though the joint chiefs-of-staff have already issued a directive to that effect. Great Britain is also said to protest against part of the program. Perhaps this is the most significant event of recent years, since it throws light on the origins of the war in 1914, however justified the protest. If Europe is not to be allowed full production, it seems idle to throw American money into the breach. The plan is stymied at the source.

The countries which possess the fifteen billion dollars of gold and foreign exchange that the National City Bank reports are not the countries with which the bulk of American trade is done, but some exchange is possessed by those countries. Should Secretary Marshall insist first on their spending their assets on American goods before receiving American bounty? Or will they say, as a British cabinet minister threatened the other day, that default in certain loans will follow or that the United States in its own interest must finance exports up to eight billions a year—the difference between exports and imports—since otherwise unemployment will result in the United States?

There are thus many obstacles which the Marshall proposal must overcome. Will the proposal founder on one or more of these obstacles? Only the future can give an answer.

EDWIN BORCHARD

INTERNATIONAL LAW IN THE CONSTITUTIONS OF THE LÄNDER IN THE AMERICAN ZONE IN GERMANY

The inclusion in the Weimar Constitution of August 11, 1919, of the provision that "The generally recognized rules of international law are valid as binding and integral parts of German Federal law"[1] was the result of a conscious adoption of what was deemed to be the Anglo-American practice with regard to the enforcement of international law through municipal law. Dr. Hugo Preuss, Minister of the Interior and "father" of the Constitution, placed at the head of his original draft three fundamental and related principles: that all political authority belongs to the people; that the state should be organized on a federal basis; and that the Reich should form a democratic *Rechtsstaat* within the international community.[2] "As once the United States of North America entered the circle of the old world of states with an acknowledgment of the binding force of international law, so," Preuss stated, "the new German Republic recognizes . . . the validity of the law of nations." In Section 2 of Article VI of the United States Constitution Preuss perceived the recognition of a new democratic principle which marked the beginning of a fundamental change in the structure of international

[1] *Artikel 4. Die allgemein anerkannten Regeln des Völkerrechts gelten als bindende Bestandteile des deutschen Reichsrechts.*

[2] Hugo Preuss, *Reich und Länder: Bruckstücke eines Kommentars zur Verfassung des Deutschen Reiches,* Berlin, 1928, p. 81 ff.

society. The individual, whose relations with the world community had hitherto been mediatized by absolute princes and cabinets, was now to come into immediate contact with international law, which would henceforth be binding as an integral part of the internal law directly upon all organs of the state and upon individuals.[3]

It is clear from the proceedings of the Weimar Assembly that not all of its members were activated by like motives in accepting the provisions of Article 4. Dr. von Simson considered that the article "desires to express the maxim dominant in Anglo-American jurisprudence and state practice that generally recognized rules of international law are binding not only on the state, but on individuals as well." The real motive for his support of the principle appears, however, in his further statement that "The inclusion of this provision in the Constitution is desirable because it represents an acknowledgment of the value and validity of international law and because it renders it difficult for our enemies to make the incorrect statement that international law is less respected in Germany than in England and America."[4] One member, indeed, opposed the article on the ground that it would "produce the impression that the German *Volk* indicts itself on account of its former attitude toward international law and makes an obeisance before non-German international law. It is worthy of notice that England during the War violated international law more widely than did Germany."[5] A later commentator expressed a widely-held view when he characterized Article 4 as "a concession to Americanism."[6]

It is probable that similar mixed motives influenced the constituent assemblies and electorates of the German *Länder* in the United States Zone which in the latter part of 1946 adopted constitutions containing provisions modeled upon Article 4 of the Constitution of the former Reich.[7]

[3] On the drafting of Article 4 see *Verhandlungen der verfassunggebenden Deutschen Nationalversammlung*, Bde. 326, 327, 336 (cited hereafter as "*Verhandlungen*"); and Preuss, work cited, pp. 80–84; Gustav A. Walz, *Völkerrecht und staatliches Recht: Untersuchungen über die Einwirkungen des Völkerrechts auf das innerstaatliche Recht*, Stuttgart, 1933, p. 300 ff.; Rudolf A. Métall, *Das allgemeine Völkerrecht und das innerstaatliche Verfassungsrecht*, in *Zeitschrift für Völkerrecht*, Vol. XIV (1928), p. 161 ff.; Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung*, Tübingen, 1923, p. 111 ff.

[4] *Verhandlungen, Bd.* 336, p. 406.

[5] Dr. Kahl, same, p. 31.

[6] Max Fleischmann, *Die Einwirkung auswärtiger Gewalten auf die deutsche Reichsverfassung*, Halle, 1925, p. 23.

[7] Constitution of the Republic of Bavaria, passed by the Constitutional Assembly, Oct. 26, 1946, and ratified by the voters of Bavaria, Dec. 1, 1946; Constitution of the State of Hesse, passed by the Constitutional Assembly, Oct. 26, 1946, and ratified by the voters of Hesse, Dec. 1, 1946; Constitution of Wuerttemberg-Baden, passed by the Constituent Assembly, Oct. 24, 1946, and ratified by the voters of Wuerttemberg-Baden, Nov. 24, 1946. For the German texts, see *Constitutions of Bavaria, Hesse, and Wuerttemberg-Baden*, Office of Military Government (U. S.), 15 February 1947. The parallel English trans-

The United States Military Governor has asserted that the constitutions of the *Länder* are "German in origin, spirit, and preparation."[8] It is natural, therefore, that they should reflect earlier German experience in the enforcement of international law through municipal law, and that they should attempt to obviate certain interpretations of Article 4 of the Weimar Constitution which distorted, and, in some important cases, practically nullified, its provisions. Under the further influence of American practice, reinforced by the necessity of obtaining the approval of the occupation authority, the *Länder* of the United States Zone have adopted the following constitutional provisions relating to the position of international law in the internal legal system:

Bavaria:

Article 84. The generally recognized principles of international law are valid as part of domestic law.

(*Die allgemein anerkannten Grundsätze des Völkerrechts gelten als Bestandteil des einheimischen Rechts.*)[9]

Hesse:

Article 67. The rules of international law are valid as part of the law of the State without requiring express incorporation in the law of the State. No law is valid which conflicts with such rules or with a State treaty.

(*Die Regeln des Völkerrechts sind bindende Bestandteile des Landesrechts, ohne dass es ihrer ausdrücklichen Umformung in Landesrecht bedarf. Kein Gesetz ist gültig, das mit solchen Regeln oder mit einem Staatsvertrag in Widerspruch steht.*)

Article 68. No one may be called to account for pointing out facts that constitute an infringement of obligations under international law.

(*Niemand darf zur Rechenschaft gezogen werden, wenn er auf Tatsachen hinweist, die sich als eine Verletzung völkerrechtlicher Pflichten darstellen.*)[10]

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lations, prepared by the Civil Administration Division, and quoted in the following paragraph, are not altogether accurate.

[8] Same, "Introduction," p. 1.

[9] The Constitution of Bavaria also provides that:

Article 181. The right of the Bavarian State, within the limits of its competence, to conclude State treaties remains unaffected.

(*Das Recht des Bayerischen Staates, im Rahmen seiner Zuständigkeit Staatsverträge abzuschliessen, bleibt unberührt.*)

Article 182. The State treaties formerly concluded, especially the treaties with the Christian Churches of 24 January 1925, remain in force.

(*Die früher geschlossenen Staatsverträge, insbesondere die Verträge mit den christlichen Kirchen vom 24 Januar 1925, bleiben in Kraft.*)

[10] The Constitution of Hesse also provides that:

Article 69. Hesse declares its attachment to peace, freedom and the comity of nations. War is outlawed.

Every act undertaken with the intention of preparing for war is unconstitutional.

(*Hessen bekennt sich zu Frieden, Freiheit, und Völkerverständigung. Der Krieg ist geächtet.*

Jede Handlung, die mit der Absicht vorgenommen wird, einen Krieg vorzubereiten, ist verfassungswidrig.)

Wuerttemberg-Baden:

> Article 46. The generally recognized rules of international law are binding integral parts of the law of the State. They are binding for the State and for the individual citizen.
>
> The rights granted to foreigners by international law may be claimed by them, even though they are not set forth in State legislation.
>
> (*Die allgemein anerkannten Regeln des Völkerrechts sind bindende Bestandteile des Landesrechts. Sie sind für den Staat und für den einzelnen Staatsbürger verbinblich.*
>
> *Die durch das Völkerrecht Ausländern verbrieften Rechte können von diesen geltend gemacht werden, auch wenn sie nicht durch Landesgesetz ausgesprochen sind.*)[11]

A mere reading of the above constitutional texts may produce the impression that they ensure the legal supremacy of international law over municipal law. Such was the general conclusion drawn in non-German legal circles from Article 4 of the Weimar Constitution, which, at first sight, appeared to represent a complete repudiation of German positivist doctrine and of monistic and pluralistic theories based upon the primacy of state law. Since the new texts, and especially those of Bavaria and Wuerttemberg-Baden, are obviously modeled upon Article 4, it seems clearly proper to interpret their possible meaning in the light of German juristic doctrine and the constitutional experience of the Republic.

A tendency to restrict the apparent meaning of Article 4 emerged in the discussions of the Weimar Assembly. Dr. Preuss' original draft had provided that the Reich should recognize *das geltende Völkerrecht.* The substitution in the final text of the phrase *allgemein anerkannten Regeln* was made, the drafter explained, at the instance of the Ministry of Justice, which considered that omission of the qualifying term *allgemein* might be interpreted to mean that rules deemed by the English and Americans to be part of international law would be binding also upon Germany.[12]

[11] The Constitution of Wuerttemberg-Baden provides also that:

> Article 47. Any action undertaken with the intention of disturbing peaceful international coöperation, especially of preparing for war, is unconstitutional.
>
> (*Jede Handlung, die mit der Absicht vorgenommen wird, eine friedliche Zusammenarbeit der Völker zu stören, insbesondere die Führung eines Krieges vorzubereiten, ist verfassungswidrig.*)

[12] *Verhandlungen,* Bd. 326, p. 32. Dr. Zweigert, Minister of Justice, considered that Article 4 would be objectionable only if it were construed to mean that express provisions of German law could be abrogated by international law (*Völkerrecht bricht Landesrecht*). "This result," he said, "is, however, avoided, since the article is restricted to generally recognized principles of international law. It is obvious that a principle of international law which is contrary to an express provision of German law is not generally recognized." Same, p. 406.

Preuss's own view was not free from ambiguity: "It is not perhaps always possible," he stated, "to determine with mathematical precision what is 'generally' recognized; but there is no doubt that rules of international law which are not recognized by all the Great Powers are not rules of international law. But here also one must not juggle concepts on the point of a needle." Same, p. 32.

Dr. Kahl, reporter for the Constitutional Committee, stated that Article 4 was approved with the understanding that a rule of international law would be valid as being "generally recognized" only if it had been recognized by Germany, and that the element of general recognition would be lacking if the alleged rule should contradict an express provision of German law.[13] The content and meaning of "generally recognized principles," Dr. Kahl asserted, remains uncertain and controversial. Such principles are, "in fact, only what the Anglo-American legal conception sets up as a rule."[14] To go beyond the interpretation placed upon the article by the Committee would be to "surrender Germany to the arbitrariness of those states which claim universal validity for their own international legal conscience."[15]

The view that purported rules of international law are not binding upon Germany unless recognized by it has been generally accepted by German doctrinal writers.[16] Not all, however, have been willing to admit the logical conclusion to which such a premise necessarily leads, namely, the primacy of internal over international law, and, consequently, the negation of the legal character and binding force of international law. Such a doctrine, if tenable, would clearly obviate the possibility of a conflict between international law and German law, since the enactment of the latter would in itself be conclusive evidence of the legal invalidity of the alleged rule of international law which it would apparently contradict. International law, according to this conception, would not form a universal and valid legal system, but would constitute merely a series of internal laws relating to matters of external concern—an *äusseres Staatsrecht*[17] or *Untergesetzesrecht*.[18]

[13] Same, p. 1208. Dr. Heintze had suggested that the article be amended to include the phrase *das vom Deutsche Reiche anerkannte Recht.* Same, Bd. 326, p. 33.

[14] Same, p. 406.

[15] Same, p. 31. Gustav Stresemann considered that adoption of Article 4 would create "a serious danger that we will be placing a noose about our own necks."

[16] See the authorities collected by Métall, work cited, pp. 168, 169, and Walz, work cited, pp. 308, 309. Walz considers that it would be *grotesk* to hold that Article 4 gave internal force to principles to which Germany had not agreed. Another writer maintains that "The correctness of this opinion results with absolute necessity from the fact that Germany, not only because of its greatness, but above all because of its political position and cultural significance, belongs to those states which must decisively influence international intercourse. It further results from the peculiar social structure of the international legal community. No state is bound by a principle of international law in the formation of which it has not participated, or which, in so far as it has been established by other states, it has not acknowledged as binding upon itself." Elisabeth Mohr, *Die Transformation des Völkerrechts in deutsches Reichsrecht,* in *Internationalrechtliche Abhandlungen,* Bd. 22, *Abh.*, Berlin-Grunewald, 1934, p. 43.

[17] See, for example, Albert Zorn, *Grundzüge des Völkerrechts,* Leipzig, 1903 (2d ed.), p. 7 ff.

German courts have, on several occasions, appeared to express their agreement with the above view. The *Reichsfinanzhof,* in a decision of October 19, 1921, rejected the contention that a new tariff law was, according to generally recognized principles of international law, invalid within the occupied zone, in stating: "This court cannot . . . agree with the plaintiff's citation of Article 4 of the Constitution because, within its meaning, a generally recognized rule of international law must be one which has been recognized by Germany." [19] The *Oberlandesgericht* of Darmstadt held, on December 20, 1926, that "Principles of international law are applicable only in so far as they have been recognized to be a part of municipal law, either through express enactment, through customary law, or by conclusive acts." [20]

Judicial practice, however, has generally been more liberal than judicial pronouncement or juristic theory, and the judges of the Republic did not in their actual application of customary international law demand evidence of the acceptance by Germany of any particular rule. Rather, they assumed, as did Lord Alverstone in the *West Rand* case,[21] that whatever had received the common consent of civilized countries must have received the consent of their own, and that it could hardly be supposed that a *Kulturstaat* would repudiate a rule widely and generally accepted by others. Thus the obligatory character of international law was reconciled with the logical exigencies of positivist theory.[22]

There is always the danger, however, that the German courts of the future, under the influence of a recrudescent nationalism and a desire to evade the consequences of the peace settlements, may resort to theories of a "higher law" destructive of international obligations. It is hardly to be anticipated that the dominant German legal and political tradition will

[18] See, for example, Leo Wittmayer on the *Primat eigenstaatlicher Rechtsordnung,* in *Zeitschrift für Völkerrecht,* Vol. XIII (1924–1926), p. 12; and Max Wenzel, *Juristische Grundprobleme,* Berlin, 1920, Vol. I, p. 387, who states: "The norms of international law have as many bases of validity as there are states, and, therefore, legal systems which have participated in their formation."

[19] *Entscheidungen des Reichsfinanzhofs,* Vol. VII (1921), p. 102.

[20] *Zeitschrift für Völkerrecht,* Vol. XIV (1927–1928), p. 594.

[21] Compare *West Rand Gold Mining Co., Ltd., v. The King* (1905), 2 K. B. 391, 406, 407.

[22] Compare with the decisions cited in the preceding paragraph those of the Prussian *Kompetenzgerichtshof* in the case of *Von Hellfeld v. the Russian State,* Jan. 25, 1910, in which the court rejected the conception of international law as "external public law" in holding that "the contention of the creditor that international law is applicable only in so far as it has been adopted by German customary law, lacks foundation in law. Such a legal maxim would, moreover, if generally applied, lead to the untenable result that in the intercourse of states with one another, there would not obtain a uniform system—international law—but a series of more or less diverse municipal laws of the individual states." This JOURNAL, Vol. V (1911), p. 490, 514; *Zeitschrift für internationales Recht,* Vol. XX (1910), p. 416.

be completely exorcised by the enactment of constitutional texts. In 1922 the *Reichsgericht,* without referring to the provisions of Article 4 of the Constitution, held:

> that the right of a belligerent state to self-preservation is superior to all rules created by treaties is a subsisting and recognized principle of international law, effective also under the Hague Regulations on Land Warfare; and a state may in case of necessity depart from the latter code.[23]

In a series of cases the *Reichsgericht* developed the doctrine that judicial protection of the political interests of the state is justifiable in a higher sense, although it may be contrary to treaties and laws concluded or adopted under duress. The functions of the state are not exhausted in the enforcement of its legal order; the natural right to defend the political interests of the state is paramount and inalienable.[24] The underlying *rationale* of these decisions has been expressed by a leading commentator in the following terms:

> Article 4 obviously does not relate to the provisions of the so-called Peace Treaty of Versailles. The "recognition" of this instrument of coercion was expressly refused by two Great Powers, the United States of North America, and Russia, in addition to China. "Generally recognized" the "Treaty" is not, but only its .[25]

During the life of the Republic a number of jurists advanced an interpretation of Article 4 according to which the generally recognized principles of international law were elevated to the rank of constitutional law. The Constitution, therefore, incorporated the principle *pacta sunt servanda,* and, since a state might not unilaterally modify or abrogate a rule of international law, a statute contrary to a treaty or to a rule of customary international law would be unconstitutional.[26] This interpretation was not

[23] Decision of Nov. 1, 1922, *Entscheidungen des Reichsgerichts in Zivilsachen* (cited hereafter as *RGZ*), Vol. 105, p. 326; *Fontes Juris Gentium,* Berlin, 1931, Ser. A, Sec. II, T. 1 (cited hereafter as *Fontes*), pp. 180, 671.

[24] See, *Reichsgericht* decision of March 27, 1924, 54 *Juristische Wochenschrift,* 1924, p. 1531; *Fontes,* pp. 1, 721. Also, decision of March 14, 1928, *Entscheidungen des Reichsgerichts in Strafsachen,* Vol. 62, p. 65 (cited as *RGSt.*); *Fontes,* p. 834. This line of cases, some of which are not officially reported, are discussed by Lawrence Preuss, "International Law and German Legislation on Political Crime," in *Transactions of the Grotius Society,* Vol. XX (1934), pp. 93–95.

[25] Walz, *Völkerrecht und staatliches Recht,* p. 391. On National Socialist attitudes, see, for example, L. Preuss, "National Socialist Conceptions of International Law," in *American Political Science Review,* Vol. XXIV (1935), p. 596 ff.

[26] See Josef L. Kunz, *Völkerrechtliche Bemerkungen zur osterreichischen Bundesverfassung,* in *Annalen des Deutschen Reichs,* 1921/1922, p. 320 ff., and authorities collected by Walz in work cited, pp. 327–330.

Compare, however, the decision of March 2, 1933, 67 *RGSt.* 130, in which the Reichsgericht stated: "The view occasionally advanced by writers that even in internal matters

adopted in judicial practice, but its influence may perhaps be perceived in the Constitution of Hesse which provides (Article 67) that "No law is valid which conflicts with such rules (of international law) or with a State treaty," and, furthermore, establishes a *Staatsgerichtshof* with the power of judicial review (Articles 130–133).[27] It appears to be the clear purpose of Article 69 of the Constitution of Hesse and Article 46 of the Constitution of Wuerttemberg-Baden,[28] which declare every act in preparation for war to be unconstitutional, to avoid a repetition of those decisions in which the *Reichsgericht* has held to be treasonable the betrayal of information concerning secret rearmament and other military measures undertaken in violation of treaty engagements and national law.[29]

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the abrogation of provisions contained in international treaties requires an amendment of the Constitution, finds no support in Articles 4 and 45, or elsewhere in the Constitution."

[26a] The courts of the Second Reich and the Republic applied the same principles as to conflicts between international law, whether conventional or customary, and statutes as have those of the United States. See, for example, the decisions of the *Reichsfinanzhof*, Aug. 8, 1928, *Entscheidungen des Reichsfinanzhofs*, Vol. 24, p. 73; and of the *Reichsgericht*, 67 *RGSt.* 130, in which the court, in making a clear distinction between the internal and external validity of international law, stated: ". . . There is no doubt that treaties with foreign states which relate to matters of German legislation . . . have the force of law not merely as between the states but also directly as regards the internal organs of the state, in particular the courts and administrative authorities. However, this is the case only—just as with any other municipal statute—so long as the legislature has not repealed or limited the validity of the treaty by a new statutory provision, which must be decisive as regards the organs of the state and individuals. As Germany alone, in virtue of her internal sovereignty, can decide what belongs to the generally recognized rules of international law within the meaning of Article 4 of the Constitution, so it lies within her discretion to promulgate legislation conflicting with the provisions of a treaty."

[27] To a limited extent the same object may be attained by Article 61 (1, 2) of the Constitution of Bavaria, which provides: "The Constitutional Court (*Staatsgerichtshof*) renders decision on charges brought against a member of the Cabinet. . . . The charge against a member of the Cabinet is that he has intentionally violated the Constitution or a law (including a generally recognized principle of international law declared by Art. 84 to be a valid part of domestic law)."

[28] See note 10, above. Articles 91 and 92 of the Constitution of Wuerttemberg-Baden also establish a *Staatsgerichtshof* with a power of judicial review over statutes, ordinances, administrative decrees, and administrative acts.

[29] See especially the *Zeigner* and *von Ossietsky* cases, discussed by L. Preuss, as cited in note 24, above.

Article 68 of the Constitution of Hesse, which provides that "No one may be called to account for pointing out facts that constitute an infringement of obligations under international law," appears to have been enacted for the purpose of preventing such decisions as those cited in the preceding note. See the decision of March 14, 1928, 62 *RGSt.* 65, *Fontes*, p. 834, in which the *Reichsgericht* affirmed the conviction of an editor charged with revealing information concerning secret rearming. The court rejected the contention of the appellant that the exposure of illegal acts could not be deemed prejudicial to the welfare of the Reich, since the interests of the state are confined to the realization of its legal will. Such a dostrine, the court said, could not be accepted without qualifica-

The new constitutions of Hesse and Wuerttenberg-Baden contain provisions which are obviously designed to terminate the controversy over the issues raised by Triepel's *Transformationstheorie,* and since continued with rising fury by adherents of the dualist and monist views of the relation between international law and municipal law. Article 67 of the former instrument, which provides that the rules of international law are valid "without requiring express incorporation in the law of the State," and Article 46 of the latter, which contains a provision to the same effect, seek to produce the legal consequence intended by the drafters of the Weimar Constitution by the inclusion in the language of Article 4 of the phrase *bindende Bestandteile.*[80] Dr. Kahl had, during the discussions in the Weimar Assembly, objected to the Preuss draft on the ground that it contradicted the fundamental principle that international law is "a law of states. It confers (he said) rights and duties only upon states; for individuals it is *res inter alios acta.* Corresponding legislation is required, therefore, if it is to have an immediate legal effectiveness for individuals."[81] Dr. Preuss stated in reply that it was the purpose of the provision to ensure that the rules of international law should, without the necessity of transformation by statute, possess legal validity in the internal sphere. Although it was true, as contended by Dr. Kahl, that the predominant doctrinal view was that international law binds only states as such, and not their organs and citizens directly, it was precisely the purpose of the new provision to advance beyond that position. "I am of the opinion," Preuss stated, "that the dogma that international law can bind the members of a state only through the intermediary of legislation is not unqualifiedly tenable."[82]

In his later commentary Preuss again referred to the *Wortstreit* regarding the juristic construction of Article 4. Its legal significance, he maintained, is not dependent upon the interpretation placed upon it either by dualists or monists, for

> . . . The positive principle of law contained in Article 4 is not in itself opposed to a construction which bases the internal legal validity of international law upon internal legislation, and especially upon the

tion, especially in cases involving foreign relations and state security. In any event, the appellant could not derive any right directly from a treaty.

[80] See the statement by Dr. von Simson, *Verhandlungen,* Bd. 326, p. 407. Dr. Haussmann had introduced before the Constitutional Committee a counter-proposal which provided that "State treaties and generally recognized principles of international law shall be operative in the relations of the German Reich to foreign states. . . ." He withdrew his amendment when it was pointed out in an article by Alfred Verdross (*Reichsrecht und internationales Recht: eine Lanze für Artikel 3 des Regierungsentwurfes der deutschen Verfassung,* in *Deutsche Juristen-Zeitung,* Vol. XXIV (1919), cols. 291, 292) that the phrasing of the proposal would defeat the purpose of making international law directly binding upon individuals. Same, p. 406.

[81] Same, p. 31.

[82] Same, p. 32.

> constitution. . . . Article 4, indeed, can serve as a basis for this construction, which views it as forming a "general, perpetual transformer of common international law" into rules which possess legal validity internally. Within the sphere of its application the positive provision of Article 4 removes the internal validity of international law from the strife of doctrine. Within the sphere of the Constitution and in appropriate cases, every one must from now on observe and apply the generally recognized rules of international law as a law binding upon them directly, whether he is in other respects an adherent of the monist or the dualist theory, of the supremacy of international law or of the law of the state. In any event, the adherents of one theoretical view will see in Article 4 a declaratory, and those of the other view a constitutive, significance. For those who see in international law a higher, because an all-embracing, legal order, Article 4 will merely declare in express terms what would be valid without it on general legal principles. On the other hand, those who trace all valid law to the command of the state are given this unequivocal command in Article 4. In either case the legal principle contained in Article 4 must undoubtedly be followed; therein lies its practical significance under all circumstances. Whether it is observed as a declaratory or a constitutive legal principle is a matter of indifference.[33]

Despite the divergent constructions placed by jurists upon Article 4, the courts of the Republic were able, save in a few cases involving strong political factors,[34] to steer clear of the factional strife of the opposing schools. Recognizing that the obligatory character of international law is not dependent upon the adequacy of the municipal legislation enacted for its enforcement, the courts, in general, held that the question whether transformation is required in any given case can be answered only on the basis of the concrete content of the rule of international law concerned.[35] The duty of the state to fulfill an international obligation is, therefore, a duty of the legislature to make the obligation effective whenever legislation, according to its constitutional system, is essential to accomplish the object in view. The problem presented to the German courts was not peculiar to the constitutional system of the Weimar Republic. It exists in the United States, notwithstanding general acceptance of the maxim "international law as a part of the law of the land." That the courts possessed a clearer insight than did the more doctrinaire jurists may be judged from the following statement of the *Reichsgericht* in a decision of March 29, 1928:

[33] *Reich und Länder*, pp. 94, 95.

[34] See, for example, the decision of the *Reichsfinanzhof*, June 28, 1926, in which the court entered into a lengthy discussion of *Monismus* versus *Dualismus* in holding invalid an ordinance of the Interallied Rhineland High Commission. *Zeitschrift für Völkerrecht*, Vol. XIV (1928), p. 440.

[35] "It follows exclusively from the substantive content of the norm of international law whether an intermediate state act is required in order to bind state organs and individuals legally—to confer on them rights and duties, or whether this legal obligation is imposed directly by the norm of international law itself." Hugo Preuss, work cited, p. 92.

> The Treaty of Versailles is an international treaty and therefore creates rights and obligations only between the contracting states. It has, indeed, received internal force in the German Reich through the Law of July 16, 1919, but an individual is entitled to advance claims on the basis of its provisions only in so far as this can be determined with complete clarity from the treaty itself, i.e., when the content, purpose and tenor of the specific provision are so adapted as to exercise an effect in private law without the necessity of further international or municipal action.[36]

The enforcement of international law through municipal law will not present any serious legal problem in the constitutional life of the new German *Länder* of the United States Zone. The practical legal issues which developed during the life of the Republic appear to have been resolved, in so far as this can be done through the adoption of constitutional texts. Article 4 of the Weimar Constitution, upon which the new provisions are based, could, in fact, have been derived from the practice of the Second Reich, which had already arrived at results similar to those reached in Great Britain and the United States.[37] Since Article 4 was less of an innovation than its framers supposed, it is perhaps unfortunate that the Anglo-American example should have been adduced, thus identifying its basic principle with an alien dostrine. The storms of juristic controversy which raged about Article 4 during the life of the Weimar Republic could not wholly obscure the political motives which produced them. The insistence by nationalist groups upon the dualist conception was merely the juristic formulation of resistance to the terms of the Peace Settlement, and the accession of the Nazi regime to power only served to accentuate and to give political force to the extremist view. The dualist conception is not, despite its theoretical shortcomings, necessarily hostile to the notion of the supremacy of international law. In maintaining that international law is directly binding solely upon the state it does not deny that the state is under the inescapable obligation to give to that law internal legal effect. One may suspect that monists have opposed the dualist view primarily because of its tendency to

[36] 122 *RGZ* 7; *Fontes,* pp. 147, 836. Also decision of May 2, 1929, 124 *RGZ* p. 204; *Fontes,* pp. 23, 859. Compare the Advisory Opinion of the Permanent Court of International Justice in the *Jurisdiction of the Courts of Danzig* case, Publications of the Court, Series B, No. 15; Hudson, *World Court Reports,* Vol. II, p. 237.

Writing in terms with which a dualist might agree, Hans Kelsen has stated: "Certainly there are norms of international law which are not intended for direct application by the judicial and administrative organs of the State. An international treaty to the effect that a State has to treat a minority in a particular manner can, for instance, have the meaning only that the State has to enact, through its legislative organ, an adequate statute which is to be applied by its courts and administrative organs. But the treaty may be formulated in such a way that it can be applied directly by the courts and administrative organs. Then transformation of international law into national law—by a legislative act of the State—is superfluous. . . ." *General Theory of Law and the State,* Cambridge, Mass., 1945, p. 379.

[37] Walz, in *Zeitschrift für Völkerrecht,* Vol. XIII (1924–1926), p. 172.

merge with the conception of *Staatsrechtsprimat*. Because of its association with traditional German theories of state supremacy the dualist conception may present a real danger, for juristic theories, when inspired by nationalist sentiment, tend to harden into legal facts. The new constitutions of the three *Länder* in the United States Zone seek to obviate this danger. Since they are probably intended to be the prototypes of the constitution of the future German state (whether composed of the *Länder* of two or three of the zones of occupation, their provisions relating to international law may represent some advance over the situation which prevailed under the Republic. Whether this advance proves to be real rather than apparent will depend upon the sincerity of the German people and the effectiveness of the international control by which they are held to their own professions.

LAWRENCE PREUSS

EFFORTS TO CURB DANGEROUS PROPAGANDA

Propaganda, particularly through the medium of the radio, becomes a grave menace to peace when used by an aggressive state to stir up hatred, revolution, and war.[1] In the preparation and commission of his crimes against the peace of the world Hitler made propaganda into a lethal weapon and, as we all know, the development of radio toward this end was one of the most pernicious accomplishments of the Nazi machine.

This being the case, one might have expected to see post-war planners devote considerable attention to the task of curbing subversive and aggressive propaganda. Surprisingly enough, however, nothing definite along this line was accomplished at San Francisco. Although the Security Council, under Article 39 of the Charter, surely has the right to deal with a case of propaganda which it considers to be a "threat to the peace, breach of the peace, or act of aggression," no direct mention of pernicious propaganda appears in the Charter.

Despite this absence of any reference to propaganda in the Charter, the United Nations has not been blind to its dangers. A number of current UN activities offer an opportunity to approach the matter from various angles. At the suggestion of Yugoslavia, the following item has been added as part of the provisional agenda of the second regular session of the General Assembly:

> Recommendations to be made with a view to preventing the dissemination with regard to foreign states of slanderous reports which are harmful to good relations between states and contrary to the purposes and principles of the United Nations.[2]

[1] Whitton and Herz, "The Radio in International Politics," in Childs and Whitton, *Propaganda by Short-Wave*, Princeton, 1942, Chapter I.

[2] *UN Weekly Bulletin*, September 16, 1947, p. 369.