Munich Alumni and the Evolution of International Human Rights Law

Thilo Rensmann*

Abstract

As a tribute to Bruno Simma on the occasion of his 70th birthday this article follows the traces of two of his fellow alumni from Munich University who belonged to the first generation of 'droit-de-l'hommistes'. *In the early 1940s they laid the foundations for the entrenchment of human rights in the international legal order. Ernst Rabel and Karl Loewenstein, who taught in Munich during the inter-war period, each played a significant role in breaking the mould of isolationism prevalent in German legal scholarship at the time. Hitler's rise to power, however, put an abrupt end to the internationalization of legal thought in Germany. Rabel and Loewenstein, like many other legal scholars of Jewish descent, were forced into exile. It so happened that in 1942 the two Munich alumni were invited by the American Law Institute to join a committee 'representing the major cultures of the world'. This committee was charged with the momentous task of drafting an international bill of rights for a new post-war global order. Their draft was later to become the single most important blueprint for the Universal Declaration of Human Rights. Against this backdrop the article attempts to identify the specific contribution made by Rabel and Loewenstein to the evolution of international human rights law.*

1 Introduction

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms . . . The first is freedom of speech and expression . . . The second is freedom of every person to worship God in his own way . . . The third is freedom from want . . . The fourth is freedom from fear. That is no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation.[1]

* Chair of International, European, and Public Law, Dresden Law School. This article is dedicated to Bruno Simma on the occasion of his 70th birthday. Email: rensmann@jura.tu-dresden.de.

[1] F. D. Roosevelt, 'Address to Congress', Congressional Record, 77th Session, Vol. 81, Pt I (6 Jan. 1941).

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Roosevelt's bold vision, mapped out in his famous State of the Union Address in January 1941 and reiterated a few months later jointly with Churchill in the Atlantic Charter,[2] marked the beginning of a Copernican turn in international law. It was the start of the 'human rights revolution' in international law which would eventually deprive 'the sovereign states of the lordly privilege of being the sole possessors of rights under international law'.[3]

Seventy years later, we have come a long way towards realizing Roosevelt's and Churchill's dream for a better world. Their hope, however, that an international order founded on human rights would be firmly established in their 'time and generation' would prove to be too optimistic. Despite the revolutionary pathos of the United Nations Charter which 'reaffirm[s] faith in fundamental human rights', the new world order established in 1945 gave the sovereignty of states rather than human rights pride of place amongst the constitutional principles spelt out in Article 2. Indeed, human rights do not figure at all among the 'principles' of the Charter but are relegated to the solemn 'purposes' and aspirations laid down in the preamble and Article 1. To the great disappointment of many human rights activists at the time, the attempt made at the San Francisco Conference to include an international bill of rights in the Charter failed.[4] Following the relatively swift success in formulating a 'common understanding' of human rights in the Universal Declaration in December 1948,[5] it was to take almost another 20 years to finalize the project of creating a binding 'International Bill of Rights' with the adoption of the two Covenants in 1966.[6]

However, Roosevelt's and Churchill's great vision of a world in which human rights constitute the true foundation of the entire edifice of international law has still not been completely realized. Bruno Simma's General Course on 'The Impact of Human Rights on International Law', held in 2009 at the Hague Academy of International Law, bears witness both to the success achieved and the work still left to be done in the effort to impress the mark of human rights indelibly on the international legal system.[7]

[2] 'Joint Declaration by President Franklin D. Roosevelt and British Prime Minister Winston Churchill', Department of State Executive Agreement Series No. 236 (14 Aug. 1941): '[a]fter the final destruction of Nazi tyranny, they [i.e., President Roosevelt and Prime Minister Churchill] hope to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want'.

[3] Sohn, 'The New International Law: Protection of Rights of Individuals Rather Than States', 32 *Am U L Rev* (1982) 1.

[4] See the account in P.G. Lauren, *The Evolution of Human Rights: Visions Seen* (2nd edn, 2003), at 177–187.

[5] Universal Declaration of Human Rights (adopted 10 Dec. 1948), UNGA Res 217 A (III) (UDHR).

[6] International Covenant on Civil and Political Rights (adopted 16 Dec. 1966, entered into force 23 Mar 1976), 999 UNTS 171; International Covenant on Economic, Social, and Cultural Rights (adopted 16 Dec. 1966, entered into force 3 Jan. 1976), 993 UNTS 3.

[7] Not yet published. See, however, Simma, 'Der Einfluss der Menschenrechte auf das Völkerrecht: ein Entwurf', in I. Buffard, J. Crawford, A. Pellet, and S. Wittich (eds), *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner* (2008), at 729; 'International Human Rights and General International Law: A Comparative Analysis', 2 *Collected Courses of the Academy of European Law* (1995-IV) 153.

The imprint which human rights have left to date on the '*ancien régime*' of international law[8] is in no small degree attributable to Bruno Simma's unfailing commitment to taking human rights seriously, both as a scholar and in his manifold functions as a practitioner. His unwavering *ceterum censeo* in the service of international human rights has led some to describe him in exasperation as a '*droit-de-l'hommiste*',[9] a characterization which Bruno Simma himself and many others would rather perceive as a badge of honour.[10]

It seems a fitting coincidence that Bruno Simma's 70th birthday and the 70th anniversary of Roosevelt's and Churchill's momentous call for a new 'moral' world order coincide. It has largely been forgotten that two Munich alumni, Ernst Rabel (1874–1955) and Karl Loewenstein (1891–1973), belonged to the first generation of '*droit-de-l'hommistes*' who, in the early 1940s, inspired by the Four Freedoms Speech and the Atlantic Charter, laid the foundations for the entrenchment of human rights in the international legal order.

In honouring Bruno Simma, who taught international law at the University of Munich for 30 years, the present contribution will try to retrace the odyssey which took his fellow alumni from Munich to Philadelphia, where in 1942 they were invited to join a committee of international experts responsible for drafting an international bill of rights for a post-war peace settlement.

2 Rabel, Loewenstein and the Internationalization of Legal Scholarship in Germany

When Ernst Rabel[11] joined the Munich faculty in 1916 German legal scholarship found itself behind 'thick walls of self-sufficiency'[12] in 'a state of ethnocentric isolation'.[13] Legal thought in Germany had become lost in 'arid positivism' which shut its eyes to the legal world beyond its national borders.[14]

The reasons for this splendid isolation lay mainly in the particular political situation of the German Empire at the time.[15] The German nation had achieved its political uni-

[8] Simma, 'Der Einfluss', *supra* note 7, at 733.

[9] Pellet, '"Droits-de-l'hommisme" et droit international', 1 *Droits Fondamentaux* (2001), available at: www.droits-fondamentaux.org/article.php3?id_article=27 (accessed 30 Aug. 2011), English version: 'Human Rightism and International Law', 10 *Italian Ybk Int'l L* (2010) 3.

[10] See Simma, 'Universality of International Law from the Perspective of a Practitioner', 20 *EJIL* (2009) 265, at 294: 'I am . . . a moderate "droit-de-l'hommiste"'.

[11] As to Ernst Rabel's biography see Coester-Waltjen, 'Ernst Rabel: Ein Leben für die Rechtsvergleichung', in P. Landau and H. Nehlsen (eds), *Große jüdische Gelehrte an der Münchener Fakultät* (2001), at 77; Kegel, 'Ernst Rabel', in S. Grundmann and K. Riesenhuber (eds), *Deutschsprachige Zivilrechtslehrer des 20. Jahrhunderts in Berichten ihrer Schüler: Eine Ideengeschichte in Einzeldarstellungen* (2007), i, at 17; Rheinstein, 'In Memory of Ernst Rabel', 2 *Am J Comp L* (1956) 185.

[12] Rabel, 'On Institutes of Comparative Law', 47 *Columbia L Rev* (1947) 227, at 230.

[13] H. Isay, *Die Isolierung des deutschen Rechtsdenkens* (1924); Rheinstein, *supra* note 11, at 190, 193.

[14] Rheinstein, 'Comparative Law and Conflict of Laws in Germany', 2 *U Chicago L Rev* (1935) 232, at 232–233.

[15] *Ibid.*, at 236–238; M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law* (2002), at 209; Rheinstein, *supra* note14, at 236–238.

fication only in 1871. Legal science had since been preoccupied with the task of creating a unified law for the young German Empire, first by assisting in the process of drafting the Civil Code and the other great codifications of the late 19th century, and later by interpreting the new codes so as to make them applicable in practice.[16] German jurisprudence was consumed with the idea of creating a logically consistent system of law on the basis of the new codifications which would provide answers to each and every problem of life.[17] Legal thought was hence essentially conceptual and dogmatic, working exclusively within the confines of positive German law.[18] Historical, sociological, and philosophical conditioning factors as such were not considered relevant to legal science. The steady political, military, and economic rise of the German Empire seemed to render moot the question of the legitimacy and efficiency of German law.[19] In this spirit of uncritical positivism and nationalism it was not thought necessary or even useful to carry the legal analysis beyond national borders. This attitude applied both to the comparative study of foreign legal systems[20] and to international law.[21] At the beginning of the 20th century professorial chairs dedicated specifically to international law did not exist at German universities.[22] International law was marginalized and many denied its autonomous existence, relegating it in the Hegelian tradition to external domestic public law (*äußeres Staatsrecht*)[23] or to an apology for belligerent power politics.[24]

It was in this intellectual climate – two years into World War I – that Ernst Rabel founded the Institute of Comparative Law at the University of Munich.[25] Despite the economic blockade and the heightened nationalism during the war Rabel succeeded in persuading the Bavarian government and private sponsors to fund his visionary project.[26] His ambition was no less than the liberation of German legal thought from its self-imposed isolation and the preparation of German legal scholarship for a globalized economy:

> We must again work in the world and with the world. What would become of our chemical or medical sciences if they isolated themselves from the outside world? We must in the same way re-establish the reputation of German legal scholarship, regain international acclaim for

[16] Koskenniemi, *supra* note 15, at 209; Rheinstein, *supra* note 14, at 236.
[17] Rheinstein, *supra* note 14, at 233.
[18] *Ibid.*, at 233.
[19] *Ibid.*, at 237–238.
[20] *Ibid.*, at 232–238.
[21] Koskenniemi, *supra* note 15, at 209, 229; M. Stolleis, *A History of Public Law in Germany 1914–1945* (trans. T. Dunlap, 2004), at 62.
[22] Koskenniemi, *supra* note 15, at 209; Stolleis, *supra* note 21, at 63.
[23] G.W.F. Hegel, *Grundlinien der Philosophie des Rechts* (1821), at 337, para. 330.
[24] E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula rebus sic stantibus* (1911), at 146, 153. For an in-depth analysis of the attitude of German legal scholarship to international law before World War I see Koskenniemi, *supra* note 15, at 179–236.
[25] As to the circumstances of its establishment see Rabel, 'Experiences of a Comparatist', 50 *RZAIP* (1986) 282, at 296. See also Coester-Waltjen, *supra* note 11, at 80–85; R.-U. Kunze, *Ernst Rabel und das Kaiser-Wilhelm-Institut für ausländisches und internationales Privatrecht 1926–1945* (2004), at 33–37; Rheinstein, *supra* note 14, at 241.
[26] Rabel, *supra* note 25, at 296; Rheinstein, *supra* note 14, at 241.

> German legal thought which was once – from Feuerbach and Savigny right up to the time of Jhering, Gierke and Jellinek – taken for granted. Why, in the days of a global economy, should we lawyers continue to live behind Chinese walls . . .?[27]

At the time of its creation the Munich Institute of Comparative Law was the first academic institution in Germany, and indeed in the world, exclusively dedicated to both researching and teaching comparative law.[28] It became a template for many other similar institutions in Germany[29] and abroad,[30] most notably the Kaiser-Wilhelm Institute for Foreign and International Private Law (today's Max Planck Institute for Comparative and International Private Law), which Rabel founded in Berlin upon his departure from Munich in 1926.[31]

Rabel not only turned the University of Munich into a focal point for comparative law in Germany but also carried a spirit of 'world-mindedness'[32] into the faculty, precipitating a systematic internationalization of its curriculum. The wide variety of courses in comparative, private, and public international law offered by the University of Munich between 1916 and 1933 was without parallel and remarkable even by today's standards.[33]

Defeat in World War I and the revolution in 1919 changed the attitude of German scholarship to foreign and international law.[34] With the collapse of the old institutions the naïve positivism of the pre-war years had lost its legitimacy. Legal science could no longer simply treat the law as a given national fact, but was called upon to build and redefine the legal institutions in the spirit of the new republic.[35] The attention of German legal thought turned to the sociological functions and the philosophical foundations of the law.[36] Law was increasingly understood as a universal phenomenon, the proper appreciation of which required the extension of legal analysis beyond the national legal system.[37] In addition, the reconstruction of international trade relations dramatically increased the need for competent advice on foreign law.[38]

[27] Rabel, 'Aufgabe und Notwendigkeit der Rechtsvergleichung', in H.G. Leser (ed.), *Ernst Rabel: Gesammelte Aufsätze, Vol 3: Arbeiten zur Rechtsvergleichung 1919–1954* (1967), at 3, 19 (trans. author). See also Rabel, 'Das Institut für Rechtsvergleichung an der Universität München', 15 *Zeitschrift für Rechtspflege* (1919) 2.

[28] Rabel, *supra* note 25, at 282; Rheinstein, *supra* note 14, 241. The Seminar of International Law in Kiel, which was founded by Theodor Niemeyer in 1914 and which in 1918 was elevated to the status of an institute, was mainly devoted to public international law: see Koskenniemi, *supra* note 15, at 232.

[29] Rheinstein, *supra* note 11, at 194: '[a]lready before the National-Socialist revolution the majority of German law faculties had begun to follow the example which Rabel had established in Munich, and to create special institutes of comparative law'.

[30] Coester-Waltjen, *supra* note 11, at 80; Rheinstein, *supra* note 11, at 194.

[31] Kunze, *supra* note 25, at 33.

[32] Rheinstein, *supra* note 11, at 190, 193.

[33] See the course catalogues of the University of Munich for the relevant period, available at: http://epub.ub.uni-muenchen.de/view/subjects/vlverz_04.html (accessed 30 Aug. 2011).

[34] See Koskenniemi, *supra* note 15, at 209–236; Rheinstein, *supra* note 14, at 238–243; Stolleis, *supra* note 21, at 60–64.

[35] Rheinstein, *supra* note 14, at 238–239.

[36] *Ibid.*, at 250–252.

[37] *Ibid.*, at 239.

Finally, the Peace Treaties which imposed heavy burdens on the new Republic led to a growing interest in international law.[39] A profound knowledge of international law was considered to provide the only chance of mitigating the consequences of what most Germans at the time considered to be an unfair *Diktat*.[40] The inclusion of international law in the curriculum of German universities was suddenly recognized as being in the national interest.

Due to Rabel's visionary foresight the Munich Institute of Comparative Law was fully braced to confront the new challenges brought to the legal profession by the end of the War. It therefore came as no great surprise that the Government of the Reich also increasingly relied on Rabel's expertise. In 1921 he was chosen to be an arbitrator at the German–Italian Mixed Arbitral Tribunal which adjudicated on reparation claims against the German Reich, and in 1925 he was appointed judge *ad hoc* at the Permanent Court of International Justice in the disputes between the German Reich and Poland concerning the expropriation of German assets in Upper Silesia.[41]

With Rabel's rising fame it became inevitable that the University of Munich would finally have to let its great comparatist move on. After almost 10 years at the University of Munich he accepted an offer from the Friedrich-Wilhelms-University (today's Humboldt University) in Berlin. The main incentive and the *conditio sine qua non* for Rabel's move to Berlin was a generous endowment furnished by the Reich and German industry which enabled him to develop his pioneering work on a much larger scale.[42] He became the founding director of the Kaiser-Wilhelm Institute for Foreign and International Private Law, which was established in the Berliner *Stadtschloss* alongside its counterpart for foreign and international public law.[43]

When Rabel moved from Munich to Berlin in 1926, Loewenstein, who was 30 years of age at the time, had not even started work on his *Habilitation* thesis. Although he had always aspired to an academic career he did not possess the financial means necessary to bridge the anticipated long waiting period between qualifying as a *Privatdozent* (non-stipendiary assistant professor) and being awarded a full professorship.[44] In order to create a sufficient economic basis for his academic ambitions he became a solicitor.[45] Despite running a busy law firm he eventually managed to finalize his *Habilitation* thesis on the 'Manifestations of Constitutional Amendments' in 1931.[46] It

[38] *Ibid.*, at 242.

[39] Koskenniemi, *supra* note 15, at 209, 231–238; Rheinstein, *supra* note 14, at 243; Stolleis, *supra* note 21, at 63–64.

[40] Koskenniemi, *supra* note 15, at 209.

[41] See Kunze, *supra* note 25, at 38; Rabel, *supra* note 25, at 288–295.

[42] See Coester-Waltjen, *supra* note 11, at 85–86.

[43] Kunze, *supra* note 25, at 47–54; Rheinstein, *supra* note 11, at 190–191.

[44] See Karl Loewenstein's unpublished autobiography, 'Des Lebens Überfluss' [Life's Abundance] (Amherst College, Archives and Special Collections, Karl Loewenstein Papers, Box 15 a, without date), at 89, 144 (a transcript of the autobiography was kindly provided to the author by Dr Markus Lang). See also M. Lang, *Karl Loewenstein: Transatlantischer Denker der Politik* (2007), at 113.

[45] Loewenstein, *supra* note 44, at 95–141.

[46] K. Loewenstein, *Erscheinungsformen der Verfassungsänderung. Verfassungsrechtsdogmatische Untersuchungen zu Art 76 der Reichsverfassung* (1931).

was, as its subtitle suggests, a 'dogmatic' study in the traditional German style, and as such not typical of his academic oeuvre.

Loewenstein reveals in his memoirs that he chose this conservative approach 'purely for utilitarian reasons' in order to pre-empt any objections from the old school positivist members of the Munich faculty.[47] In contrast, his earlier writings, which all centred round constitutional law issues,[48] reflected rather the new 'antipositivist' methodological approaches which shook up the academic establishment after World War I and culminated in the famous *Methodenstreit* of the mid-1920s.[49] Loewenstein was both a 'realist' and a comparatist. As a 'realist' he was strongly influenced by the legal sociology of Max Weber whom he knew personally and whom he considered one of his most important academic inspirations.[50] It was particularly the experience of the normative frailty of the Weimar constitution which focused his interest throughout his academic career on the interaction between constitutional law and constitutional reality (*Verfassungswirklichkeit*).[51] As a comparatist he considered it his academic vocation 'to trawl foreign constitutional practice in order to draw lessons for German constitutional life from the experience made abroad'.[52] In the 1920s and early 1930s he followed the developments in British constitutional law and practice with particular zeal.[53]

When Loewenstein joined the faculty as a *Privatdozent* in 1931 he was awarded the *venia legendi* for 'the general theory of the State, German and foreign constitutional law, and public international law'.[54] Thus Loewenstein added a public law dimension to the international profile of the legal faculty which until that time had been dominated by private law.[55] In this sense he stood at the beginning of a line of tradition at Munich University which can be followed all the way to the Chair of Public International Law held by Bruno Simma from 1973 to 2003.

[47] Loewenstein, *supra* note 44, at 151.

[48] See his dissertation, *Volk und Parlament nach der Staatsauffassung der französischen Nationalversammlung von 1789: Studien zur Dogmengeschichte der unmittelbaren Volksgesetzgebung* (1922); Loewenstein, 'Zur Soziologie der parlamentarischen Repräsentation in England', in M. Palyi (ed.), *Erinnerungsgabe für Max Weber: Hauptprobleme der Soziologie* (1923); K. Loewenstein, *Die britischen Parlamentswahlen im November 1922* (1923); Loewenstein, 'Zur Soziologie der parlamentarischen Repräsentation in England nach der großen Reform: Das Zeitalter der Parlamentssouveränität', 51 *Archiv für Sozialwissenschaft und Sozialpolitik* (1924) 614; K. Loewenstein, *Minderheitsregierung in Großbritannien* (1925); Loewenstein, 'Das heutige Verfassungsrecht des britischen Weltreichs', 8 *Jahrbuch des Öffentlichen Rechts* (1925) 404; Loewenstein, 'Die "Magna Charta" des britischen Weltreichs', 12 *Archiv des öffentlichen Rechts* (1927) 255.

[49] On the *Methodenstreit* (quarrel over methodology) see Stolleis, *supra* note 21, at 66–70.

[50] Loewenstein, *supra* note 44, at 57–60, 151.

[51] See as to Loewenstein's 'constitutional realism' R.C. van Ooyen (ed.), *Verfassungsrealismus: Das Staatsverständnis von Karl Loewenstein* (2007).

[52] Loewenstein, 'Curriculum Vitae' (Amherst College, Archives and Special Collections, Karl Loewenstein Papers, Box 30, Folder 7, without date) (trans. author).

[53] See *supra* note 48.

[54] See course catalogue of the summer term 1932, *supra* note 33, at 7 (trans. author).

[55] Note, however, that Karl Neumeyer (1869–1941) who taught private and public international law at the Munich faculty specialized in international administrative law. Loewenstein regarded Neumeyer, to whom he was related, as his mentor in Munich: see Loewenstein, *supra* note 44, at 143–144.

3 Emigration to the United States

The courses taught by Loewenstein in 1932 and 1933 in Munich included 'Basic Principles of British Constitutional Law', 'Comparative Study of Democratic Institutions', and 'Constitutional Law of the British Empire'.[56] In the 1932–1933 winter term he was entrusted with the lecture course on public international law when Reinhard von Frank (1860–1934), a criminal law professor who had been lecturing in public international law at the faculty since 1914, was suddenly taken ill. Teaching this course was a particular honour for Loewenstein, since at the time the main compulsory lecture courses were traditionally taught only by professors with full tenure. [57]

Hitler's rise to power, however, put an abrupt end to the promising start of the Jewish *Privatdozent*'s academic career. As Loewenstein describes in his memoirs, his international law students in Munich initially remained loyal:

> When I came to the lecture hall on January 30, 1933, the day of Hitler's seizure of power, only a small fraction of the students expressed their discontent . . .; they were, however, soon silenced by the constant stamping of the feet of the great majority. The student body at the time had not yet been forced into line or terrorised.[58]

Nevertheless, he was soon to receive a letter from the Bavarian government which read, '[t]he admission as Privatdozent is hereby revoked since constitutional theory and law cannot be taught by a Non-Aryan in the National Socialist State'.[59]

Loewenstein's dream of an academic career in Germany had been shattered. His immediate realization that, owing to his Jewish descent, there was no future for him as an academic scholar nor as a practising lawyer in the German Reich spared him a worse fate. Due to his excellent command of English and his good contacts in the United States he succeeded within a reasonably short time in obtaining a position as associate professor of political science at Yale University.[60]

On 19 December 1933 he and his wife boarded a ship bound for New York.[61] For the 42-year-old Loewenstein it would be the beginning of a brilliant academic and professional career in the United States.

Meanwhile Rabel, baptized but of Jewish descent,[62] held out for another six years in Germany. At 60 years of age, he found it much more difficult than Loewenstein to

[56] See the course catalogues, *supra* note 33, of the summer term 1932, the winter term 1932–1933, and the summer term 1933.

[57] See Loewenstein, *supra* note 44, at 161–162.

[58] *Ibid.*, at 162 (trans. author).

[59] Letter to Karl Loewenstein from the Bavarian Minister for Cultural Affairs Hans Schlemm (11 Oct 1933), in excerpts reprinted in S. Harrecker, *Die Aberkennung der Doktorwürde an der Ludwig-Maximilians Universität München während der Zeit des Nationalsozialismus* (2007), at 320 (trans. author); see also Loewenstein, *supra* note 44, at 138; Lang, *supra* note 44, at 159–161. In 1941 Loewenstein's doctoral degree was annulled by the University of Munich on the grounds of his Jewish descent: see Harrrecker, *supra*, at 195–197, 319–322.

[60] Loewenstein, *supra* note 44, at 138–141, 163. As to the exact circumstances see Lang, *supra* note 44, at 161–171.

[61] See *ibid.*, at 171.

[62] See Coester-Waltjen, *supra* note 11, at 89.

leave behind everything he had so successfully built up. Despite all the humiliations the Nazi regime inflicted upon him he stubbornly persisted in attempting to continue his academic work in Germany. In 1937 he was forced to resign from his position as director of the Kaiser-Wilhelm-Institute.[63] Eventually he was even denied access to his Institute library.[64] Only at the insistence of his closest friends could Rabel finally bring himself in 1939 to emigrate to the United States.[65]

Rabel's world had fallen apart. For the once celebrated professor and internationally recognized representative of the German Reich in numerous international bodies, it proved to be extremely difficult to find a new academic home in the United States.[66] In this sense Rabel's fate was much more typical of that of Jewish emigrants than Loewenstein's.[67] It was only through the initiative of his friend William Draper Lewis, the director of the American Law Institute, that a task worthy of Rabel's intellectual calibre could be found. The American Law Institute (ALI) invited him to write 'European Annotations' to the Restatement of the American Conflict of Laws.[68] The project was later taken over by the University of Michigan Law School where he was granted the status of a 'research associate'.[69] Rabel's spirit and inquiring mind remained unbroken. In Ann Arbor he wrote his *magnum opus*, a four-volume comparative study of the conflict of laws.[70]

4 Rabel, Loewenstein and the Statement of Essential Human Rights

A *Rabel and Loewenstein at the Table of the 'Major Cultures of the World'*

Inspired by the Four Freedoms Speech and the Atlantic Charter, the American Law Institute in 1942 set itself the unprecedented task of elaborating a global restatement of 'essential human rights'.[71] It was indeed, as many felt at the time, going to be 'the most important [project] the Institute has ever undertaken'.[72]

If it were possible to prove that among the great legal cultures of the world a consensus existed about certain 'essential' human rights there should be no serious obstacle to the inclusion of such rights in a peace treaty.[73] What was at issue in the

[63] See Kunze, *supra* note 25, at 164–168.
[64] Rheinstein, *supra* note 11, at 194.
[65] Kegel, *supra* note 11, at 18.
[66] See Coester-Waltjen, *supra* note 11, at 90–91; Rheinstein, *supra* note 11, at 195; Thieme, 'Ernst Rabel (1874–1955) – Schriften aus dem Nachlass: Einführung', 50 *RZAIP* (1986) 251, at 266–268.
[67] See E.C. Stiefel and F. Mecklenburg, *Deutsche Juristen im amerikanischen Exil (1933–1950)* (1991).
[68] Rheinstein, *supra* note 11, at 195; Thieme, *supra* note 66, at 267–268.
[69] See *ibid.*, at 268.
[70] E. Rabel, *The Conflict of Laws* (4 Vols, 1945–1958).
[71] Statement of Essential Human Rights, 243 *Annals Am Acad Pol & Soc Sci* (1946) 18. See also Lewis, 'Annual Report of the Director', 19 *ALI Proceedings* (1941–42) 34, at 48.
[72] See Lewis, 20 *ALI Proceedings* (1942–43) 189.
[73] Lewis, *supra* note 73, at 49–50.

eyes of the American Law Institute was the question whether certain human rights had already become part of the 'common law of mankind'[74] or – as it is put in Article 38(3) of the PCIJ Statute[75] – had been accepted as 'general principles of law recognised by civilised nations'.[76]

The herculean task of a global restatement of human rights could not be shouldered by American experts alone. William Draper Lewis, the director of the American Law Institute therefore enlisted the support of a committee of international experts representing 'the principal cultures of the world'.[77] He eventually succeeded in gathering together a high-profile group of 24 advisors which – apart from experts from the United States[78] – included representatives of Canada,[79] China,[80] France,[81] India,[82] Panama,[83] Poland,[84] the Soviet Union,[85] Spain,[86] Syria,[87] the United Kingdom,[88] and,

[74] Cf. W.C. Jenks, *The Common Law of Mankind* (1958).

[75] Statute of the Permanent Court of Justice (adopted 16 Dec 1920, entered into force 1 Sept 1921) 6 LNTS 379, 390 (PCIJ Statute).

[76] Lewis, 'Annual Report of the Director', 20 *ALI Proceedings* (1942–43) 33, at 35. See also Rabel, 'Criminal Procedure and International Law', 2 *The Judge Advocate J* (1945) 20, at 21.

[77] Lewis, 'Annual Report of the Director', 21 *ALI Proceedings* (1943–44) 31, at 33. This phrase was possibly inspired by Art. 9 of the PCIJ Statute.

[78] Noel T. Dowling (1885–1969), Professor of Law at Columbia University; John R. Ellingston, at the time special advisor to the American Law Institute on Criminal Justice – Youth; Manley O. Hudson (1886–1960), Professor of International Law at the Harvard Law School, judge at the Permanent Court of International Justice; Charles E. Kenworthey, judge at the Pennsylvania Superior Court; Roland S. Morris (1874–1945), former ambassador of the United States to Japan, President of the American Philosophical Society; John E. Mulder, Professor of Law at the University of Pennsylvania; David Riesman (1909–2002), at the time attorney and Professor of Law at the University of Buffalo Law School, later Professor of Social Science at the University of Harvard, author of *The Lonely Crowd* (1950); Warren A. Seavey (1880–1966), Professor of Law at the Harvard Law School; Quincy Wright (1890–1970), Professor of Political Science and International Law at the University of Chicago.

[79] Percy E. Corbett (1892–1983), at the time Professor of Government and Jurisprudence at Yale University.

[80] Hu Shi (1891–1962), Chinese philosopher, at the time Ambassador of the Chinese Republic to the United States.

[81] Henri Laugier (1888–1973), at the time Professor of Physiology in Montreal, later Assistant Secretary General to the United Nations; Paul Weill, French solicitor, member of the executive committee of France Forever, the representation of the Free French movement in the United States.

[82] Kailash Chandra Mahindra (1890–1963), industrialist, at the time head of the India Supply Mission to the United States.

[83] Ricardo J. Alfaro (1882–1971), former President of Panama, at the time Secretary-General of the American Institute of International Law, later Foreign Minister of Panama, member of the International Law Commission and judge at the International Court of Justice.

[84] Ludwik Rajchman (1881–1965), bacteriologist, at the time advisor of the Bank of China, later director of UNICEF.

[85] Kenneth Durant (1889–1972), US citizen, at the time director of the press agency of the Soviet Union TASS.

[86] Julio A. del Vayo (1891–1975), Foreign Minister of the republican government during the Spanish civil war.

[87] George M. Barakat (1904–1989), Syrian lawyer, at the time working for the US Board of Economic Warfare.

[88] C. Wilfred Jenks (1909–1973), at the time legal advisor, later Director-General of the International Labour Organization.

which seems at first sight somewhat surprising, Germany[89] and Italy.[90] In view of the barbarism of National Socialism and Fascism, was it really possible for Germany and Italy to be counted among the 'civilised nations' whose legal cultures inform the general principles of international law?

Paradoxically it was precisely the inhumanity of the Hitler and Mussolini regimes which secured German and Italian legal thought a seat at the table of the 'major cultures of the world'.[91] The numerous German and Italian legal scholars who, like Rabel and Loewenstein, were forced into emigration had revealed the decent face of German and Italian legal culture to the world.[92] National Socialism and Fascism were viewed by the American Law Institute as a cancerous growth that had laid itself upon the otherwise vital body of German and Italian legal thought.[93] For Lewis it was beyond doubt that 'pre-Nazi Germany'[94] and pre-Fascism Italy belonged to the great legal cultures of the world.

It so happened that Ernst Rabel and Karl Loewenstein, together with the German émigré lawyer Georg Wunderlich,[95] were invited to join the international experts' committee. Rabel and Loewenstein were not only very worthy ambassadors of 'pre-Nazi' German legal culture[96] but, as highly skilled comparatists, were ideally suited to the envisaged task of distilling general principles of human rights from the world's national constitutions. It was therefore hardly surprising that they were both to play a key role in the process of drafting the Statement of Essential Human Rights.

Rabel and Loewenstein found themselves in illustrious company. Among the experts were Manley O. Hudson, at that time judge at the Permanent Court of International Justice; Quincy Wright, professor of international law at the University of Chicago; Ricardo Alfaro, later member of the International Law Commission and

[89] Karl Loewenstein, Ernst Rabel, and Georg Wunderlich (1883–1951), the last a former solicitor and notary in Berlin, first president of the 'American Association of Former German Jurists', at the time advisor to the US State Department and lecturer at the Pennsylvania Law School.

[90] Angelo P. Sereni (1903–1967), Professor of International Law at the University of Ferrara and later at the University of Bologna, at the time attorney in New York and Lecturer at the New School for Social Research, New York.

[91] This aspect is more fully developed in Rensmann, 'Karl Loewenstein, Ernst Rabel und die Allgemeine Erklärung der Menschenrechte: Der Einfluss der deutschen Rechtskultur auf die Evolution des internationalen Menschenrechtsschutzes', 46 *Der Staat* (2007) 129.

[92] As to Germany see Stiefel and Mecklenburg, *supra* note 67; as to Italy: Finzi, 'The Damage to Italian Culture: The Fate of Jewish University Professors in Fascist Italy and After, 1938–1946', in J.D. Zimmerman (ed.), *Jews in Italy under Fascist and Nazi Rule, 1922–1945* (2005), at 96.

[93] In comparing national constitutional law only elements of legal culture 'consciously or unconsciously affected by Nazi or Fascist philosophy or the philosophy of the Japanese military' were to be excluded: see Lewis, *supra* note 76, at 185.

[94] Thus the designation in the Statement of Essential Human Rights, *supra* note 71, at 18 n 1.

[95] Wunderlich did not play a significant role in the experts' committee. His main contribution was the preparation of a report on the Weimar Constitution which remained, however, largely superficial and descriptive: see Wunderlich, 'Preparing an International Bill of Rights: The German Conception' (Biddle Law Library, University of Pennsylvania Law School, American Law Institute Archives, Series VI, Subseries 3, Box 6052, Folder 22, 48 pp, without date).

[96] Despite his Austrian descent, Rabel was considered by the American Law Institute to be a representative of 'pre-Nazi German' legal culture: see Statement of Essential Human Rights, *supra* note 71, at 18 n 1.

judge at the International Court of Justice; Ludwik Rajchman, initiator and first director of UNICEF; and Wilfred Jenks, later general director of the International Labour Organization.[97]

The proceedings of the Committee make fascinating reading.[98] It is striking to realize how many aspects of human rights law later to be hailed as new dogmatic discoveries were in fact conceived in the early 1940s by the advisors of the American Law Institute. In the context of this short sketch it is only possible to highlight a few of the many treasures buried in the archives of the American Law Institute upon which Rabel's and Loewenstein's contribution had a particular bearing.

B *Social Rights and Protective Duties*

The most intensely debated issue among the committee members was the question whether a universal bill of rights could indeed encompass all Four Freedoms which Roosevelt and Churchill envisaged as the foundation of a future world order.[99] In addition to the classical liberal First Amendment freedoms of speech and religion the Atlantic Charter promised 'freedom from fear' and 'freedom from want'.[100] Contemporary observers and the majority of the ALI committee took the Four Freedoms as a call for an integrated human rights concept encompassing 'positive' liberties. 'Freedom from fear' was understood as an individual right to protection against encroachments on individual liberties from within the societal sphere,[101] 'freedom from want' as a guarantee of those basic social and economic conditions which are indispensable for a life in dignity.[102]

Loewenstein was staunchly in favour of including social rights in the Statement of Essential Human Rights. He even went so far as to posit that 'Positive Rights of Social Justice and Economic Security' should become 'the core and the essential part of an International Bill of Rights'.[103] In a passionate appeal he urged his fellow committee members to look beyond the 'liberal-bourgeois' spirit of the American Bill of Rights and the other classical human rights documents of the late 19th century:

> The danger inherent in any attempt at drafting an International Bill of Rights lies in the temptation to establish a system of such rights which is more or less a restatement of previously existing catalogues of the liberal-bourgeois period of history extending roughly from the French Revolution to the Russian revolution in 1917. Even if vastly improved and modernised such a restatement would

[97] See also *supra* notes 78–88 and 90.

[98] The conference and meeting records, written reports and correspondence of the Committee can be found in the American Law Institute Archives, ALI.04.006, Biddle Law Library, University of Pennsylvania Law School.

[99] See the discussions at the 21st Annual Meeting of the American Law Institute, 20 ALI Proceedings (1943–44) 183.

[100] See *supra* note 2.

[101] See R.K. Carr, *Federal Protection of Civil Rights: Quest for a Sword* (1947), at 203–204.

[102] Sohn, 'How American International Lawyers Prepared for the San Francisco Bill of Rights', 89 *AJIL* (1995) 540, at 546–553.

[103] Loewenstein, 'Some General Observations on the Proposed "International Bill of Rights"' (Biddle Law Library, University of Pennsylvania Law School, American Law Institute Archives, Series VI, Subseries 3, Box 6052, Folder 18, 23 pp, 25 Oct. 1942), at 9.

> defeat its very purpose, namely to make the life of the individual more secure and happy and to lay the basis of a cooperative effort of all members of a given political entity. . . . [T]he intrinsic dynamics of the world revolution of which the second World War is the outward reflexion only, should have impressed even on the most incurable liberal that the dawn of a new social era has arrived. The individual has ceased to be the exclusive value of a good society.[104]

Apparently in immediate response to Loewenstein, Rabel retorted with a flaming and very personal defence of the classical individual liberties of the American Bill of Rights and their relevance for a future international bill of rights:

> I want to say a few words on the international importance of the [American] Bill of individual rights . . . Those most revered guarantees, dear to every American – do they need any defense in this country or abroad? Well, – yes, experience warns us – they do! . . . [I]t is not seldom that emphasis on individual rights is considered bourgeois, that means, inadequate to this age of the masses – or, on the other hand, regarded inconsequential in comparison with postulated new social rights. . . . Now I would like to ask: even if it were not possible to promise the world anything new in these respects, would it be true that those familiar guarantees, the children of former centuries, are not worthy of being paraded in the forefront of a twentieth century International Bill of Rights? . . . [A]s things have developed, there is no need to be afraid of proclaiming the trivial, if we repeat:
>
> – that religion should be freely exercised – whereas Catholic and Evangelical churches are persecuted and Jewish synagogues set on fire;
> – that the people be secure in their persons, houses, papers – whereas no person is safe from concentration camp, or torture, no house assured against nightly searches and violence;
> – that no person shall be held for a crime without proper indictment – whereas thousands upon thousands are incarcerated, maimed and killed by licentious police;
> – that in criminal prosecutions the accused shall enjoy the right to a speedy and public trial, an orderly defense and an impartial court, that confiscations are illicit – these just distant dreams of innumerable victims.
>
> In Germany, in Italy, in Japan, and in all the countries which have fallen under their yoke, the American Bill will come a second time as a promise of liberation, and this time its immense import will be better understood.[105]

Rabel was not categorically opposed to the inclusion of social rights. He realized that such rights had already been entrenched in a considerable number of national constitutions, including the Weimar constitution.[106] His concern was that, in contrast to Loewenstein's proposal, liberal rights should continue to be given 'a privileged place' in the future International Bill of Rights.[107]

In the end the committee of experts discarded both Loewenstein's and Rabel's advice in favour of the integral approach advocated by Roosevelt's Four Freedoms, according to which liberal and social rights, negative and positive liberties are, as it was later put, 'indivisible and interdependent and interrelated'.[108]

[104] *Ibid.*, at 1.
[105] Rabel, 'On an International Bill of Rights', 50 *RZAIP* (1986) 312, at 312–314.
[106] *Ibid.*, at 313.
[107] *Ibid.*
[108] Vienna Conference on Human Rights, 'Vienna Declaration and Programme of Action' (25 June 1993), UN Doc A/CONF 157/23, at para. 5.

The final draft of the Statement of Essential Human Rights contained a comprehensive catalogue of social rights, including such rights as the right to education, to work, to reasonable conditions of work, to adequate food and housing, as well as social security. Loewenstein initially maintained, in keeping with the view prevailing amongst constitutional scholars in the Weimar Republic, that social rights belonged more 'to the domain of programmatic intentions than to that of positive law' and were 'probably unenforceable'.[109] In his opinion they were nevertheless of essential importance as a matter of 'international psychology' since social rights affected 'the common man' most directly: '[p]olitical psychology demands . . . that we boldly enter this uncharted sea of a new social world'.[110]

The final draft of the ALI Statement and its commentary, in contrast, painstakingly elaborate the normative contents of the social rights.[111] The ALI committee of experts thereby foreshadowed some of the ground-breaking work undertaken by the Committee on Economic, Social and Cultural Rights during Bruno Simma's tenure as one of its members.[112]

The ALI experts also challenged the conventional wisdom that liberal freedoms exclusively impose negative obligations on the state. In a truly revolutionary move the committee maintained that classical liberal human rights also impose a positive 'duty to protect' the respective freedoms.[113] This was understood as a duty of the state not only to offer protection against encroachments on human rights by private actors, but in a comprehensive sense to ensure by governmental action the 'practical effect' of human rights.[114] Also in this respect the ALI draft anticipated what belongs today to the *acquis* of international human rights law.[115]

C *Ernst Rabel's Battle for the Right to Property*

William Draper Lewis appointed Ernst Rabel, whom he already knew through their cooperation in the project of drafting 'European annotations' to the Conflict of Law Restatement,[116] as rapporteur of the subcommittee on property rights.[117] He thereby entrusted Rabel with an extremely delicate mission. Amongst the experts there was a strong current of opinion which opposed the inclusion of a right to property in the

[109] Loewenstein, *supra* note 103, at 9–10.

[110] *Ibid.* This argument is reminiscent of Rudolf Smend's 'theory of integration': see R. Smend, *Verfassung und Verfassungsrecht* (1928).

[111] See Statement of Essential Human Rights, *supra* note 71, Arts 11–14 and the respective commentaries. As to a more detailed analysis of these clauses see Rensmann, *supra* note 91, at 142–143; Sohn, *supra* note 102, at 549–550.

[112] See in particular UN Committee on Social Economic and Cultural Rights, 'General Comment No. 3: The Nature of States Parties Obligations (art 2 para 1)' (14 Dec. 1990), UN Doc E/1991/23, Annex III.

[113] Statement of Essential Human Rights, *supra* note 71, Arts 1(2), 2(2), 4(2), 5(2), 6(2).

[114] *Ibid.*, Commentary to Art. 1.

[115] See UN Committee on Civil and Political Rights, 'General Comment No. 31 (80): The Nature of the General Legal Obligations Imposed on States Parties to the Covenant' (29 Mar. 2004), UN Doc CCPR/C/21/Rev 1/Add 13.

[116] See *supra* note 68.

[117] The other two members of the subcommittee were Noel T. Dowling and Warren A. Seavey.

Statement of Essential Human Rights. The right to property was viewed by many as a relic of a vanquished 'liberal-bourgeois' age and as an obstacle to social reform.[118]

Rabel was virtually predestined for the task with which he was entrusted by the American Law Institute. The right to property constitutes one of the central interfaces between human rights and private law. Rabel, the pioneer and grandmaster of private comparative law, was hence on his home turf when faced with the challenge of identifying the status of property in the major legal cultures of the world. In addition, as judge *ad hoc* in the *Chorzow Factory* case, he had dealt intensively with the public international law aspects of the right to property.[119]

Rabel drafted a passionate plea for the recognition of the right to property as an 'essential' international human right.[120] He insisted that property should not wilfully be removed from the classical liberal trinity of 'life, liberty and property'. In a masterful combination of legal history and comparative law, which was so characteristic of his work, Rabel first led the other ALI experts as time-travellers through the evolution of the legal and social concept of property from antiquity to the 20th century,[121] only then to whisk them off on a journey around the world in a dazzling comparative study of the national constitutions in force at the time.[122] His conclusion was plain but effective: '[p]roperty has proved its juridical and social value through 2000 years . . . [I]t is still an object worthy of protection.'

The resistance amongst the ALI experts was broken. The right to property found its way into the Statement of Essential Human Rights,[123] which in turn became a decisive catalyst for the inclusion of a corresponding guarantee in the Universal Declaration of Human Rights.[124]

Despite this initial success, the right to property is still in some quarters denied its proper place amongst the universally recognized human rights. Only a few years ago the German Federal Constitutional Court categorically stated, 'Universal international law does not know the guarantee of property . . . as a human rights standard'.[125]

[118] Cf. Rabel, 'Introduction to the Consideration of Property Rights, Submitted to the Members of the Subcommittee on Property' (Biddle Law Library, University of Pennsylvania Law School, American Law Institute Archives, Series VI, Subseries 6, Box 6054, Folder 16, 25 pp, 18 Jan. 1943), at 1; Rabel, *supra* note 105, at 313. Loewenstein was also among the committee members critical of the right to property: see Loewenstein, *supra* note 103, at 8, 18–19.

[119] See *Case Concerning the Factory at Chorzów (Germany v. Poland)* (Merits) PCIJ Rep Series A No. 17.

[120] Rabel, *supra* note 118, at 1–25.

[121] *Ibid.*, at 1–6.

[122] *Ibid.*, at 7–25.

[123] Statement of Essential Human Rights, *supra* note 71, Commentary to Art. 10: '[e]very one has the right to own property under general law. The state shall not deprive any one of his property except for a public purpose and with just compensation.'

[124] On the influence of the ALI draft on the Universal Declaration of Human Rights in general see *supra* text accompanying notes 149–151; with particular reference to Art. 17 of the Universal Declaration see J. Morsink, *The Universal Declaration of Human Rights: Origin, Drafting and Intent* (1999), at 143. Note also that the draft of an international bill of rights prepared by Hersch Lauterpacht, which was also of some significance in the process of drafting the Universal Declaration, did not contain a guarantee of the right to property: see H. Lauterpacht, *An International Bill of the Rights of Man* (1945).

[125] 112 Sammlung der Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 1, 34.

The Constitutional Court relied heavily on the fact that the right to property was not included in the two International Human Rights Covenants. However, more than 40 years after the adoption of the Covenants and 20 years after the end of the Cold War the conclusion reached by the Court seems far from convincing.[126] Had Rabel had the opportunity to plead his case before the German Federal Constitutional Court the judges might well have been more amenable to recognizing the right to property as a universal human right.

D *Karl Loewenstein: The Father of the Right to Democracy*

Karl Loewenstein was possibly the most innovative mind in the ALI experts' committee. As special rapporteur for political rights[127] he advocated the inclusion of a completely novel provision in the International Bill of Rights which addressed the mutual relationship between democracy and human rights.

Thus far national constitutions had strictly separated the Bill of Rights from the frame of government. Loewenstein, however, put forward the proposition that human rights were not neutral in relation to the frame of government.[128] History had shown, and this was also his personal experience, that human rights can be realized only in a democracy.[129] Since a democratic constitution was accordingly an indispensible condition for the effective realization of human rights, an international bill of rights without this structural *conditio sine qua non* would make no sense.[130]

This insight led Loewenstein to formulate a truly revolutionary right to democracy ('a revolution within a revolution'),[131] which was adopted as Article 16 of the ALI draft: '[e]very one has the right to take part in the government of his state'. This right to participation in government corresponds to a duty of the state 'to conform to the will of the people as manifested by democratic elections'. The 'Emerging Right to Democratic Governance' about which Thomas Franck speculated in 1992[132] had thus already been formulated 50 years earlier.[133]

[126] See Golay and Cismas, 'Legal Opinion: The Right to Property from a Human Rights Perspective' (2010), available at: http://ssrn.com/abstract=1635359 (accessed 30 Aug. 2011); Rensmann, 'Völkerrechtlicher Enteignungsschutz', in D. Ehlers, H.-M. Wolffgang, and U.J. Schröder (eds), *Rechtsfragen internationaler Investitionen* (2009), at 25, 49–50.

[127] The other members of the subcommittee on political rights were Ricardo J. Alfaro and John E. Mulder.

[128] Loewenstein, *supra* note 99.

[129] *Ibid.*, at 225; 'Report of the Subcommittee on Political Rights' (Biddle Law Library, University of Pennsylvania Law School, American Law Institute Archives, Series VI, Subseries 6, Box 6054, Folder 13, 17 pp, 16 Feb 1943), at 1. See also Loewenstein, 'Freedom is Unsafe Without Self-Government', 243 *Annals Am Acad Pol & Soc Sci* (1946) 47.

[130] Loewenstein, *supra* note 128, at 227; Loewenstein, *supra* note 129, at 47; Report of the Subcommittee, *supra* note 129, at 1.

[131] Cf. Rosas, 'Article 21', in G. Alfredsson and A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999), at 431.

[132] Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46.

[133] Note that Art. 10 of Hersch Lauterpacht's draft also contained a right to government by consent: Lauterpacht, *supra* note 124; see also H. Lauterpacht, *International Law and Human Rights* (1950), at 281–284, 350–351.

The right to democracy found its way into Article 21 of the Universal Declaration of Human Rights and later into Article 25 of the International Covenant on Civil and Political Rights. With marked understatement Loewenstein wrote in his autobiography, '[a]s chance had it, I thereby made a little, a very little contribution to contemporary history'[134].

Of great interest are also Loewenstein's thoughts on the international enforcement of the right to democracy. In a memorandum submitted to the ALI experts' committee he suggested that the international recognition of states and the grant of economic support by international organizations should be made contingent on the sufficient realization of democratic governance within the state at issue.[135] This is another instance in which Loewenstein ingeniously anticipated future developments in international law.[136]

In terms of its practical effect Loewenstein's persistent advocacy of a substantive, 'militant' notion of democracy was perhaps his most important contribution to the evolution of international human rights law.[137] He was convinced that the downfall of the Weimar Republic was to a large extent due to the prevailing value-neutral understanding of democracy.[138] Never again should it be possible for a dictator to use the democratic process as a Trojan horse with which to destroy democracy from within. In Loewenstein's view the democratic process therefore needed to be substantively underpinned.[139] This idea of substantive boundaries of the democratic process found its way into the general limitation clause of the ALI draft: '[i]n the exercise of his rights every one is limited by the rights of others and by the just requirements of the democratic state'.[140]

This meant in terms of the 'right to democracy' that participation in the democratic process was contingent on the continued acceptance of the basic tenets of democracy.[141] Anyone disregarding the 'just requirements of the democratic state' would forfeit his political liberty: *pas de liberté pour les ennemis de la liberté*. This is the fundamental idea behind the concept of 'militant democracy' which is, still today, indelibly associated with the name of Karl Loewenstein.[142]

By virtue of the limitation clause the power of the democratically elected legislator to limit human rights is in turn limited by the 'just requirements of the democratic state', or 'democratic society' as it is later put in the Universal Declaration[143] and the

[134] Loewenstein, *supra* note 44, at 232 (trans. author).

[135] Loewenstein, *supra* note 103, at 4.

[136] Cf. G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000).

[137] See Karl Loewenstein's seminal study, 'Militant Democracy and Fundamental Rights', 31 *Am Polit Sci Rev* (1937) 417 and 638.

[138] *Ibid.*, at 426.

[139] Loewenstein, *supra* note 103, at 6, 20; *supra* note 128, at 227; *supra* note 129, at 48–49.

[140] Statement of Essential Human Rights, *supra* note 71, Art. 18.

[141] Loewenstein, *supra* note 103, at 6, 20; *supra* note 129, at 48–49.

[142] See Avineri, 'Introduction', in A. Sajo (ed.), *Militant Democracy* (2004), at 1; Rensmann, 'Procedural Fairness in a Militant Democracy: The "Uprising of the Decent" Fails Before the Federal Constitutional Court', 3 *German LJ* (2004) 1117.

[143] Art 29 UDHR.

Covenants.[144] This was another lesson drawn from the failure of the Weimar constitution. Fundamental rights become meaningless if they are allowed to be neutralized by the legislator.[145] The Statement of Essential Human Rights therefore introduced a substantive check on the democratic process. Karl Loewenstein and the other ALI experts were among the first to turn the spotlight on the dialectic relationship between the values of a democratic society which are at the same time 'the genesis of [human] rights and freedoms . . . and the ultimate standard against which a limit on a right or freedom must be shown to be . . . justified'.[146] The effort to resolve this dialectic puzzle eventually brought about the 'proportionality test' which today is the main yardstick against which limitations of human rights are measured.[147]

E *The Contribution of the Statement of Essential Human Rights to the Evolution of International Human Rights Law*

The Four Freedoms speech and the Atlantic Charter led to an unprecedented mobilization of private organizations and individual human rights activists who attempted to translate Roosevelt's and Churchill's political battle cry into a universal bill of rights for a peaceful post-war order.[148] However, among the many proposals prepared in the first half of the 1940s the ALI Statement of Essential Human Rights remained the most profound and influential contribution to the later evolution of international human rights.[149] Panama sponsored the ALI draft at the San Francisco Conference for inclusion in the United Nations Charter.[150] Despite the failure of this initiative the ALI Statement continued to be an important point of reference in the process of drafting the Universal Declaration of Human Rights and the two Covenants. Even a cursory comparison of the ALI draft with the Universal Declaration reveals that both its basic structure and the wording of many Articles closely follow the Statement of Essential Human Rights. John Humphrey, who as the Director of the Human Rights Division in the UN Secretariat prepared the first draft of the Universal Declaration, revealed in his memoirs that this was no coincidence: 'the best of the texts from which I worked was the one prepared by the American Law Institute, and I borrowed freely from it'.[151]

[144] Arts 14(1)(2), 21(2), 22(2)(1) ICCPR; Arts 4, 8(1)(a)(c) ICESCR.

[145] Loewenstein, *supra* note 103, at 11–13.

[146] Canadian Supreme Court, *R v. Oakes,* 1 SCR (1986) 103, at 136.

[147] See T. Rensmann, *Wertordnung und Verfassung: Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (2007), at 131–134, 275–278.

[148] See Lauren, *supra* note 4, at 147–154; A.W.B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (2001), at 190–220.

[149] See Lauterpacht, *supra* note 133, at 274; Sohn, 'The Contribution of Latin American Lawyers to the Development of the United Nations Concept of Human Rights and Economic and Social Justice', in A.A. Cançado Trindade (ed.), *The Modern World of Human Rights, Essays in Honour of Thomas Buergenthal* (1996), at 33, 53: '[t]he influence of this statement which represents the spirit of the times is often underestimated'.

[150] UNCIO Doc 2 G/7 (g) (2) (5 May 1945) 3 UNCIO Docs 266.

[151] J.P. Humphrey, *Human Rights and the United Nations: A Great Adventure* (1984), at 32.

5 Concluding Remarks

Bruno Simma and his fellow '*droit-de-l'hommistes*' have taken over the baton from Ernst Rabel, Karl Loewenstein, and the pioneering generation of lawyers who masterminded the 'human rights revolution'. The revolution is far from over. Securing the 'impact of human rights on international law'[152] can probably be achieved only on the basis of a permanent revolution. It is encouraging that today's standard-bearers of the 'human rights revolution', in their march through the institutions of international law, have arrived at the International Court of Justice. As Dame Rosalyn Higgins aptly observed, it was only with the advent of Bruno Simma at the Court that the faction of the '*droit-de-l'hommistes*' on the bench attained the strength necessary to ensure that human rights would forthwith be viewed 'as in the centre of what the Court does, not at the margin'.[153] It seems that after 70 years Roosevelt's and Churchill's hopeful message of a better 'world founded on four essential freedoms' has finally reached the World Court.

[152] See *supra* note 7.

[153] Higgins, 'Human Rights in the International Court of Justice', 20 *Leiden J Int'l L* (2007) 745, at 746.