H e a d n o t e s

to the Order of the First Senate of 13 July 2018

– 1 BvR 1474/12 –

– 1 BvR 670/13 –

– 1 BvR 57/14 –

1. **Article 9(1) of the Basic Law protects the formation and the existence of associations. Article 9(2) of the Basic Law, as a manifestation of a pluralist and at the same time militant constitutional democracy, sets a limit to freedom of association.**

2. **Any interference with freedom of association must comply with the principle of proportionality. When the requirements for a prohibition under Article 9(2) of the Basic Law are met, the association must be prohibited; however, if there are measures available that are less restrictive but equally effective for protecting the legal interests specified in Article 9(2) of the Basic Law, these take precedence.**

3. **The power to prohibit an association under Article 9(2) of the Basic Law must be interpreted strictly.**

a. **An association meets the requirements for a prohibition under Article 9(2) first alternative of the Basic Law when its apparent aim or its activity is, in essence, to provoke, encourage or enable its members or third parties to commit criminal offences or to facilitate them by supporting or by recognisably identifying with criminal actions.**

b. **An association meets the requirements for a prohibition under Article 9(2) second alternative of the Basic Law when it opposes the constitutional order by openly taking an actively belligerent stance against the fundamental principles of the Constitution.**

c. An association meets the requirements for a prohibition under Article 9(2) third alternative of the Basic Law when it actively advocates and promotes violence or similarly serious actions violating international law, such as terrorism in international relations or among parts of the population. This may also be the case when an association supports third parties, where this support is objectively capable of significantly, severely, and deeply compromising international understanding, and where the association is aware of this fact and at least approves of it. However, in this respect, prohibitions of associations may not prevent every form of humanitarian aid in crisis areas merely because this might indirectly promote terrorism.

4. To the extent that the prohibition of an association pursuant to Article 9(2) of the Basic Law is founded in actions protected by fundamental rights or impairs other fundamental rights, these fundamental rights must be taken into account in the context of justifying the interference with Article 9(1) of the Basic Law. The prohibition of an association must not forbid what is otherwise protected by fundamental freedoms, and it must not be biased against particular political opinions.

FEDERAL CONSTITUTIONAL COURT

– 1 BvR 1474/12 –

– 1 BvR 670/13 –

– 1 BvR 57/14 –

IN THE NAME OF THE PEOPLE

In the proceedings
on
the constitutional complaints

I. of the International Humanitarian Aid Organisation (*Internationale Humanitäre Hilfsorganisation e.V.* – IHH), a registered association, represented by its board members,

– authorised representative: Rechtsanwalt Dr. Reinhard Marx, Niddastraße 98-102, 60329 Frankfurt –

1. directly against

a) the Judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) of 18 April 2012 – BVerwG 6 A 2.10 –,

b) the Order of the Federal Ministry of the Interior of 23 June 2010 – ÖS II 3 – 619 314/28 –,

2. indirectly against

§ 3(1) first sentence of the Associations Act (*Vereinsgesetz* – VereinsG)

– 1 BvR 1474/12 –,

II. of the Organisation Supporting Domestic Political Prisoners and Their Families (*Hilfsorganisation für nationale politische Gefangene und deren Angehörige e.V.* – HNG), a registered association, represented by its board members,

– authorised representative: Rechtsanwalt L… –

1. directly against

a) the Judgment of the Federal Administrative Court of 19 December 2012 – BVerwG 6 A 6.11 –,

b) the Order of the Federal Ministry of the Interior of 30 August 2011 – ÖS III 4 – 619 312/48 –,

2. indirectly against

§ 3(1) first sentence of the Associations Act (Vereinsgesetz – VereinsG)

– 1 BvR 670/13 –,

III. Hells Angels, MC Charter Westend Frankfurt am Main, an association, represented by its members

1. Mr A..., 2. Mr A..., 3. Mr B..., 4. Mr B..., 5. Mr B..., 6. Mr B..., 7. Mr B..., 8. Mr B..., 9. Mr B..., 10. Mr C..., 11. Mr D..., 12. Mr E..., 13. Mr F..., 14. Mr H..., 15. Mr H..., 16. Mr H..., 17. Mr K..., 18. Mr K..., 19. Mr M..., 20. Mr M..., 21. Mr O..., 22. Mr P..., 23. Mr R..., 24. Mr R..., 25. Mr R..., 26. Mr S..., 27. Mr S..., 28. Mr V..., 29. Mr V..., 30. Mr Z..., 31. Mr Z…,

– authorised representatives: westendLaw Rechtsanwälte, schersheimer Landstraße 60/62, 60322 Frankfurt –

1. directly against

a) the Order of the Federal Administrative Court of 19 November 2013 – BVerwG 6 B 26.13 –,

b) the Judgment of the Higher Administrative Court of the Land Hesse (*Hessischer Verwaltungsgerichtshof*) of 21 February 2013 – 8 C 2134/11.T –,

c) the Order of the Hessian Ministry of the Interior and Sports of 29 September 2011 – II 3 – 05b06.07-01-11/004 –,

2. indirectly against

§ 3(1) first sentence of the Associations Act (Vereinsgesetz – VereinsG)

– 1 BvR 57/14 –

the Federal Constitutional Court – First Senate –

with the participation of Justices

Vice-President Kirchhof,

Eichberger,

Masing,

Paulus,

Baer,

Britz,

Ott,

Christ

held on 13 July 2018:

The constitutional complaints are rejected.

Reasons:

A.

[Excerpt from Press Release No. 69/2018]

The three associations were prohibited on the basis of the Associations Act. The International Humanitarian Aid Organisation (*Internationale Humanitäre Hilfsorganisation e.V.* – IHH) is accused of having indirectly supported a terrorist organisation by channelling financial donations to it and thus actively contravening the concept of international understanding. The Organisation Supporting Domestic Political Prisoners and Their Families (*Hilfsorganisation für nationale politische Gefangene und deren Angehörige e.V.* – HNG) is accused of having encouraged imprisoned right-wing extremists, in its association magazine, in their attitude to combat the foundations of the constitutional order of the Federal Republic of Germany, thus actively and belligerently opposing the constitutional order and contravening criminal statutes. The association Hells Angels MC Charter Westend Frankfurt am Main is accused of having supported its members in committing criminal offences. The three associations unsuccessfully sought legal recourse before the administrative courts against the orders prohibiting them issued by the Federal Ministry of the Interior and the Ministry of the Interior of the *Land* Hesse. Their constitutional complaints are directed against the orders and the judicial decisions, and indirectly against the provision that allows for their prohibition in the Associations Act.

[End of excerpt]

[...] 1

I.

1. In [German] constitutional law, the right to “form associations or organisations” was first granted by the Weimar Constitution (*Weimarer Reichsverfassung* – WRV) under Art. 124(1) first sentence WRV. Art. 124 WRV guaranteed this right in respect of all Germans and for all purposes, Art. 130(2) WRV specifically guaranteed it in respect of civil servants, Art. 137(2) WRV for religious purposes and Art. 159 WRV in 2

respect of coalitions. There was no specific provision on political parties in the Weimar Constitution, in contrast with today's Art. 21 of the Basic Law (*Grundgesetz* – GG). At the time, the legislature itself was authorised to determine the scope of freedom of association, given that the Constitution provided a limit to this freedom in the form of criminal statutes directed precisely against associations. In response to attacks on politicians of the Weimar Republic, in particular to the assassinations of Walther Rathenau and Matthias Erzberger, numerous associations were prohibited on the basis, up until 1929, of the Republic Protection Act (*Republikschutzgesetz*) of 21 July 1922 (Reich Law Gazette, *Reichsgesetzblatt* – RGBl p. 585), because they sought to undermine the republican form of government of the *Reich* or a *Land*. Yet the new State Court (*Staatsgerichtshof*), established in 1922 to protect the Republic, generally interpreted the provisions on prohibition restrictively; for instance, to justify a prohibition, it required planned and systematic efforts […]. Later, on numerous occasions, associations were prohibited or at least monitored under Art. 48(2) WRV, on the basis of emergency decrees issued by the President of the *Reich*. The fact that the *Länder* were primarily competent and had discretion to prohibit associations had a decisive impact on the Weimar Republic. Not only were associations prohibited in one *Land* able to move to another *Land* and continue to exist, but, in addition, decisions regarding the prohibition of associations were subject to particular political pressure, which ultimately prevented effective actions against precisely those associations that actively combatted democracy […].

2. The Constitution of the Free State of Bavaria (*Verfassung des Freistaates Bayern* – BayVerf) of 2 December 1946 (Law and Ordinance Gazette, *Gesetz- und Verordnungsblatt* – GVBl p. 333), which entered into force prior to the Basic Law, also left the prohibition of associations to the discretion of the respective authorities under Art. 114(2) BayVerf. The provision was interpreted to the effect that action against associations could only be taken by means of a prohibition. This was considered a problem because "according to this provision, only the most restrictive means can be used, even though less restrictive means could be successful – perhaps even more so." (cf. Nawiasky/Leusser, Die Verfassung des Freistaates Bayern, 1948, p. 129, original quote in German). 3

3. In Art. 9(1) GG, in contrast with the Weimar Constitution, freedom of association was guaranteed for the first time regardless of statutory provisions. In addition, freedom of labour coalitions (Art. 9(3) GG), freedom of political parties (Art. 21 GG) and freedom of religious associations (Art. 140 GG in conjunction with Art. 137(2) WRV) are expressly laid down in the Basic Law. Art. 9(2) GG now provides a uniform legal framework for the prohibition of associations throughout Germany. 4

The provision on prohibition, Art. 9(2) GG, was not the object of in-depth deliberations or substantive discussions by the Parliamentary Council (*Parlamentarischer Rat*). The Constitutional Convention at Herrenchiemsee adopted the proposal by Sub-Committee I of the Committee on Fundamental Policy Issues (*Ausschuss für Grundsatzfragen*), which designed the right to freedom of association "while at the 5

same time prohibiting the pursuit of unlawful and immoral aims and the endangerment of democracy and international understanding" (Der Parlamentarische Rat 1948-1949, vol. 2, p. 222). The draft of Bergsträsser, an MP who was the rapporteur on this issue, was also part of the deliberations. According to this draft, associations were to be prohibited if they "pursued unlawful aims or combatted democracy or international understanding or did not reject the use of force to reach their goals" (Der Parlamentarische Rat 1948-1949, vol. 5/I, p. 25). In particular, the Committee on Fundamental Policy Issues advocated that a prohibition could also be justified on the basis of the aims and the activities of an association (Der Parlamentarische Rat 1948-1949, vol. 5/II, pp. 685, 703 and 704). The following version of Art. 9(2) GG, which is still applicable today, was adopted: "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited."

a) In the early years after the Basic Law entered into force, it was widely assumed that the prohibition of an association would directly come into effect once the requirements of a prohibition under Art. 9(2) GG were fulfilled (cf. *Bundestag* document, *Bundestagsdrucksacke* – BTDrucks 4/430, p. 12). At first, the courts set a low threshold for finding that there are reasons for a prohibition (cf. Decisions of the Federal Administrative Court, *Entscheidungen des Bundesverwaltungsgerichts* – BVerwGE 1, 184). However, in 1956, the Federal Administrative Court (*Bundesverwaltungsgericht*) held that an association could only be prohibited if the authorities had established that the requirements of Art. 9(2) GG were met (BVerwGE 4, 188). The Associations Act (*Vereinsgesetz* – VereinsG), which entered into force in 1964, provided a statutory basis for prohibitions from then on. Its purpose was to set out the procedure for the authorities to prohibit associations (cf. BTDrucks 4/430, pp. 8 and 9) and thus align associations law with the requirements of the Basic Law, the case-law of the Federal Administrative Court and other developments that had taken place. 6

b) In response to the terrorist attacks of 11 September 2001, the First Act Amending the Associations Act of 4 December 2001 (Federal Law Gazette, *Bundesgesetzblatt* – BGBl I p. 3319) was enacted. It extended the scope of application of the provisions on the prohibition of associations to encompass religious associations, by abolishing the so-called "religion privilege" (*Religionsprivileg*) (cf. BTDrucks 14/7026, p. 6). Since 2001, the number of prohibitions of associations has increased considerably, to more than 60 overall. This number is higher than all prohibitions imposed between 1964, when the Associations Act entered into force, and 11 September 2001. 7

4. The Associations Act of 5 August 1964, in the version of 10 March 2017, now provides the statutory basis for the prohibition of associations. It is designed as an act implementing Art. 9(2) GG ([…]). Pursuant to the Act's § 1(1), its aim is to protect the freedom of association as well as to counteract its abuse so as to uphold public safety and order (§ 1(2) VereinsG). Pursuant to § 3 VereinsG, an association may "only be treated as a prohibited association (Article 9(2) of the Basic Law) if, by order of the authority competent for prohibitions, it has been established that its aims or activities 8

contravene criminal statutes or that they are directed against the constitutional order or the concept of international understanding; it must order the dissolution of the association (prohibition)".

a) An order prohibiting an association pursuant to § 3(1) first sentence first half-sentence VereinsG establishes that the requirements for a prohibition are met, and orders the dissolution of the association. Subsequently, the only act the association may undertake is to seek to revoke the prohibition order in court proceedings […]. 9

b) [...] 10

II.

[…] 11-47

III.

[…] 48-66

IV.

Statements in respect of all three proceedings were submitted by the Federal Government, the Federal Administrative Court, the Ministry of Justice (*Justizbehörde*) of the Free and Hanseatic City of Hamburg, the State Ministry of Justice of Saxony, the Ministry of Justice, Europe and Consumer Protection of the *Land* Brandenburg and the Government of the Free State of Bavaria. In addition, statements regarding proceedings 1 BvR 1474/12 were submitted by five international aid organisations, a statement regarding proceedings 1 BvR 670/13 was submitted by the Centre for Criminology (*Kriminologische Zentralstelle*), and a statement regarding proceedings 1 BvR 57/14 was submitted by the State Chancellery of the *Land* Hesse. 67

[…] 68-84

B.

The constitutional complaints of complainants nos. I to III directly challenge the respective prohibition orders and the court decision affirming the orders; in substance, they also indirectly challenge the statutory basis of the prohibition orders in § 3(1) first sentence VereinsG. When interpreted in this manner, the complaints, which claim a violation of Art. 9(1) GG, are admissible. 85

I.

Pursuant to § 90(1) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG), the complainants have standing to lodge the constitutional complaints. Not just its members, but also the group itself, are afforded the right to freedom of association (cf. Decisions of the Federal Constitutional Court, *Entscheidungen des Bundesverfassungsgerichts* – BVerfGE 12,174 <175>). Therefore, the complainants are entitled to claim, by way of constitutional complaint, that the prohibi- 86

tion of their association violates their right under Art. 9(1) GG. The fact that they were prohibited does not preclude their lodging constitutional complaint proceedings against these prohibitions.

II.

[…] 87-90

III.

[…] 91-94

IV.

[…] 95

C.

The constitutional complaints are unfounded. 96

I.

1. The freedom of association in Art. 9(1) GG protects the right of individuals to unite and to exist as an association (cf. BVerfGE 13, 174 <175>; 84, 372 <378>). Art. 9(1) GG thus guarantees the principle of free establishment of social groups (cf. BVerfGE 38, 281 <302 and 303>; 80, 244 <252 and 253>) initiated by private individuals and independent of the state (cf. BVerfGE 146, 164 <193 and 194, para. 78>). For constitutional law purposes, the legal capacity of an association, which depends on certain characteristics set out by the legislature, is irrelevant (cf. BVerfGE 13, 174 <175>; 84, 372 <378>). However, special constitutional protection is granted to those associations to which the Basic Law accords a special status as political parties (cf. BVerfGE 107, 339 <358>; 144, 20 <194 para. 512>) and religious communities. 97

Both for its members and for the association itself, the protection of the fundamental right under Art. 9(1) GG comprises the establishment of the association, self-determination regarding its organisation, its decision-making procedures and its management (cf. BVerfGE 50, 290 <354>), i.e. the right to be established and to exist in the chosen united form (cf. BVerfGE 13, 174 <175>; 80, 244 <253>). By contrast, activities that go beyond measures to establish an association and to ensure its continued existence are not covered by the guarantee of Art. 9(1) GG (cf. BVerfGE 70, 1 <25>). Rather, they are protected according to those fundamental rights and equivalent guarantees under whose scope of protection they fall. The establishment of an association does not expand the fundamental rights protection with regard to the individual actions of its members (cf. BVerfGE 54, 237 <251>), but acting within an association does not lower fundamental rights protection either. Where an association's activities fall within the scope of protection of other fundamental rights, interferences must in principle be measured against those fundamental rights; yet for the prohibition of associations, even if it affects other fundamental rights, the specific provision 98

of Art. 9(2) GG is primarily applicable […].

2. Interferences with the freedom of association must be measured against the principle of proportionality. The constitutional legislature (*Verfassungsgeber*) expressly provided prohibition as the most restrictive means available in Art. 9(2) GG. 99

a) In Art. 9(2) GG the constitutional legislature (cf. […] para. 5 above) did not restrict the scope of protection of freedom of association from the outset (still in this vein, BVerwGE 134, 275 <306 and 307>, para. 86), but rather added an express limit to the collective right to the continued existence of associations protected under Art. 9(1) GG (cf. BVerfGE 80, 244 <253>; see also BVerfGE 30, 227 <243>; 84, 372 <379>; […]). In this respect, the wording of the fundamental right differs from the wording of provisions in *Land* constitutional law, which only guarantee freedom of association for constitutionally protected aims (Art. 13(1) of the Constitution of the *Land* Rhineland-Palatinate, *Verfassung für Rheinland-Pfalz*, Ordinance Gazette, *Verordnungsblatt* – VOBl p. 209; formerly Art. 19(1) of the Constitution of the *Land* Baden, *Verfassung des Landes Baden*, of 18 May 1947). In contrast to these provisions, Art. 9(2) GG – in a distinct subsection of Art. 9, separate from the determination of the scope of protection – determines when an association is to be prohibited entirely, i.e. under which circumstances the most serious interference with an association's fundamental rights can be justified under constitutional law. 100

Freedom of association is guaranteed even in light of the possibility of restricting it that arises from Art. 9(2) GG. The provision on prohibition must be seen in the historical context of the rise of a totalitarian system (cf. BVerfGE 5, 85 <138>; paras. 2 et seq. above); it is a mechanism of the "preventive protection of the constitutional order" (Stern, Staatsrecht, vol. 1, 2nd ed. 1984, p. 183, original quote in German). In this respect, Art. 9(2) GG, together with Art. 21(2) and Art. 18 GG, are manifestations of the Basic Law's commitment to a "militant democracy" (*streitbare Demokratie*) (cf. BVerfGE 5, 85 <139>; 25, 88 <100>; 80, 244 <253>). Therefore, the Basic Law does not provide any discretion with regard to the decision to prohibit an association […]. If it is established that an association meets one of the prohibition requirements pursuant to Art. 9(2) GG, it must be prohibited. The constitutional legislature did not provide for any possible gradation of the legal consequences. This is confirmed by the provision's legislative history. In this respect, it is different from the provisions applicable during the Weimar Republic (see para. 2 above), but similar to the provision on the prohibition of political parties in Art. 21(2) GG, notwithstanding the question whether prohibition proceedings are to be brought at all (cf. BVerfGE 144, 20 <231 and 232 paras. 600 and 601>, regarding differences <228 and 229 para. 595>). The Parliamentary Council decided not to make the prohibition of associations in Art. 9(2) GG discretionary, in contrast with Art. 114(2) of the Constitution of the Free State of Bavaria of 2 December 1946, which pre-dates the Basic Law. Compulsory prohibition in the Basic Law is also intended to counteract any politically one-sided exercise of the power to prohibit associations. As such, Art. 9(2) GG is the manifestation of a pluralist and at the same time militant constitutional democracy. 101

b) Prohibitions of associations, just like any interference with the fundamental rights of an association, are subject to the principle of proportionality, derived from the rule of law, which restricts acts of public authority in favour of freedoms protected by fundamental rights. The principle of proportionality requires that the least restrictive yet equally effective means be used in respect of associations, in order to accommodate legitimate public interests (similarly BVerwGE 61, 218 <220 et seq.>; for exceptions since BVerwGE 134, 275 <306 et seq.>, paras. 86 and 87; cf. BVerwGE 153, 211 <232 and 233>, paras. 48 and 49 with further references). Art. 9(2) GG does not preclude interferences with the fundamental rights of associations that are less restrictive than its prohibition, such as the prohibition of certain activities of the association or measures directed at individual members. […] 102

The prohibition of an association, as the most serious form of an interference, can only be imposed where such less restrictive and equally effective means are not sufficient for achieving the objectives of the prohibition requirements set out in Art. 9(2) GG. Thus, in particular, an association cannot be prohibited based solely on isolated actions taken by individual members; rather, these actions must define the association and be attributable to it. The less the prohibition requirements are met by the actions of the association's organs themselves, by the majority of its members, or by third parties controlled by it, the more it must be clearly ascertainable that the association is aware of them, approves of them and identifies with them (cf. BVerwG, Judgment of 3 December 2004 - 6 A 10.02 -, juris, paras. 62 et seq.), and that the objective of Art. 9(2) GG can thus be achieved only by prohibiting the association. In that sense, the prohibition provision of Art. 9(2) GG is a manifestation of, and not an exception to, the principle of proportionality. 103

3. Art. 9(2) GG provides the prohibition of an association as a limit to freedom of association when the association is directed against or contravenes the following legal interests of paramount importance: criminal statutes, the constitutional order and the concept of international understanding. Only these expressly provided reasons justify prohibition as the most serious interference with the fundamental rights of an association; in accordance with the principle of proportionality, which requires that the prohibition must be necessary, they are to be interpreted strictly. Thus, an association cannot already be considered to be pursuing prohibited aims where actions related to the association and directed against the protected legal interests laid down in Art. 9(2) GG occurred only in the past and only in isolated cases. Rather, the prohibition of associations is designed to prevent future infringements of the protected legal interests, particularly those infringements arising from the organisational structures of the association as a group of many persons with a common purpose (cf. BVerfGE 80, 244 <253>). In this respect, the power to prohibit an association under Art. 9(2) GG must be interpreted strictly as well. 104

a) According to the first alternative of Art. 9(2) GG, the prohibition of an association is justified if its aims or activities contravene criminal statutes. These criminal statutes only encompass punishable offences of general application. Criminal provisions that 105

only specifically target associations as such are not to be taken into account, since otherwise freedom of association would ultimately be subject to legislative discretion [...]. Also, a prohibition cannot be based on regulatory offences (*Ordnungswidrigkeiten*).

An association's aims or activities are contrary to criminal statutes if organs, members or even third parties contravene criminal statutes and this is attributable to the association, either because it is apparent that they represent the association and the association at least approves of this, or because the association deliberately provokes, encourages, enables or facilitates criminal offences. This may also be the case when an association approves of and promotes such actions after the fact, thus identifying with them, or when at first only certain activities contravene criminal statutes, yet these are then continued with the knowledge and support of the association. However, as an independent mechanism of preventive protection of the constitutional order, the prohibition of associations is not tied to the existence of a conviction under criminal law (cf. BVerwGE 80, 299 <305 and 306>; BVerwGE 134, 275 <280 and 281>, paras. 17 and 18). The prohibition of an association only satisfies the requirements of proportionality (see paras. 102 and 103 above) when taking action against individual criminal offences would not suffice given that punishable actions are planned or committed within the organisation itself […], i.e. that violating criminal statutes largely defines the organisation. This is not the case when individual members of an association direct their actions against the protected legal interests or when the association primarily pursues lawful aims. 106

b) According to the second alternative of Art. 9(2) GG, the prohibition of an association is justified if the association is directed against the constitutional order. Similarly to the "free democratic basic order" of Art. 18 and Art. 21(2) GG (cf. BVerfGE 144, 20 <202 et seq. paras. 529 et seq.>), the protected legal interest of the "constitutional order" covers the fundamental principles of the Constitution (cf. BVerfGE 6, 32 <38>), which are human dignity pursuant to Art. 1(1) GG, the principle of democracy and the principle of the rule of law (cf. BVerwGE 134, 275 <292 and 293>, para. 44 with further references […]). 107

According to Art. 9(2) GG, an association must be "directed" against these fundamental principles. Its prohibition is not justified merely on the basis of an association's criticism or rejection of these principles or its advocating a different order. Taking into account Art. 5 [freedom of expression] and Art. 3(3) first sentence GG [prohibition of discrimination], Art. 9(2) GG does not prohibit a certain ideology or world view, and it does not target specific attitudes or political beliefs (cf. BVerfGE 124, 300 <333>; regarding the prohibition of political parties BVerfGE 144, 20 <224 para. 585>). The dissemination of anti-constitutional ideas or of certain political views is, as such, still within the boundaries of free political debate (cf. BVerfGE 5, 85 <141>). Just as the Basic Law, relying on the power of free public debate, guarantees freedom of expression even for the enemies of freedom (cf. BVerfGE 124, 300 <330>), it relies on free organisation within society and the power of civic engagement in free and open politi- 108

cal debate in principle when guaranteeing freedom of association (cf. BVerfGE 124, 300 <320 and 321>). Therefore, to justify the prohibition of an association, it is decisive whether the association takes an actively belligerent stance (*kämpferisch-aggressive Haltung*), outwardly and against the fundamental principles of the Constitution (cf. BVerfGE 124, 300 <330>). This is confirmed by the provision's legislative history, given that the Parliamentary Council drew attention to the fact that the provision was intended to address associations that combat democracy or that do not reject violence (see para. 5 above).

Conversely, a prohibition can also be considered prior to an association posing a specific threat to the free democratic basic order (regarding prohibitions of political parties BVerfGE 144, 20 <199 para. 522; 223 para. 581>) or prior to actually jeopardising the fundamental principles of the Constitution. Unlike Art. 21(2) GG, which requires that a political party "seek" to abolish the free democratic basic order, the wording of Art. 9(2) GG renders it sufficient that an association be "directed" against the constitutional order (cf. BVerfGE 144, 20 <228 para. 595>). The Parliamentary Council deliberately did not adopt the proposal to also include "jeopardising" in Art. 9(2) GG, which was put forward by the Constitutional Convention at Herrenchiemsee, based on the Constitution of the Free Hanseatic City of Bremen (Der Parlamentarische Rat 1948-1949, vol. 2, p. 581). Rather, by way of Art. 9(2), the constitutional legislature opted for preventive protection of the constitutional order as a manifestation of its commitment to a militant democracy (cf. BVerfGE 80, 244 <253>). Thus, the power to prohibit associations makes it possible to counter organisations before it is too late […]. Unlike in the case of political parties, the prohibition of associations neither depends on their potentiality, meaning specific and weighty indications that make it seem possible that their actions may succeed (cf. BVerfGE 144, 20 <224 and 225 para. 585>), nor on the territorial reach of their actions (cf. BVerfGE 144, 20 <340 et seq. paras. 933 et seq.>). The fact that an association takes an active and belligerent stance and aims to destroy essential elements of the constitutional order is sufficient to justify its prohibition. 109

c) According to the third alternative of Art. 9(2) GG, the prohibition of an association is justified if it is directed against the concept of international understanding. 110

The prohibition of the use of force under international law guides the reason that justifies the prohibition in Art. 9(2) GG. This is in line with Art. 26(1) GG and follows the spirit of the Constitution's openness to international law (cf. BVerfGE 141, 1 <26 and 27 paras. 65 and 66>). Art. 2(4) of the Charter of the United Nations obliges states in their international relations to refrain from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations. This concept of international understanding concerns both conflicts between states and internal conflicts among different parts of the population and threats posed by terrorist organisations […]. This is presumably also the scope of application of Art. 9(2) GG. 111

An association is directed against the concept of international understanding when it actively advocates and promotes violence or comparable serious actions violating international law in international relations […]. An association itself can do this directly; yet the requirements for prohibition can also be met if the association is directed against the concept of international understanding through its support of third parties. This includes financial support of terrorist actions and organisations, if this support is objectively likely to impair the concept of international understanding significantly, severely, and deeply, and if the association is aware of this fact and at least approves of it. Here, too, the principle of proportionality must be taken into account; prohibition is the most serious interference with constitutionally protected freedom of association and can only be justified if the association's stance carries great weight and defines the association. 112

4. To the extent that the prohibition of an association pursuant to Art. 9(2) GG is based on actions protected by fundamental rights or otherwise impairs other fundamental rights, these fundamental rights must be taken into account in the context of justifying the interference with Art. 9(1) GG. Prohibitions of associations must not forbid what is otherwise protected by fundamental freedoms. Yet the collective exercise of fundamental rights also cannot result in more extensive fundamental rights protection (cf. BVerfGE 54, 237 <251>; […]). 113

Therefore, prohibitions of associations can, in principle, neither be based solely on such statements of opinion as protected under constitutional law by Art. 5(1) GG (on the link with statements of opinion cf. BVerfGE 113, 63 <82>; […]), nor can they be based on other behaviour that is subject to effective constitutional protection. Thus, prohibitions of associations must not be directed one-sidedly against particular political opinions, even if they are imposed based on opposition to the constitutional order, because this would violate the prohibition of discrimination under Art. 3(3) first sentence GG […]. Art. 3(3) first sentence GG imposes the setting of strict requirements. Accordingly, prohibitions of associations cannot be based on political opposition to the constitutional order when such views are merely expressed; rather, such opposition must be pursued in an active and belligerent manner (see paras. 108 and 198 above; […]). A prohibition can only be based on opposition to international understanding when the use of force is actively advocated and promoted (see para. 112 above). 114

5. The framework of international law that must be observed within the German legal order does not result in protection of freedom of association different from Art. 9(2) GG. In particular, this holds true with regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, to the extent that they have entered into force in the Federal Republic of Germany (Act on the Convention for the Protection of Human Rights and Fundamental Freedoms of 7 August 1952, BGBl II p. 685; official notice of 15 December 1953, BGBl II 1954 p. 14; new official notice of the Convention in the version of Protocol No. 11 in BGBl II 2002 p. 1054). Their texts, together with the case-law of the European Court of Human Rights, serve 115

as guidelines for interpretation in determining the content and scope of fundamental rights and rule-of-law principles under the Basic Law, to the extent that this – as the Convention itself makes clear (cf. Art. 53 European Convention on Human Rights – ECHR) – does not result in limiting or lowering the protection afforded by fundamental rights under the Basic Law (cf. BVerfGE 111, 307 <317>; 120, 180 <200 and 201>; 128, 326 <366 et seq.>; established case-law).

Art. 11(1) first half-sentence ECHR guarantees freedom of association; it is deemed a yardstick for the state of a democratic society, since democracy, pluralism and freedom of association are directly interrelated (cf. ECtHR <GC>, Gorzelik and others v. Poland, Judgment of 17 February 2004, No. 44158/98, § 88; ECtHR, Fondation Zehra et autres c. Turquie, Judgment of 10 July 2018, No. 51595/07, § 50). Yet where an association jeopardises state institutions or the rights and freedoms of others, it can be prohibited under Art. 11(2) ECHR in order to protect these (cf. ECtHR <GC>, Gorzelik and others v. Poland, ibid. § 94). The interference must be prescribed by law and must be necessary in a democratic society; that is to say, just as in German constitutional law, it must be proportionate, and, in particular, it must correspond to a pressing social need (cf. ECtHR <GC>, Gorzelik and others v. Poland, ibid., § 96). This does not exceed the requirements arising from fundamental rights. 116

II.

Thus, the constitutional complaints are unfounded. Both the provision regarding prohibitions in associations law as well as the challenged decisions issued by the authorities competent for prohibitions and by the regular courts that upheld them are compatible with the fundamental rights requirements. 117

1. To the extent that the constitutional complaints indirectly challenge the statutory basis authorising the prohibition of associations in § 3(1) first sentence VereinsG, they are unsuccessful. The statutory provision does indeed lack an express requirement of proportionality, even though such a requirement must be observed also with regard to the prohibition clause in Art. 9(2) GG. However, the proportionality requirements arising from the rule of law can be satisfied by means of interpretation. The provision on prohibition of an association does not preclude the use of less restrictive means, if this renders the prohibition unnecessary, as a consequence of its aims, activities or stance. 118

Substantively, the statutory basis for the prohibition of associations in § 3(1) first sentence VereinsG reflects the constitutional provision of Art. 9(2) GG and does not exceed it. With regard to the three limits to the freedom of association, the wording of § 3(1) VereinsG matches the wording of Art. 9(2) GG, apart from one linguistic nuance. This is within the legislature’s leeway to design (cf. BVerfGE 80, 244 <254 and 255>). 119

The statutory provision is also sufficiently specific. Such specificity is not lacking simply because a provision requires interpretation (cf. BVerfGE 45, 400 <420>; 117, 120

71 <111>; 128, 282 <317>; established case-law). Uncertainties must merely not go so far as to render the actions of the competent state agencies unpredictable or withdraw these from the scope of judicial decision-making (cf. BVerfGE 118, 168 <188>; 120, 274 <316>; established case-law). In the case at hand, there are no indications for this.

2. The challenged decisions are compatible with the constitutional requirements; […] [regarding] the prohibition of complainant no. I, this at least applies with regard to its outcome. 121

a) Unlike the prohibition of political parties, the prohibition of associations is not decided in proceedings before the Federal Constitutional Court (cf. BVerfGE 13, 174 <176 and 177>). Therefore, in particular, it is not incumbent on the Federal Constitutional Court to establish the necessary facts; its review is in principle limited to examining whether the findings by the authorities and the courts are plausible. 122

b) The constitutional complaint of complainant no. I – 1 BvR 1474/12 – is unsuccessful. The Judgment of the Federal Administrative Court […] ultimately satisfies the constitutional requirements. 123

The Federal Administrative Court assumes that an association is directed against the concept of international understanding within the meaning of § 3(1) first sentence VereinsG in conjunction with Art. 9(2) GG if it provides considerable financial support, over a long period of time, to an organisation which forms part of another organisation promoting violence in the relations between peoples, if it does so knowingly and identifies with this organisation and the acts of violence it commits. This is compatible with the requirements arising from Art. 9(2) GG. According to it, an association meets the requirements for prohibition if it advocates and promotes violence or comparable serious actions violating international law (see paras. 111 and 112 above). The court sets out in detail that the organisation indirectly supported by complainant no. I is to be classified as a terrorist organisation and that its nature is incompatible with the concept of international understanding (see (aa) below). The stance justifying the prohibition can be attributed to complainant no. I (see (bb) below). Ultimately, the requirements of proportionality are met, given that complainant no. I is defined by its identification with prohibited actions; therefore, no less restrictive means were available to achieve the objective of the prohibition (see (cc) below). The prohibition is essentially based on the channelling of financial donations to a terrorist organisation. There are no indications to suggest that the donations were a form of humanitarian aid in crisis areas, which would be protected against prohibitions of the association under humanitarian international law (see (dd) below). 124

aa) By channelling considerable financial donations to an organisation that, by its nature, is incompatible with the concept of international understanding, complainant no. I supported this organisation. The Federal Administrative Court sets out in detail that the supported organisation, Hamas, violates the concept of international understanding, because it ignores basic principles of international law, including, in particu- 125

lar, the prohibition of the use of force under international law and the rejection of terrorism (on this term BVerfGE 141, 220 <266 para. 96>; 143, 101 <138 and 139 paras. 124 and 125>). The European Union also currently qualifies the supported organisation as a group involved in terrorist acts (cf. II no. 8 of the list annexed to Council Decision <CFSP> 2017/1426 of 4 August 2017 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision <CFSP> 2017/154). Furthermore, the Federal Administrative Court sets out that the supported organisation operates on the basis of an anti-Semitic charter and refuses to accept the prohibition of the use of force and local peace agreements. This is sufficient evidence that the nature of the supported organisation is contrary to international law.

bb) Hamas's stance against the concept of international understanding, which is incompatible with Art. 9(2) GG, can be attributed to complainant no. I. A prohibition of an association can also come into play in cases where international understanding, protected under Art. 9(2) GG, is jeopardised indirectly, by means of financial donations supporting terrorism. However, not every form of humanitarian aid in crisis areas may be halted by means of prohibitions of associations pursuant to § 3(1) first sentence VereinsG on the grounds of their indirect effects promoting terrorism (see paras. 134 et seq. below). Attributing the actions of third parties to an association that merely channels financial donations is subject to strict requirements. In this respect, the court comprehensibly sets out that the donations were objectively capable of significantly, severely, and deeply compromising international understanding, and that complainant no. I was aware of this and at least approved of it. 126

[…] 127-128

cc) The proportionality requirements also apply to the justification of the prohibition of an association pursuant to Art. 9(2) GG (see paras. 102 and 103 above), and, ultimately, are met here. The prohibition of an association, as the most serious interference with its fundamental rights, is only constitutional if no less restrictive means are available to remedy or prevent infringements of protected legal interests. 129

(1) However, the Federal Administrative Court makes the general statement that there is nothing to suggest that it would be appropriate under the principle of proportionality to permit the continued existence of an association that meets one of the prohibition requirements merely because it also pursues activities that are not prohibited. This statement is not compatible with the constitutional requirements. It exceeds the constitutionally required objective of limiting any interference with fundamental freedoms to what is necessary. According to the court's statement, a prohibition of certain activities, which would be less restrictive than the overall prohibition of an association, would not be considered even if these activities only represented a minor share of the association's activities. It may well be true that, where such less restrictive means are available, associations may try to avoid a prohibition by diversifying their activities, as assumed by the Federal Administrative Court. Yet the limitation to pro- 130

portionate actions under constitutional law cannot be ignored in order to counter such motives from the outset. Rather, it must be reviewed in each specific case whether an activity is so defining of the stance of an association that the mere prohibition of certain activities would not be as effective as the prohibition of the association.

(2) In this case, though, it is not objectionable that the Federal Administrative Court takes into account the requirements of proportionality in the context of the prohibition requirements (see also BVerwGE 134, 275 <307 and 308> para. 87; BVerwGE 154, 22 <42>, para. 45). This leads to a strict interpretation of the reasons justifying the prohibition (see para. 104 above). According to the case-law of the regular courts, in order to justify a prohibition, associations must be defined by the prohibited aims (on the stance against the constitutional order cf. already BVerwGE 80, 299 <306 et seq.>, and on the stance against the concept of international understanding cf. meanwhile BVerwGE 154, 22 <39 and 40>, para. 41). By reviewing whether an association is defined by such aims, the courts take into account the fundamental rights requirement that an association may only be prohibited if no less restrictive means are available to protect the legal interests designated in Art. 9(2) GG (see paras 102 and 103 above). 131

(3) It is true that the Federal Administrative Court does not expressly set out that no less restrictive means would be as effective as a prohibition of the association to protect the legal interests designated in Art. 9(2) GG. It does not expressly establish that complainant no. I is defined by its stance against the concept of international understanding to such an extent that less restrictive means could not be equally effective to avert a threat to international understanding. However, it follows from the detailed findings of the court that this is the case. […] 132

dd) It is compatible with fundamental rights requirements, even when taking into account the Constitution’s openness to international law (cf. BVerfGE 141, 1 <26 et seq. paras. 65 et seq.>), that the Federal Administrative Court assumes that an association’s activities related to humanitarian aid also meet the prohibition requirement where the association directly supports an organisation whose activities promote actions of another organisation that violates the concept of international understanding. In this respect, the prohibition of an association pursuant to Art. 9(2) GG may not serve to prohibit humanitarian actions that are permissible under international law. 133

(1) Not every financial donation made by an association to social organisations that provide primary care to the population in conflict zones justifies the prohibition of an association under Art. 9(2) GG on the grounds that it is directed against the concept of international understanding. By themselves, the general “benefits deriving from increased acceptance and financial relief”, which might arise when charitable groups and associations with social aims are supported in areas that are controlled by terrorists, are not a sufficient basis for prohibiting an association that channels donations to such crisis areas. While humanitarian aid regularly contributes to easing the strain on the parties to a conflict, the rules of international humanitarian law and humanitarian 134

aid apply, which ensure that humanitarian aid in such areas is not prevented at the expense of the suffering population. According to these rules, humanitarian aid provided by means of financial donations can only justify the prohibition of an association pursuant to Art. 9(2) GG where the aid itself violates the principle of neutrality. The rules on providing humanitarian aid in conflicts specify when this is the case.

The aim of international humanitarian law is not simply to restrict the means of warfare, but also to protect civilians. Therefore, the provisions regarding humanitarian aid in armed conflicts set forth in the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (GC IV; BGBl II 1954 p. 917) and the Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (AP I; BGBl II 1990 p. 1550) are intended to allow for sufficient supplies of food, medical supplies and shelter to the population. Under international humanitarian law, states that are not parties to an armed conflict are obliged to allow the free passage of goods and personnel for the purpose of aid, provided impartially and without any adverse distinction, in armed conflicts (Art. 23(1) and Art. 59(3) GC IV, Art. 70(2) AP I). Yet under Art. 23(2) GC IV, this only applies where no definite advantage accrues to military efforts. In addition, the aid provided must be necessary for the population, and the general principles of humanity, neutrality and impartiality must be observed. As set out in detail by the German Red Cross in these proceedings, this is meant to ensure that the aim of humanitarian aid is solely to alleviate suffering […]. This applies to occupations (Art. 59(3) GC IV) and is also to be applied to situations that have not escalated into armed conflict or which do not formally constitute occupation. 135

At the same time, states are obliged under international law to prevent the direct or indirect financing of terrorism. Art. 2(1) and Art. 4 of the International Convention for the Suppression of the Financing of Terrorism of the United Nations of 9 December 1999 (Terrorist Financing Convention, BGBl II 2003 p. 1923) define the cases in which funds are provided or collected directly or indirectly, unlawfully and wilfully with the intention that they should be used or in the knowledge that they are to be used, in full or in part, to commit criminal offences or acts of violence in armed conflicts. Further, according to Art. 21 of the Terrorist Financing Convention, obligations under international humanitarian law remain unaffected; thus, it does not impede neutral humanitarian aid. 136

These rules allow a distinction between permissible humanitarian aid from aid that violates the concept of international understanding within the meaning of Art. 9(2) GG. Even financial donations to areas controlled by terrorists are thus not directed against the concept of international understanding where these must be granted “free passage” as means of humanitarian aid within the meaning of Art. 23(1) and Art. 59(3) GC IV, Art. 70(2) AP I. When an association makes donations with the intention to alleviate suffering, and when it observes the general principles of humanity, neutrality and impartiality, it does not meet the prohibition requirement under Art. 9(2) GG. 137

(2) The Federal Administrative Court did not fail to recognise these standards. It does not base its affirmation of the prohibition of complainant no. I on financial support alone, but rather sets out in detail that the social associations and projects supported were not neutral and that complainant no. I itself did not intend to act neutrally. The challenged decisions are thus compatible with the requirements laid down in the Basic Law. 138

c) The constitutional complaint of complainant no. II is unfounded. Its prohibition can be based on the prohibition requirements in Art. 9(2) GG, according to which an association must be prohibited if its aims and activities are directed against the constitutional order and contravene criminal statutes. 139

aa) The authority competent for prohibitions and the Federal Administrative Court, which affirmed the authority's decision, found that complainant no. II opposes the constitutional order (see (1) below) actively and belligerently (see (2) below). This finding is not objectionable under constitutional law. For the rest, too, it is proportionate (see (3) below). 140

(1) Complainant no. II calls into question fundamental principles of the "constitutional order" within the meaning of Art. 9(2) GG. The authority and the court base this finding on the fact that the association specifically rejects human rights, core elements of the rule of law and democratic principles, which are considered the cornerstones of society by the Basic Law. The authority and the court specify in a comprehensible manner that the association's statements, its regular publications and activities express its clear proximity and explicit commitment to the "agenda, ideas and overall design" of National Socialism and its commitment to the former NSDAP and its main functionaries. Complainant no. II calls the Federal Republic of Germany "corrupt", "degenerate", "forced upon the people" and "disgraceful", seeks democracy's downfall, and propagates anti-Semitism and quasi-religious conspiracy theories. In addition, it rejects democracy and calls on its members to defeat the constitutional order. It also disseminates a racist doctrine that is not only incompatible with Art. 3(3) first sentence GG but also with the respect of human dignity and human rights (Art. 1(1) and (2) GG). It is not objectionable under constitutional law that the authority and the court therefore consider that the constitutional order within the meaning of Art. 9(2) GG is affected. 141

(2) It was compatible with constitutional requirements for the authorities and the Federal Administrative Court to assume that complainant no. II is "directed" against the constitutional order within the meaning of Art. 9(2) GG. 142

(a) The statement by the Federal Administrative Court that no proof is needed for specific actions is not to be understood to mean that a particular attitude or opinion would already be sufficient. The court itself explicitly clarifies this. It highlights that the mere rejection of the constitutional order is not sufficient to justify a prohibition. Freedom in the constitutional order includes that this order may be called into question. The court's findings establish that the statements which underlie the prohibition are 143

not merely “verbal radicalism”.

b) The prohibition in question is based on the assumption that the association’s attitude is actively belligerent and justifies a prohibition, given that the association not only rejects and disdains the foundations of constitutional democracy under the Basic Law, but also actively seeks to “undermine” them and calls upon its members to combat them. This is not objectionable under constitutional law. In its submission, the Centre for Criminology points out that prisoners with extremist backgrounds in particular are easily influenced and that, according to empirical studies, prisoners with a right-wing extremist background show a comparatively high affinity to violence. The preventive nature of Art. 9(2) GG, as an element of the militant democracy under the Basic Law (see paras. 101, 109 above), allows for the prohibition of an association even before violence is used. Further, it is not relevant how effective the association’s active and belligerent actions are. Unlike the requirements for the prohibition of a political party under Art. 21(2) GG, activities of an association directed against fundamental elements of the constitutional order are sufficient to prohibit the association even at the municipal or local level in “delimited social spaces” (cf. BVerfGE 144, 20 <340 et seq. paras. 933 et seq.>). The decisive factor is whether the overall character of the association, including its formal and actual purpose, its apparent stance, its organisation and the activities of its organs and members, clearly meets the prohibition requirements. According to the Federal Administrative Court’s findings, there is no doubt that this is the case here, given the statements of leading members of the association. 144

According to these statements, one must create “liberated national space”, “the rat system” must be combatted, one must never capitulate, which will not be possible without violence, and “what is needed is a bang that cripples everything”. According to the court’s findings, the association’s communication with prisoners who are right-wing extremists is aimed at radicalising them so that they will again commit violent acts upon their release from prison. Furthermore, in its magazine, complainant no. II called upon its readers to name “public prosecutors, heads of police operations or judges” so that they could be “brought to justice” at a later date. Given that the objective of complainant no. II’s magazine is to promote criminal offences with an extremist background and to make threats against state officials, its similarity in nature to National Socialism goes beyond a shared political attitude. The objective can therefore justify the prohibition of the association pursuant to Art. 9(2) GG. The prohibition of the association is thus comprehensibly based on the active and belligerent stance the association as such takes against the constitutional order. 145

(c) A prohibition linked to such statements does not raise constitutional concerns, even with regard to Art. 5(1) GG (cf. BVerfGE 124, 300 <331 et seq., 335>). In particular, this prohibition of the association is not based on the “mere holding and stating” of opinions and attitudes deemed to be right-wing extremist, but on an actively belligerent stance. 146

(d) It clearly follows from the findings of the Federal Administrative Court that no one-sided action was taken against complainant no. II on the basis of its political views – which would have been contrary to Art. 3(3) first sentence GG – but rather because it openly opposes the constitutional order in an active and belligerent manner. There is no general fundamental principle of anti-National Socialism in the Basic Law (BVerfGE 124, 300 <330>). Therefore, under Art. 9(2), Art. 18 and Art. 21(2) GG, free political discourse does not *per se* end where the dissemination of anti-constitutional ideas as such begins (cf. BVerfGE 124, 300 <330>). Rather, the Basic Law protects the core elements of constitutional democracy against attacks from within that go beyond political debate in that the attacks seek to destroy the very prerequisites of these core elements. In this case, the advocacy of Nazi rule is not linked merely to a particular political opinion. The prohibition of complainant no. II is, in that respect, also not directed generally against an approving attitude in respect of individual measures of the Nazi regime (cf. BVerfGE 124, 300 <337>). Rather, the association was prohibited because it identifies with the Nazi regime's violent means in particular, which reflects an active and belligerent stance against the free democratic basic order (see paras. 108 and 109 above; […]). 147

(3) Furthermore, the prohibition of complainant no. II is also proportionate. It was necessary because complainant no. II is defined by its opposition to the constitutional order. Therefore, it was not an option to take less restrictive action solely against the statements upon which the prohibition of the association is essentially based and which can be attributed to the association. 148

(a) The prohibition of an association can be based on statements of its board members. They are organs of the association that also represent it vis-à-vis the public. The same applies with regard to members whose actions have an apparent link to the association. 149

It is also not objectionable under constitutional law that statements taken from prisoners' letters which are printed in the association's magazine are attributed to complainant no. II. As "letters to the editor", they are not necessarily written by members of the association, but rather by those prisoners who are supported by complainant no. II as "national prisoners" as well. However, according to the Federal Administrative Court, the magazine of complainant no. II does not contain a "free exchange of opinions": the "letters to the editor" are not letters from the outside containing reactions to the contents of the magazine, but rather they make up its essential content. Printing selected letters is a main focus of the association's activities; the Federal Administrative Court finds that it selects these letters to sustain those "offenders who have already acted, as combatants" against the democratic system. 150

(b) Only taking action against these statements was ruled out, as complainant no. II is largely defined by its stance against the constitutional order, according to the findings of the authority competent for prohibitions and of the Federal Administrative Court. The authority and the court could thus assume that individual measures would 151

not be equally effective in countering the association's stance against the protected legal interests of Art. 9(2) GG.

bb) The decisions of the authority competent for prohibitions and the Federal Administrative Court to also impose a prohibition because complainant no. II's aims and activities contravene criminal statutes (Art. 9(2) first alternative GG) are also compatible with the constitutional requirements. 152

(1) The prohibition is based on specific reasons that can justify it in a constitutionally sound manner. According to the factual findings, complainant no. II's aim is to uphold and reinforce prisoners' motives and also the attitude which subjectively serves to apologetically justify their actions. In particular, the association makes unequivocal statements regarding the future use of force, thus promoting the contravention of general criminal statutes. The court comprehensibly demonstrates that the association sought to consolidate the "fanatically aggressive attitude" of the prisoners, who could therefore be expected to commit further criminal offences; and that such offences had also been announced in the association magazine. The presumption that this promotes criminal offences is confirmed by findings from research submitted in these proceedings by the Centre for Criminology. As an independent mechanism of preventive protection of the constitutional order, the prohibition of associations is not tied to convictions under criminal law (see para. 106 above). The prohibition of complainant no. II is also not simply based on an ideology or attitude; rather, there is specific proof of activities contravening criminal statutes. 153

(2) It is not objectionable to attribute activities by members and third parties to complainant no. II. 154

The Federal Administrative Court has not failed to recognise the constitutional requirements where it attributes to complainant no. II, on the basis of its bylaws, not only the support of a selected group of criminal offenders, but also the efforts to uphold and strengthen their attitude and thus their willingness to commit criminal offences in future. Where actions are taken directly by an association's organs or the majority of its members, these actions can readily be attributed to the association, which is why the magazine, as central to its activities, is relevant here in respect of complainant no. II. 155

In this respect, the behaviour of third parties who are supported like members by the association, as is the case here, may also be taken into account […]. While the prisoners are not third parties "controlled" by the association, in the sense of the prisoners being its tools, the association in fact recognisably supported their actions according to the Federal Administrative Court's findings. The Federal Administrative Court specifically substantiates how complainant no. II "glorifies" these offenders and their crimes and identifies with them in the magazine, which is central to the association. 156

However, the prohibition of an association cannot be based on the fact that it supports prisoners in their social reintegration (*Resozialisierung*). The guarantee of invio- 157

lable human dignity under Art. 1(1) GG is specifically designed to prevent the legal system from abandoning persons, even if they have contravened the law. Prisoners, too, deserve a chance at reintegrating into society (cf. BVerfGE 33, 1 <10 f.>; 98, 169 <200 and 201>). Thus, it is an objective of detention to enable prisoners to, “in future, lead a life in social responsibility without committing criminal offences” (§ 2 of the Prison Act, *Strafvollzugsgesetz* – StVollzG). However, this was not the objective pursued by complainant no. II.

(3) The prohibition satisfies the proportionality requirements also with regard to the contravention of criminal statutes. It is true that there is a failure to properly recognise the protection of the freedom of association in Art. 9(1) GG where, in the context of the prohibition of an association pursuant to Art. 9(2) GG, there is no review as to whether less restrictive means are available for preventing the contravention of criminal statutes (see para. 106 above). Even though the Federal Administrative Court did not expressly take this into account in the challenged decision, it still satisfies the fundamental rights requirements. According to the factual findings, it is constitutionally sound to assume that there was no scope for refraining from prohibiting the association. The prohibition of an association is only disproportionate where it is ascertainable that less restrictive means can be applied that would do away with the association’s stance, without prohibiting the entire association. There were no indications of less restrictive means in the complainant’s case. The prohibition is neither based on the behaviour of only some individual members, against whom individual action could be taken, nor is it linked only to one certain activity that might have been prevented without otherwise restricting the association. Moreover, the Federal Administrative Court was right to assume that complainant no. II’s magazine was just as defining for the association as the crimes of the persons it deliberately and knowingly supported. 158

cc) The fact that the authority competent for prohibitions tolerated the existence of the complainant for more than 30 years cannot be invoked against the prohibition. The time elapsed does not in any way reflect whether and when the requirements for prohibition were met. It was also not required under constitutional law to subject the prohibition of complainant no. II to a time limit. 159

d) The constitutional complaint of complainant no. III is also unfounded. The decision by the Higher Administrative Court of the *Land* Hesse to apply § 3(1) first sentence VereinsG is compatible with Art. 9 GG. 160

aa) Complainant no. III claims that a prohibition without a prior hearing of the association violates its rights, but this claim cannot be upheld. While it is a general requirement under the rule of law that decisions by public authorities that impose a burden be made only after the persons concerned are given the opportunity to be heard (foundational BVerfGE 9, 89 <95 and 96>), this is not required in every case. By way of exception, overriding public interests may justify that the persons concerned are not heard. The legislature laid this down, for instance, in § 28 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz* – VwVfG). In the case of the prohibition 161

of associations, it is not objectionable under constitutional law that the persons concerned are not heard where there are indications to suggest that they would otherwise hide evidence or assets. This was the case here.

bb) The Higher Administrative Court, in line with the criteria of Art. 9(2) GG, assumes that complainant no. III's aims and activities contravene criminal statutes. It presumes that the criminal offences underlying the prohibition do not have to be the primary aim of the association, nor must they be committed on an ongoing basis. The Higher Administrative Court finds that the prohibition of complainant no. III is justified since the organisation poses a specific threat to public safety and order, and that no less restrictive means are available to eliminate this threat. This meets the constitutional requirements. In its interpretation of § 3(5) VereinsG, the court highlights that the criminal members of the association regularly presented a united front in representing the association; that the criminal offences were clearly recognisable as activities of the association; and that the association at least tolerated this. The court was also right to take into account the association's admission procedures, the clothing contributing to the members' sense of identity and the fact that the association expressly distanced itself from being bound by the law. An article of clothing with the slogan "You don't respect our life, we don't respect your laws" is, as such, protected by Art. 5(1) first sentence GG. However, a statement of opinion that is permissible in isolation can also be an indication for an organisational context that contravenes criminal statutes when the statement precisely expresses the association's defining self-image (see para. 106 above). 162

The Higher Administrative Court was entitled to attribute to complainant no. III those actions which the association backed through its support of criminal members, and its conveying the impression that it sought or approved of their behaviour. The court bases its decision on the fact that it has become apparent that the criminal members always received the protection they expected. This meets the fundamental rights requirements. 163

As such, visits to an association's members in prison do not provide a reason justifying a prohibition (see para. 157 above). However, in the case of complainant no. III, it is understandable that the court assumed that the manner in which these visits were organised revealed the infrastructure of the association, which did not seek the prisoners' social reintegration, but publicly approved of criminal offences, i.e. especially going "beyond the usual friendly favours" by expressly having leading figures of the association make the visits and by organising them in a professional system. As such, the prohibition of the association is a reaction to the organisation's "momentum", and in particular to the specific threat emanating from the actions of the association, against which Art. 9(2) GG is directed. 164

cc) The prohibition is also proportionate. According to the court's analysis, no less restrictive means were available that could have reached the objective of Art. 9(2) GG just as effectively. It is not objectionable under constitutional law that the 165

Higher Administrative Court of the *Land* Hesse specifically attributed several serious crimes to complainant no. III (regarding the standards, see paras. 105 and 106 above) and thus affirmed that the association violates criminal law, which ruled out less restrictive means.

Unlike the authority competent for prohibition, the court did not classify the list called "MC Germany Rules" and the association's bylaws as defining. Based on specific facts, the court assesses in detail the recognisability of membership in the association in the course of the commission of criminal offences; the cooperation between members in committing criminal offences, and in particular the association's reaction to the criminal offences themselves through their organisation of visits to prisoners; the association's actions in respect of drug-related offences; its admission of new members who have committed a string of violent offences and making such persons its leaders; members' commission of criminal offences while wearing the association's clothing; and the storage of weapons and ammunition in the association's club house. Given these circumstances, it is not objectionable under constitutional law to assume that the association as such is defined by actions contravening criminal statutes. Thus, isolated measures could not be as effective in reaching the objective of Art. 9(2) GG as would be the prohibition of the association. 166

In the proportionality test, it must be taken into account when an association also performs and supports lawful activities, yet this does not rule out a prohibition. Here, no alternative conclusion is merited on the basis that complainant no. III had not been prohibited for a long time. Rather, the Higher Administrative Court emphasises that law enforcement authorities and courts have prosecuted criminal offences by the association's members since its establishment, and that the authorities competent for protection against threats have sought to uncover the structures that contravene criminal law. These findings in particular are compatible with the proportionality requirements that apply to the prohibition of an association (see paras. 102 and 103 above). 167

Kirchhof Eichberger Masing

Paulus Baer Britz

Ott Christ

Bundesverfassungsgericht, Beschluss des Ersten Senats vom 13. Juli 2018 - 1 BvR 1474/12, 1 BvR 57/14, 1 BvR 670/13

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