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In Honor of Stefan A. Riesenfeld

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I. Introduction

In 1976 Professor Stefan A. Riesenfeld entered a new phase in a distinguished academic career and at the same time embarked upon a period of important public service to the United States of America. Having taken emeritus status at the University of California at Berkeley, he joined the faculty of the Hastings College of Law; and he also responded favorably to a call from Washington inviting him to assume the post of Counselor on International Law in the Office of the Legal Adviser at the U.S. Department of State. This position was designed principally to give the government's chief international lawyer the benefit of expert counsel from a nongovernmental authority in international law, and incidentally to promote mutually valuable interchange between the academic community and the Office of the Legal Adviser.[1] Riesenfeld's inimitable expertise, cultivated over four decades in academic life and ranging across all the relevant subfields of international law, made him the ideal occupant of what had typically been a one-year position for a professor on sabbatical—but became a five-year position in Riesenfeld's case.

Some months after Professor Riesenfeld took up the post of Counselor, a brand-new staff attorney arrived in the Office of the Legal Adviser. It was my good fortune to be assigned to a series of projects in which Riesenfeld was engaged at the time. At my then age of not yet twenty-five, I was rather more energetic than I am now; but I quickly learned that it was necessary to live in the fourth dimension in order to keep up with Steve Riesenfeld. Of course, he had the advantage of gaining almost three hours per week by virtue of the time change on his commute to San Francisco most weekends. On the

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1. The Legal Adviser is a presidential appointee who heads an office of some 100 lawyers responsible for furnishing legal advice on all international and domestic problems arising in the work of the Department of State. For background on the Office of the Legal Adviser, see Current Development, *The Role of the Legal Adviser of the Department of State*, 85 AM. J. INT'L L. 358 (1991).

westward flight (where those three extra hours could be put to good use) he wrote scholarly articles,[2] while on the return trip to Washington (via the red-eye special) he marked up draft memoranda for submission to the Legal Adviser on Monday morning. Some of my most diligently researched drafts emerged in tatters from the eastbound flights.

In this issue dedicated to Professor Riesenfeld, his achievements as a scholar and teacher will appropriately receive central attention. As a contributor who also worked with him in his Washington days, I would like first to recall a few anecdotes from that time (which I hope he remembers as fondly as I do) and then turn to an assessment of his contributions to the literature on the interface between the constitutional and international law of treaties.

II. Reminiscences

Two projects from 1978 are especially memorable. During most of that calendar year, Steve Riesenfeld was the senior member (and I the most junior) of a team charged with planning and justifying the legal framework for continuation of full economic, commercial, and people-to-people relations with the Republic of China on Taiwan, in anticipation of the change in recognition which was to be announced near the end of that year. Riesenfeld had been thinking and writing about legal aspects of recognition policy since the time of judicial challenges to President Roosevelt's acceptance of the 1933 Litvinov Assignment.[3] My own recent exposure to these concepts in law school, on the other hand, had left me still somewhat confused as to whether the Soviet regime was a band of robbers or a government,[4] let alone whether any "rules of recognition" applied to such situations.[5]

Among the questions before us was whether the expected derecognition of the Republic of China would result in the denial to Taiwan or its people of access to various benefits and privileges under U.S. law. For example, would Taiwan continue to qualify for "most-favored-nation" treatment if it ceased to be a "nation?" Would the

2. From this period, see, for example, Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?* 74 AM. J. INT'L L. 892 (1980) [hereinafter *Win at Any Price?*]. On aspects of the self-executing treaty question, see *infra*, text accompanying notes 18-40.

3. *See, e.g.*, Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 CAL. L. REV. 643 (1937).

4. *Cf.* Salimoff & Co. v. Standard Oil Co., 262 N.Y. 220, 233, 186 N.E. 679, 681 (1933).

5. *See generally* H.L.A. HART, THE CONCEPT OF LAW 97-107 (1961).

Foreign Sovereign Immunities Act apply to an entity viewed as something other than a "foreign state?" There were scores, perhaps hundreds of statutory provisions requiring investigation. In those days before the availability to government lawyers of electronic searching techniques, the most efficient way to canvass every conceivable statutory provision raising definitional problems as regards "country," "nation," "sovereign," "state," "territory," "customs territory," and so on, was to brainstorm with Steve Riesenfeld. At some point or another during his career, he had worked with each and every one of these statutes. By the time we submitted our fat binder with tabs for innumerable federal programs relevant to state or nonstate entities, the legal analysis pretty much boiled down to the following paraphrase of Justice Potter Stewart's concurrence in *Jacobellis v. Ohio*:[6]

Is Taiwan a country? It don't seem to be one.

I can't quite define, but I know when I see one.[7]

Also in 1978 it fell to me to work with a small team of lawyers, including Riesenfeld, on the legal argumentation for the United States in an aviation dispute with France, involving a particular service proposed by Pan American World Airways (Pan Am) for a route to Paris. Briefly, the United States accused France of violating a bilateral air services agreement and demanded arbitration under the agreement, while France insisted not only that no violation had occurred, but also that arbitration was premature pending exhaustion of local remedies by Pan Am. The details of the arbitration need not concern us here;[8] but on the point of exhaustion of local remedies, Riesenfeld's vast knowledge of foreign and comparative law proved invaluable. The French legal team, in what turned out to be a futile effort to forestall the tribunal from considering the claim on the merits, had devoted some seventeen pages in its memorial to the exhaustion argument, relying in part on notions of French administrative law. But a few succinct passages in the U.S. reply based on Riesenfeld's research (citing five decisions of the *Conseil d'Etat* and half a dozen French treatises on administrative law) overcame the French on propositions that the French lawyers had asserted concerning their own domestic legal sys-

6. 378 U.S. 184 (1964) (Stewart, J., concurring) ("I know it when I see it").

7. Credit for the couplet goes to David Damrosch, playing the role of Chief Justice Warren Burger at the Christmas party of the Office of the Legal Adviser, held the day after the announcement of the Supreme Court's judgment in *Goldwater v. Carter*, 444 U.S. 996 (1979).

8. *See generally* Lori Fisler Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980).

tem. The point was unanswerable and we went on to win the case on the merits on all issues.

Stefan Riesenfeld made himself indispensable to a succession of Legal Advisers between 1976 and 1981, each of whom summoned him back from San Francisco for successive renewals of his tour of duty as Counselor. I recall one office party—in the nature of a provisional goodbye party—where we gave him the Muhammed Ali award for most career comebacks. Meanwhile, I said my own good-bye to that office and went off for a few years in private practice. I soon had to persuade the partner in charge of one of my cases that I really should not be sent as a junior attorney to a trial in Buffalo in January of 1982, because I had an invitation to a conference on international banking in Santo Domingo that would be much more significant to my professional development. Fortunately I prevailed in this reassignment and had the pleasure of discussing sovereign debt rescheduling and extraterritorial application of U.S. assets freezes by poolside in the Dominican Republic and benefiting again from Riesenfeld's expertise.[9] With Riesenfeld as a role model, the attractions of an academic career came to seem irresistible.

III. Riesenfeld's Contributions to Treaty Law

During the period of Riesenfeld's service as Counselor, he took issue with the litigating position of the U.S. Government in a case involving a nonconsensual boarding of a foreign-flag vessel on the high seas.[10] One of the issues in the case was whether the U.S. court in a criminal proceeding could properly exercise jurisdiction over defendants arrested in violation of a treaty to which the United States was party.[11] The government contended that the court could ignore the treaty rule, on the theory that the treaty in question was non-self-executing. In a cogent analysis bearing the subtitle *Win at Any*

9. Our conference papers appear back to back as Roberts B. Owen & Lori Fisler Damrosch, *The International Legal Status of Foreign Government Deposits in Overseas Branches of U.S. Banks*, 1982 U. ILL. L. REV. 305, and Stefan A. Riesenfeld, *The Powers of the Executive to Govern the Rights of Creditors in the Event of Defaults of Foreign Governments*, 1982 U. ILL. L. REV. 319.

10. The case was *U.S. v. Postal*, 589 F.2d 862 (5th Cir. 1979), *cert. denied*, 444 U.S. 832 (1979), discussed in PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY 443 (Stefan A. Riesenfeld & Frederick M. Abbott eds., 1994) [hereinafter PARLIAMENTARY PARTICIPATION].

11. The treaty in question was the 1958 Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

Price?,[12] Riesenfeld criticized the government for having made this argument and the court for having accepted it: He queried whether the Justice Department (in its zeal to win convictions) had even bothered to consult with the Legal Adviser of the Department of State on a matter falling squarely within the latter's responsibilities concerning international treaties and having implications across a range of subject matters; and he advanced a series of important points concerning the interaction between the treaty process at the international level and treaty implementation at the domestic level. This was just one of a number of articles in which Riesenfeld had taken up problems of treaty law at the intersection between domestic and international law.[13]

More broadly, Riesenfeld has pursued over many years an ambitious research agenda concerning treaty law in a comparative context, with attention to parliamentary participation in the treaty process in a variety of national systems. In 1990 Riesenfeld and his colleague Professor Frederick Abbott (of the Chicago-Kent Law School) set in motion plans for a conference on this subject, to be held in Geneva in November of 1991. The several years of planning and preparation that went into that event by the co-organizers yielded an exceptionally rich intellectual harvest, fortunately available to audiences around the world through a symposium issue of the Chicago-Kent Law Review[14] and through a parallel hardcover volume that adds a transcript of the discussions at the symposium to the collection of published papers.[15] Riesenfeld drew on his vast roster of close friends from around the world to bring together for this event such eminences as François Luchaire (a member of the French *Conseil d'Etat* and a former member of the *Conseil constitutionnel*); the Right Honourable the Lord Templeman (a member of the Appellate Committee of the House of Lords, the highest judicial tribunal in the United Kingdom); Judge José Maria Ruda (a distinguished Argentine jurist then presiding over the Iran-United States Claims Tribunal, and formerly the president of

12. *Win at Any Price?*, *supra* note 2, at 892.

13. For other contributions before and after *Win at Any Price?*, see, for example, Stefan A. Riesenfeld, *Note on the Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548 (1971); Stefan A. Riesenfeld, *Jurisdiction Over Foreign Flag Vessels and the U.S. Courts: Adrift Without a Compass?* 10 MICH. J. INT'L L. 241 (1989).

14. Symposium, *Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT L. REV. (Profs. Stefan A. Riesenfeld & Frederick M. Abbott Symposium eds., 1991).

15. *See generally* PARLIAMENTARY PARTICIPATION, *supra* note 10.

the International Court of Justice); and other experts in the treaty process from nine different countries. At the conclusion of the conference, Riesenfeld referred to the symposium as "a dream that I had forty years ago, and now it became reality."[16] For all the participants, the realization of that dream made it possible to benefit from Riesenfeld's own reflections over the course of many decades, as well as from the exchange of ideas with experts from a wide range of legal systems.

In his major paper at that conference, co-authored with Professor Abbott,[17] Riesenfeld elaborated a controversial theory of the Senate's role in the treaty-making process, one that differs from the position staked out many years ago by my present colleague at Columbia Law School, Professor Louis Henkin, concerning the scope of the Senate's authority to condition its consent to treaties.[18] Back in the 1950s, Henkin had criticized an appellate court decision that had declined to give effect to a reservation that the Senate had attached to its resolution of advice and consent to ratification of a treaty with Canada concerning allocation of the waters of the Niagara River.[19] The court considered that since the reservation involved a strictly domestic matter (concerning how the treaty would be implemented after entry into force), it did not belong to the treaty itself and thus did not fall within the scope of the Senate's treaty-approving powers under Article II of the Constitution. Henkin had argued in that context for an expansive conception of the Senate's role, including the Senate's ability to control the domestic legal effect of the treaty.[20] More recently, Henkin had invoked a similarly strong view of the Senate's constitutional role in the treaty process in support of the position that the Senate's understanding (at the time of advice and consent) with respect to the meaning of a treaty must govern the interpretation to be given to the treaty as a matter of U.S. law, even if that interpretation turns out to be inconsistent with the negotiating record, with the position of the Executive Branch at a future date concerning the optimal interpreta-

16. *Id.* at 559.

17. *See* Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991) [hereinafter Riesenfeld & Abbott].

18. For the article in which the position was originally explained at length, see Louis Henkin, *The Treaty Makers and the Law Makers: The Niagara Power Reservation*, 56 COLUM. L. REV. 1151 (1956) [hereinafter *Treaty Makers*].

19. Power Authority of New York v. Federal Power Commission, 247 F.2d 538 (D.C. Cir.), *vacated*, 355 U.S. 64 (1957).

20. Following *Treaty Makers*, *supra* note 18, Henkin reiterated this view in, *inter alia*, FOREIGN AFFAIRS AND THE CONSTITUTION 133-36, 160-61, 380-81 (1972), and in other places cited in Riesenfeld & Abbott, *supra* note 17, at n.3.

tion from the point of view of U.S. interests, or even with an interpretation established by an international tribunal or another authoritative international body.[21] By implication (or extrapolation) from this strong view of Senatorial prerogatives, the line of argument associated with Henkin could conceivably be invoked in cases entailing a fairly wide gap between the Senate's objectives and the object and purpose of the treaty in question on the international plane.[22] On the most extreme view (not necessarily one endorsed by academic authorities, but probably held by at least some Senators), Senatorial conditions would have to be respected even if an international tribunal found them impermissible under the international law of treaties or possibly even if violative of peremptory norms of international law (*jus cogens*).[23]

Riesenfeld and Abbott, in contrast, aimed to return the Senate's role in the treaty process to moorings in a conception of the treaty as an instrument of international law, one that must perforce be governed by international law. Under this conception, the Senate cannot have an unfettered power to condition its consent to treaties but rather has only such powers as are consistent with the limited rationales for Senatorial involvement in the treaty-making process on the domestic and international planes. Since the Senate by itself has no domestic law-making powers, it should not be considered to have ancillary domestic legislative powers as part of its treaty-approving function. Rather, it can attach only such conditions as could validly form part of the treaty on the international plane. Under the Riesenfeld-

21. *See* Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406 (1989); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 52-54 (1990). This constitutional question achieved considerable notoriety in connection with the so-called Anti-Ballistic Missile Treaty Reinterpretation Controversy. For references and discussion, see PARLIAMENTARY PARTICIPATION, *supra* note 10, at 365-82, 428-31.

22. I say "extrapolation" because there is reason to doubt that Henkin himself holds quite as extreme a view of Senatorial prerogatives as his critics might impute to him. For a recent clarification on his part, *see infra* text accompanying note 40. Riesenfeld & Abbott acknowledge that Henkin's supposed view "might be understood (or perhaps rather misunderstood)" to justify results that Henkin himself might not endorse. *See* PARLIAMENTARY PARTICIPATION, *supra* note 10, at 272.

23. Under the Vienna Convention on the Law of Treaties, Article 19, a reservation can be impermissible under several circumstances, including incompatibility with the object and purpose of the treaty. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 19, 1155 U.N.T.S. 331, 336-37, 8 I.L.M. 679, 686-87 (1969). Consequences of impermissible or objectionable reservations are dealt with in *id.* arts. 20-24, 1155 U.N.T.S. at 337-38, 8 I.L.M. at 687-89. Severability of the provision to which the reservation pertains from the rest of the treaty is an important issue in this connection. Invalidity as a consequence of violation of a peremptory norm (*jus cogens*) is dealt with in *id.* arts. 53, 64, 1155 U.N.T.S. at 344, 347, 8 I.L.M. at 698, 703.

Abbott view, the Senate would lack power to attach conditions inimical to the treaty under international law, and moreover would lack authority to control the domestic effect of treaties, including whether a treaty should be considered self-executing or not.[24]

The Riesenfeld-Abbott thesis sparked one of the most interesting discussions at the Geneva symposium.[25] A recurrent theme was whether the purported assertion by the Senate of power to control the domestic legal effect of a treaty is merely a bad idea (as most but not all the participants agreed), or whether it was something more than that—an unconstitutional action, a nullity.[26] Several U.S. participants added a variety of perspectives,[27] to which my modest contribution was a brief paper addressed to the problem of the U.S. Senate's attempts to control the self-executing or non-self-executing effect of a treaty.[28] Some of the non-U.S. participants likewise addressed the same question with reference to the constitutional role in their own system of the parliamentary organ that has treaty-approving powers.[29] Riesenfeld and Abbott took the bold position that the U.S. Senate lacks constitutional power to attach such conditions. The reactions of the other symposium participants ranged from sympathetic to skeptical to strongly opposed.[30]

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24. *See generally* Riesenfeld & Abbott, at nn.81-114.

25. PARLIAMENTARY PARTICIPATION, *supra* note 10, at 3-5, 433-449.

26. For example, see the colloquy between Professor Joachim Frowein and Professor Riesenfeld on this point, in *Transcript of Meeting*, PARLIAMENTARY PARTICIPATION, *supra* note 10, at 474-76.

27. In the case of Professor Michael Glennon (formerly legal counsel to the Senate Foreign Relations Committee), his viewpoint contrary to that of Riesenfeld and Abbott reflected an even more expansive conception of Senatorial powers than the position attributed to Henkin. Michael Glennon, *The Constitutional Power of the United States Senate to Condition its Consent to Treaties*, 67 CHI.-KENT L. REV. 533 (1991).

28. *See* Lori Fisler Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991).

29. For example, see Professor Frowein's discussion of the German system and colloquy with Riesenfeld concerning distinctions between systems growing out of the scope of legislative powers of one house of a bicameral legislature, in PARLIAMENTARY PARTICIPATION, at 470-71, 474-76.

30. On a policy level, I am fully sympathetic with their position (and indeed argued in my paper that the Senate ought not to be exercising such a power under any plausible theory of the constitutional foundations for the Senate's role in the treaty process); but as a predictive matter I believe that U.S. courts would quite likely give effect to the Senate's conditions and would probably not find that the Senate had exceeded its constitutional powers. *See* Damrosch, *supra* note 28, at 526-32. For views in opposition to Riesenfeld & Abbott on this point, see Michael Glennon, *Transcript of Meeting*, *in* PARLIAMENTARY PARTICIPATION, *supra* note 10, at 403, 405-14.

The issue addressed with such fervor by Riesenfeld and Abbott has only increased in importance in the five years since they elaborated their position. The Senate's propensity to attach a variety of qualifications to its resolutions approving treaties has continued apace: the resolution with respect to the International Covenant on Civil and Political Rights (approved a few months after Riesenfeld's Geneva conference) is one of the more egregious instances in which the Senate has erected substantial barriers to full implementation of the letter and spirit of the treaty.[31] The so-called non-self-executing declaration that Riesenfeld and Abbott attack seems to have become *de rigueur*: witness, for example, the U.S. instrument of ratification of the Convention on the Elimination of All Forms of Race Discrimination, approved by the U.S. Senate in 1994, and the near-certainty that the Senate would insist on a comparable declaration as a price for ratification of either the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child.

Bodies charged with implementation of these treaties have indicated that certain reservations of the sort that trouble Riesenfeld and Abbott are indeed of questionable validity under international law.[32] The U.N. Human Rights Committee has pointedly criticized two of the U.S. reservations to the International Covenant on Civil and Political Rights as incompatible with the object and purpose of that treaty, thereby casting into doubt the validity of the reservations on the international plane.[33] Under the Riesenfeld-Abbott view, such rulings of international bodies would put the Senate's reservations in jeopardy for domestic purposes as well, since the international validity of a treaty condition would be a *sine qua non* of its validity from the point of view of domestic law. These developments underscore the practical as well as theoretical importance of the Riesenfeld-Abbott analysis.

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31. For the five reservations, five understandings, four declarations, and one proviso to the International Covenant on Civil and Political Rights, see 138 CONG. REC. S. 4781, S. 4783 (1992).

32. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE, GENERAL COMMENT No. 24 TO RESERVATIONS MADE UPON RATIFICATION OR ACCESSION TO THE COVENANT OR THE OPTIONAL PROTOCOL THERETO, OR IN RELATION TO DECLARATIONS UNDER ARTICLE 41 OF THE COVENANT, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

33. *See* INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, HUMAN RIGHTS COMMITTEE, CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT, U.N. Doc. CCPR/C/79/Add.50, para. 14 (1995).

But if the Riesenfeld-Abbott view were to gain ascendancy over the maximalist attitude toward Senatorial prerogatives that has been solidly entrenched within the Senate itself (and in substantial segments of the academic community) for decades, the cost could be high. If the Senate cannot rest secure that conditions of its consent to treaties will be honored both domestically and internationally, the likely consequence is an even greater reluctance to approve U.S. ratification of such treaties in the future. Although it is indeed distressing that the Senate of the 1990s will only approve human rights treaties with crippling and embarrassing conditions undermining their substance, it would be even sadder to return to the status quo of the 1950s through 1980s when such treaties could not gain Senatorial approval in any form.

Reservations concerning the death penalty can provide a concrete illustration of the problem as it exists in the late 1990s. The Senate—mirroring political trends in many U.S. states and the U.S. Congress[34]—has required that U.S. instruments of ratification of human rights treaties include reservations addressed to preserving application of capital punishment under existing and future laws at the state or federal level.[35] The U.S. Supreme Court's decisions of recent years leave little or no room for arguments against the death penalty based on international human rights norms more exacting than constitutional norms, in the absence of affirmative political decisions by the appropriate legislative organs to embrace those international norms.[36] But international treaty bodies at the United Nations and regional levels have opined more than once that international human rights law may restrict certain applications of the death penalty, and that parties (or prospective or putative parties) to human rights treaties may not be completely free to tailor their international obligations in these respects. Putting to one side the view (recently embraced by some national courts) that international law has already progressed to

34. See, for example, the reintroduction of the death penalty by new legislation adopted in New York State in 1995 and the expansion of the death penalty at the federal level in 1996. 1995 N.Y. Laws 759-82; Antiterrorism & Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1258 (1996).

35. With respect to the International Covenant on Civil and Political Rights, for example, the Senate required the following reservation: "That the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below 18 years of age." *See supra* note 31.

36. *See* Thompson v. Oklahoma, 487 U.S. 815, 821-23 (1988).

the point of delegitimizing application of capital punishment in general, more modest positions find strong support in the jurisprudence of a number of international organs. Some such well-supported positions include that the death penalty must not be reintroduced in jurisdictions where it has been abolished, that it must not be applied to new crimes, and that it must never be applied to juveniles or mentally incapacitated persons.[37] If the logic of this international jurisprudence is that the U.S. reservations addressed to such points are invalid under international law, then the Riesenfeld-Abbott position would hold them invalid for U.S. domestic purposes as beyond the scope of the Senate's power to condition consent to treaties.

At the 1991 symposium, this aspect of the Riesenfeld-Abbott thesis gave rise to spirited discussion over the consequences of a finding by an international body that a U.S. reservation was invalid under international law: would the consequence be simply deletion of the reservation, or rather a negation of the Senate's approval of the treaty as a whole?[38] The decisions of international courts do not reflect a completely consistent approach to the severability question on the plane of international law, so the implications were left unresolved. Riesenfeld took the principled position that a U.S. court should be bound by any authoritative ruling of an international body, and in the absence of such a ruling should attempt to predict what such a body would decide, instead of beginning and ending with the U.S. Senate's point of view.[39]

When Riesenfeld and Abbott wrote in 1991, they correctly observed that the problem to which they directed their attention had received little attention in legal scholarship to that date. This situation, fortunately, has been changing—in no small measure due to the spur that their creative scholarship gave to the field. Riesenfeld may be gratified to know that Professor Henkin has clarified his position somewhat in the direction of Riesenfeld's approach. In the revised edition of his treatise, *Foreign Affairs and the Constitution*, issued in late 1996, Henkin comes rather closer to the Riesenfeld-Abbott point of view by criticizing the Senate's non-self-executing declarations as "'anti-Constitutional' in spirit and highly problematic as a matter of

37. In addition to the positions of international bodies cited in *supra* note 32-33, see, for example, Advisory Opinion on Restriction to the Death Penalty, Inter-American Court of Human Rights, Adv. Op. No. OC-3 (1983), Ser. A, No. 3, *reprinted in* 23 I.L.M. 320 (1984).

38. PARLIAMENTARY PARTICIPATION, *supra* note 10, at 437-440.

39. *Id.*

law."[40] More generally in the international community, the years since the Riesenfeld symposium have seen increasing attention to the problem of reservations (in their international and domestic effect) in the scholarly literature and in the circles of those concerned with treaty practice; and this important topic is now being taken up by the International Law Commission for systematic study.

IV. Conclusion

Everyone who has been privileged to study or work with Stefan Riesenfeld knows first-hand what an extraordinary career he has had. In the twenty years I have known him—coextensive with his time at Hastings but at long-distance from that academic home—he has been unstintingly generous with ideas and inspiration. With this celebratory issue, we offer our thanks and congratulations to a unique human being.

40. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 202 (2d ed. 1996); *see also id.* at 202 n. **, 477 n.100 (treating his previous position concerning the Niagara Treaty as involving "special circumstances").