

1998

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Recommended Citation

Richard M. Buxbaum and David D. Caron, *Stefan A. Riesenfeld, International Law and the University of California*, 16 BERKELEY J. INT'L LAW. 1 (1998).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol16/iss1/1>

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Stefan A. Riesenfeld, International Law and the University of California

By
Richard M. Buxbaum† and David D. Caron††

What we had intended as a tribute is now, we are saddened to say a eulogy: Stefan Riesenfeld died on February 17, 1999.

On June 8, 1998, following a springtime of celebrations, Professor Stefan Albrecht Riesenfeld reached ninety years of age. This issue of the Berkeley Journal of International Law honors Stefan Riesenfeld, his many contributions in the fields of *International and Comparative law*, and his long and treasured affiliation with the University of California.

I.

STEFAN ALBRECHT RIESENFELD

What a wonderful gift is the combination of longevity and productivity, and how much are we the beneficiaries of Stefan Albrecht Riesenfeld's possession thereof. Consider: a published output that already spans well over two-thirds of a century; a teaching record that could count the grandchildren of his first students among his current ones; public service that ranges from reform proposals of the German Civil Code in the days of the Weimar Republic through participation in the drafting of *Germany's Basic Law* in the early days of the Allied Occupation regime to our own Bankruptcy Commission's second reform effort today. And a range of interests that would put a polymath to shame—legal history, comparative law and European Community law, public international law, creditors' remedies and bankruptcy, property law, commercial law.

Steve Riesenfeld has written a storehouse of books and articles by writing first (and usually final) drafts with a pen on lined paper, bent close to the page and gnawing his knuckles. He goes to the shelves and the locked cage himself, finds everything, and remembers everything he has found, including where he found it. His research assistants—groupies, really (we both served in this capaci-

† Jackson H. Ralston Professor of International Law, University of California at Berkeley. This essay draws in part on an earlier tribute by me which appeared at 20 *HASTINGS INT'L. AND COMP. L. Q.* 527 (1997).

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ity)—learn more by following him on these rounds than they do writing drafts for other, more passive employers. Secondary citations do not substitute for primary ones, nor translations for their original versions—no matter the language.

Students remember Steve's classroom and seminar comments more clearly than those they heard at their mothers' knees. Decades after their recipients' graduation, these "aphorisms" remain the subject of heated and contradictory exegeses at well-lubricated alumni gatherings. "I can explain it to you," he would say, "but I can't understand it for you." Steve's colleagues at Boalt and Hastings, at the gatherings of the American Societies of Comparative Law and International Law, at the Max-Planck-Institute in Hamburg gather and treasure his witticisms (who can forget the Chancellor's Indiscretionary Fund). In the days when Boalt's Third-Year Class Revue was ambitious enough to put its producers in serious risk of flunking out, the bid to play Riesenfeld was fiercely contested and the results worth it (who can forget David Hayden in his Viking costume).

Stefan Albrecht Riesenfeld was born on June 8, 1908 in Breslau, Germany, one of the twin sons of an academic father. Steve states that his first memory is one of him sitting atop his father's shoulders watching as Kaiser Wilhelm astride a horse with polished armor proceeded through Breslau to dedicate a Hall celebrating the hundred year anniversary of the defeat of Napoleon. After the First World War, in which Steve's father was killed, he studied at the renowned university in Breslau, now the University of Wroclaw, Poland, which proudly fêted him on his first postwar return to his birthplace in the late 1970s. Following his state examination, he presented a doctoral dissertation on the law of mutual insurance companies, for which he received his *Dr. iur. summa cum laude* in 1930. The dissertation was published in 1932 (and it was not his first publication) in a famous series of legal texts edited by Berlin's Arthur Nussbaum.¹ During these late Weimar years Stefan Riesenfeld practiced with a Berlin commercial firm and became a research associate of the famous Kaiser-Wilhelm Institute, founded by Ernst Rabel. Both mentors were able to emigrate in time, Nussbaum to Columbia and Rabel to Michigan, though neither regained the position or respect they commanded in those earlier years; in that context, their age worked against them as Steve's worked for him.

It was during an academic stint at Milano, where he earned the *Dott. in giur.* in 1934, that Steve would have the chance meeting that would lead him to his distinguished career at Boalt Hall. While studying in Milano, Riesenfeld met Boalt Hall's famous comparativist Max Radin, who, conversing with Steve in German, mentioned that the then-Dean of Boalt Hall, Edwin Dickinson, was looking for a research associate who could work in German, Italian and French. In due course, Steve received an invitation from Dickinson to work with him in California, an invitation the onset of the Third Reich regime the year before

1. STEFAN A. RIESENFELD, *DAS PROBLEM DES GEMISCHTEN RECHTSVERHÄLTNISSES IM KÖRPERSCHAFTSRECHT UNTER BESONDERER BERÜCKSICHTIGUNG DER VERSICHERUNGSVEREINE AUF GEGENSEITIGKEIT* (1932).

made easy to accept. Needless to say, Dickinson was surprised to learn on Riesenfeld's arrival that he did not speak English! Radin, speaking in German, had never mentioned *that* language. Undaunted, and young and energetic enough to wave aside the obvious handicaps, Stefan Riesenfeld asked for and received permission to enroll at Boalt while earning his living in comparative legal research, and graduated in 1937 with distinction as a member of a distinguished class, one which includes his lifelong friend and colleague, Richard W. Jennings. Both delight in recalling the comment of their distinguished teacher and later colleague, Barbara Nachtrieb Armstrong, who, advised by Steve of his desire to become a law professor, exclaimed, "That's ridiculous, Mr. Riesenfeld, you don't know any English and you don't know any law!" That Heratian lapse did not spoil the close relationship they had over the many decades during which she was proved wrong.

Then followed graduate study at Harvard, leading to the J.S.D. in 1940, a major book on fisheries regimes in public international law,² and a beginning on an academic career at the University of Minnesota, where Stefan Riesenfeld taught law while simultaneously earning an undergraduate degree in engineering. Voluntary enlistment in the U.S. Navy and an extended tour of duty on an LST in the South Pacific were the source of some of Steve's choicest anecdotes; and why not, with a Harvard Law graduate as the vessel's commander.

On his return to teaching in Minnesota in 1946, Steve met and married the indomitable Phyllis Thorgrimson, whose Icelandic heritage and excellent choice of grandparents well prepared her for life with a husband who would never be mistaken for a bank clerk. They have two sons, Peter and Stefan, both scientists, three grandchildren, and a warm and inviting house, whose giant mutant indoor rubber trees and luxuriant garden, both tended by Steve, have always welcomed their visitors.

In 1952 Stefan Riesenfeld accepted a call to Boalt Hall and the rest is California history. From 1952 until 1976, when he suffered mandatory retirement at Boalt, Steve flourished at Berkeley and Berkeley flourished with him. After 1976, Steve took it upon himself to redefine the word "retirement." He was promptly appointed to the Hastings faculty and has enjoyed continuous annual re-appointments at Boalt to this day. Moreover, he immediately took up the post of Counselor for Public International Law at the U.S. Department of State where he served for most of President Carter's administration. He continues to work with the Department and twice has been engaged to argue major cases before the International Court of Justice in the Hague.³

2. STEFAN A. RIESENFELD, *PROTECTION OF COASTAL FISHERIES UNDER INTERNATIONAL LAW* (1942).

3. *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Oct. 12); *Military and Paramilitary Activities* (Nicar. v. U.S.), 1984 I.C.J. 392 (Nov. 26). Professor Riesenfeld was also an active consultant in *Electronica Sicula S.P.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15 (July 20) and many of the intergovernmental disputes before the Iran - United States Claims Tribunal.

II.

THE LAW SCHOOLS OF THE UNIVERSITY OF CALIFORNIA AND THE
CONTRIBUTIONS TO THIS SYMPOSIUM

One should recall that when Steve Riesenfeld arrived in Berkeley in 1935, the study of law was — relative to what he had experienced in Germany and Italy — a very recent addition to the University of California and the state. The University of California was established in 1868 at what would later be known as the Berkeley campus. Although courses in law were offered there as early as 1882, the honor of being the first Law School of the University of California goes to The Hastings College of the Law, which was established in San Francisco in 1878. Thus in 1935, the Hastings College of the Law was approximately sixty years old, while the then School of Jurisprudence at Berkeley was approximately forty. Steve Riesenfeld's association with the University of California has at this point lasted longer, and coincided with the University's emergence as the preeminent public university. It is said that when Clark Kerr pronounced the era of the "Multiversity," Steve Riesenfeld commented that the *universe* always had been enough for him. Even if the number of universes would remain the same, there would be more campuses and law schools for the University of California. The Law School at the University of California at Los Angeles welcomed its first class in the fall of 1949, while the Law School at the University of California at Davis first class entered in the fall of 1965. And today the University of California is undertaking the construction of its tenth campus. Stefan Riesenfeld's long affair with the University of California makes it thus particularly appropriate that this *Festschrift* should represent the international law faculty of all four of the law schools of the University of California.

It is likewise appropriate that the five articles contained in this *Festschrift* address questions and issues that have preoccupied and fascinated Stefan Riesenfeld over his academic career. These are in the order of their appearance: The legal order managing fisheries, the treaty power of the United States, the law of sovereign immunity, the presumption of extraterritoriality and the interpretive function played by international norms, and separation of powers questions between the President and Congress.

A. *International Law and the Management of Fisheries*

Professor Harry N. Scheiber, The University of California at Berkeley
Christopher J. Carr, The University of California at Berkeley

As touched on already, Stefan Riesenfeld was a central contributor in this century to our understanding of the legal principles guiding the management of fisheries⁴ and the international legal order of the oceans generally.⁵ As a young

4. See *supra* note 2.

5. Stefan Riesenfeld, *The Third United Nations Conference on the Law of the Sea: What was Accomplished?* 46 *LAW & CONTEMP. PROB.* 5 (1983); *THE DEVELOPING ORDER OF THE OCEANS: PROCEEDINGS OF THE LAW OF THE SEA INSTITUTE EIGHTEENTH ANNUAL CONFERENCE* (1985) (co-editor with R.B. Krueger); Stefan Riesenfeld, *Pacific Ocean Resources: The New Regionalism and*

man he attended the 1930 League of Nations Conference on the Law of the Sea in the Hague. Later in the 1970s and early 1980s, he would be a member of the U.S. delegation to the *Third* United Nations Conference on the Law of the Sea (UNCLOS III) and in 1984 a member of the legal team representing the United States in the Gulf of Maine case between Canada and the U.S. before the International Court of Justice. In between the League and UNCLOS III, Professor Riesenfeld wrote his great treatise, *The Protection of Coastal Fisheries under International Law*.⁶ Of this work, Professor Harry N. Scheiber writes that “while its author [in 1942] was entering the U.S. Navy to serve as an enlisted man in combat areas, the treatise appeared in print and was quickly recognized as one of the landmarks of the twentieth century in the literature of international law.”⁷

It is particularly appropriate that Professor Scheiber should contribute on this subject. Professor Scheiber, in addition to holding the Stefan A. Riesenfeld Chair at Boalt Hall, is the leading legal historian and scholar of contemporary ocean issues. Professor Scheiber both understands the crucial role that Stefan Riesenfeld has played in this century and contributes himself to the development of sound policy as did Professor Riesenfeld. Christopher Carr is a doctoral candidate in the Jurisprudence and Social Policy Program at the School of Law at Berkeley. He has co-authored this article with Professor Scheiber. Currently, they are collaborating on a history of the Magnuson Fishery Conservation and Management Act. The Scheiber and Carr contribution weaves together in historical perspective the legal, economic and scientific debates that explain the evolution of fisheries management over the middle half of this century. Amidst the collapse of fisheries stocks around the world, Professor Scheiber’s contribution illuminates the beliefs and debates that underlay the regimes that led to today’s problematique.

B. *The Treaty Power of the United States*

Professor Phillip Trimble, The University of California at Los Angeles

The California Law Review was established in 1912, and Steve Riesenfeld is the only person to publish in the 25th, 50th and 75th anniversary issues of the journal.⁸ One of his contributions to the 75th volume of the California Law

the Global System, 16 *ECOLOGY L. Q.* 355 (1989); STEFAN RIESENFELD, *INTERNATIONAL AND MARITIME LAW* (Supplementary materials) (1960).

6. For a discussion placing this work in the context of debates then existing, see Harry N. Scheiber & Christopher Carr, *From Extended Jurisdiction to the Privatization Movement: International Law, Biology, and Economics in the Marine Fisheries Debates, 1937 – 1976*, 16 *BERKELEY J. INT’L L.* , n.1 (1998).

7. *Id.* at

8. See Stefan A. Riesenfeld, *The Power of Congress and the President in International Relations: Three Recent Supreme Court Decisions*, 25 *CAL. L. REV.* 643 (1937); Stefan A. Riesenfeld, *Antitrust Laws in the European Economic Community*, 50 *CAL. L. REV.* 459 (1962); Stefan A. Riesenfeld, *Antitrust Laws in the European Economic Community: A Sequel*, 50 *CAL. L. REV.* 829 (1962); Stefan A. Riesenfeld, *Classification of Claims and Interests in Chapter 11 and 13 Cases*, 75 *CAL. L. REV.* 391 (1987); Stefan A. Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 75 *CAL. L. REV.* 405 (1987).

Review “revisits” the subject of his contribution to the 25th volume: The Power of Congress and the President in International Relations. An important part of this division of power concerns the process by which the United States assumes an international obligation and the place of that obligation in the U.S. legal system. Over his career, Steve made particularly influential contributions to our understanding of the doctrine of “self executing” treaties in the U.S. and abroad.⁹ The relationship between the President and the Senate over the conclusion and ratification of treaties has been troublesome throughout the history of this country. Nonetheless, this relationship over the last several decades has been particularly strained and Professor Riesenfeld in his recent writings has addressed some of these developments.¹⁰

Professor Trimble first explored his academic instincts by teaching legal research and writing at Boalt immediately after graduating from law school. There he first encountered Steve and another significant mentor, the senior author of this introduction, and set his distant course toward academia. Years later, as a senior lawyer at the State Department he re-encountered Steve and saw first-hand the incredible depth of knowledge and wisdom that Steve brought to a breathtaking variety of international legal problems. The wise mentoring of Dick, Steve and other Boalt colleagues then guided Trimble back to the University of California where he has since built on what he learned from them, including most recently the article that appears in this volume.

C. Sovereign Immunity

Professor Naomi Roht-Arriaza, Hastings College of the Law

Professor Riesenfeld’s work on sovereign immunity also spans his entire academic career. In 1940, Professor Riesenfeld published a masterful study of the sovereign immunity of vessels.¹¹ Later, while Counselor on Public International Law with the U.S. Department of State, Steve would play the crucial role in the Amicus brief for the United States submitted in support of jurisdiction in the *Filartiga*¹² litigation, a decision widely viewed as launching the revival of the Alien Tort Statute and human rights litigation generally. A decade later, Riesenfeld advised counsel for Amerada Hess in their action against the Republic of Argentina for their destruction of the vessel *Amerada Hess* during the

9. Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT’L L. 548 (1971); Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and Community Law: A Pioneer Decision of the Court of Justice of the European Community*, 67 AM. J. INT’L L. 504 (1973); Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and U.S. v. Postal: Win at Any Price?* 74 AM. J. INT’L L. 892 (1980).

10. Stefan Riesenfeld, *The Powers of Congress and the President in International Relations: Revisited*, 75 CAL. L. REV. 405 (1987); Stefan 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); PARLIAMENTARY PARTICIPATION IN THE MAKING AND OPERATION OF TREATIES: A COMPARATIVE STUDY (Stefan Riesenfeld & Frederick M. Abbott, eds., 1994).

11. Stefan Riesenfeld, *Sovereign Immunity of Foreign Vessels in Anglo-American Law: The Evolution of a Legal Doctrine*, 25 MINN. L. REV. 1 (1940).

12. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

Falklands war.¹³ The central issue in this famous case was again sovereign immunity.

Professor Naomi Roht-Arriaza of Hastings College of the Law, the University of California, like our previous contributors, is a particularly appropriate scholar to comment on recent developments in the field. Professor Roht-Arriaza was a student of Stefan Riesenfeld while she studied at Berkeley and following her clerkship with Judge Browning of the Ninth Circuit she served as the first Riesenfeld Fellow in International Law and Organization at Berkeley. While a student, she followed the rise of *Amerada Hess* case through the U.S. courts and wrote with two fellow students the first and, in our opinion, most persuasive article favoring an implied waiver of sovereign immunity in the case of violations of jus cogens norms.¹⁴ That she could discuss the article with Professor Riesenfeld was undoubtedly of some import.

Professor Roht-Arriaza's article in this collection addresses recent Congressional actions that accomplish in part what she thought was appropriate through judicial interpretation of the Foreign Sovereign Immunity Act.¹⁵ "While the courts have been almost universally reluctant to allow jurisdiction over these cases, Congress has recently proven more responsive."¹⁶ Her article traces these Congressional actions and further measures that remain pending. She emphasizes that Congress's piece-by-piece actions limiting immunity in certain instances should be seen as incomplete and incoherent steps toward the rule supported by Professor Riesenfeld in the *Amerada Hess* case and by her in her important 1989 article.

D. *The Presumption Against Extraterritoriality*

Professor William Dodge, Hastings College of the Law

Stefan Riesenfeld's work has also extended to the areas of the act of state doctrine and to antitrust, and one cannot cross into these fields without encountering the judicial presumption that Congress, if silent, should not be taken to have intended extraterritorial effect to its legislation. Professor William Dodge, who joined the Hastings faculty in 1995, is one of the more recent of Professor Riesenfeld's colleagues within the University of California focusing upon international law. In this brief time at Hastings, Professor Dodge has written prolifically on the knotty problems which arise in the allocation of legislative and judicial jurisdiction between states. In this article, he provides an understanding of extraterritoriality that incorporates the changing international understanding of the normal jurisdictional reach of any state.

13. See *Argentine Republic v. Amerada Hess Shipping Corporation, et al.*, 488 U.S. 428, 109 S.Ct. 683 (1989).

14. Belsky, Merva and Roht-Arriaza, *Implied Waiver under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 CAL. L. REV. 365 (1989).

15. Naomi Roht-Arriaza, *The Foreign Sovereign Immunities Act and Human Rights Violations: One Step Forward, Two Steps Back?* 16 BERKELEY J. INT'L L. 71 (1998).

16. *Id.*

In teaching the general course in International Law, Professor Riesenfeld utilizes the British case captioned *Trendex Trading Corp. vs Central Bank of Nigeria*.¹⁷ Lord Denning, in that case, stresses that in order for international customary law to be a part of the common law of the United Kingdom, these customs must stand apart from the normal rules of precedent, and any changes in these customs on the international level must also occur automatically within the U.K. legal system. Because the role of custom in U.S. law is taken from the British, Professor Riesenfeld contends that the incorporation school of thought preferred by Denning is appropriate in the U.S. legal system. Professor Dodge's thesis, that the meaning of the presumption against extraterritoriality should likewise follow the shifting view of international law, is congruent with this view. From that starting point, Professor Dodge's careful scholarship details the shift in the presumption from one focused on territoriality to one based on effects.

E. The Powers of the President and Congress

Professor Michael Glennon, The University of California at Davis

As mentioned in the case of Professor Trimble's contribution on the subject of the treaty power of the United States, Steve Riesenfeld has been long fascinated and concerned with the roles of Congress and the President in international relations. The University of California is fortunate to have within its combined law faculties the leading scholars in the nation on the broad range of issues involved in these relationships. Professor Michael Glennon, along with Phillip Trimble, is such a scholar. Like Professor Trimble, Michael Glennon found a friend and an advisor in Stefan Riesenfeld. When Professor Glennon began serving as counsel to the Senate Foreign Relations Committee, Steve was working as Counselor at the Department of State. A long-lasting friendship soon developed as the two worked together on numerous treaty issues, particularly the Panama Canal Treaty.

The separation of powers between Congress and the President often comes down to matters that may seem, when viewed in isolation from one another, somewhat unimportant. But together these matters add up to form the walls of institutional separation. A key part of this separation is the desire to gain or to deny access to information, and it is to a recent incident in this respect that Professor Glennon turns his discerning eye.

III.

CONCLUSION

At the age of ninety, Professor Riesenfeld can be found in Boalt Hall at all hours doing that which has always fascinated him. Between his teaching at both Hastings College of the Law and Boalt Hall, Steve spends more time in the classroom than virtually any of his colleagues. He continues to be a part of the

17. [1977] 1 Q.B. 529, (Eng. C.A.).

University of California, of Berkeley, and an important contributor to the fields of international law and comparative law. This is not Steve's first *Festschrift*¹⁸ and we trust it will not be his last.

18. Tribute, *Stefan A. Riesenfeld*, 63 CAL. L. REV. 1381 (1975); IUS INTERNATIONES: FESTSCHRIFT FÜR STEFAN RIESENFELD (E. Jayme et al. eds., 1983); Mary Kay Kane, *In Tribute*, 20 HASTINGS INT'L & COMP. L. REV. 525 (1997). See also the collective tribute including Professor Riesenfeld in *U.S. Law in an Era of Democratization*, 38 AM. J. COMP. L. i (Supp. 1990), and his role as both subject and author in *DER EINFLUSS DEUTSCHER EMIGRANTEN AUF DIE RECHTSENTWICKLUNG IN USA UND DEUTSCHLAND* (1994). And from an earlier day, see his starring role in Eugene B. Morosoli, Book Review, 43 CAL. L. REV. 369, 373 (1955) (cartoon).