EHRM 30 juni 2009, nrs. 25803/04 en 25817/04, par. 76, «EHRC» 2009/101). In de onderhavige zaak lijkt het Hof voor het eerst ook de inzet voor een vreedzame oplossing van *internationale* conflicten als kernwaarde van het EVRM te beschouwen. Gelet op de context en bedoeling van de totstandkoming van dit verdrag is dit echter geen grote verrassing. Reeds in de preambule van het EVRM geven de verdragsluitende partijen immers aan te streven naar gerechtigheid en vrede.

7. Naast een vreedzame oplossing van internationale conflicten is ook de eerbiedwaardigheid (*sanctity*) van het menselijk leven een kernwaarde die volgens het Hof door Hizb Ut-Tahrir is geschonden. Hoewel het Hof dit begrip niet nader toelicht, lijkt het hiermee te refereren aan het recht op leven in art. 2 EVRM. Andere zaken met betrekking tot de uitleg van dit begrip hebben echter veelal betrekking op het recht op zelfbeschikking, zoals de zaak *Pretty* (*Pretty* t. *Verenigd Koninkrijk*, EHRM 29 april 2002, nr. 2346/02, «EHRC» 2002/47 m.nt. Gerards en Janssen) en de recente zaak *Koch* (*Koch* t. *Duitsland*, EHRM 19 juli 2012, nr. 497/09). In de gegeven zaak lijkt het Hof het begrip eerbiedwaardigheid van het menselijk leven daarentegen te bezien in het licht van het oogmerk van Hizb Ut-Tahrir om het Israëlische volk te vernietigen. In diverse publieke verklaringen had Hizb Ut-Tahrir tevens zelfmoordaanslagen waarbij Joodse burgers omkwamen gerechtvaardigd. Ik kan mij voorstellen dat het Hof dit niet vindt getuigen van eerbied voor het menselijk leven en deze waarde daarom geschonden acht.

8. Geen van beide kernwaarden, de vreedzame oplossing van internationale conflicten noch de eerbiedwaardigheid van het menselijk leven, is eerder door het Hof zo nadrukkelijk in verband gebracht met de toepassing van de misbruikclausule van art. 17 EVRM. Hiermee lijken de gronden voor toepassing van deze bepaling te zijn verruimd. Hoewel het Hof met name problemen lijkt te hebben met het propageren van geweld door de vereniging, acht ik het echter niet onmogelijk dat het feit dat Hizb Ut-Tahrir haar pijlen richt tegen Israël en de Joodse gemeenschap voor het Hof mede aanleiding waren voor de toepassing van een zwaar middel als art. 17 EVRM. In het verleden heeft het Hof immers al vaker korte metten gemaakt met groeperingen met antisemitische sentimenten (*W.P. e.a.* t. *Polen*, EHRM 2 september 2004 (ontv.), nr. 42264/98 en *Pavel Ivanov* t. *Rusland*, EHRM 20 februari 2007 (ontv.), nr. 35222/04, «EHRC» 2007/68). De Duitse regering lijkt in het verbod wel te hebben meegewogen dat de vereniging zich verzet tegen Israël. De Duitse openbare orde omvat volgens de Duitse regering ook de speciale relatie met Israël. De Duitse regering benadrukt in dit kader de bijzondere verplichting die zij heeft ten opzichte van de veiligheid van de Israëlische staat. Het Hof gaat hier echter niet nader op in.

9. De cruciale vraag bij zaken die betrekking hebben op de toepassing van art. 17 EVRM is: waarom vindt het Hof dat er *in casu* sprake is van misbruik van verdragsrechten? Had de kwestie niet (ook) op een andere manier kunnen worden beoordeeld? Er zijn immers meerdere manieren voor het Hof om het overheidsoptreden te toetsen. Zo had het Hof wellicht kunnen oordelen dat verenigingen die aanzetten tot ge-

weld sowieso buiten de reikwijdte van de verenigingsvrijheid vallen. Dan was de uitkomst min of meer hetzelfde geweest in die zin dat de klacht van Hizb Ut-Tahrir niet-ontvankelijk zou zijn verklaard. Een andere mogelijkheid is dat het Hof de beperking van de verenigingsvrijheid toetst aan de beperkingsclausule van art. 11, tweede lid, EVRM. Dan was het Hof waarschijnlijk in de onderhavige casus tot de conclusie gekomen dat de beperking van de vrijheid van vereniging in casu noodzakelijk was in een democratische samenleving ter bescherming van de openbare veiligheid, de openbare orde en de rechten en vrijheden van anderen. Dit is ook wat de Duitse regering lijkt voor te stellen in haar verdediging voor het Hof. Het Hof maakt niet echt duidelijk waarom het de activiteiten van Hizb Ut-Tahrir dusdanig ernstig vindt dat dit de toepassing van art. 17 EVRM rechtvaardigt. In de zaak van de Spaanse Batasuna, die er net als Hizb Ut-Tahrir van werd beschuldigd aan te zetten tot geweld, kwam het Hof bijvoorbeeld tot een andere conclusie (*Herri Batasuna & Batasuna* t. *Spanje*, EHRM 30 juni 2009, nrs. 25803/04 en 25817/04, «EHRC» 2009/101, par. 76). De Baskische politieke partijen Batasuna en Herri Batasuna werden ervan beschuldigd banden te hebben met de gewelddadige afscheidingsbeweging ETA. Op basis daarvan waren zij in maart 2003 door het Spaanse Hooggerechtshof (*Tribunal Supremo*) verboden. Batasuna en Herri Batasuna tekenden hiertegen beroep aan bij het Spaanse Constitutionele Hof (*Tribunal Constitucional*). Dit Hof verklaarde hun klacht echter in januari 2004 ongegrond. Het Hof in Straatsburg oordeelde vervolgens dat een politieke partij wier leiders aanzetten tot geweld niet kan rekenen op de bescherming van het Verdrag. Het door het Spaanse Hooggerechtshof opgelegde verbod diende volgens het Hof het belang om het rechtvaardigen van terrorisme te veroordelen. Uiteindelijk beoordeelde het Hof het verbod van Batasuna en Herri Batasuna in het licht van de beperkingsclausule van art. 11 EVRM en concludeerde dat de ontbinding van beide partijen noodzakelijk was in een democratische samenleving in het belang van de openbare veiligheid, het voorkomen van wanordelijkheden en de bescherming van de rechten en vrijheden van anderen. Waarom leidde deze zaak tot een rechtvaardiging van het verbod omdat dit noodzakelijk zou zijn in een democratische samenleving, terwijl het Hof in de zaak Hizb Ut-Tahrir concludeert dat misbruik is gemaakt van art. 11 EVRM waardoor er via art. 17 EVRM geen beroep op deze bepaling mogelijk is? Heeft dit te maken met het feit dat Batasuna en Herri Batasuna politieke partijen zijn en Hizb Ut-Tahrir niet? Ook de Turkse politieke partij Refah Partisi werd door de Turkse regering verweten een jihad (*holy war*) te propageren om haar doelen te realiseren (*Refah Partisi (the Welfare Party) en anderen* t. *Turkije*, EHRM 13 februari 2003 (GK), nrs. 41340/98, 41342/98, 41343/98 & 41344/98, «EHRC» 2001/59 m.nt. Janssen, par. 84). Het Hof overwoog eveneens dat Refah Partisi onduidelijkheid had laten bestaan over de mogelijkheid geweld te gebruiken om haar doelen te verwezenlijken (par. 129-131). Uiteindelijk oordeelde het Hof echter dat met het verbod van de partij art. 11 EVRM niet was geschonden door het partijverbod en dat de beperking van de vrijheid van vereniging noodzakelijk was in een democratische samenleving. Art. 17 EVRM kwam er hierbij niet aan te pas. Wanneer nu precies sprake is van misbruik en wanneer een zaak kan worden afgedaan met de beperkingssystematiek blijft daardoor (nog) niet volledig verklaarbaar.

10. Interessant was daarom ook geweest om te weten wat de tegenstanders binnen de Kamer van het Hof erover te zeggen zouden hebben. De beslissing is namelijk bij meerderheid genomen en dus niet unaniem. Helaas is bij beslissingen van het Hof niet te achterhalen hoeveel rechters voor de toepassing van art. 17 EVRM waren en hoeveel tegen. En, nog belangrijker, wat de argumenten waren van de dissenters om tegen deze uitkomst te stemmen. Alleen daarom al is het jammer dat de zaak niet in een inhoudelijke uitspraak is afgedaan, maar het Hof heeft volstaan met een beslissing. Misschien is het wachten op de volgende zaak waarin het Hof art. 17 EVRM toepast voordat meer duidelijkheid ontstaat over de criteria voor toepassing van deze misbruikclausule.

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