

RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

BOOK REVIEWS

The American Society of International Law's First Century: 1906–2006. By Frederic L. Kirgis. Leiden, Boston: Martinus Nijhoff, 2006. Pp. xxviii, 632. \$146.

From the late 1890s until 1916, a small group dedicated to the peaceful settlement of international disputes met annually at the Lake Mohonk Mountain House in Ulster County, New York. The group shared the vision of establishing a permanent institution that would apply legal principles to resolve international disputes. During the 1905 Lake Mohonk Conference, the participants were asked to move beyond rhetoric and take meaningful measures to promote peace and justice through international arbitration. Among those who rose to the challenge were George W. Kirchwey, dean of the Columbia University School of Law; Dr. James Brown Scott, a law professor and later the solicitor of the U.S. Department of State; and Robert Lansing, later the U.S. secretary of state. Others, including U.S. secretary of state Elihu Root, Oscar S. Straus, who in 1906 became the U.S. secretary of commerce and labor, and industrialist Andrew Carnegie, joined in the undertaking.

The efforts of these men of considerable stature led in 1906 to the founding of the American Society of International Law (ASIL). The Society's objectives were "to foster the study of International Law and promote the establishment of international relations on the basis of law and justice."¹ The Society planned to engage in two principal activities. First, it would host an annual

meeting for the presentation and discussion of substantive papers. The first Annual Meeting was held in April 1907 at the New Willard Hotel in Washington, D.C. President Theodore Roosevelt invited attendees to a reception at the White House. Subsequent early Annual Meetings followed a similar pattern. Second, the Society would publish a journal on a quarterly basis. In addition to contributing to the development of international law, the *American Journal of International Law* would allow those unable to travel to Washington for the Annual Meeting to learn about international issues. The founders believed the *Journal* would inform the nation's community leaders about the benefits of international law. The community leaders, in turn, would spread the word throughout the land.

The Society's transformation over one hundred years from an elite, exclusively male institution with a focus on the lofty goal of world peace into an open scholarly society of women and men from around the world is examined in Professor Frederic L. Kirgis's *The American Society of International Law's First Century: 1906–2006*. Kirgis, the Law Alumni Association Professor, Emeritus, at Washington and Lee University School of Law and the ASIL secretary since 1994, has documented the Society's history in rich detail and in a readable, engaging manner.

One would expect the Society's history to be mundane and boring. Indeed, how could the history of a group that now includes many law professors be stimulating? Kirgis holds the reader's

his philosophy: "The more clearly the people of a country understand their own international rights the less likely they are to take extreme and extravagant views of their rights and the less likely they are to be ready to fight for something to which they are not really entitled." Elihu Root, *The Need of Popular Understanding of International Law*, 1 AJIL 1, 2 (1907).

¹ 1 ASIL PROC. 5 (1907). In the first article in the first issue of the Society's *American Journal of International Law*, the Society's first president, Elihu Root, described

attention by offering more than an account of an institution. *First Century* is about Society leaders and members, many of whom stood at the forefront in shaping international law and advocating adherence to it. Further, *First Century* recounts the development of international law over a century that underwent numerous and profound challenges to the founders' belief that constructing international institutions and promoting an understanding of international affairs and law would lead to world peace.

The most notable strength of *First Century* is its presentation of the Society's history in the broader context of world affairs. This development is not accidental. It reflects the relevance of the Society and its members both to international law and to other societal concerns. It is also a testament to Kirgis's solid understanding of international law and history. He adeptly avoided cluttering the work with boring minutiae. Yet certain details, even about the Society's governance and financial issues, are instructive. His discussions of reform of the Society's leadership structure to avoid the entrenchment of officers, ASIL fund-raising efforts, including grant proposals, and the chartering of the Society by the U.S. Congress draw in broader issues relating to the management of an institution with a relatively prominent public profile.

Kirgis's history of the Society is based on substantial research conducted over many years. He reviewed minutes, reports, and board books of the Society's Executive Council, ASIL memoranda, director reports, *ASIL Proceedings*, and *ASIL Newsletters*. He also focused on administrative aspects of the *Journal* and substantive issues examined in *Journal* articles. He interviewed Society presidents and executive directors, current and former. He read published works about and written by Society leaders. He worked with the staff at ASIL headquarters, Tillar House, to gather and review relevant files. By means of this research, coupled with his sense of perspective, Kirgis effectively recreated key events in the Society's history.

As Kirgis notes, those events involve recurring themes. In many instances, the focus and intensity of these themes reach well beyond the Society. The first theme involves the Society's role in promot-

ing adherence to international law. Elihu Root, in his opening address at the 1915 Annual Meeting, deplored the absence of adherence to law among European nations. According to Root, one nation's failure to follow international law did not justify other nations' challenges to the relevance of international law. Kirgis reminds the reader that the arguments Root made shortly before the engagement of the United States in World War I have currency today, as the world struggles to deal with nonstate actors.

A second theme that permeates *First Century* involves the Society's relationship to the world beyond the United States. ASIL founders believed that U.S. involvement in international dispute resolution would lead to just results. As Kirgis describes it, the attitude reflected an "essentially American" approach to peace. The American legalist Joseph Choate referred to "the American doctrine," which accepted "that peace is and shall be the normal condition of mankind, and that war is only an occasional incident interrupting and disturbing it" (pp. 3–4).² "European power politics," in the minds of Society founders, were tantamount to war (p. 1). In conformity with the focus on the U.S. perspective, the Society's early Annual Meetings steered toward domestic issues. Root's opening address at the first Annual Meeting examined U.S. federal treaty authority. Today, U.S. foreign relations law still receives considerable attention at the Annual Meeting and in the *Journal*.³

Throughout its existence, however, the Society has not defined itself solely in American terms. The logical consequence of Root's belief that knowledge would lead to peace is the need for a forum to air the views of the world's diverse people. The Society has clearly helped foster such dialogue. In its early days, the Society established the

² Quoting JOSEPH H. CHOATE, THE TWO HAGUE CONFERENCES 33 (1913).

³ See, e.g., Lori Fisler Damrosch, *The "American" and the "International" in the American Journal of International Law*, 100 AJIL 2, 7 (2006) (the current co-editor in chief notes the focus of the *Journal* on U.S. foreign relations law, explaining that "[i]t is part of our mission as an American journal to hold up U.S. practices to informed debate in the discourse of international law").

practice of recognizing honorary foreign members. For a limited time, from 1912 to 1922, it also published the *Journal* in Spanish as the *Revista americana de derecho internacional*, and distributed it without cost to ministries of foreign affairs. In addition, foreign diplomats occasionally spoke at the Annual Meeting and a Ford Foundation grant enabled visitors from Cuba, Japan, Pakistan, and Taiwan to attend fiftieth-anniversary events in 1956.

Nevertheless, as *First Century* relates, the Society made its most meaningful contribution to engagement with the outside world during its second fifty years. Beginning in the 1960s when H. C. L. (Chris) Merillat served as the first executive director, the ASIL developed a more structured and substantive outward focus, one that continues today. The Consultative Committee on Expanded Program had established the Society's first program and research agenda. Included among the proposals were plans to distribute the *Journal* to foreign libraries and institutions and to build relations with foreign societies. The Society received forty thousand dollars from the Carnegie Corporation and the support of corporations and individuals for the Consultative Committee's aggressive agenda. The agenda viewed international law as also including international investment and economic law. In 1961 the Society secured its first substantial, long-term grant, five hundred thousand dollars, from the Ford Foundation. Merillat's outreach effort included the development of the monthly newsletter and *International Legal Materials*. Under his watch, the Society cosponsored a seminar on federations with legal scholars from Africa, Asia, and the United States. Research conducted under the Society's auspices led to publications involving foreign enterprise in India and studies on the Socialist Commonwealth of Nations, East African unity, and the Middle Eastern federations. And Merillat organized two sessions in which legal advisers from a variety of nations commented on their role in foreign affairs. Lawyers from regional organizations also participated in the second meeting.

Merillat launched many important initiatives that involved a broad constituency and a range of issues. New scholars and researchers, including

political scientists and economists, were brought within the Society's ambit. His successor, Stephen Schwebel, who later became president of the International Court of Justice (ICJ), continued the agenda on research and scholarship. Further, under Schwebel's leadership, the Society expanded the base of its foreign contacts by hosting the Philip C. Jessup International Law Moot Court Competition.

From Schwebel through Dr. Charlotte Ku, the Society's executive director at the end of the first century, the Society expanded its outreach abroad. Under the leadership of ASIL president Peter Trooboff (1990–1992), in particular, the Society established collaborative projects with foreign societies, including the Netherlands Society of International Law, the Japanese Association of International Law, and the Canadian Council on International Law. Continuing in the 1990s, Presidents Edith Brown Weiss, Charles Brower, and Thomas Franck, and in the early twenty-first century, James Carter and José Alvarez expanded on these initiatives, leading to other collaborative events with the Australian and New Zealand Society of International Law, the Indian Society of International Law, and more recently the European Society of International Law.

This engagement with lawyers and scholars from outside the United States reflects the Society's focus on "international" law, not just the American understanding of that law. The development evidences a maturing view of international law, one far removed from the arguably provincial perspective that drove the Society's founders. As a result, today more than 30 percent of the Society's roughly four thousand members either are not Americans or live outside the United States. Foreign lawyers sit on the Society's Executive Council, serve on the Board of Editors of the *Journal*, and regularly participate in the Annual Meeting and the Society's interest groups.

The third theme of *First Century*, the Society's relationship to U.S. foreign policy, may appear to contrast with the previous theme, the Society's engagement with the world beyond the United States. Yet in the early years and even through World War II, ASIL leaders shaped U.S. foreign policy at the highest level. The names alone, Elihu

Root, William Howard Taft, and Charles Evans Hughes, tell the story. In fact, Cordell Hull was ASIL president from 1939 to 1942 when he was also secretary of state. Both Root and Hull were recipients of the Nobel Peace Prize. As Kirgis reminds the reader, all the presidents of the Society from its inception until 1942 had served as secretary of state, except for Scott. The major contributions of these leaders to U.S. foreign policy, however, were made in their public capacities, not necessarily as Society officers.

In recent times, prominent public figures have not been active ASIL leaders, although some U.S. government officials are members and they and other leading officials, including the secretary of state and various Supreme Court justices, have participated in recent Annual Meetings. One notable exception is Justice Sandra Day O'Connor, who from 1999 until 2005 chaired the Society's Advisory Board of the Judicial Outreach Program and did so in a very hands-on manner. The outreach to the judiciary, in terms of training and education on international law, began in earnest under Professor Franck's presidency. It gathered momentum under successor presidents and continued under the leadership of President Alvarez with a new chair, Justice Ruth Bader Ginsburg.

Kirgis touches on the lack of distinguished, high-ranking U.S. officials in today's ASIL leadership in contrast to the earlier years. While not directly dwelling on the leaders' status, he covers the ground in his assessment of the Society's influence. Is the perceived lack of influence a measure of how far the Society or international law is removed from political reality? World War I dealt a serious blow to the American peace movement that had inspired the Society's founding. The U.S. rejection of the League of Nations and refusal to join the Statute of the Permanent Court of International Justice further weakened the movement. Whatever traces remained may have been extinguished by World War II. Did the Society make mistakes along the way by not asserting itself and the values of international law more aggressively? In 1945 President Frederic R. Coudert, the first private sector lawyer to lead the ASIL, submitted a request to the State Department that the Society

be given consultant status at the San Francisco Conference. Kirgis dissects the process that led to the request and its eventual rejection, which cost the Society the opportunity to have an official role in the founding of the United Nations. The request, it seems, came too late. Kirgis also considers the Society's general practice of not taking stands on international law issues, as it arose quite often in the first one hundred years. Silence on critical questions kept the Society from being associated with reform on many important public issues, even though individual Society members were actively involved in these issues in their private or other capacities.

Kirgis's analysis of the Society's effect on the United States and international law permeates the work. In the concluding chapter, he assesses the success of the Society in meeting its dual objectives, to "foster the study of International Law" and to "promote the establishment of international relations on the basis of law and justice." In his view, the early failures to establish justice and peace through international institutions meant that the Society's resources were best devoted to the educational function. That, in turn, made the Society more of a scholarly institution. The fact that Scott, an academic with apparently endless energy and time to handle Society matters, assumed the presidency after Root and Hughes, was perhaps another reason for the emphasis on the study of international law. And so it was for many years, particularly through the two world wars and shortly thereafter. The eras of Manley O. Hudson, Philip C. Jessup, and Myres S. McDougal were defined by their fairly intense academic focus.

Since the 1960s, the Society has attempted to regain ground, to make the voice of international law heard, through concentrated and deliberate efforts. President Louis Henkin in 1992 attempted to resurrect the founders' vision by actively engaging the Society in establishing the relevance of international law in the United States. Other presidents, including Thomas Franck, Arthur Rovine, and Anne-Marie Slaughter, specifically identified their terms with outreach to the judiciary, the media, and Congress.

Not lost in the focus on the institution and law is Kirgis's development of the Society's human side. He writes of tears streaming down Root's face at the Annual Meeting dinner in 1914, held shortly after U.S. troops invaded Vera Cruz, Mexico. Tears aside, Root remained loyal to his country and proposed a toast to the U.S. president while the orchestra played the national anthem. An amusing account involves Taft, a Society vice president. The minutes of the Executive Committee of December 12, 1908, noted "the probable vacancy in the office of the vice president caused by the election of Mr. Taft to the Presidency of the United States" (p. 24). According to Kirgis, after this statement, business continued "as usual" (*id.*). Today, if an ASIL officer or even a member were elected U.S. president, there would be considerable fanfare. No doubt, the blogs would have dissected the Society and the candidate's involvement in it to no end.

Or, again on the human side, consider how Hudson, a young professor at the University of Missouri, introduced himself to the Society in 1917. He wrote seeking membership and stated, "I am professor of law here, and have done some work in both public and private International Law" (p. 73). Jessup, as a student at Columbia University School of Law in 1922, sent Scott his first writing on international law. In the accompanying handwritten letter (a copy is included in *First Century*) (p. 266), he admitted that the manuscript "reeks of 'first effort,'" yet was submitting it for publication in the *Journal* on the basis of "nothing ventured, nothing gained" (*id.*). As it happened, the piece was rejected. Professor Hudson's account and Jessup's letter bring to mind the heartfelt remarks of ICJ president Rosalyn Higgins near the end of her keynote address at the Centennial Annual Meeting in 2006. As Judge Higgins poignantly noted:

The reaching out of this Society to a young English woman learning the tools of her trade, and the warmth and consistency over the years of the friendship extended, has given me a home and a base in the United States. I have never felt an "outsider" in this

Society, nor, because of that, in the fellowship of international law in this country.⁴

The Society has touched and affected many people in many ways, as Kirgis reveals and as many of us know.

Kirgis finds a markedly humorous element in the human side, even when serious matters were at stake. At the Annual Meeting of 1984, then U.S. permanent representative to the United Nations Jeane J. Kirkpatrick spoke at a luncheon sponsored by the ASIL and the ABA Section of International Law and Practice. She delivered her remarks shortly after the United States filed its withdrawal of consent to ICJ jurisdiction as to cases involving Central America. Society president Covey Oliver, who sat with Dr. Kirkpatrick at the luncheon, observed that "the atmosphere and the soup were chilly" (p. 405).

On a more somber note, the ASIL leaders elected not to hold Annual Meetings after the United States entered World War I and conducted at least an abbreviated meeting in 1942, followed by full meetings during the rest of World War II. The gravity of wartime emerges from the book. Due to the press of the first war, lawyers and government officials could not dedicate time to Society matters. Yet, as Kirgis reveals, the decision not to have a public airing of international law during World War I also reflected some sense that the Society would be ridiculed for talking about the connection of international law to justice and peace. Instead, it issued a statement about its commitment to international law. During World War II, however, the Society did not remain silent. As George A. Finch wrote, "it was felt to be more in consonance with the Society's purposes to meet and publicly discuss problems of international law arising out of the war."⁵ Even before the United States entered World War II, the *Journal* was steps ahead of the U.S. leadership in understanding the situation in Germany. In the issue of January 1939, James Wilford Garner published an account of the Nazi purge of German academics. Seventeen of the twenty-four purged professors of

⁴ Rosalyn Higgins, *Keynote Address: "A Just World Under Law,"* 100 ASIL PROC. 387, 395 (2006).

⁵ George A. Finch, *The American Society of International Law, 1906-1956*, 50 AJIL 293, 311 (1956).

international law were dismissed or retired on the grounds that they were “non-Aryans.”⁶ Some of the purged academics came to the United States and became luminaries in the law, including Hans Kelsen and Arthur Nussbaum.

First Century devotes considerable attention to the role of women in the Society. In the early days, membership was reserved to “any man of good moral character, interested in the objects of the Society” (p. 12).⁷ Early members were all men, mainly “lawyers with diplomatic experience and legal academics,” as Kirgis reminds us (p. 13). Women were first admitted to membership in 1920, even though Mary Elizabeth Urch, dean of women at Lewiston State Normal School in Idaho, had managed to gain a slot on the 1907 and 1908 membership rolls.⁸ Even after women were admitted as members, the Society leadership remained predominantly male until 1923, when Judge Kathryn Sellers was elected to the Executive Council. It was not until 1966 that a woman, Alona E. Evans, became a member of the Board of Editors of the *Journal*. Evans was also the Society’s first woman president. She assumed the post in 1980, although her tenure was cut short by her untimely death.

The Society and the *Journal* frequently held meetings at the Cosmos Club, a male-only membership club that prohibited women guests from entering through the front door. In the early 1970s, Marilou Righini, editor of *International Legal Materials*, and James Nafziger, then the Society’s administrative director, challenged the prohibition by walking through the front door. The

Society’s executive director, Stephen Schwebel, a Cosmos Club member, sponsored a motion calling on the club to change its bylaws to nullify the prohibition, which was approved. Ultimately, after the Society voted to refuse to meet at institutions whose membership policies discriminated on the basis of sex, the Cosmos Club admitted women as members. The reason for the club’s change in policy is not clear. Nevertheless, the story was worth telling in *First Century* and worth repeating here, as it is a window into the not-too-distant past and a reminder of the Society’s sometimes closed, removed approach to its work. It also sheds light on the willingness of ASIL leaders to take on the Washington, D.C. establishment.

Today’s Society has come a long way from its elitist, exclusively male roots, as Kirgis demonstrates. And the world has changed dramatically since the founders gathered at Lake Mohonk in 1905. The United Nations and a world trading system emerged from the ashes of the two world wars. Regional systems developed in Europe, the Americas, Asia, and Africa. Nations have engaged in a series of bilateral and multilateral relationships. The ICJ and other international courts and tribunals routinely sit in judgment on international matters and they apply international law to the disputes. The nation-state is still the focus of world governance, but individuals and nongovernmental organizations and their respective rights and interests shape the international law landscape. In addition to the increased number of institutions and the broadening of the focus of international law over the past century the world has witnessed an abundance of dialogue on and analysis of international law. Law schools and faculties around the globe now regularly offer international law in their curricula. Regions and nations have their own international law societies. People readily travel far and wide to the many conferences and meetings held annually on international law. With a click of the “send” button, they can have a dialogue with foreign colleagues. Journals, newspapers, and Internet blogs cover international law just as they cover municipal law.

Further, matters of a nation’s governance are not as simple as they once were. Secretaries of state and other high-ranking officials have little spare

⁶ James Wilford Garner, *The Nazi Proscription of German Professors of International Law*, 33 AJIL 112, 114 (1939).

⁷ Quoting ASIL Executive Council, *Précis of the First Meeting* at 3 (Jan. 29, 1906).

⁸ Kirgis draws on the work of Alona Evans and Carol Per Lee Plumb in examining the early history of women in the Society. See Alona E. Evans & Carol Per Lee Plumb, *Women and the American Society of International Law*, 68 AJIL 290 (1974). It is not clear why women were banned. Evans and Plumb dispel the notion that the term “men” was used generically, as Philip Jessup would later claim. They note: “it is difficult to avoid the conclusion that there was, if not a prejudice against, then a cognizable social bar to women at that time in an organization such as the Society.” *Id.* at 291.

time, let alone time to serve as officers of a non-profit organization. Arranging for them to speak at the Annual Meeting for even an hour is a substantial undertaking in itself, yet one the Society has recently performed with great success. The Secret Service could not have handled the appearance of all sixteen hundred attendees at the Centennial Annual Meeting for a reception with the U.S. president if, indeed, he had even considered renewing the tradition of hosting a reception at the White House. Society members, for their part, during the same meeting, showed their commitment to international law by considering, and ultimately taking the unusual step of supporting, a resolution that, while not mentioning the United States, was aimed at criticizing its stance in the Iraq war and its treatment of detainees.

First Century is necessary reading both for Society members and for others who want a more nuanced understanding of the forces and people that shaped international law during its formative years in the United States. An appreciation of that history will better equip the reader to help the Society as it goes forward to fulfill its important objectives concerning the body of law and principles we hold in esteem.

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International Investment Arbitration: Substantive Principles. By Campbell McLachlan, Laurence Shore, and Matthew Weiniger. Oxford, New York: Oxford University Press, 2007. Pp. xlix, 474. Index. \$275.

International investment arbitration continues to grow. The International Centre for Settlement of Investment Disputes registered 26 new cases in fiscal year 2006 and 26 more in 2007, bringing to 140 the number of cases ICSID is currently administering.¹ A study by a well-informed nongovernmental organization contends that in calendar 2006, more new investment cases were initiated in

other forums than in ICSID.² The United Nations Conference on Trade and Development (UNCTAD), a close observer of bilateral investment treaties (BITs), identified 2573 such treaties at the end of 2006, most of which empower investors to initiate arbitration of claims of treaty violations, promising more cases. BITs are not just for North-South relationships these days; all sorts of countries conclude them, and investors of many nations have brought BIT arbitrations.

The result is a rising tide of arbitral awards, many publicly available, but many not. There is no hierarchy of awards, and no central quality control mechanism. (ICSID's annulment procedure offers some control of ICSID awards, and other awards may face some scrutiny by national courts in post-award proceedings, but such review is episodic and limited.) No formal rule of precedent governs these proceedings, leaving each arbitral tribunal theoretically free to decide on a tabula rasa. In certain much-noted situations, different tribunals have reached seemingly contradictory legal or factual conclusions, and the legal reasoning in a few awards has come in for withering criticism. Some concerned commentators see all of this as a recipe for unwelcome fragmentation of international law; others go so far as to see a crisis for the system of arbitration.

The authors of *International Investment Arbitration: Substantive Principles* offer a powerful response to the critics, and an important aid to parties, arbitrators, and others eyeing the growing stacks of 150-page awards on their shelves. On the basis of their assessment of arbitral awards through August 2006, the authors join with observers who contend that a de facto system of precedent is emerging, bringing growing clarity and coherence to investment law.³ They maintain that iterative development of similar treaty clauses through

² LUKE ERIC PETERSON, INVESTMENT TREATY NEWS: 2006—A YEAR IN REVIEW (International Institute for Sustainable Development, 2007), at <<http://www.iisd.org/publications/pub.aspx?id=929>>.

³ See Andrea K. Bjorklund, *Investment Treaty Arbitral Decisions as Jurisprudence Constante*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 265 (Colin B. Picker, Isabella D. Bunn, & Douglas W. Arner eds., 2008).

¹ ICSID, ANNUAL REPORT 2006 at 3; ICSID, ANNUAL REPORT 2007 at 3, both available at <<http://icsid.worldbank.org/ICSID/FrontServlet>> (follow "About ICSID" hyperlink).