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on civil and
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Eightieth session
15 March – 2 April 2004

VIEWS

Communication No. 1002/2001

<u>Submitted by:</u>	Franz Wallmann et al. (represented by Alexander H.E. Morawa)
<u>Alleged victim:</u>	The authors
<u>State party:</u>	Austria
<u>Date of communication:</u>	2 February 2001 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 91 decision, transmitted to the State party on 30 July 2001 (not issued in document form)
<u>Date of adoption of Views:</u>	1 April 2004

On 1 April 2004 the Human Rights Committee adopted its Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1002/2001. The text of the Views is appended to the present document.

[ANNEX]

* Made Public by decision of the Human Rights Committee.

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights

Eightieth session

concerning

Communication No. 1002/2001**

Submitted by: Franz Wallmann et al. (represented by Alexander H.E. Morawa)

Alleged victim: The authors

State party: Austria

Date of communication: 2 February 2001 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 1 April 2004,

Having concluded its consideration of communication No. 1002/2001, submitted to the Human Rights Committee on behalf of Franz Wallmann et al. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, and the State party,

Adopts the following:

** The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Alfredo Castillero Hoyos, Ms. Christine Chanet, Mr. Franco Depasquale, Mr. Maurice Glèlè Ahanhanzo, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Martin Scheinin, Mr. Ivan Shearer, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski and Mr. Maxwell Yalden.

Views under article 5, paragraph 4, of the Optional Protocol

1. The authors of the communication are Franz Wallmann (first author) and his wife, Rusella Wallmann (second author), both Austrian nationals, as well as the “Hotel zum Hirschen Josef Wallmann” (third author), a limited partnership including a limited liability company, represented by Mr. and Mrs. Wallmann for the purposes of this communication. The authors claim to be a victim of violations by Austria¹ of article 22, paragraph 1, of the Covenant. They are represented by counsel.

The facts as submitted by the authors

2.1 The first author is the director of a hotel in Salzburg, the “Hotel zum Hirschen”, a limited partnership (*Kommanditgesellschaft*) acting as the third author. Until December 1999, the first author and Mr. Josef Wallmann were the company’s partners, in addition to its general partner, the “Wallmann Gesellschaft mit beschränkter Haftung”, a limited liability company (*Gesellschaft mit beschränkter Haftung*). Since December 1999, when the first author and Josef Wallmann left the limited partnership, the second author holds 100 percent of the shares of both the limited liability company and the limited partnership.

2.2 The “Hotel zum Hirschen Josef Wallmann”, a limited partnership (*Kommanditgesellschaft*) is a compulsory member of the Salzburg Regional Section of the Austrian Chamber of Commerce (*Landeskammer Salzburg*), as required under section 3, paragraph 2, of the Chamber of Commerce Act (*Handelskammergesetz*). On 26 June 1996, the Regional Chamber requested the limited partnership’s to pay its annual membership fees (*Grundumlage*) for 1996, in the amount of 10,230.00 ATS².

2.3 On 3 July 1996, the first author appealed on behalf of the limited partnership to the Federal Chamber of Commerce (*Wirtschaftskammer Österreich*) claiming a violation of his right to freedom of association protected under the Austrian Constitution (*Bundesverfassungsgesetz*) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). On 9 January 1997, the Federal Chamber of Commerce rejected the appeal.

2.4 The first author lodged a constitutional complaint with the Austrian Constitutional Court (*Verfassungsgerichtshof*), which declared the complaint inadmissible on 28 November 1997, since it had no prospect of success in the light of the Court’s jurisprudence regarding compulsory

¹ The Covenant and the Optional Protocol to the Covenant entered into force for the State party respectively on 10 December 1978 and 10 March 1988. Upon ratification of the Optional Protocol on 10 December 1987, the State party entered the following reservation: “On the understanding that, further to the provisions of article 5 (2) of the Protocol, the Committee provided for in Article 28 of the Covenant shall not consider any communication from an individual unless it has been ascertained that the same matter has not been examined by the European Commission on Human Rights established by the European Convention for the Protection of Human Rights and Fundamental Freedoms.”

² 1 euro is equivalent to ATS 13.76.

membership in the Chamber of Commerce, and referred the case to the Supreme Administrative Court (*Verwaltungsgerichtshof*) to review the calculation of the annual fees. Accordingly, that tribunal did not address the question of the limited partnership's compulsory membership.

2.5 On 3 July 1998, the first author submitted an application to the European Commission of Human Rights (European Commission), alleging a violation of his rights under articles 6, paragraph 1 (right to a fair trial in the determination of his civil rights and obligations), 10 (freedom of expression), 11 (freedom of association) and 13 (right to an effective remedy) of the European Convention. In a letter dated 10 July 1998, the Secretariat of the former European Commission advised the first author of its concerns as to the admissibility of his application, informing him that, according to the Commission's jurisprudence, membership in a chamber of commerce was not covered by the right to freedom of association since chambers of commerce could not be considered associations within the meaning of article 11 ECHR. Moreover, article 6 of the Convention did not apply to domestic proceedings concerning the levy of taxes and fees. His application would therefore have to be declared inadmissible by the Commission. In the absence of any further observations by the author, his application could neither be registered, nor be transmitted to the Commission.

2.6 By letter of 22 July 1998, the first author responded to the Secretariat, setting out his arguments in favour of registering his application. On 11 August 1998, the Secretariat of the European Commission informed the author that his application had been registered. As a consequence of the entry into force of Protocol No. 11 to the European Convention on 1 November 1998, the author's application was transferred to the European Court of Human Rights. On 31 October 2000, a panel of three judges of the Court declared the application inadmissible under article 35, paragraph 4, of the Convention, noting "that the applicant has been informed of the possible obstacles to its admissibility" and finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".³

2.7 On 13 October 1998 and on 16 December 1999, respectively, the Federal Commerce Chamber dismissed the third author's appeals against decisions of the Salzburg Regional Chamber specifying the limited partnership's annual membership fees for 1998 and 1999. No constitutional complaint was lodged against these dismissals.

The complaint

3.1 The authors claim to be victims of a violation of article 22, paragraph 1, of the Covenant, because the limited partnership's compulsory membership in the Regional Chamber of Commerce, combined with the obligation to pay annual membership fees, effectively denies them their right to freedom of association, including the right to found or join another association for similar commercial purposes.

³ See European Court of Human Rights, Third Section, Decision on the admissibility of Application No. 42704/98 (*Franz Wallmann v. Austria*), 31 October 2000.

3.2 The authors submit that the applicability of article 22 to compulsory membership in the Austrian Federal Chamber and Regional Chambers of Commerce has to be determined on the basis of international standards. Their qualification as public law organizations under Austrian legislation does not reflect their true character, since the Chambers: (1) represent the interests of the businesses that make up their membership, rather than the public interest; (2) engage themselves in a broad range of economic, profit-oriented activities; (3) assist their members in establishing business contacts; (4) exercise no disciplinary powers vis-à-vis their members; and (5) lack the characteristics of professional organizations in the public interest, their common feature being limited to “doing business”. The authors contend that article 22 of the Covenant is applicable to the Chambers, since they perform the functions of a private organization representing its economic interests.

3.3 The authors argue that even if the Chambers were to be considered public law organizations, the financial burden placed on their members by the annual membership fees effectively prevents members from associating with one another outside the Chambers, since individual businesspeople cannot reasonably be expected to make similar contributions in addition to the Chambers’ annual membership fees, to fund alternative private associations to enhance their economic interests. The annual membership fees therefore serve, and are calculated, as a *de facto* prohibition of the exercise of the right freely to associate outside the Chambers.

3.4 For the authors, the compulsory membership scheme is not a necessary restriction to further any legitimate State interest within the meaning of article 22, paragraph 2, of the Covenant. There is no such compulsory membership in most other European States.

3.5 With regard to the Austrian reservation to article 5, paragraph 2 (a), of the Optional Protocol, the authors argue that, taking the text of the reservation literally, the same matter has not been examined by the “European Commission of Human Rights”, as the first author’s application to the Commission was dismissed by the European Court of Human Rights without any examination on the merits, in particular as regards the questions of whether the Austrian Chamber of Commerce falls under the definition of “association” and whether its compulsory membership makes it impossible for individuals to exercise their right to freedom of association outside the Chamber. The failure of the European Court’s Secretariat first to inform the author about the concerns as to the admissibility of his application deprived him of his right to forum selection by withdrawing his application before the European Court and submitting it to the Committee. The fact that he had already received a letter from the Commission’s Secretariat in July 1998 is said to be irrelevant, since it pre-dated the registration of his application and because the Court’s case law had evolved in the meantime.

The State party’s observations on admissibility

4.1 On 26 September 2001, the State party made its submission on the admissibility of the communication. It considers that, insofar as the first author is concerned, the Committee’s competence to examine the case is precluded by article 5, paragraph 2 (a), of the Optional Protocol read in conjunction with the relevant Austrian reservation.

4.2 The State party argues that the reservation is applicable to the communication because the first author had already brought the same matter before the European Commission of Human Rights, whose Secretariat informed him of its concerns as to the admissibility of his application, concluding that the application would likely be declared inadmissible. Given that the Secretariat did not only raise formal issues in the letter to the first author, but referred to several precedents from the Commission's substantive case law, the State party argues that the European Commission proceeded to an examination of the merits of the application and has, therefore, "examined" the same matter.

4.3 In addition, the European Court, in its decision of 31 October 2000, stated that it "had examined the application". The fact that the Court eventually rejected the application as inadmissible is without prejudice to this finding, since it was not dismissed on the formal grounds set out in article 35, paragraphs 1 and 2, of the Convention. Rather, the Court's finding that the matters complained of "do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols" clearly shows that the Court's examination also comprised "a far-reaching analysis of the merits of the case". The application was thus rejected on the merits, in accordance with article 35, paragraph 4, of the Convention, as manifestly ill-founded.

4.4 For the State party, the applicability of the reservation is not hampered by its explicit reference to the European Commission of Human Rights. Even though the author's application was eventually rejected by the European Court and not by the European Commission, the Court has taken over the former Commission's functions after the entry into force of Protocol No. 11 on 1 November 1998, when all cases previously pending before the Commission were transferred to the new European Court. The new Court must therefore be considered the former Commission's successor.

4.5 Finally, the State party submits that the fact that the European Court did not inform the first author of its intention to dismiss his application does not constitute a reason for which the Austrian reservation could not apply in the present case.

Comments by the authors

5.1 By letter of 15 October 2001, the first author amended the communication so as to include his wife and the "Hotel zum Hirschen Josef Wallmann" limited partnership as additional authors.

5.2 In response to the State party's observations on admissibility, the authors submit that permissible and duly accepted reservations to international treaties become integral parts of these treaties and must therefore be interpreted in the light of the rules in articles 31 and 32 of the Vienna Convention on the Law of Treaties. Since the Austrian reservation, pursuant to the ordinary meaning of its wording, clearly refers to an examination by the European Commission of Human Rights, no room is left for an interpretation based on its context or object and purpose, let alone the supplemental means of treaty interpretation in article 32 of the Vienna Convention

(*travaux préparatoires* and circumstances of treaty conclusion). The ordinary meaning of the reservation's text being equally clear in requiring that the same matter "has not been *examined*"⁴ by the European Commission, the mere fact that the first author *submitted* an application to the former Commission is not sufficient to justify the applicability of the reservation to his present communication.

5.3 The authors reiterate that the application was never "examined" by the European Commission, as the Secretariat's letter of 10 July 1998, informing the first author of certain admissibility-related concerns, was sent at a time when the application had neither been registered nor brought to the attention of the Commission. Similarly, the Commission never examined the application after it had been registered because of its referral to the new European Court, after entry into force of Protocol No. 11.

5.4 The authors reject the State party's argument that the new European Court simply replaced the former European Commission and that the Austrian reservation, despite its wording, should cover cases in which the same matter was examined by the new Court, on the basis that the new Court's competencies are broader than those of the former Commission.

5.5 Moreover, the authors argue that, in any event, it appeared from the reference, in the European Court's decision, to the letter of 10 July 1998 of the Secretariat that the Court rejected the application as inadmissible *ratione materiae* with article 11 of the Convention, which cannot, however, be considered an examination within the meaning of the Austrian reservation, in accordance with the Committee's jurisprudence.⁵

5.6 The authors recall that the Austrian reservation to article 5(2) (a) of the Optional Protocol is the only one explicitly referring to the "European Commission of Human Rights" instead of "another procedure of international investigation or settlement". The aim of the drafters of the reservation is said to be irrelevant, because the clear and ordinary meaning of the Austrian reservation does not permit having resort to supplemental means of treaty interpretation within the meaning of article 32 of the Vienna Convention.

5.7 By reference to the jurisprudence of the European and the Inter-American Courts of Human Rights, the authors emphasize that reservations to human rights treaties must be interpreted in favour of the individual. Any attempt to broaden the scope of the Austrian reservation should be rejected, as the Committee disposes of adequate tools to prevent an improper use of parallel proceedings, such as the concepts of "substantiation of claims" and "abuse of the right to petition", in addition to article 5, paragraph 2 (a), of the Optional Protocol.

⁴ Emphasis added.

⁵ The authors refer to Communication No. 441/1990, *Robert Casanovas v. France*, Views adopted on 19 July 1994, UN Doc. CCPR/C/51/D/441/1990, at para. 5.1, and Communication No. 808/1998, *Georg Rogl v. Germany*, decision on admissibility adopted on 25 October 2000, UN Doc. CCPR/C/70/D/808/1998, at paras. 9.3 *et seq.*

5.8 The authors conclude that the communication is admissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, because the same matter is not being examined by another procedure of international investigation or settlement and since the Austrian reservation does not apply. Insofar as the second and the third authors are concerned, there is no need for the Committee to consider whether the Austrian reservation to article 5, paragraph 2 (a), applies, since these authors and not petition the European Commission or Court of Human Rights.⁶

5.9 Lastly, the authors submit that they have sufficiently substantiated, for purposes of admissibility, that the Austrian Federal and the Regional Chambers of Commerce perform the functions of associations within the meaning of article 22, paragraph 1, of the Covenant.

Additional observations by the State party

6.1 On 30 January 2002, the State party submitted further observations on the admissibility and, in addition, on the merits of the communication. It argues that the communication is inadmissible under articles 1 and 2 of the Optional Protocol, insofar as the third author is concerned, since, according to the Committee's jurisprudence⁷, associations and corporations cannot be considered individuals, nor can they claim to be victims of a violation of any of the rights protected in the Covenant.

6.2 The State party submits that the communication is also inadmissible with regard to the first and second authors, because they are essentially claiming violations of the rights of their partnership. Although, as a limited partnership, the "Hotel zum Hirschen Joseph Wallmann" has no legal personality, it may act in the same way as entities with legal personality in its legal relations, which was reflected by the fact that the "Hotel zum Hirschen Josef Wallmann" was a party to the domestic proceedings. Since all domestic remedies were brought in the name of the third author and no claim related to the first and second authors personally has been substantiated for purposes of article 2 of the Optional Protocol, the first and second authors have no standing under article 1 of the Optional Protocol. The first and second authors also failed to exhaust domestic remedies, as only the third author was a party to the domestic proceedings.

6.3 Furthermore, the second author cannot claim to be a victim of the impugned decision of the Salzburg Regional Chamber of Commerce of 26 June 1996, as she only became a partner of the limited partnership and shareholder of the limited liability company in December 1999.

⁶ In this regard, the authors refer to Communication No. 645/1995, *Vaihere Bordes and John Temeharo v. France*, decision on admissibility adopted on 22 July 1996, UN Doc. CCPR/C/57/D/645/1995, at para. 5.2.

⁷ The State party refers to Communications No. 104/1981, *J.R.T. and the W.G. Party v. Canada*, decision on admissibility adopted on 6 April 1983, UN Doc. CCPR/C/18/D/104/1981, at para. 8 (a); No. 502/1992, *S.M. v. Barbados*, decision on admissibility adopted on 31 March 1994, UN Doc. CCPR/C/50/D/502/1992, at para. 6.3, and No. 737/1997, *Michelle Lamagna v. Australia*, decision on admissibility adopted on 7 April 1999, UN Doc. CCPR/C/65/D/737/1997, at para. 6.2.

6.4 With regard to the authors' argument that the Austrian reservation only refers to the European Commission but not to the European Court of Human Rights, the State party explains that the reservation was made on the basis of a recommendation by the Committee of Ministers, which suggested that member States of the Council of Europe, "which sign or ratify the Optional Protocol might wish to make a declaration [...] whose effect would be that the competence of the UN Human Rights Committee would not extend to receiving and considering individual complaints relating to cases which are being or already have been examined under the procedure provided for by the European Convention"⁸.

6.5 The State party submits that its reservation differs from similar reservations made by other member States only insofar as it directly addresses the relevant Convention mechanism, for the sake of clarity. All reservations aim at preventing any further international examination following a decision of the review mechanism established by the European Convention. It would, therefore, be inappropriate to deny the Austrian reservation its validity and continued scope of application merely because of the organizational reform of the review mechanism.

6.6 The State party notes that, because of the merger of the European Commission and the "old" Court, the "new" European Court can be considered the "legal successor" of the Commission, since most of its key functions were formerly discharged by the Commission. Given that the reference to the European Commission in the State party's reservation was specifically made in respect of these functions, the reservation remains fully operative after the entry into force of Protocol No. 11. The State party contends that it was not foreseeable, when it entered its reservation in 1987, that the review mechanisms of the European Convention would be modified.

6.7 The State party again emphasizes that the same matter was already examined by the European Court which, in order to reject the author's application as being inadmissible, under article 35, paragraphs 3 and 4 of the European Convention, had to examine it on the merits, if only summarily. It concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol.

6.8 On the merits, the State party submits that the Austrian Chamber of Commerce is a public organization, established by law rather than private initiative, and to which article 22 of the Covenant does not apply. Compulsory membership in chambers, such as, chambers for workers and employees, agricultural chambers, and chambers for the self-employed, is commonplace under Austrian law. Certain characteristics of the Chamber of Commerce are laid down in the Austrian Constitution, including its compulsory membership, its organization as a public law organization, its financial and administrative autonomy, its democratic structure and its supervision by the State, including the supervision of its financial activities by the Court of Audit. Moreover, the Chamber participates in matters of public administration by commenting on bills of Parliament, which have to be submitted to experts of the Chamber, by nominating lay

⁸ Council of Europe, Committee of Ministers Resolution (70) 17 of 15 May 1970.

judges for labour and social courts, as well as delegates for a large number of commissions in the field of public administration.

6.9 The State party refutes the authors' arguments equating the Federal and Regional Chambers with private associations (see para. 3.2), arguing that (1) the representation of the common economic interests of Chamber members is in the public interest; (2) the Chamber is a non-profit organization, whose membership fees are limited and must not exceed the amount required for the necessary expenses, pursuant to article 131 of the Chamber of Commerce Act; (3) the addresses of Chamber members are accessible to the general public, through the Trade Register; (4) the fact that the Chamber has no disciplinary powers does not compel the conclusion that the Chamber is not a professional organization, as the existence of disciplinary powers is not a constitutive element of such organizations; (5) except for disciplinary matters, the Chamber can in every respect be compared to professional organizations in the public interest.

6.10 The State party submits that any comparison with the structure of commerce chambers in other European countries fails to recognize that the Austrian Chamber could not fulfill the public functions assigned to it if it were treated on an equal basis with private associations. The public law character of the Chamber was also confirmed by the European Court of Human Rights⁹, on the basis that it was created by law and not by private act and that it discharges functions in the public interest, such as the prevention of unfair trade practices, the promotion of professional training and the supervision of the actions of its members. The State party endorses the European Court's conclusion that article 11 of the European Convention does not apply to the Chamber of Commerce and considers the argument applicable to article 22 of the Covenant.

6.11 Concerning the author's contention that the annual membership fees of the Chamber in their effect prevent members from founding or joining alternative associations, the State party submits that these fees are relatively modest compared with the authors' other expenses and are tax deductible, as are contributions to private professional or trade organizations. The annual contribution to the private Association of Hotel Owners, ranging between 5,000 and 24,000 ATS, has not prevented its nearly 1,000 members from joining the Association. In the authors' case, the fee would amount to less than 10,000 ATS, a fee they could afford.

Additional comments by the authors

7.1 By letter of 11 March 2002, the authors responded to the State party's additional observations. While agreeing that the Committee has, in principle, held so far that only individuals can lodge communications, they argue that nothing precludes several persons who are engaged in the same commercial activity from submitting a complaint together.¹⁰ According

⁹ The State party refers to the Court's decision on admissibility on Application No. 14596/89 (*Weiss v. Austria*), 10 July 1991.

¹⁰ The authors refer to Communication No. 273/1988, *B d. B. et al. v. The Netherlands*, decision on admissibility of 30 March 1989, UN Doc. CCPR/C/35/D/273/1988.

to the Committee's jurisprudence¹¹, such "categories of persons" form a semi-independent entity for purposes of admissibility under articles 1 and 2 of the Optional Protocol, while the individuals concerned merely stand behind that entity. The standing of "categories of persons" thus points to a developing practice which will eventually result in the recognition of entities made up of individuals as authors of communications.

7.2 The authors submit that, by denying that the first and second authors have substantiated a violation of their own rights, the State party overlooks that the right to freedom of association under article 22 is "by [its] nature inalienably linked to the person"¹². The fact that this right is also linked, to a certain extent, to commercial activities does not make it less protected.¹³ Since the first and second authors have been personally affected in their economic activities by the levy of annual membership dues, based on their compulsory membership in the Chamber of Commerce, they did not lose their individual rights simply because they founded a business pursuant to the requirements of domestic law, nor did they lose the right to claim these rights by means of individual petition.¹⁴

7.3 On domestic remedies, the authors argue that in the absence of any specification by the State party as to which other proceedings the first and second authors could have initiated under Austrian law to claim their right to freedom of association, apart from appealing the Chamber's decision and lodging a constitutional complaint, in the name of the limited partnership, the State party's procedural objection must fail.¹⁵ Moreover, through these proceedings, the State party was given an opportunity to remedy the alleged violation of article 22 of the Covenant, which, according to the Committee's jurisprudence¹⁶, is the main purpose of the requirement to exhaust domestic remedies.

¹¹ Reference is made to Communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, UN Doc. CCPR/C/47/D/359/1989, at para. 10.4.

¹² Quoted from Communication No. 455/1991, *Allan Singer v. Canada*, Views adopted on 26 July 1994, UN Doc. CCPR/C/51/D/455/1991, at para. 11.2.

¹³ The authors refer to Communication No. 359/1989, *John Ballantyne, Elizabeth Davidson and Gordon McIntyre v. Canada*, Views adopted on 31 March 1991, UN Doc. CCPR/C/47/D/359/1989, at para. 11.3.

¹⁴ In support of this claim, the authors refer to Communication No. 273/1988, *B. d. B. v. The Netherlands*, decision on admissibility adopted on 30 March 1989, UN Doc. CCPR/C/35/D/273/1988 and Communication No. 316/1988, *C.E.A. v. Finland*, decision on admissibility adopted on 10 July 1991, UN Doc. CCPR/C/42/D/316/1988.

¹⁵ The authors refer to Communication No. 83/1981, *Machado v. Uruguay*, Views adopted on 4 November 1983, UN Doc. CCPR/C/20/D/83/1981, at para. 6.

¹⁶ Reference is made to Communications No. 220/1987, *T. K. v. France*, decision on admissibility adopted on 8 November 1989, UN Doc. CCPR/C/37/D/220/1987, at para. 8.3, and No. 222/1987, *H. K. v. France*, decision on admissibility adopted on 8 November 1989, UN Doc. CCPR/C/37/D/222/1987, at para. 8.3.

7.4 As to the alleged failure of the second author to substantiate her claim to be a victim of a violation of article 22, the authors submit that the “Hotel zum Hirschen Joseph Wallmann” limited partnership continues to be a compulsory member of the Chamber of Commerce. While their communication was originally directed against the decision determining the membership fees for 1996, subsequent decisions concerning membership fees have been similar. The second author was affected by these decisions, once she became a partner and shareholder of the “Wallmann Gesellschaft mit beschränkter Haftung”.

7.5 Regarding exhaustion of domestic remedies against subsequent decisions of the Salzburg Regional Chamber, the authors state that the Federal Chamber of Commerce, on 13 October 1998 and 16 December 1999, respectively, dismissed the third author’s appeals against the decisions concerning its membership fees for 1998 and 1999. No further appeals were brought against these dismissals, since such remedies would have been futile, in the light of the Constitutional Court’s consistent jurisprudence and, in particular, its decision of 28 November 1997 rejecting the constitutional complaint concerning the membership fees for 1996.¹⁷

7.6 With respect to the Austrian reservation, the authors reiterate that nothing prevented the State party from entering a reservation upon ratification of the Optional Protocol precluding the Committee from examining communications if the same matter has already been examined “under the procedure provided for by the European Convention”, as recommended by the Committee of Ministers, or from using the broader formulation of a previous examination by “another procedure of international investigation or settlement”, as other States parties to the European Convention did.

7.7 Moreover, the authors submit that the State party is free to consider entering a reservation to that effect by re-ratifying the Optional Protocol, as long as such a reservation could be deemed compatible with its object and purpose. What is not permissible, in their view, is to broaden the scope of the existing reservation in a way contrary to fundamental rules of treaty interpretation.

7.8 The authors reject the State party’s argument that key tasks of the “new” European Court, such as decisions on admissibility and establishment of the facts of a case, were originally within the exclusive competence of the European Commission, arguing that the “old” European Court also consistently dealt with these matters. They question that the reorganization of the Convention organs was not foreseeable in 1987 and quote parts of the Explanatory Report to Protocol No. 11, summarizing the history of the “merger” deliberations from 1982 until 1987.

7.9 On the merits, the authors contest the State party’s arguments to the effect that the Chamber of Commerce is a public law organization, by submitting (1) that the mere fact that the Chamber was established by law does not make it a public law organization; (2) that the right to comment on draft laws is not peculiar to public law organizations; (3) that the Court of Audit supervises the financial activities of many entities, including companies partly owned by the State; (4) that members of commissions in the field of public administration are nominated not

¹⁷ The authors refer to Communication No. 210/1985, *Wim Hendriks v. The Netherlands*, Views adopted on 27 July 1988, UN Doc. CCPR/C/33/D/201/1985, at para. 6.3.

only by certain chambers, but also by associations representing relevant interest groups such as trade unions or the churches.

7.10 Moreover, the authors argue (1) that, while the fact that groups of people have the opportunity to have their interests represented may be in the public interest, this does not convert the economic interests of the Chamber members into the “public interest”; (2) that the Chamber engages in extensive profit-based economic activity, as it is a shareholder of companies and undertakes advertisement campaigns on behalf of its members; (3) that the task of sanctioning members who infringe professional duties constitutes the crucial characteristic of professional organizations operating in the public interest, according to the case law of the European Commission of Human Rights¹⁸; (4) that the European Court of Human Rights confirmed the public law character of the Austrian Chamber of Commerce, in 1991, merely on the basis of the domestic laws establishing the Chamber without making a substantive assessment of the question¹⁹; (5) that the Chamber is merely a private association, which is unjustifiable given special powers to participate in all branches of government and to require compulsory membership.

7.11 As regards their freedom to found and join other associations, the authors submit that compulsory membership in one entity will generally affect adversely their resolve to found and join another association, as well as their prospects of convincing other compulsory members to join the alternative association. They reiterate that the annual membership fees, amounting to 40,000 ATS, is not an amount they can easily afford, given the losses of the limited partnership over the past years and the need for improving the hotel’s facilities.²⁰

7.12 The authors reiterate that they have sufficiently substantiated their claim, at least for purposes of admissibility.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

8.2 The Committee notes that the State party has invoked its reservation under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering

¹⁸ The authors refer to the Commission’s decisions on Applications No. 19363/92 (*Gerhard Hirmann v. Austria*), 2 March 1994, and No. 14331-2/88 (*Paul Revert and Denis Legallais v. France*), 8 September 1989.

¹⁹ The decision criticized is Application No. 14596/89 (*Franz Jakob Weis v. Austria*), decision on admissibility of 10 July 1991.

²⁰ Both the losses of the limited partnership as well as the necessary improvements of the facilities of the hotel are specified in the communication.

claims if the “same matter” has previously been examined by the “European Commission on Human Rights”. As to the authors’ argument that the first author’s application to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission’s tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee recalls that, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.²¹

8.3 The Committee considers that a reformulation of the State party’s reservation, upon re-ratification of the Optional Protocol, as suggested by the authors, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party’s reservation as applying also to complaints which have been examined by the European Court.²²

8.4 As to the question of whether the subject matter of the present communication is the same matter as the one examined by the European Court, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The first two requirements being met, the Committee observes that article 11, paragraph 1, of the European Convention, as interpreted by the Strasbourg organs, is sufficiently proximate to article 22, paragraph 1, of the Covenant²³ now invoked, to conclude that the relevant substantive rights relate to the same matter.

8.5 With respect to the authors’ argument that the European Court has not “examined” the substance of the complaint when it declared the first author’s application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds²⁴, but on reasons that include a certain consideration of the merits of the case, then the same matter has been “examined” within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.²⁵ The Committee is satisfied that the European Court went beyond an examination of purely

²¹ See Communication No. 989/2001, *Kollar v. Austria*, decision on admissibility adopted on 30 July 2003, UN Doc. CCPR/C/78/D/989/2003, at para. 8.2.

²² See *ibid.*, at para. 8.3.

²³ Cf. Nowak, Manfred, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (1993), at p. 387.

²⁴ See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, UN Doc. CCPR/C/65/D/716/1996, at para. 6.4.

²⁵ See, for example, Communications No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, UN Doc. CCPR/C/16/D/121/1982, at para. 6, and No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, UN Doc. CCPR/C/66/D/744/1997, at para. 4.2.

procedural admissibility criteria when declaring the first author's application inadmissible, because it did "not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

8.6 The Committee notes that, the authors, based on the reference in the European Court's decision to the letter of the European Commission's Secretariat, explaining the possible obstacles to admissibility, argue that the application was declared inadmissible *ratione materiae* with article 11 of the Convention, and that it has therefore not been "examined" within the meaning of the Austrian reservation. However, it cannot be ascertained, in the present case, on exactly which grounds the European Court dismissed the first author's application when it declared it inadmissible under article 35, paragraph 4, of the Convention²⁶.

8.7 Having concluded that the State party's reservation applies, the Committee concludes that the communication is inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, insofar as the first author is concerned, since the same matter has already been examined by the European Court of Human Rights.

8.8 The Committee observes that the examination of the application by the European Court did not concern the second author, whose communication, moreover, relates to different facts than the first author's application to the European Commission, namely the imposition of membership fees by the Salzburg Regional Chamber after she had become a partner of the limited partnership as well as a shareholder of the limited liability company in December 1999. The State party's reservation does not therefore apply insofar as the second author is concerned.

8.9 The Committee considers that the second author has substantiated, for purposes of article 2 of the Optional Protocol, that the applicability of article 22 of the Covenant to the Austrian Chamber of Commerce cannot *a priori* be excluded. It further notes that the "Hotel zum Hirschen Josef Wallmann KG", being a limited partnership, has no legal personality under Austrian law. Notwithstanding the fact that the third author has, and availed itself of its, capacity to take part in domestic court proceedings, the second author, who holds 100 percent of the shares of the limited partnership, is, in her capacity as partner, liable for the third author's obligations vis-à-vis its creditors. The Committee therefore considers that the second author is directly and personally affected by the third author's compulsory membership in the Chamber and the resulting annual membership fees, and that she can therefore claim to be a victim of a violation of article 22 of the Covenant.

8.10 To the extent that the second author complains that the practical effect of the annual membership fees is to prevent her from founding or joining alternative associations, the Committee finds that she failed to substantiate, for purposes of admissibility, that the annual payments to the Chamber is so onerous as to constitute a relevant restriction on her right to

²⁶ Article 35, paragraph 4, of the European Convention reads, in pertinent parts: "The Court shall reject any application which it considers inadmissible under this article." This refers, *inter alia*, to the inadmissibility grounds set out in article 35, paragraph 3, i.e. inadmissibility *ratione materiae*, manifestly ill-founded applications, and abuse of the right of application.

freedom of association. The Committee concludes that this part of the communication is inadmissible under article 2 of the Optional Protocol.

8.11 As to the State party's objection that the second author failed to exhaust domestic remedies, as the limited partnership itself was party to the domestic proceedings, the Committee recalls that wherever the jurisprudence of the highest domestic tribunals has decided the matter at issue, thereby eliminating any prospect of success of an appeal to the domestic courts, authors are not required to exhaust domestic remedies.²⁷ The Committee notes that the State party has not shown how the prospects of an appeal by the second author against the levy of annual membership fees by the Chamber for the years 1999 onwards would have differed from those of the appeal lodged by the limited partnership and eventually dismissed by the Austrian Constitutional Court in 1998, for lack of reasonable prospect of success.

8.12 Accordingly, the Committee concludes that the communication is admissible insofar as the second author complains, as such, about the compulsory membership of the "Hotel zum Hirschen Joseph Wallmann" limited partnership in the Chamber of Commerce and the resulting membership fees charged since December 1999.

8.13 Regarding the third author, the Committee notes that the "Hotel zum Hirschen Josef Wallmann" is not an individual, and as such cannot submit a communication under the Optional Protocol. The communication is therefore inadmissible under article 1 of the Optional Protocol, insofar as it is submitted on behalf of the third author.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The issue before the Committee is whether the imposition of annual membership fees on the "Hotel zum Hirschen" (third author) by the Salzburg Regional Chamber of Commerce amounts to a violation of the second author's right to freedom of association under article 22 of the Covenant.

9.3 The Committee has noted the authors' contention that, although the Chamber of Commerce constitutes a public law organization under Austrian law, its qualification as an "association" within the meaning of article 22, paragraph 1, of the Covenant has to be determined on the basis of international standards, given the numerous non-public functions of the Chamber. It has equally taken note of the State party's argument that the Chamber forms a public organization under Austrian law, on account of its participation in matters of public administration as well as its public interest objectives, therefore not falling under the scope of application of article 22.

²⁷ See, for example, Communication No. 511/1992, *Länsmanet al. v. Finland*, at para. 6.1.

9.4 The Committee observes that the Austrian Chamber of Commerce was founded by law rather than by private agreement, and that its members are subordinated by law to its power to charge annual membership fees. It further observes that article 22 of the Covenant only applies to private associations, including for purposes of membership.

9.5 The Committee considers that once the law of a State party establishes commerce chambers as organizations under public law, these organizations are not precluded by article 22 of the Covenant from imposing annual membership fees on its members, unless such establishment under public law aims at circumventing the guarantees contained in article 22. However, it does not appear from the material before the Committee that the qualification of the Austrian Chamber of Commerce as a public law organization, as envisaged in the Austrian Constitution as well as in the Chamber of Commerce Act of 1998, amounts to a circumvention of article 22 of the Covenant. The Committee therefore concludes that the third author's compulsory membership in the Austrian Chamber of Commerce and the annual membership fees imposed since 1999 do not constitute an interference with the second author's rights under article 22.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of article 22, paragraph 1, of the Covenant.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
