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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3317/2019*.,**

<i>Communication submitted by:</i>	Markus Wilhelm (represented by counsel, Irene Oberschlick)
<i>Alleged victims:</i>	The author
<i>State party:</i>	Austria
<i>Date of communication:</i>	22 February 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 97 of the Committee's rules of procedure (now rule 92), transmitted to the State party on 11 March 2019 (not issued in document form)
<i>Date of adoption of Views:</i>	23 October 2023
<i>Subject matter:</i>	Freedom of expression
<i>Procedural issues:</i>	Same matter; abuse of right of submission
<i>Substantive issues:</i>	Restriction of freedom of expression
<i>Articles of the Covenant:</i>	19 (2)
<i>Articles of the Optional Protocol:</i>	3 and 5

1. The author of the communication is Markus Wilhelm, a national of Austria born on 30 April 1956. He claims that the State party has violated his rights under article 19 of the Covenant. The Optional Protocol entered into force for Austria on 10 December 1987. The author is represented by a counsel.

Facts as presented by the author

2.1 The author is a Tyrolean publicist, environmental activist, and mountain farmer. He is a well-known blogger in the federal state of Tyrol, as he publishes critical articles on social and political affairs on his website "dietiwag.org".

2.2 On 28 March 2013, the author published an article titled "OVP party convention in the right place" on his website. The article referred to an event scheduled for 6 April 2013, dedicated to the launch of the Tyrolean People's Party's ("the Party") state election campaign and its convention. The event was to take place on the premises of Area 47, a limited liability

* Adopted by the Committee at its 139th session (9 October–3 November 2023).

** The following members of the Committee participated in the examination of the present communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Laurence R. Helfer, Carlos Gomez Martinez, Bacre Waly Ndiaye, Hernan Quezada Cabrera, José Manuel Santos Pais, Chongrok Soh, Tijana Surlan, Kobauyah Tchamdja Kpatcha, Koji Teraya and Hélène Tigroudja..

company (“the Company”) that managed an event centre in Tyrol. The author’s article claimed that the venue was largely sponsored with taxpayers’ money and revealed that the director of the Company was a friend of the governor of Tyrol, who was also the chairman of the Party. Furthermore, the author also pointed out the fact, that Area 47 previously hosted concerts of the right-wing neo-Nazi ideological rock band “Frei.Wild”. The author illustrated his article with a logo of Area 47, in which he transformed the number into a swastika.

2.3 Shortly after the publication of the article, the Company and the Party lodged a civil suit for defamation against the author. On 22 November 2013, the Innsbruck Regional Court concluded that the author had overstepped the limits of permissible criticism by using an excessive value judgment. The Court considered that politicians should have a higher degree of tolerance towards criticism. The same higher degree of tolerance was applied to the Company because, by allowing a highly controversial band to play on its premises, it had accepted the criticism that may derive therefrom. However, the Court pointed out that there is a special connotation to the term “Nazi” and the use of the swastika, which an average reader would not understand as a mere symbol of the right-wing ideological activities, but rather as the mark of an atrocious National Socialist regime. In German-speaking countries, there is no harsher stigmatisation than that of being a “Nazi”, and such stigmatization is represented by the very symbol used by the author. The article published by the author did not contain general remarks concerning right-wing extremism but specifically criticized the actions of the plaintiffs, and thus the limits of permissible criticism have been overstepped. The Court further stated that there was no factual basis provided in the article to link the ideology of the band with the Company. Regarding the Party, no facts had been presented to link it with the band or to justify the association of the Party with the right-wing extremism. The Court concluded that the mere allegations of corruption could not justify criticism in the form of using a swastika, and its use was neither necessary nor permissible within the framework of this criticism. The Court ordered the author to refrain from altering the logo of Area 47 with a swastika, using, and disseminating it in connection with the Company and the Party and concluded that he shall be liable for all related incurred and future damages.

2.4 On 24 February 2014, the Innsbruck Court of Appeal upheld the judgment of the Regional Court on appeal. On 6 November 2014, the Supreme Court also dismissed the author’s appeal, rejecting the author’s argument of his role as a watchdog. The Supreme Court stated that calling someone a “Nazi” is an insulting value judgment, and that value judgments interfering with the honour of another person based on an untrue fact are impermissible and cannot be justified by the right to freedom of expression. A swastika placed next to a brief outline that included the names of the Company and the Party, amplified by the wording of the title “in the right place” would, in the eyes of an ordinary reader, link both of them to National Socialist ideology. The Supreme Court found that in his article, the author fails to establish any clear connection between the Company and the Party and the right-wing extremist music band, and thus upheld the domestic courts’ decisions.

2.5 On 6 May 2015, the author applied to the European Court of Human Rights (“the ECtHR”). On 2 July 2015, the ECtHR declared the application inadmissible and dismissed it in a single-judge decision.

Complaint

3.1 The author alleges that the Courts’ decisions constituted an interference with his right to freedom of expression guaranteed by article 19 (2) of the Covenant.

3.2 The author claims that as a blogger he should have benefitted from the level of protection guaranteed to journalists as public watchdogs. However, the courts, except for the first-instance court, had failed to consider the fact that the author published the article together with the image of the altered logo as a journalist in the context of a political debate. The courts simply stated that his opinions had not been substantiated with proof of the truth of his allegations.

3.3 The author further argues that the courts weighted his right to freedom of expression against the plaintiffs’ fundamental right to reputation and honour. However, as both plaintiffs were only legal entities, when weighing the interests involved the courts should have attached

greater importance to the author's right to freedom of expression rather than to the honour and reputation of legal entities.

State party's observations on admissibility

4.1 By a note verbale of 10 May 2019, the State party submitted its observations on the admissibility of the communication.

4.2 The State party argued that in the light of the reservation made by Austria to article 5, paragraph 2 (a), of the Optional Protocol, the communication should be declared inadmissible, as the same matter has been examined by the ECtHR. The ECtHR found the author's application incompatible with the provisions of the European Convention and based its decision on article 35 (3) of the European Convention, thus rejecting his claims on substantive rather than purely formal grounds, after at least a cursory examination of the merits.

4.3 The State party also contended that due to the considerable amount of time that had elapsed between the ECtHR's decision and the author's submission of the communication to the Committee, it could be inferred that the case held no particular importance to the author. Thus, the Committee might consider, that the communication constitutes an abuse of the right pursuant to rule 99 (c) of the Committee's Rules of Procedure.

State party's observations on merits

5.1 By a note verbale dated 11 September 2019, the State party submitted its observations on the merits of the communication. Firstly, the State party pointed out that the Courts' proceedings focused exclusively on the prohibition for the author to alter the Company's logo with a swastika, as well as its usage and dissemination on the Internet in connection with the plaintiffs, along with the respective liability for possible related damages. The State party confirms that the article, bearing its original title, remains accessible on the author's website, and the Austrian courts have never questioned the author's right to publish it.

5.2 Secondly, the State party noted that the right to honour and good reputation of a person is part of personal rights regulated in Section 16 of the General Austrian Civil Code. Section 1330 of the Civil Code outlines the legal repercussions for infringing upon this right and establishes the prerequisites for seeking damages and obtaining an injunction against the responsible party. Since the European Convention on Human Rights has constitutional status in Austria, this provision is interpreted by the courts in accordance with the ECtHR's case-law, by balancing conflicting rights: right to freedom of expression and right to reputation. The 1947 Prohibition Act bans the National Socialist German Labour Party (NSDAP), its military branches, its subdivisions, and all associated units, as well as all National Socialist organisations and institutions in Austria. Furthermore, Sections 3 to 3i of the 1947 Prohibition Act provide for a comprehensive ban of National Socialist resurgence. These provisions forbid any individual from engaging in activities on behalf of the NSDAP or promoting its objectives, as well as acting in any manner associated with National Socialism (as per Sections 3 and 3g of the Act). Pursuant to Section 1 of the Insignia Act, it is strictly prohibited to publicly wear, display, depict, or distribute insignia, uniforms, or partial uniforms of organizations that are banned in Austria. Violations of these provisions can be punished by an administrative penalty of up to EUR 4,000 or a one-month detention. The swastika as a symbol of National Socialism and the NSDAP is among the banned symbols.

5.3 Thirdly, the State party argues that as the author has not contested the legal basis for the imposed restriction, the Committee should only consider whether it pursued a legitimate aim of respecting the right or reputation of others and if it was necessary and proportionate.

5.4 The State contests the author's argument that as corporate entities, the Company and the Party were not entitled to the protection of their reputation, and that subsequently a restriction of the author's freedom of expression did not have a legitimate aim. The State party argues that although the Covenant essentially only affords protection to natural persons, the broad wording of the article 19 (3) (for "respect of the rights and the reputation of others") implies that it does not only apply to natural persons.

5.5 Furthermore, the State party contests the argument of the author that he was denied protection guaranteed to journalists and public watchdogs due to his occupation as a part-

time farmer. The State party noted that the author himself added “farmer” as a profession next to his name in his submissions to the courts, even though it was not required. In addition, it noted that even if the courts had assumed that the author’s status is equal to the one of a journalist, it would not automatically have resulted in a different outcome. Relying on the case-law of the ECtHR, they pointed out that while great weight is attached to journalists by default due to their special role in a democratic society, they are also expected to exercise exceptional diligence, including refraining from publishing clearly false allegations.¹

5.6 Finally, the State party argued that the courts followed the approach established by the ECtHR and imposed a proportionate limitation of the author’s right. The courts have considered the nature of the expression of opinion, whether it contributed to a political debate, whether the expression concerned a group of persons who must tolerate a high level of criticism and whether the expressed criticism was supported by relevant facts. The Supreme Court noted that a swastika, placed next to a brief outline which included the names of the Company and the Political party, together with a title would link both of them to National Socialist ideology. As a State that experienced the horrors of Nazi regime, Austria is assumed to have a special moral responsibility to distance itself from the massive atrocities perpetrated by the Nazis. This is partly reflected in the provisions of the 1947 Prohibition Statute and the Insignia Act. Hence, the Austrian courts considered the alteration of the company’s logo with a swastika, the very symbol of the atrocities of the National Socialist regime, a value judgment constituting harsh stigmatisation as “Nazi”. The author failed to provide evidence, both in the article and during the court proceedings, to justify such a grave accusation.

5.7 The Austrian courts, following the principle of proportionality, carefully weighted the rights of the Company and the Party against the right of the author to freedom of expression. In doing so they sufficiently considered the language and form used by the author, his social role and that of the plaintiffs, and other relevant circumstances. As the result, the author was ordered to refrain from altering the logo with a swastika, using and distributing it in connection with the plaintiffs, which was the only possible way to remedy the stigmatisation created and prevent further consequences for the plaintiffs. The author was ordered to only pay the procedural costs, and he did not complain about any other consequences. Thus, the Courts’ decisions had no unjustified “chilling effect”.

Author’s comments on the State party’s observations

6.1 On 18 November 2019, the author submitted comments on the State party’s observations.

6.2 As to the admissibility of the communication, the author asserted that the fact that an identical complaint was previously declared inadmissible by the ECtHR does not bar the Committee from considering the communication. The author argued that the Court did not examine his claims on the merits, as the decision indicated that:

“As far as the complaint is under its jurisdiction, the court, on the basis of all records accessible to it, has come to the conclusion that the criteria mentioned in Article 34 and 35 of the Convention have not been met.”

Since the decision did not contain any further details as to the criteria that were not met by the application, the author considers that the dismissal was based on procedural grounds. The author argues that without further details on the reasons why his application was declared inadmissible, it is impossible to unequivocally determine whether his complaint has been examined on the merits. Therefore, the present communication cannot be declared inadmissible pursuant to article 5, paragraph 2 (a), of the Optional Protocol. Furthermore, the author contested the State party’s argument concerning a delay in lodging present application, as he submitted the communication within the timeframe established by rule 99 (c) of the Committee’s Rules of procedure.

6.3 Regarding the State party’s observations on the merits, the author reiterated that the focus of his complaint is the imposed obligation to refrain from altering the logo by means of a swastika, using and disseminating it in connection with the Company and the Party.

¹ The State party refers to *Armellini and Others vs Austria*, no. 14134/07, para. 39, 16 April 2015.

According to the author, this constitutes a pre-censorship, effectively restricting his ability to use the altered logo or discuss it in future comments, particularly in relation to events that might be attributed to the plaintiffs and raise similar concerns.

6.4 Furthermore, the author asserts that Austria's historical role and experience with National Socialism, along with the moral obligation to distance itself from the atrocities committed by the Nazis, should foster an environment that encourages the discussion of relevant information and opinions, including pointed value judgments, as expressed by the author. The author clarifies that he did not claim, nor intended to claim that the Company and the Party were Nazi organisations or had an affiliation with National Socialism. Instead, the author wanted to point out that they provided a platform for the band to perform, thereby justifying an accusation of ideological alignment and warranting a value judgment that incorporates a logo altered with a swastika. The decision prohibiting the author to use such a pointed value judgment appears to be an attempt to conceal and suppress "embarrassing" debates on problematic behaviour or associations with Nazi ideology.

6.5 Lastly, the author notes the domestic courts' failure to examine his complaint in the light of the freedom of the press and media. Given the existence and the impact of the social media on the Internet, it is crucial that those who, like traditional media outlets, participate in discussions of public interest enjoy the freedom of the press. The author claims that while speculating that the status of the journalist might not have changed the outcome of the domestic proceedings, the State party goes beyond the content of the domestic judgments. This argument, though inadmissible, highlights the deficiencies and shortcomings of the final domestic decision.

State party's additional observations on admissibility and merits

7. On 7 September 2021, the State Party submitted additional comments, in which they upheld the abovementioned arguments and disagreed with the author's interpretation of the wording of their submissions. The State party added that the prohibition of altering the logo should not be considered as pre-censorship since any obligation to cease and desist, resulting from a court judgment, naturally applies to future actions.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

8.2 The Committee notes the State party's submission concerning inadmissibility of the communication pursuant to article 5 (2) (a) of the Optional Protocol. In this regard, the Committee observes that on 2 July 2015, the ECtHR, sitting in a single-judge formation, found that the admissibility criteria set out in articles 34 and 35 of the Convention had not been met. The Committee notes that, upon ratifying the Optional Protocol, the State party made a reservation on the understanding that the provisions of article 5 (2) of the Protocol signified that the Committee would not consider any communication from an individual unless it had ascertained that the same matter was not being examined or had not been examined under another procedure of international investigation or settlement. The Committee recalls its jurisprudence which provides that when an inadmissibility decision of the ECtHR is based not solely on procedural grounds but also on reasons that include a consideration of the merits of a case, the same matter should be deemed to have been examined within the meaning of the respective reservations to article 5 (2) (a) of the Optional Protocol.² However, in the present case, the limited reasoning of the decision by the European Court of Human Rights does not allow the Committee to accept that the examination involved sufficient consideration of the merits.³ Accordingly, the Committee is not precluded from

² See, among other authorities, *A.M. v. Denmark* (CCPR/C/16/D/121/1982), para. 6; *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2; *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010), para. 7.3; and *Genero v. Italy* (CCPR/C/128/D/2979/2017), para. 6.2.

³ See *Murne et al. v. Sweden* (CCPR/C/137/D/2813/2016), para. 9.3.

considering the present communication in accordance with article 5 (2) (a) of the Optional Protocol.

8.3 As regards the State party's submission alleging that the communication might constitute an abuse of the right of submission, the Committee recalls that, pursuant to rule 99 (c) of its Rules of Procedure, a communication may constitute an abuse of the right of submission when it is submitted more than five years after the exhaustion of domestic remedies by the author of the communication, or, where applicable, three years from the conclusion of another procedure of international investigation or settlement, unless there are reasons justifying the delay, considering all the circumstances of the communication. As the author lodged his complaint within the three years' time-limit after his application was considered by the ECtHR, the Committee finds no signs of abuse of right under article 3 of the Optional Protocol.

8.4 The Committee considers the claims of the author sufficiently substantiated for the purpose of admissibility. It therefore declares the communication admissible and proceeds with its consideration on the merits.

Consideration of the merits

9.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, as required under article 5 (1) of the Optional Protocol.

9.2 The Committee notes that the decisions of the domestic courts ordering the author to refrain from producing, using, and distributing the altered logo in connection with the plaintiffs constituted a restriction of the author's right to freedom of expression as protected by article 19 (2) of the Covenant. The Committee must therefore examine whether the imposed restriction was justified under the criteria provided by article 19 (3) of the Covenant.

9.3 The Committee refers to its General Comment No. 34 (2011), according to which freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society and constitute the foundation stone for every free and democratic society.⁴ According to article 19 (3) of the Covenant, the right to freedom of expression can be subject to certain restrictions, but only such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order, or of public health or morals.⁵ All restrictions imposed on freedom of expression must be provided by law. They may only be imposed on the grounds set out in subparagraphs (a) and (b) of article 19 (3) and they must conform to the strict tests of necessity and proportionality.

9.4 Furthermore, the Committee recalls that a free, uncensored, and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. Furthermore, journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere.⁶

9.5 The Committee also notes that the relevant provisions of the Austrian Civil Code, and their application in this particular case, pursued the legitimate aim of the protection of the reputation or rights of others. Therefore, the restriction imposed on the author was provided by law. The Committee shall now decide whether the limitation of the author's right to freedom of expression, as provided by the Austrian Civil Code, was necessary and proportionate.⁷

9.6 According to the General Comment No. 34 (2011), when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific

⁴ General comment No 34 (2011) on the freedoms of opinion and expression, para. 2.

⁵ Ibid., para. 28.

⁶ Ibid., paras. 13 and 42.

⁷ Ibid., para. 22.

and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.⁸ The Committee reiterates that to protect the reputation of the plaintiffs, the author was ordered to remove the altered logo from his website and to refrain from using and disseminating it in the future. The State party argued that the restriction imposed on the author was the least intrusive way to remedy the stigmatisation of the plaintiffs and prevent further consequences for them (see para. 5.7 above).

9.7 As regards the nature of the threat, the author confirmed that by altering the logo with the swastika he wanted to express a pointed value judgment, criticizing the ideological affinity of the Company and the Party with a Neo-Nazi band. However, the Committee cannot disregard the historical and social context in which such a statement has been made. As a symbol widely associated with Nazism, the swastika is considered offensive and highly inappropriate in most contexts, particularly in the State party. Furthermore, the ECtHR has established in numerous judgments that in the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis.⁹ In that regard the Committee accepts that the comparison of the plaintiffs with Nazis by the use of swastika, implying their ideological affiliation with Nazism and the Neo-Nazi musical band, was perceived as a harsh insult by the Austrian domestic courts and constituted a valid threat to the Company's and Party's reputation.

9.8 In circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the Covenant upon uninhibited expression is particularly high. Thus, the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties.¹⁰ In the present case, the domestic courts explicitly acknowledged and took into consideration the higher degree of tolerance applicable to both the Party and the Company as a political actor and a legal entity. The Committee further notes that although the journalists and public watchdogs, such as the author, should enjoy the extensive freedom to criticise local authorities and to draw attention to matters of political and social importance, such freedom is not absolute. In that regard, journalists are expected to act in good faith and to provide reliable and substantiated information. Meanwhile, the text of the article, while raising important issues of corruption and nepotism, did not support the strong allegation of the plaintiffs' involvement with right-wing ideology, as implied by the use of the swastika that illustrated the article.. The Committee considers, in this regard, that the author's statement impacted on the respect of the rights and reputations of others, namely the Party and the Company. Moreover, considering the lack of solid factual basis and the gravity of the comparison implied by the altered logo, the decision by domestic courts to impose restrictions on the author's right to freedom of expression was necessary and in line with subparagraph b) of article 19(3).¹¹

9.9 Lastly, the Committee considers that the restriction was not criminal, but civil in nature, applied in the framework of a civil suit for defamation (see para. 2.3 above) and was formulated in a precise and limited manner that did not entail any personal consequences for the author, except for all related incurred and future damages. Moreover, the courts did not order the removal of the article featuring the altered logo, which is still available on the author's website. Thus, the author was not deprived of the opportunity to convey his opinion regarding the Party or the Company by any means other than the images containing Nazi symbols.¹² Considering the above findings, the Committee considers that the State party adduced relevant and sufficient reasons and convincingly justified the proportionality and necessity of the specific restriction for the aim of the protection of the reputation or rights of others.

⁸ Ibid., para 35; see also *Shin v. Republic of Korea*, communication no. 926/2000, para. 7.3.

⁹ See, among other authorities, the findings of the ECtHR in *Perinçek v. Switzerland* [GC], no. 27510/08, para. 243, ECHR 2015 (extracts).

¹⁰ General comment No 34 (2011) on the freedoms of opinion and expression, para. 38.

¹¹ Ibid., para. 36.

¹² Compare with, for instance, *Zündel v. Canada* (CCPR/C/78/D/953/2000), para. 8.5.

9.10 The Committee concludes that the facts before it do not disclose a violation of the author's rights under article 19 (2) of the Covenant.
