

IN THE EUROPEAN COURT OF HUMAN RIGHTS
Application No. 35943/10

GÁBOR VONA

v

HUNGARY

**WRITTEN COMMENTS OF
THE EUROPEAN ROMA RIGHTS CENTRE
SUBMITTED PURSUANT TO ARTICLE 36(2)**

I. Introduction

1. These written comments are submitted by the European Roma Rights Centre in accordance with permission to intervene granted by the President of the Chamber pursuant to Article 36(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).
2. This intervention addresses the degree to which freedoms guaranteed under Article 11 of the Convention can be legitimately restricted to protect the rights and freedoms of members of minority communities. It focuses on the way in which discrimination – and in particular racism – is considered in the context of a democratic society, in relation to Article 11(2) and / or Article 17 of the Convention. It also recalls several positive obligations by which states are to protect against discrimination and various forms of racial hatred. It also examines the situation of Roma – broadly and in Hungary – which is also pertinent to an evaluation of democratic values and in the narrower consideration of restrictions under Article 11(2), in particular for the protection of rights and freedoms of others.
3. Within this framework, the intervention sets out a considerable body of international and regional human rights law, non-binding regional guidelines and jurisprudence of the European Court of Human Rights (the Court) which indicates the following principles should be taken into account when considering restrictions to Article 11 freedoms:
 - a) combating racial discrimination is of vital importance given the foundational nature of equality in democratic society;
 - b) racial and ethnic minorities, such as Roma, are to be afforded special protection within the framework of the Convention, including the protection of their rights under Article 11(2).

II. Racism in a Democratic Society

4. Article 11 protects freedom of assembly and association to be restricted only in the context of what is necessary in a democratic society. The following demonstrates the extent to which international and regional norms consider discrimination, and racism in particular, to be contrary to the fundamental principles of democratic society in the context of respect for freedoms of expression, assembly and association. In this regard, the Court has noted that restrictions under Article 11 must also be considered in light of Article 10, and the Article 10 jurisprudence cited below is noted insofar as the principles under review are similar in context of both Articles.¹
5. Several of the positive obligations cited in this section are also informative in interpreting and applying permissible restrictions under Article 11(2), particularly of protection of rights and freedoms of others and most obviously where Articles 3, 5, 8 and 14 are engaged.

International and regional human rights law and non-binding regional guidelines on combating racism

6. Restrictions similar to those set out in Article 11(2) exist in all international and regional human rights instruments in which freedoms of assembly and association are enshrined.²
7. Articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) in particular are preceded by Article 20 which imposes an explicit positive duty upon states: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. This imperative has been considered by the Human Rights Committee to justify a restriction in the context of freedom of expression in the case of *Faurisson v France*,³ and may be considered applicable *mutatis mutandis* in Article 21 and 22 cases.
8. Notwithstanding the importance of expressive freedoms, the strength of protections afforded in international law against discriminatory / racist organisations is best illustrated by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination⁴ (ICERD), which requires that: “State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote

¹ *United Communist Party of Turkey v Turkey* [GC], no. 19392/92, 30 January 1998, para. 42. See also: *Ezelin v France*, no. 11800/85, 26 April 1991, para. 37

² Article 20(1) of the Universal Declaration of Human Rights (UDHR), Articles 21 and 22 International Covenant on Civil and Political Rights (ICCPR), Article 10 and 11 of the African Charter on Human and Peoples’ Rights (ACHPR), Articles 15 and 16 of the American Convention on Human Rights (ACHR), Article 28 of the Arab Charter on Human Rights, and Article 12 of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States.

³ Decision of 8 November 1996, Communication No. 550/1993

⁴ Ratified by Hungary without reservations to Article 4. See: United Nations Treaty Collection: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec

racial hatred and discrimination in any form” and imposes upon State Parties the duty to adopt “immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination”. However, it goes further and requires State Parties to criminalise “all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin” and “declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law.”

9. Similarly, the European Commission on Racism and Intolerance (ECRI) has called for the criminalisation of statements “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”.⁵ ECRI further advises that states, “[i]n conformity with the [aforementioned] international obligations, take measures, including where necessary legal measures, to combat racist organisations – bearing in mind the fact that they can pose a threat to the human rights of minority groups – including banning such organisations where it is considered that this would contribute to the struggle against racism”.⁶ ECRI General Policy Recommendation No. 13 (2011) calls for states “to condemn all public discourse which publicly incites direct or indirect discrimination, hatred or violence against Roma”.⁷
10. The CoE Framework Convention for the Protection of National Minorities (FCNM) requires State Parties “to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.”⁸
11. The OSCE/ODIHR Venice Commission Guidelines on Freedom of Peaceful Assembly⁹ also highlights that those who advocate “national, racial or religious hostility [that] constitutes incitement to discrimination, hatred or violence” may forfeit the protection of their expressive rights under the ECHR and the ICCPR.¹⁰

⁵ ECRI General Policy Recommendation No 1, *Combating Racism, Xenophobia, Anti-Semitism and Intolerance*, adopted by ECRI on 4 October 1996, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/gpr/en/recommendation_n1/Rec01en.pdf, at page 4

⁶ *Ibid.*, page 4

⁷ ECRI General Policy Recommendation No.13, *Combating Anti-Gypsyism and Discrimination Against Roma*, adopted on 24 June 2011, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf, para. 15

⁸ Council of Europe Framework Convention for the Protection of National Minorities, adopted 1 February 1995, Strasbourg, European Treaty Series No. 157, Article 6(2)

⁹ European Commission for Democracy through Law (Venice Commission) and Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Cooperation for Europe (OSCE), *OSCE/ODIHR- Venice Commission Guidelines on Freedom of Peaceful Assembly* (2nd ed), Adopted by the Venice Commission at its 83rd Plenary Session (Venice, 4 June 2010), available at: <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29020-e.pdf>

¹⁰ “While expression should normally still be protected even if it is hostile or insulting to other individuals, groups or particular sections of society, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence should be prohibited by law.

Protection of democratic values under the Convention

12. The Court has also established a clear link between the Convention, democracy and the importance of equality. The Court has defined “tolerance, social peace and non-discrimination” as basic values protected by the Convention¹¹ and affirmed that “it is particularly conscious of the vital importance of combating racial discrimination in all its forms and manifestations”.¹² In *Gündüz v Turkey*, the Court stated:

“Having regard to the relevant international instruments [...] and to its own case-law, the Court would emphasise, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”¹³

13. The Court has further established that organisations with “undemocratic” aims or who use “undemocratic” means will not come within the scope of Article 11 protection. In the case of *Refah Partisi* the Court lays down a threshold test for associations seeking the protection of the Convention. The two fundamental conditions are that (i) the means used “must be legal and democratic”, and (ii) any proposed change “must itself be compatible with fundamental democratic principles”.¹⁴ In the case of *Herri Batasuna and Batasuna v Spain*, the Court reiterated that political parties can only use legal and democratic means to propose changes, which must be compatible with fundamental democratic principles.¹⁵ Consequently, the Court stated 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.”¹⁶

14. Further, the Court considered that in cases in which a policy is incompatible with the Convention and democracy, and in which the dangers from such policy are sufficiently established and imminent, a State cannot be required to wait for the implementation of concrete steps of such a policy before intervening. The Court stated that “[...] where the presence of such a danger

Specific instances of hate speech ‘may be so insulting to individuals or groups as not to enjoy the level of protection afforded by Article 10 of the European Convention on Human Rights to other forms of expression. This is the case where hate speech is aimed at the destruction of the rights and freedoms laid down in the Convention or at their limitation to a greater extent than provided therein’, para. 96

¹¹ *Norwood v the United Kingdom*, no. 23131/03, Decision on Admissibility, 16 November 2004

¹² *Jersild v Denmark* [GC], no. 15890/89, 23 September 1994, para. 30

¹³ *Gündüz v Turkey*, no. 35071/97, 14 June 2004, para. 40

¹⁴ *Refah Partisi (The Welfare Party) and Others v Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003, para. 98

¹⁵ *Herri Batasuna and Batasuna v Spain*, nos. 25803/04 and 25817/04, 30 June 2009, para. 79

¹⁶ *Ibid.*, para. 75

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”.¹⁷ In the Court’s view 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.¹⁸

15. In several other judgments, the Court has confirmed that some expressions constituting hate speech are not protected by Article 10, by virtue of Article 17 of the Convention. For example, in the case of *Norwood v UK* the Court relied on Article 17 and stated that “the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention” and therefore held that deliberate incitement to racial hatred constituted an abuse of rights and was not protected under Article 10.¹⁹ The result was the same in *Glimmerveen and Hagenbeek v the Netherlands* in which the Commission declared that the applicants (members of an extreme-right party advocating for a racially-pure population and the removal of all non-white people from the Netherlands) could not rely on the protection of Article 10.²⁰

III. Protection of Ethnic Minorities

16. Among the justifications set out in Article 11(2) for restricting the right to freedom of assembly and association is the “protection of the rights and freedoms of others”. It is submitted here that in assessing the legitimacy of any restriction of Article 11 rights, particular regard should be had to the importance of safeguarding the rights and freedoms of vulnerable minorities, such as Roma.

Special protection of Roma under the Convention

17. The Court has established that discrimination on account of a person's ethnic origin is a form of racial discrimination. In view of its perilous consequences it is particularly invidious and requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence.²¹ The vulnerability of the group against whom discrimination takes place has been a factor in the Court’s analysis: the Court has established that Roma enjoy special protection under Article 14 of the Convention.²² In

¹⁷ Ibid., para. 81. See also *Refah Partisi*, above, para. 102

¹⁸ Ibid., para. 82

¹⁹ *Norwood*, above

²⁰ *Glimmerveen and Hagenbeek v the Netherlands*, nos. 8348/78 and 8406/78, 11 October 1979, Decision on Admissibility

²¹ *Nachova and Others v Bulgaria* [GC], nos. 43577/98 and 43579/98, para. 145, ECHR 2005-VII; and *Timishev v Russia*, nos. 55762/00 and 55974/00, para. 56, ECHR 2005-XII

²² *Chapman v the United Kingdom*, judgment of 18 January 2001, *Connors v the United Kingdom*, judgment of 27 May 2004

D.H. and Others v the Czech Republic, the Court reiterated that “the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases”.²³ This, more recently, was reaffirmed by the Court in *Aksu v Turkey* in which it was stated that “the Roma have become a specific type of disadvantaged and vulnerable minority [...] they therefore require special protection”.²⁴ The Court had observed over a decade ago “that there is an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity that is of value to the whole community.”²⁵

Protection of Roma in Hungary

18. The particular vulnerability of Roma as noted by the Court, is aligned with a wealth of opinions from several international and regional monitoring bodies and non-governmental organisations.²⁶ Such opinions have also mapped the increasing precariousness of the situation of Roma in Hungary in particular.

19. In the past few years, international monitoring bodies²⁷ and national non-governmental organisations²⁸ have expressed particular concerns about the rise in anti-Roma rhetoric and racism among extreme political forces and

²³ *D.H. and Others v the Czech Republic* [GC], no. 57325/00, 13 November 2007, para. 181

²⁴ *Aksu v Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, para. 44, See as well: *Muñoz Díaz v Spain*, no. 49151/07, 8 December 2009, para. 60

²⁵ *Chapman v the United Kingdom* [GC], no. 27238/95, para. 93, ECHR 2001-I

²⁶ See for example: CERD General Recommendation 27, focusing specifically on ‘Discrimination against Roma’ and urging States Parties to adopt measures to protect Roma communities against racial violence and to improve their living conditions. (See: *General Recommendation No. 27: Discrimination against Roma: 08/16/2000. Gen. Rec. No. 27. (General Comments)*, available at: <http://www.unhcr.ch/tbs/doc.nsf/%28Symbol%29/11f3d6d130ab8e09c125694a0054932b>); ECRI General Policy Recommendation No.13, *Combating Anti-Gypsyism and Discrimination Against Roma*, adopted on 24 June 2011, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N13/e-RPG%2013%20-%20A4.pdf); The OSCE also expressed commitment to the special protection of Roma. In November 2003, the Permanent Council of the OSCE adopted Decision No. 566 on an ‘Action Plan on Improving the Situation of Roma and Sinti within the OSCE Area’ aiming at eradicating discrimination against Roma, and ensuring their equality. (See: OSCE, Permanent Council, Decision No. 566 adopted on 27 November 2003, available at: <http://www.osce.org/odihr/17554>)

²⁷ See for example Press Statement and Report on Hungary by Githu Muigai, United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11085&LangID=E> and http://www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33.Add.1_en.pdf; See also: UN Human Rights Committee, Concluding observations of the Human Rights Committee, Hungary, 100th session, Geneva, 11-29 October 2010., para. 18, available at: <http://www2.ohchr.org/english/bodies/hrc/hrcs100.htm>

²⁸ See for example Hungarian Civil Liberties Union, *Shadow Report about the Events in Gyöngyöspata*, 27 September 2011, pages 12 and 46, available at: http://tasz.hu/files/tasz/imce/tasz_gyongyospata_armyekjelentes_110927.pdf; See also: European Roma Rights Centre, *Attacks against Roma in Hungary: January 2008-July 2011*, available at: <http://www.errc.org/cms/upload/file/attack-list-in-hungary.pdf>; and Amnesty International, *Annual Report, Hungary, 2010*, available at: <http://www.amnesty.org/en/region/hungary/report-2010>

physical violence against Roma in Hungary. In particular, in his report on Hungary, Githu Muigai, United Nations Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance expressed its deep concern “at the growth of paramilitary organizations with racist platforms which target Roma [...]”.²⁹

20. Thomas Hammarberg, then CoE Commissioner for Human Rights, in a letter addressed to the Prime Minister of Hungary expressed grave concern about “the observed rise of extremism, intolerance and racism which has been specifically aimed at members of the Roma community [...]”.³⁰ In his report the Commissioner noted the rise of hate speech and antigypsism being exploited by extremist groups.³¹
21. Similarly, in its report on Hungary ECRI noted that “there has been disturbing increase in racism and intolerance in public discourse in Hungary.”³² In its Conclusions on the Implementation of the Recommendations adopted in December 2011, ECRI noted “[b]earing in mind the possible links between hate speech and racist acts, it considers this situation especially worrying in a context where the overall climate appears to have become increasingly intolerant and violent racist attacks, targeting Roma in particular, have occurred.”³³ The Advisory Committee of the FCNM in its Third opinion adopted in 2010 also noted the particularly intolerant climate towards Roma in Hungary and the “worrying rise in intolerance and racism, chiefly aimed at Roma”.³⁴
22. Finally, during a field assessment in June/July 2009, the OSCE/ODIHR expressed its concern about “the formation and development of a political movement that has openly voiced extreme anti-Roma attitudes and used its

²⁹ 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, available at: http://www.ohchr.org/Documents/Issues/Racism/A.HRC.20.33.Add.1_en.pdf

³⁰ Letter addressed to Mr Gordon BAJNAI, Prime Minister of Hungary, from Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 2009, available at:

<https://wcd.coe.int/ViewDoc.jsp?id=1545389&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

³¹ Human rights of Roma and Travellers in Europe, Council of Europe, 2012, pages 9, 42-48; available at:

http://www.coe.int/t/commissioner/source/prems/prems79611_GBR_CouvHumanRightsOfRoma_WEB.pdf

³² European Commission Against Racism and Intolerance (ECRI), Fourth Monitoring Cycle, ECRI Report on Hungary, 24 February 2009 para. 61-65; available at:

<http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Hungary/HUN-CbC-IV-2009-003-ENG.pdf>

³³ European Commission Against Racism and Intolerance (ECRI), Conclusions on the Implementation of the Recommendations in Respect of Hungary Subject to Interim Follow-up, 8 December 2011, page 5., available at:

<https://wcd.coe.int/ViewDoc.jsp?id=1892255&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

³⁴ Advisory Committee on The Framework Convention for the Protection of National Minorities, Third Opinion on Hungary, adopted on 18 March 2010, Strasbourg, paras 72-81, available at: http://www.coe.int/t/dghl/monitoring/minorities/3_FCNDocs/PDF_3rd_OP_Hungary_en.pdf

paramilitary Hungarian Guard organization to induce fear among Roma and, at the same time, to gain public support.”³⁵

Budapest, 11 July 2012

Dezideriu Gergely
Executive Director
European Roma Rights Centre

³⁵ OSCE/ODIHR, Field Assessment of violent incidents against Roma in Hungary: Key developments, Findings and Recommendations, June-July 2009, Warsaw, page 8., available at: <http://www.osce.org/odihr/68545>