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Macedonia: Written contribution on ECtHR admissibility of application on violations of Bulgarians' freedom of association and freedom of expression

Greek Helsinki Monitor (GHM) highlights a very important application declared admissible by the **European Court of Human Rights** (ECtHR) on 8 July 2008. It concerns multiple alleged violations of the freedom of association and the freedom of expression of Macedonia's Bulgarians, and more specifically of the association **"Radko"** and its President **Mr Vladimir Paunkovski**. The ECtHR statement of facts follows. GHM wrote a report in 1997 about this "hidden" minority, usually ignored in all human rights reports. GHM's report, along with other related information, is available at its webpage http://www.greekhelsinki.gr/special-issues-Bulgarians-of-Macedonia.html.

CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

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

FIFTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 74651/01
by the Association of citizens "Radko" and Paunkovski
against the former Yugoslav Republic of Macedonia
lodged on 30 July 2001

http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=838992&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649

The European Court of Human Rights (Fifth Section), sitting on 8 July 2008 as a Chamber composed of:

Peer Lorenzen, *President,*
Karel Jungwiert,

Volodymyr Butkevych,
Renate Jaeger,
Mark Villiger,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska, *judges,*
and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 30 July 2001,

Having regard to the initial observations submitted by the respondent Government and the observations in reply submitted by the applicants in 2006,

Having regard to their additional observations of September 2007 and May 2008,

Having regard to the comments submitted by the Bulgarian Government who had exercised their right to intervene (Article 36 § 1 of the Convention and Rule 44),

Having regard to the parties' and the third party's oral submissions at the hearing on 19 June 2008,

Having deliberated, decides as follows:

THE FACTS

The first applicant is the Association of Citizens "Radko" ("the Association"). The second applicant is Mr Vladimir Paunkovski, the Chairman of the Association, who has dual Macedonian and Bulgarian nationality. He was born in 1954 and lives in Ohrid, in the former Yugoslav Republic of Macedonia. The applicants are represented before the Court by Mr Y. Grozev and Mr B. Boev, both lawyers practising in Sofia, Bulgaria. At the oral hearing on 19 June 2008, Mr Y. Grozev was also assisted by Mrs N. Dobreva.

The Macedonian Government ("the Government") are represented by their Agent, Mrs R. Lazareska Gerovska.

The Bulgarian Government ("the third-party intervener") are represented by their Agents, Mrs M. Kotzeva and Ms S. Atanasova; only the latter attended the oral hearing.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 24 May 2000 ten Macedonian nationals, including the second applicant, founded the Association in the city of Ohrid. On 19 June 2000 the Ohrid Court of First Instance registered the Association in the register of associations of citizens and foundations under the following name: "Association of Citizens Radko-Ohrid".

1. The Association's Articles of Association

Article 3 of the Articles of Association ("the Articles") defined the Association as an independent, non-political and public organisation, which studies and promotes the Macedonian Liberation Movement ("the Movement") through commonly accepted democratic principles and standards.

Article 7 defined its objectives and tasks as follows:

"The Association has the following objectives and tasks:

- it endeavours to raise and affirm the Macedonian cultural space;

- it endeavours to establish traditional ethical and human values;

- it endeavours to popularise the objectives, tasks and ideas of the Macedonian Liberation Movement through the publication of its own newspaper, publishing activity and library, and through its own electronic media, seminars, conferences, forums and other forms of cultural action."

Article 8 set out that the Association will attain these objectives and tasks through:

"- the individual and collective activities of its members, bodies and structures of the Association,

- cooperation between the Association and other similar associations and structures, inside the country and abroad".

Article 9 provided that every citizen who accepted the Association's Programme could become a member.

Article 10 § 1 provided:

"Every citizen of the Republic of Macedonia and citizens of a foreign state may become a member, if they have reached the age of 18, after signing a membership application".

2. The Association's Programme

The Association's Programme of 24 May 2000 consisted of two paragraphs. It read as follows:

"The Association is founded as a non-governmental, non-party and non-political organisation with the purpose of raising and affirming the Macedonian cultural space, establishing traditional ethical and human virtues, affirmed in the ideas of the Macedonian Liberation Movement, through the publication of its own newspaper, publishing activity and library, and through its own electronic media, seminars, conferences, forums and other forms of cultural action.

For the above objectives, the Association will organise public forums, with the participation of outstanding cultural and scientific workers from inside the country and abroad, through its local committees."

3. The Association's promotional leaflet

On 27 October 2000 the official launch of the Association took place in a hotel in Skopje, the capital of the former Yugoslav Republic of Macedonia. A promotional leaflet by the Association (which allegedly accompanied the letters of invitation for the opening ceremony) was published at the beginning of October. It provided information about the Association's name, objectives and the ways in which these were to be achieved. It read:

"a. Name of the Association

The founders of the Association have taken as its name the most frequently used pseudonym of Ivan Mihajlov, RADKO.

Ivan Mihajlov-Radko, his name, his life, his revolutionary activity and especially his cultural and literary activity are deeply woven in the history of Macedonia. Praised, but also denounced by his ideological adversaries, he became and still remains a legend for his ideological companions, including the founders of this Association. Although his work is yet to be evaluated, it is undisputable that under his leadership the Macedonian Liberation Movement became an example of the human spirit's love of freedom. Thus, he placed an obligation on future generations to complete the holy liberation.

Ivan Mihajlov headed the Movement for an extremely long period (1925-1990). He remained and worked as an intellectual and moral pillar of the revolutionary and cultural struggle of the Bulgarians from Macedonia. This allows us to state that his publications are the most authentic and most reliable evidence of the ideological content of the Macedonian Liberation Movement. Due to their factual reliability they remain as historical evidence of unquestionable scientific value. His written legacy provides the present and coming generations with the most concrete evidence of the revolutionary and cultural struggle of the Bulgarians from Macedonia. Of this legacy, the most important [work] is his four-volume "Memoirs", which are a national treasure of unchangeable value in the recent history of Macedonia."

b. The Association aims to:

- raise and affirm the Macedonian cultural space, having as its priority the cultural and historical identity of the Slavs from Macedonia who have appeared as Bulgarians throughout the centuries;

- establish traditional ethic and human values;

- affirm the ideas of the Macedonian Liberation Movement.

c. The Association realises its objectives through:

- own book-publishing activity, publication of its own newspaper and its own electronic media;

- the organisation of conferences, seminars and forums with outstanding scientific and cultural scholars from the country and abroad;

- cooperation with scientific, cultural and educational institutions, and with similar associations and organisations from the country or abroad.

After the opening speech by the chairman of the Association and a solemn performance of the anthem of Todor Alexandrov, three young men threw gas bombs inside the conference hall, which caused a temporary delay. Some of the participants started to beat and kick the young men. The latter managed to escape, but a retired journalist was injured. According to the daily newspaper "*Utrinski vesnik*" of 30 October 2000, he sustained a "fracture of his left hand and blood on his face".

On 7 October 2005 the Skopje Court of First Instance convicted two persons of causing grievous bodily injury and sentenced them to three months' imprisonment. It found that the perpetrators had pushed the journalist, who had sustained a fracture of the forearm. One of the perpetrators was a member of the Association.

There was a strong media campaign before and after the launch of the Association, condemning its foundation and functioning as contrary to the Macedonian national identity. The Association was described as "fascist" and as rehabilitating "terrorism and fascism, which were the basic characteristics of Hitler's collaborator Vančo Mihajlov" (excerpts from the newspapers "*Utrinski vesnik*", mentioned above, and "*Dnevnik*" from 24 October 2000).

4. The procedure before the Constitutional Court and subsequent events

In or about October 2000 three practising lawyers from Skopje, together with a political party and the Association of War Veterans from the Second World War filed a petition before the Constitutional Court challenging the conformity of the Association's Articles and Programme with Article 20 of the Constitution. They also challenged the lawfulness of the Ohrid court's decision to register the Association.

The petitioners, *inter alia*, stressed that:

> "...the aims of the Association are the infiltration of Bulgarian linguistic elements into the Macedonian language and alphabet..."

The petitioners noted that all the Association's documents bore the flag of Vančo Mihajlov. They continued:

> "The Association promotes Vančo's (meaning Ivan Mihajlov's) ideology for a change in the national conscience of the Macedonian people in favour of another one, which destroys the Macedonian national texture and leads to the encouragement of and incitement to national hatred and intolerance. The Association rehabilitates and legalises terrorism and fascism as crucial characteristics of the work of Hitler's collaborator Vančo Mihajlov, as an "act of holy liberation" and as a legacy that is left to someone to complete...The Slavs from Macedonia who appeared as Bulgarians (*Болгари*) throughout the centuries...are unknown in the Republic of Macedonia. They do not exist as a nation, any nationality or legitimate entity whatsoever. There are only Macedonians in Macedonia, and there also might be Bulgarians, Serbs...as affiliated to different people and nations. However, there are no "Slavs from Macedonia-Bulgarians".

On 8 November 2000 the Constitutional Court sent the petitions for reply to the second applicant, as Chairman of the Association. The Association contested the petitioners' arguments as its Articles and Programme did not contain any elements that would incite to national, religious or racial hatred or intolerance or would advocate violent destruction of the constitutional order.

On 17 January 2001 the Constitutional Court declared the petition admissible. The court found, *inter alia*, that there existed:

> "well-founded doubts that the Association's Articles and Programme were directed towards violent destruction of the constitutional order of the Republic of Macedonia and incitement to national or religious hatred or intolerance, and that as such they are not in conformity with the Constitution of the Republic of Macedonia".

It further declared itself incompetent to judge the constitutionality of the registration decision of the Ohrid Court of First Instance, because it was not vested with jurisdiction to decide on such decisions.

On 21 March 2001 the Constitutional Court declared the Association's Articles and Programme null and void, on the ground that they were directed towards violent destruction of the constitutional order and incitement to national or religious hatred or intolerance.

The Constitutional Court based its decision on the following reasoning:

> "According to Ivan Mihajlov's ("Radko's") teaching, Macedonian ethnicity never existed on this territory, but belonged to the Bulgarians (*Болгари*) from Macedonia and its recognition (i.e., that of Macedonian ethnicity) was the biggest crime committed by the Bolshevik headquarters during its existence. According to his teaching, the process of de-bulgarisation of Macedonia, which was violently carried out after the Second World War, was a [form of] slavery executed by the Serb-communist regime and such Serb-communist doctrine continued to be the official one of the State after it became independent in 1991.

In line with those arguments, the founders of the Association "Radko" took the following as their main Programme objectives: (1) to raise and affirm the Macedonian cultural space, having as a priority the cultural and historical identity of the Slavs from Macedonia who have appeared as Bulgarians throughout the centuries; (2) to establish traditional ethic and human values; (3) not to forget the Bulgarian ethnic origin of the Macedonian people, as that would mean a denunciation of its tradition and culture.

Affirmation of the ideas of the Macedonian Liberation Movement, according to the Association, in fact means relief from "Macedonianism", as a Serb-communist doctrine, and from the "imagined Macedonian nation" which was used as an open door for the accession of the whole of Macedonia to Yugoslavia.

Taking that into consideration, the court holds that the Articles and the Programme of the Association of Citizens "Radko"- Ohrid are directed towards the violent destruction of the constitutional order of the Republic of Macedonia and to incitement to national or religious hatred or intolerance, and finds that they are not in compliance with the Constitution of the Republic of Macedonia."

As regards freedom of association, the Constitutional Court argued as follows:

"... the court has taken into consideration that citizens' freedom and right to association and activity, as part of the corpus of human rights and freedoms, is one of the fundamental values for the existence and development of democratic relations in the functioning of government in the Republic of Macedonia, oriented towards its citizens and their rights, freedoms, interests and aspirations. They are also the basis for the accomplishment of the constitutional determination of the Republic of Macedonia as a democratic state. This being so, the above freedom and right are explicitly guaranteed in Article 20 §§ 1 and 2 of the Constitution of the Republic of Macedonia.

However, the court finds that the freedom and right to association, organisation and activity cannot be taken to indicate approval for all objectives and the choice of means to attain them.

The principles and safeguards for exercising freedom of association and activity are explicitly determined in Article 20 § 3 of the Constitution, which bans the Articles and activities of associations of citizens which are directed towards the violent destruction of the constitutional order of the Republic and to incitement to national or religious hatred or intolerance. Furthermore, Articles 1, 3 and 8 of the Constitution protect the sovereignty and territorial integrity of the Republic."

Applying these criteria to the present case, the Constitutional Court held as follows:

"The Articles and the Programme of the Association, read in the light of the prohibitions set forth in Article 20 § 3 of the Constitution, must be interpreted as aims which directly and explicitly call for destruction of the constitutional order, i.e. they explicitly encourage an incitement to national hatred and intolerance, and as such they are to be treated as aims and activities that are objectively directed towards what is banned by the Constitution.

In this context, the court takes into consideration the Preamble to the Constitution of the Republic of Macedonia, which takes as an the historical fact that Macedonia is constituted as a national state of the Macedonian people and that every activity directed towards denunciation of its identity is in fact directed towards the violent destruction of the constitutional order of the Republic and towards encouragement of or incitement to national or religious hatred or intolerance and towards denunciation of the free expression of its national affiliation.

Bearing this in mind, the court found that the Programme and the Articles of the Association of Citizens "Radko"- Ohrid are directed towards the violent destruction of the state order; hindrance of free expression of the national affiliation of the Macedonian people, i.e. negation of its identity and incitement to national or religious hatred or intolerance."

On 10 April 2001 the Constitutional Court's decision was published in the "Official Gazette of the Republic of Macedonia" and became final and enforceable.

The Government stated that on 9 January 2002 the Constitutional Court returned the case file to the Ohrid Court of First Instance, seeking information as to possible measures for enforcement of its decision. They provided no copy of that communication.

On 16 January 2002 the Ohrid Court of First Instance *ex officio* decided to terminate the activities of the Association (*се утврдува престанок на работа на Здружението*).

On 29 January 2002 the applicants appealed the latter decision. They complained that it had been given on the basis of the Constitutional Court's decision, which in their view had not been final, but that the Strasbourg Court's holdings on their application should be awaited.

On 11 February 2002 the Bitola Court of Appeal dismissed the appeal as ill-founded. It found that an association of citizens would cease to exist *ipso jure* when the Constitutional Court had declared its Articles and Programme unconstitutional. As the Constitutional Court's decision had been published in the Official Gazette and had accordingly entered into force, the Court of Appeal upheld the lower court's decision.

B. Relevant domestic law

1. *The Constitution of the Republic of Macedonia*

The Preamble to the Constitution, as valid at the material time, read, *inter alia*:

"...the historical fact that Macedonia is established as a national state of the Macedonian people, in which full equality as citizens and permanent co-existence with the Macedonian people is provided for Albanians, Turks, Vlachs, Roma and other nationalities living in the Republic of Macedonia..."

Amendment IV of the Constitution of 2001 replacing the Preamble, reads, *inter alia*, as follows:

"The citizens of the Republic of Macedonia, the Macedonian people, as well as citizens living within its borders who are part of the Albanian people, the Turkish people, the Vlach people, the Serbian people, the Romany people, the Bosniak people and others ..."

The relevant provisions of the Constitution related to freedom of association and the Constitutional Court read as follows:

Article 20

"Citizens are guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions.

Citizens may freely establish associations of citizens and political parties, join them or resign from them.

The programmes and activities of political parties and other associations of citizens may not be directed at the violent destruction of the constitutional order of the Republic, or at encouragement of or incitement to military aggression or ethnic, racial or religious hatred or intolerance.

Military or paramilitary associations which do not belong to the Armed Forces of the Republic of Macedonia are prohibited."

Article 50

"Every citizen may invoke protection of the freedoms and rights set forth in the Constitution before the courts, including before the Constitutional Court of the Republic of Macedonia, in a procedure based upon the principles of priority and urgency.

Judicial protection of the legality of individual acts of the state administration, as well as of other institutions carrying out public mandates, is guaranteed.

A citizen has the right to be informed about human rights and fundamental freedoms and also actively to contribute, individually or jointly with others, to their promotion and protection.

Article 110 §§ 3 and 7

"The Constitutional Court of the Republic of Macedonia:

- protects the freedoms and rights of the individual and citizen relating to freedom of conviction, conscience, thought and public expression of thought; political association and activity; and the prohibition of discrimination among citizens on the ground of sex, race, religion or national, social or political affiliation;

- decides on the constitutionality of the programmes and statutes of political parties and associations of citizens..."

Article 112 §§ 2 and 3

"The Constitutional Court shall repeal or invalidate a collective agreement, other regulation or enactment, statute or programme of a political party or association, if it finds that they do not conform to the Constitution or law.

The decisions of the Constitutional Court are final and enforceable."

2. Associations of Citizens and Foundations Act

The relevant provisions of the Associations of Citizens and Foundations Act provide:

Article 2

"Citizens may freely associate in associations of citizens and may establish foundations in order to accomplish and protect their economic, social, cultural, scientific, professional, technical, humanitarian, educational, sports and other rights, interests and beliefs in conformity with the Constitution and laws.

Associations of citizens and foundations shall be non-profit organisations."

Article 4

"The Programmes and activities of associations of citizens and foundations shall not be directed towards:

- the violent destruction of the constitutional order of the Republic;

- encouragement of or incitement to military aggression; and

- encouragement of national, racial or religious hatred or intolerance."

2. Cessation of the associations of citizens and foundations

Article 52

"An association of citizens shall cease to exist:

... if the Constitutional Court of the Republic of Macedonia decides that the Programme and the Articles are not in conformity with the Constitution...

The person authorised to represent the association of citizens shall be obliged to notify the first-instance court of the circumstances as described in paragraph 1 within 15 days.

The first-instance court shall determine the cessation of the association of citizens by adopting a decision in non-contentious proceedings. "

4. *Book of Regulations of the Constitutional Court* (Деловник на Уставниот суд на Република Македонија)

Article 14

"The Constitutional Court may, on its own motion, initiate proceedings for review of the constitutionality of a law or the constitutionality and legality of a regulation or other generally binding regulation".

COMPLAINTS

The applicants complained under Article 11 of the Convention that the Constitutional Court's decision declaring the Association's Articles and Programme null and void had violated their freedom of association, in that it led to the dissolution of the Association and deprived its members of the possibility jointly to pursue the purposes they had laid down in its Articles and Programme. They complained that the interference had not been prescribed by law and had been disproportionate: the Association had dissolved with immediate and permanent effect. The applicants submitted that the arguments put forward by the Constitutional Court had been baseless, vague and unproven and that they had not corresponded to the concept of a "pressing social need". Furthermore, they indicated that there had been nothing in the Association's activities, Articles and Programme which would indicate that it had advocated the use of violence, anti-democratic or unconstitutional means. The Constitutional Court based its decision on a presumption that "every action directed at the negation of the ethnic origin of the Macedonian people and the national state was aimed at the violent destruction of the constitutional order and encouragement of and incitement to national or religious hatred or intolerance".

The second applicant complained also under Article 10 that the dissolution of the Association amounted to a violation of his freedom of expression as the Association had served as a venue for expression of his views (and those of the Association's other members) views regarding the ethnic

origin of certain segments of the population. In this context, he noted the media campaign and a statement by the then President of the respondent State, who had allegedly said that "there is no place for a man who claims that Macedonians are (ethnic) Bulgarians". The second applicant inferred that that statement had referred to him.

THE LAW

The applicants complained under Article 11 of the Convention that their freedom of association had been violated by the Constitutional Court's decision declaring the Association's Articles and the Programme null and void. The second applicant also complained under Article 10 that his freedom of expression had been violated in that the Association's dissolution had prevented him from expressing his views regarding the ethnic origin of certain segments of the population. In so far as relevant, Articles 10 and 11 of the Convention provide:

Article 10

"1. Everyone has the right to freedom of expression. ....

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."

Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, ...

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. ..."

A. The Government's objection concerning the non-exhaustion of domestic remedies

1. The parties' submissions

The Government submitted that the application should be rejected for non-exhaustion of domestic remedies. They noted that the applicants had failed to lodge with the Constitutional Court a constitutional complaint for the protection of their freedoms enshrined in Articles 10 and 11 of the Convention, which formed part of the corpus of human rights and freedoms in relation to which the latter had jurisdiction. They also submitted that the applicants, by failing to lodge with the Constitutional Court a constitutional complaint under Article 110 § 3 of the Constitution, had deprived that court of the possibility to build its case-law on the matters in question. They maintained that they could not speculate about the outcome of the proceedings had the applicants availed themselves of that remedy. However, they submitted that "had they done so, the procedure and outcome would have been entirely different". Mere doubts on the part of the applicants as to their possible success did not exempt them from attempting this remedy. In that connection, the Government added that the Constitutional Court's proceedings on human rights protection were

separate from constitutional review proceedings. Furthermore, in proceedings related to human rights protection the Constitutional Court was not bound by its decisions on the constitutionality of a regulation.

They also argued that such a complaint might have triggered the Constitutional Court to initiate proceedings for review of the constitutionality or legality of a law or other generally binding regulation related to associations of citizens.

The Government further stated that the Association had formally ceased to exist by the decision of the Ohrid Court of First Instance, which had been given over nine months after the Constitutional Court's decision. During that time, the applicants had had an opportunity to harmonise the Association's Articles and Programme with the Constitutional Court's decision.

Finally, the Government submitted that the application had been premature since it was lodged with the Court six months before the Association had been formally terminated and erased from the court's registry.

The applicants disputed the availability and effectiveness of the constitutional complaint as a remedy which they had been required to exhaust. They argued that they had raised arguments against the alleged promotion and support by the Association of "fascist" ideas, "ethnic violence" and "terrorism" in the memorials submitted to the Constitutional Court in the proceedings for judicial review of the Association's Articles and Programme. They claimed that the Constitutional Court had dealt with these arguments in its judgment and had explicitly discussed freedom of association. They submitted that a fresh constitutional complaint before the Constitutional Court would not have added anything to the issues under examination in the latter's judgment of 21 March 2001. They had brought the aims and objectives of the Association to the attention of the Constitutional Court, thus providing the latter with an opportunity to consider the proportionality of the interference with the applicants' rights under Article 11. They concluded that the Government had not demonstrated the availability and effectiveness of the constitutional complaint, as they had not provided any evidence to support their allegations that such a constitutional complaint to the Constitutional Court had ever been made and had proved effective in a particular case.

They also challenged the effectiveness of a constitutional complaint against the decision of the Ohrid Court of First Instance. The absence of any evidence to that effect, let alone evidence of a successful complaint, lent support to their assertion.

2. The Court's assessment

(a) General principles

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. Article 35 § 1 also requires that the complaints intended to be brought subsequently before the Court should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see, *mutatis mutandis, Merger and Cros v. France* (dec.), no. 68864/01, 11 March 2004; *Aksoy v. Turkey*, judgment of 18 December 1996, ECHR 1996-VI, §§ 51-52; and *Akdivar and Others v. Turkey,* judgment of 16 September 1996, ECHR 1996-IV, §§ 65-67).

The Court emphasises that the application of the exhaustion rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights and that it must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; for the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, in particular, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the

Contracting State concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (see *Jasar v. the former Yugoslav Republic of Macedonia* (dec.), no. 69908/01, 19 January and 11 April 2006).

As stated in the Court's case-law, Article 35 provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied 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 *Selmouni v. France* [GC], no. 25803/94, § 76, ECHR 1999-V; *Akdivar and Others*, cited above, § 68).

(b) Application of these principles in the present case

Consideration of the applicable legislation as described above (see "Relevant domestic law") leads the Court to conclude that the Constitutional Court's decision of 21 March 2001 was based mainly on Article 20 of the Constitution, which enshrines freedom of association. Relying on Article 110 § 7 of the Constitution, the Constitutional Court declared the Association's Articles and Programme unconstitutional, finding that they had been directed towards the violent destruction of the constitutional order and incitement to national or religious hatred or intolerance. The Court finds that it was the relationship between freedom of association and the permissible restrictions of its exercise that the Constitutional Court considered when reviewing the constitutionality of the Association's constitutive acts. Although they were not explicitly mentioned, it is the Court's finding that the Constitutional Court addressed in substance the issues under Articles 10 and 11 of the Convention. It is not persuaded that a constitutional complaint for the protection of freedom of association would have raised any issue separate from those examined in the Constitutional Court's decision regarding the constitutionality of the Association's Articles and Programme. Even assuming that Article 110 § 3 of the Constitution provided sufficient legal grounds for lodging a constitutional complaint regarding freedom of association, the Court considers that that remedy would appear ineffective in the particular circumstances of this case. No jurisprudence by the Constitutional Court on the matter was presented to prove the contrary.

Finally, the Court considers that a fresh constitutional complaint regarding freedom of association would merely amount to seeking revision of the Constitutional Court's decision of 21 March 2001. Given the fact that, under Article 112 § 3 of the Constitution, the Constitutional Court's decisions are final and enforceable, the Court's view is that such a complaint would lack any prospect of success.

The Government's speculation that such a remedy, if used, could have triggered the Constitutional Court to review the constitutionality or legality of some generally binding regulation in the domain of associations of citizens is not convincing either. The Government did not specify what legislative revision such a complaint might have provoked and in what way this would have been relevant to the present case. Furthermore, the constitutional complaint was not indispensable for the Constitutional Court to review the constitutionality or legality of a law or other generally binding regulation since that court, as the Government admitted, could carry out such a review on its own motion (Article 14 of the Book of Regulations of the Constitutional Court).

The fact that the applicants failed to seek harmonisation of the Association's Articles and Programme with the Constitutional Court's decision is not decisive for the admissibility of their application. The applicants complained about the fact that the Association could not exist as it stood. Any modification would not change the victim status.

Lastly, as to the Government's objection that the application should have been lodged only after the Ohrid court's decision and was therefore premature, the Court considers that that court's decision was of a declaratory nature. It solely aimed at securing enforcement of the Constitutional Court's decision which entailed, *ipso jure*, the termination of the Association. Having regard to section 52 of the Associations of Citizens and Foundations Act (see "Relevant domestic law", cited above), the courts of general jurisdiction had no other alternative but formally to pronounce the termination of the Association. The Bitola Court of Appeal's decision of 11 February 2002 supports that conclusion (see "the Facts" above). Consequently, the Constitutional Court's decision was decisive for instituting the proceedings before the Court.

Having regard to the circumstances of this case, the Court finds that the applicants must be regarded as having exhausted domestic remedies. The Government's objection must accordingly be rejected.

B. The substance of the case

1. The applicants' complaint under Article 11 of the Convention

The parties' submissions

(i) The Government

The Government submitted that the State's interference with the applicants' freedom of association had been prescribed by law. They stated that Article 20 of the Constitution had provided for boundaries in exercising freedom of association. The same restrictions were prescribed in Article 4 of the Associations of Citizens and Foundations Act (see "Relevant domestic law" above). They asserted that the Constitutional Court, on the basis of these provisions, had found that the Association's name, and the ideology of Ivan Mihajlov which it pursued, had encouraged and incited to national hatred and intolerance and had led to a denial of the free expression of the Macedonian national affiliation. They maintained that the affirmation of the ideas of the Movement, as a terrorist association, would in practice mean killings, terrorist activities and support of fascism and its ideology. That had caused disorder and public reactions, resulting in two incidents at the Association's opening ceremony. They presented a number of documents concerning Ivan Mihajlov's life and his activities; the activities of the organisation called the VMRO (*Внатрешна Македонска Револуционерна Организација)* under his leadership, in particular in the period 1924-1934, and his alleged alliance with the fascist regime during the Second World War. Referring to that material, they maintained that Ivan (Vančo) Mihajlov (Radko) was considered as a person who used terrorist methods to impose the fascist idea of denunciation of the Macedonian people's identity and to promote the latter as a fictitious and non-existent people called "Macedonian Bulgarians" (*Македонски Болгари).* They stated that in pursuance of that idea, he and his followers had killed and massacred a considerable number of Macedonians who had fought for the national freedom of their people. The Government stated that the creation and operation of an Association, the name, platform and programme activities of which had been inspired by the name and image of Ivan Mihajlov, had irrefutably been directed towards incitement to national hatred or intolerance, contrary to Article 20 § 3 of the Constitution, which could result in clashes between the Macedonian people and the citizens associated with the Association. They claimed that repudiation of the identity of the Macedonian people and its statehood had been at the heart of the Association's activity. Accordingly, the violent destruction of the constitutional order was the fundamental objective of the Association. As stated by the Government, the public reaction on the opening ceremony had been clear evidence that the Association would incite to national hatred. The Association's members had had recourse to brutal physical force against their adversaries, causing injuries for which they had been subsequently convicted by a court and sentenced to imprisonment.

The Government submitted that the existence of the Association should be considered as an abuse of freedom of association, as its aim had not been the expression of thoughts and beliefs, but negation of the identity of the Macedonian people through promotion of the fascist ideas of Ivan Mihajlov concerning the "Macedonian Bulgarians", who were unknown in history, legal science and practice. The ultimate objective of the Association was to initiate national hatred, religious unrest and a revival of the terror that Ivan Mihajlov had practiced in his time, when he executed hundreds of opponents.

The Government concluded that the Association's dissolution should be assessed in the light of the political circumstances of the former Yugoslav Republic of Macedonia, where certain forces from neighbouring States (1) denied the national identity, culture and alphabet of the Macedonian people (Bulgaria); (2) denied the name of the State (Greece); and (3) contested the autocephaly of the Macedonian Orthodox Church (Serbia). They stated that the creation of an Association with such a name, objectives and programme activities had been an indication that the State was required, as a pressing social need, to undertake certain measures to prevent, from the very beginning, any provocations.

In their supplementary submissions of September 2007, the Government maintained that the Constitutional Court, by declaring the Association's constitutive acts null and void, had established that every activity directed against the Macedonian people as a constituent element of the respondent State was in fact directed at the violent destruction of the constitutional order and at incitement to and encouragement of national or religious hatred and intolerance. They further presented additional historical material and an extensive exposé about the historical circumstances related to Ivan Mihajlov in support of their argument that the State's intervention should be seen in a historical context.

They stated that it had been within the State's margin of appreciation to define its national interest and take measures to safeguard it. The dissolution of the Association was not aimed at preventing the Association's members, including the second applicant, from declaring themselves as Macedonian Bulgarians and from founding an association to that effect. The existence of the "Association of Bulgarians from the Republic of Macedonia", the "Association of Macedonian-Bulgarian Cooperation" and the "Association of Macedonians with Slav-Bulgarian origin for interaction between cultures" supported that assertion. The Association's aims had nothing in common with freedom of association and expression, but rather, would have provoked inter-ethnic hatred and disorder. In such circumstances, they stated that the State had not only a right, but also a duty to take the necessary measures in a democratic society in the interests of national security, territorial integrity, public safety, for the prevention of disorder and crime and for the protection of the rights and freedoms of others. They concluded that the insinuations contained in the Association's constitutive acts had not concerned a small group of people, but rather amounted to defamation of the entire Macedonian nation.

At the oral hearing of 19 June 2008, the Government added that the application should be considered in the light of Article 17 of the Convention, since the applicants' objectives had run counter the rights and freedoms of others. In that connection, they stated that ... the negation of the identity of the entire Macedonian people is an attempt at organised terror against it, which has nothing to do with human rights and freedoms ... the insinuations noted in the acts of the Association and the use of the name of Mihajlov ... are not directed towards a small grouping in the State, but are an offence to the entire Macedonian people, the self-identity of which is denied ... the present case is not about denying the Association's founders, including the second applicant, the right to express freely their conviction [that they are] Macedonian Bulgarians.

(ii) The applicants

The applicants contested the Government's arguments, maintaining that the State's interference had not been justified and necessary in a democratic society. They stated that there had been no a legitimate aim justifying the dissolution of the Association, nor had the reasons given by the

Constitutional Court been relevant or sufficient. Having regard to the Court's case-law, they argued that the Court had found restrictions imposed on freedom of expression and freedom of association by the Contracting States necessary only in two types of cases: in cases of threats of use of violence and in cases of justification of the use of violence.

They submitted that the Constitutional Court's decision had been based on two grounds: firstly, that the Association's Programme had denied the concept of "Macedonian identity" and could accordingly provoke strong public reaction resulting in ethnic violence and, secondly, that by choosing Ivan Mihajlov's pseudonym as its own, the Association had promoted "fascism" and "terrorism". They contested that the Association or its members had ever suggested something that could be interpreted as sympathy for political violence or terrorism. There was nothing in the Association's Articles or in the history of its leaders and members that could be interpreted as even vague hostility towards the democratic form of government, its principles or institutions. They argued that their agenda for the "proper interpretation of the history of Macedonia and ethnic Bulgarians in Macedonia", although it might have been regarded as hostile and offensive by many in the respondent State, could not justify the dissolution of the Association. Such reading of the history of the region by the Association, even if it was perceived by some as "denunciation of the national identity", had been a legitimate debate within a free society, which ought not to have been stifled by a democratic government.

They claimed that their aims had been fully legitimate – to promote traditional culture and historical knowledge through the publication of books, newspapers and magazines and through electronic media. They submitted copies of articles and interviews with the second applicant, originally published in Bulgarian newspapers, in support of this argument. They concluded that the Government's arguments that the Association had posed a threat to the democracy were ill-founded.

They contested the Government's argument that their view might cause hostile reactions from certain segments of the population. They argued that views, such as the Association's, concerning the protection of the fundamental rights of an ethnic group and their cultural and political identity, had been of paramount importance in a democratic society and that advanced protection should be offered. Even if such views might be shocking and disturbing for parts of the general public, this could not be considered as a valid ground for banning the dissemination of such views.

The applicants further disputed the Government's assertion that the Association had been a "fascist" and "terrorist" organisation, maintaining that the description of Ivan Mihajlov as a "fascist" and "terrorist" was contrary to the historical facts. They submitted that there had been no evidence linking him to any terrorist acts nor had the Constitutional Court provided any justification for making the link between Ivan Mihajlov and fascism and for the conclusion that the use of his name had automatically implied support of fascism. They maintained that, according to Mihajlov's views, a large part of the Macedonian population was of Bulgarian ethnic origin and that at the end of the Second World War he had considered possible cooperation with Nazi Germany. However, Ivan Mihajlov could not be considered a straightforward symbol of fascism. They admitted that a person who had been politically active in the Balkans between the two world wars might provoke strong feelings, but that it had been unacceptable to ban the Association, as a drastic measure, on the basis of dubious historical interpretations. They further submitted an expert opinion by a historian from Sofia University about the historical context and the political activities of Ivan Mihajlov.

They submitted that the Constitutional Court had based its decision on the assumption that the Association's aim had been the denial of "Macedonian identity", without providing sufficient evidence that the Association had advocated the use of violence or any anti-democratic means in pursuing its aims. They maintained that no analysis of the necessity of the measure, the existence of the pressing social need and the proportionality had been undertaken by the Constitutional Court.

At the hearing the applicants recalled that their interpretation of the history of the Slavic people in Macedonia is in marked difference to the official historiography of the State. A State protecting one account of history, even if the latter is crucial for the national identity of the country, by banning other alternative accounts of history, is something that runs contrary to the most

fundamental principles of freedom of expression and association. While the interpretation of the history of Macedonia by the applicants might be offensive to many in Macedonia, it clearly does not contain any element of an attack against democratic rules or promotion of violent means.

(iii) The third-party intervener

In the written submissions, the Bulgarian Government stated that every initiative by citizens and their associations that might bring about a change within a State would be legitimate if the aims sought were compatible with the fundamental democratic principles and the means employed were legal and democratic. They argued that, as the most drastic measure, the Association's dissolution had not been "necessary in a democratic society" and that there had been no "pressing social need", since the only argument advanced by the Constitutional Court had been a link between the Association's presumed future activities and a historical figure, Ivan Mihajlov-Radko. They further maintained that that the Constitutional Court had found that the Association's aims were not in conformity with the constitutional order solely by placing it, arbitrarily, within a certain historical and ideological context. No "relevant and sufficient reason" had been given for the Association's dissolution. They further stated that no evidence whatsoever had been presented that any of the leaders or members of the Association had called for the use of violence or for the rejection of the principles of democracy. In addition, there had been no evidence that the Association had taken any measure in practice which had effectively threatened the constitutional order. The Association's practical activities were never subject to review by the Constitutional Court, due to its short existence.

Finally, they concluded that, although any interpretation of historical events, such as the personality and activity of Ivan Mihajlov, could not be relevant for the Court, ideas fell under the protection of Articles 10 and 11 of the Convention, irrespective of how shocking and unacceptable they might be for the authorities and/or the larger part of a society.

At the hearing they added that the fact that the applicants' convictions and the Association's aims [were] considered incompatible with the current official political doctrine in Macedonia did not make them incompatible with the rules and principles of democracy.

2. The second applicant's complaint under Article 10 of the Convention

The parties' submissions

In his submissions received by the Court on 17 September 2007, the second applicant stated that the Association's dissolution had rendered impossible any expression of his views and opinions, given the public impact of the Constitutional Court's decision of 21 March 2001 and the understanding which it had created that the Association and its members were "fascists" and "terrorists". He maintained that he was constantly harassed and publicly discredited, which made any public discussion meaningless. The statement by the former President (see "Complaints" above) indicated that the authorities displayed no tolerance towards him. He continued that the law-enforcement authorities of the respondent State had been biased, since they had made no effort to investigate and prosecute those who had disrupted the inaugural ceremony of the Association. He averred that that inactivity had stimulated a hate campaign against him in the media. As evidence of his isolation, he stated that he could not find a Macedonian lawyer to represent him before the Court.

3. The Court's assessment

The Court considers, in the light of the parties' submissions, that the complaints raise serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that these complaints are not manifestly ill-founded

within the meaning of Article 35 § 3 of the Convention. No other ground for declaring them inadmissible has been established.

For these reasons, the Court by a majority

Declares the application admissible, without prejudging the merits of the case.

Claudia Westerdiek	Peer Lorenzen
Registrar	President