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International Covenant on Civil and Political Rights

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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*, **

Communication submitted by:	Markus Wilhelm (represented by counsel, Irene Oberschlick)
Alleged victim:	The author
State party:	Austria
Date of communication:	22 February 2017 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 11 March 2019 (not issued in document form)
Date of adoption of Views:	23 October 2023
Subject matter:	Freedom of expression
Procedural issues:	Same matter – another procedure of international investigation or settlement; abuse of right of submission
Substantive issue:	Restriction of freedom of expression
Article of the Covenant:	19 (2)
Articles of the Optional Protocol:	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 1978. The author is represented by counsel.

Facts as submitted 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, publishing critical articles on social and political affairs on his website "dietiwag.org".

* 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, Carlos Gómez Martínez, Laurence R. Helfer, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Chongrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji and Hélène Tigroudja.

2.2 On 28 March 2013, the author published an article entitled "ÖVP 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 state election campaign of the Tyrolean People's Party and its convention. The event was to take place on the premises of Area 47, a limited liability company that managed an event centre in Tyrol. The author claimed in his article that the venue was largely sponsored with taxpayer 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 pointed out that Area 47 had previously hosted concerts of the rock band Frei.Wild, which, he maintained, subscribed to a right-wing neo-Nazi ideology. The author illustrated his article with the logo of Area 47, in which he had transformed the number "47" into a swastika.

2.3 Shortly after the publication of the article, Area 47 and the Tyrolean People's 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 than the general public. 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 might derive therefrom. However, the Court pointed out that there was 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 right-wing ideological activities but rather as the mark of an atrocious National Socialist regime. In German-speaking countries, there is no harsher stigmatization than that of being branded 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 had been overstepped. The Court also stated that no factual basis was 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 its association with right-wing extremism. The Court concluded that the mere allegation of corruption could not justify criticism expressed through the use of a swastika and that its use was neither necessary nor permissible within the framework of that criticism. The Court ordered the author to refrain from altering the logo of Area 47 with a swastika and from using and disseminating it in connection with either the company or the party and concluded that he was liable for all related damages, both incurred and future.

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 his argument regarding his role as a watchdog. The Supreme Court stated that calling someone a "Nazi" was an insulting value judgment and that value judgments interfering with the honour of another person based on an untrue fact were impermissible and could not 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 the National Socialist ideology. The Supreme Court found that, in his article, the author had failed 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. On 2 July 2015, the Court declared the application inadmissible and dismissed it in a single-judge decision.

Complaint

3.1 The author alleges that the Austrian courts' decisions constituted an interference with his right to freedom of expression, which was guaranteed by article 19 (2) of the Covenant.

3.2 The author claims that, as a blogger, he should have benefited from the same level of protection guaranteed to journalists as public watchdogs. However, the courts, except for the first-instance court, failed to consider the fact that the author had 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 also argues that the courts weighed 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 than to the honour and reputation of legal entities.

State party's observations on admissibility

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

4.2 The State party argues that, in the light of the reservation made by Austria to article 5 (2) (a) of the Optional Protocol, the communication should be declared inadmissible, as the same matter has been examined by the European Court of Human Rights. That court found the author's application to be incompatible with the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) and based its decision on article 35 (3) of that 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 contends that, due to the considerable amount of time that elapsed between the decision of the European Court of Human Rights and the author's submission of the communication to the Committee, it could be inferred that the case held no particular importance for the author. Thus, the Committee might consider that the communication constitutes an abuse of the right to submit a complaint, pursuant to rule 99 (c) of the Committee's rules of procedure.

State party's observations on the merits

5.1 In a note verbale dated 11 September 2019, the State party submitted its observations on the merits of the communication. Firstly, the State party points out that the courts' proceedings were focused exclusively on the prohibition against the author's altering of the logo of Area 47 with a swastika and its usage and dissemination on the Internet in connection with the plaintiffs, along with liability for possible related damages. The State party confirms that the article, bearing its original title, remains accessible on the author's website and that the Austrian courts have never questioned the author's right to publish it.

5.2 Secondly, the State party notes that a person's right to honour and good reputation is one of the personal rights regulated in section 16 of the Austrian General Civil Code. Section 1330 of the Civil Code outlines the legal repercussions for infringing upon that right and establishes the prerequisites for seeking damages from and obtaining an injunction against the responsible party. Since the European Convention on Human Rights has constitutional status in Austria, that provision is interpreted by the courts in accordance with the European Court of Human Right's case law by balancing conflicting rights: the right to freedom of expression and the right to reputation. The Prohibition Act of 1947 bans the National Socialist German Worker's Party, its military branches, its subdivisions and all associated units and all National Socialist organizations and institutions in Austria. Furthermore, sections 3 through 3 (i) of the Prohibition Act provide for a comprehensive ban on National Socialist resurgence. Those provisions forbid any individual from engaging in activities on behalf of the National Socialist German Worker's Party or promoting its objectives or acting in any manner associated with National Socialism, in accordance with sections 3 and 3 (g) 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 those provisions are punishable by an administrative penalty of up to 4,000 euros or detention of one month. The swastika, as a symbol of National Socialism and the National Socialist German Worker's Party, is among the banned symbols.

5.3 Thirdly, the State party argues that, as the author did not contest the legal basis for the imposed restriction, the Committee should consider only whether the restriction was in

pursuit of the legitimate aim of respecting the right or reputation of others and if the restriction was necessary and proportionate.

5.4 The State contests the author's argument that, as corporate entities, Area 47 and the Tyrolean People's Party were not entitled to the protection of their reputations and that, subsequently, restricting the author's freedom of expression did not have a legitimate aim. The State party argues that, although the Covenant essentially affords protection only to natural persons, the broad wording of article 19 (3), namely, respect of the rights or reputations of others, implies that it does not apply only to natural persons.

5.5 Furthermore, the State party contests the argument of the author that he was denied the protection guaranteed to journalists and public watchdogs due to his occupation as a part-time farmer. The State party notes 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 notes that, even if the courts had assumed that the author's status was equal to that of a journalist, it would not automatically have resulted in a different outcome. Relying on the case law of the European Court of Human Rights, they point out that, while great deference is paid to journalists by default due to their special role in a democratic society, journalists are also expected to exercise exceptional diligence, including by refraining from publishing clearly false allegations.[1]

5.6 Finally, the State party argues that the courts followed the approach established by the European Court of Human Rights and imposed a proportionate limitation on 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 that included the names of the company and the political party, together with the title, would link both of them to the National Socialist ideology. As a State that experienced the horrors of the Nazi regime, Austria is assumed to have a special moral responsibility to distance itself from the massive atrocities perpetrated by the Nazis. That responsibility is partly reflected in the provisions of the Prohibition Act 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, to be a value judgment constituting harsh stigmatization 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 weighed the rights of Area 47 and the Tyrolean People's Party against the right of the author to freedom of expression. In doing so, they sufficiently considered the language and format used by the author, his social role and that of the plaintiffs and other relevant circumstances. The result was that the author was ordered to refrain from altering the logo with a swastika and from using and distributing it in connection with the plaintiffs, which was the only possible way to remedy the stigmatization created for the plaintiffs and to prevent further consequences for them. The author was ordered to pay only the procedural costs and he did not complain about any other consequences. Thus, the courts' decisions did not have an unjustified chilling effect of discouraging free expression.

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 asserts that the fact that an identical complaint was previously declared inadmissible by the European Court of Human Rights does not bar the Committee from considering the communication. The author argues that the European Court of Human Rights did not examine his claims on the merits, as, in its decision, it indicated that, on the basis of all the records accessible to it, it had come to the conclusion that the criteria set out in articles 34 and 35 of the European Convention on

[1] The State party refers to European Court of Human Rights, *Armellini et al. v. Austria,* Application No. 14134/07, Judgment, 16 April 2015, para. 39.

Human Rights had 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 that his application was declared inadmissible, it is impossible to unequivocally determine whether his complaint was examined on the merits. Therefore, the present communication cannot be declared inadmissible pursuant to article 5 (2) (a) of the Optional Protocol. Furthermore, the author contests the State party's argument concerning a delay in the lodging of the present application, as he submitted the communication within the time frame 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 reiterates that the focus of his complaint is the imposed obligation to refrain from altering the logo by means of a swastika and using and disseminating it in connection with Area 47 and the Tyrolean People's Party. According to the author, that obligation constitutes future censorship, as it effectively restricts his ability to use the altered logo or to discuss it in future comments, particularly in relation to events that might be attributed to the plaintiffs and that raise similar concerns.

6.4 Furthermore, the author asserts that the historical role of Austria and its 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 did he intend to claim that the company and the party were Nazi organizations or had an affiliation with National Socialism. Instead, the author wanted to point out that they had provided a platform for the band to perform, thereby justifying an accusation of ideological alignment and warranting a value judgment expressed by means of a logo altered with a swastika. The decision prohibiting the author from using such a pointed value judgment appears to be an attempt to conceal and suppress debates on problematic behaviour or associations with Nazi ideology that might be embarrassing.

6.5 Lastly, the author notes the domestic courts' failure to examine his complaint in the light of the freedom of the press and the media. Given the existence and the impact of social media, it is crucial that those who use social media to participate in discussions of public interest enjoy the freedom of the press, as do those publishing in traditional media outlets. The author claims that, while the State party speculates that having the status of journalist might not have changed the outcome of the domestic proceedings, it goes beyond the content of the domestic judgments.

State party's additional observations

7. On 7 September 2021, the State Party submitted additional comments, in which it reiterates its arguments, as set out above, and disagrees with the author's interpretation of the wording of its submissions. The State party adds that the prohibition against altering the logo should not be considered as future 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 the inadmissibility of the communication pursuant to article 5 (2) (a) of the Optional Protocol. In that regard, the Committee observes that, on 2 July 2015, the European Court of Human Rights, sitting in a single-judge formation, found that the admissibility criteria set out in articles 34 and 35 of the European Convention on Human Rights 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 Optional 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 that provides that, when an inadmissibility decision of the European Court of Human Rights 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 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-year time limit following the consideration of his application by the European Court of Human Rights, the Committee finds no signs of abuse of rights under article 3 of the Optional Protocol.

8.4 The Committee considers the claims of the author to be sufficiently substantiated for the purposes of admissibility. It therefore declares the communication admissible and proceeds with its consideration of 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 or 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 in article 19 (3) of the Covenant.

9.3 The Committee refers to paragraph 2 of its general comment No. 34 (2011) on the freedoms of opinion and expression, according to which the freedom of opinion and the 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. 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 (ordre public), or of public health or morals.[4] All restrictions imposed on the freedom of expression must be provided by law. They may be imposed only on the grounds set out in article 19 (3) (a) and (b) and they must conform to 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 the freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. That 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

[2] See, for example, Human Rights Committee, *A.M. v. Denmark*, communication No. 121/1982, para. 6; and *Linderholm v. Croatia* (CCPR/C/66/D/744/1997), para. 4.2.

[3] See *Murne et al. v. Sweden* (CCPR/C/137/D/2813/2016), para. 9.3; *Achabal Puertas v. Spain* (CCPR/C/107/D/1945/2010 and Corr.1), para. 7.3; and *Genero v. Italy* (CCPR/C/128/D/2979/2017), para. 6.2.

[4] General comment No. 34 (2011), para. 28.

shared by a wide range of actors, including professional full-time reporters and analysts, in addition to bloggers and others who engage in forms of self-publication in print on the Internet or elsewhere.[5]

9.5 The Committee also notes that, in the present case, the relevant provisions of the Austrian General Civil Code were applied with the legitimate aim of protecting the reputation or rights of others. Therefore, the restriction imposed on the author was provided for by law. The Committee shall now decide whether the limitation of the author's right to freedom of expression, as provided by the Austrian General Civil Code, was necessary and proportionate.[6]

9.6 As the Committee noted in paragraph 35 of its general comment No. 34 (2011), when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific 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.[7] 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 stigmatization 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 Area 47 and the Tyrolean People's Party with a neo-Nazi band. However, the Committee cannot disregard the historical and social context in which such a statement was 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 European Court of Human Rights has established in numerous judgments that, in the light of their historical role and experience, States that experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis.[8] In that regard, the Committee accepts that the comparison of the plaintiffs with Nazis by the use of the swastika, implying their ideological affiliation with Nazism and the neo-Nazi band, was perceived as a harsh insult by the Austrian domestic courts and constituted a valid threat to the reputations of the company and the party.

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.[9] In the present case, the domestic courts explicitly acknowledged and took into consideration the higher degree of tolerance applicable to both the party as a political actor and the company as a legal entity. The Committee also notes that, although the journalists and public watchdogs, such as the author, should enjoy extensive freedom to criticize 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 that regard, that the author's statement affected 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,

[5] Ibid., para. 13.
[6] Ibid., para. 22.
[7] See also *Shin v. Republic of Korea* (CCPR/C/80/D/926/2000), para. 7.3.
[8] See, for example, European Court of Human Rights, *Perinçek v. Switzerland*, Application No. 27510/08, Judgment, 15 October 2015, para. 243.
[9] General comment No 34 (2011), para. 38.

the decision by the domestic courts to impose restrictions on the author's right to freedom of expression was necessary and in line with article 19 (3) (b).[10]

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, 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.[11] Considering the findings above, 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.

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.

[10] Ibid., para. 36.

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