

**Part I**  
**General Articles**

# Chapter 1

## T.M.C. Asser and Public and Private International Law: The Life and Legacy of ‘a Practical Legal Statesman’

Geert De Baere and Alex Mills

**Abstract** This contribution commemorates the award of the tenth ever Nobel Peace Prize to Tobias Michael Carel Asser on 10 December 1911, and examines his life and his lasting contribution to scholarship and practice in private and public international law. After a biographical sketch, it considers the scholarship of TMC Asser, including his part in the foundation of the *Revue de droit international et de législation comparée*, and his international institution-building, particularly his role in the foundation of the *Institut de droit international*, the International Law Association, the ‘Hague Conferences on International Private Law’ (which ultimately became the international institution of the Hague Conference on Private International Law), the Permanent Court of Arbitration, and the Hague Academy of International Law. It also explores his legal and diplomatic practice, for example his important role as a Dutch delegate at the 1899 and 1907 Hague Peace Conferences. The article concludes with a reflection on Asser’s contribution to public and private international law, and concludes that while he was no doubt a very talented scholar, it was the combination of this with his skills and initiative as a negotiator, diplomat and international institution builder which secured his reputation and his legacy.

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The quotation in the title is from an award ceremony speech by Jørgen Gunnarsson Løvland, Chairman of the Nobel Committee, 1911, available at [http://nobelprize.org/nobel\\_prizes/peace/laureates/1911/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/1911/press.html). The authors wish to thank Ms Hanne Cuyckens and Mr Janek-Tomasz Nowak for research assistance, and Dr Kimberley Trapp and Mr Hans van Loon, Secretary General of the Hague Conference on Private International Law, for helpful comments.

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## 1.1 Introduction: The 1911 Nobel Peace Prize Winner, a Century On

### 1.1.1 Biographical Sketch

On 10 December 1911, the Norwegian Nobel Academy<sup>1</sup> awarded the tenth ever Nobel Peace Prize to Tobias Michael Carel Asser.<sup>2</sup> This contribution commemorates that event a century on, and examines the life of the 1911 Nobel Prize

<sup>1</sup> Which from 1907 to 1912 consisted of Jørgen Løvland, John Lund, Hans Jakob Horst, Georg Francis Hagerup and Carl Berner, available at [http://nobelprize.org/nobel\\_prizes/peace/articles/committee/nnclist/index.html](http://nobelprize.org/nobel_prizes/peace/articles/committee/nnclist/index.html).

<sup>2</sup> Shared with Alfred Fried (11 November 1864–5 May 1921), an Austrian-born journalist and peace activist. See further Haberman 1972.

winner and his lasting contribution to scholarship and practice in private and public international law.<sup>3</sup>

Asser was born in Amsterdam on 28 April 1838 to Carel Daniel Asser, a prominent lawyer and sometime member of the *Hoge Raad der Nederlanden*, and Rosette Henry Godefroi, both of well-known Jewish families.<sup>4</sup> His maternal uncle, Michaël Hendrik Godefroi, for example, was minister of justice from 1860 to 1862. Asser's family had been involved in the Jewish community of Amsterdam for generations. His great-great-grandfather, Moses Salomon Asser, a trader in cacao and a lawyer, was an important representative of the Haskala or Jewish enlightenment in The Netherlands and the driving force behind the *Felix Libertate* society for the equal treatment of Dutch Jews. Asser himself was a member of the Curatorium of the Dutch–Jewish Seminarium from 1882 to 1887, but broke with Judaism around 1890 and became a member of the protestant church.

Asser took up the study of law at the *Athenaeum Illustre* in 1856.<sup>5</sup> On 8 February 1858, he won a gold medal for his reply to a prize question set by the University of Leiden with his thesis on the economic conception of value.<sup>6</sup> Less than 10 days before his twenty-second birthday, he obtained his doctorate *utriusque iuris* (literally 'of both laws', that is to say in both Roman law and canon law) in Leiden on 19 April 1860 under the supervision of Professor S. Vissering, with a thesis on the history of the principles of Dutch constitutional law relating to foreign policy.<sup>7</sup> It provided a critical analysis of the *ad hoc* involvement of the Dutch parliament in foreign policy and pleaded for the subjection of all treaties to parliamentary approval. After obtaining his doctorate, Asser practiced law in Amsterdam. He was appointed a professor of law at the Athenaeum in 1862, where he taught civil and commercial law, as well as criminal law and criminal procedure. He married Johanna Ernestina Asser on 22 June 1864, and together they had three sons and one daughter. In 1877, he became a part-time professor of commercial law and private international law at the same institution when it was restyled the Municipal University of Amsterdam ('Gemeentelijke Universiteit van Amsterdam'), all the while continuing his legal practice; something quite uncommon for a professor of that era.<sup>8</sup> He continued in this post until 1893, when he was appointed a Member of the Council of State, the highest administrative

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<sup>3</sup> Among the numerous biographical essays, see, for example, van der Mandere 1946; Haberman 1972; Westenberg 1992; Voskuil 1995.

<sup>4</sup> Voskuil 1995, pp. 6–7.

<sup>5</sup> Considered to be the predecessor of the University of Amsterdam, the *Athenaeum Illustre* was founded in 1632. At the time of Asser's student years, law was taught by only two professors, viz. Jeronimo de Bosch Kemper and Martinus des Armorie van der Hoeven. See Westenberg 1992, p. 55.

<sup>6</sup> Asser 1858. The front cover identifies Asser as 'T.M.C. Asser, student in de rechten aan het Athenaeum Illustre te Amsterdam' (T.M.C. Asser, law student at the Athenaeum Illustre in Amsterdam).

<sup>7</sup> Asser 1860.

<sup>8</sup> See further Sect. 1.4 below.

body in the government. As a professor, he had a particular reputation for being a practical teacher, with an emphasis on mooted sessions. While his practical approach to teaching was innovative and must have gained him popularity with his students,<sup>9</sup> it also attracted criticism from some of his colleagues at the university, who took the view that his concentration on the practical application of the law implied that his teaching was more superficial.<sup>10</sup>

Asser developed an interest in international law, particularly private international law, quite early on in his academic career. Together with Gustave Rolin-Jaequemyns<sup>11</sup> and John Westlake,<sup>12</sup> he founded a journal of international law, *Revue de droit international et de législation comparée* ('RDI') in 1869.<sup>13</sup> He was one of those invited by Rolin-Jaequemyns to take part in the conference at Ghent on 8 September 1873 which founded the *Institut de Droit International* (Institute of International Law).<sup>14</sup> A strong believer in the avoidance and peaceful settlement of disputes through international conferences where principles for conflict solution could be agreed, he managed to persuade the Dutch government to call several conferences on the codification of private international law at The Hague in 1893, 1894, 1900 and 1904 over which Asser presided.<sup>15</sup> Asser later also presided over both Hague Conferences on the Unification of the Laws on Bills of Exchange and Cheques, held in 1910 and 1912, respectively.<sup>16</sup> He further acted as his country's delegate to the Hague Peace Conferences of 1899 and 1907.<sup>17</sup> He was part of The Netherlands delegation to the Congo conference in 1884–1885 and the Suez Canal Conference of 1885.<sup>18</sup> Asser was a member of an international committee for the abolition of tolls on the Rhine River (established in 1860), reflecting his support for free trade and for Dutch interests in having access to German markets. Navigation on the Rhine would become one of Asser's favourite subjects for scholarship.<sup>19</sup> The Dutch government appointed him a member of the Central Commission for the Navigation of the Rhine, in which he served from 1888 until 1895. Noted as a negotiator, Asser was involved during this period from 1875 to 1913 in virtually every treaty concluded by the Dutch government. Noted also as an arbiter of international disputes, he was a member of the Permanent Court of

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<sup>9</sup> Though his first lecture was apparently attended by only two students: van der Mandere 1946, p. 172.

<sup>10</sup> Voskuil 1995, p. 9.

<sup>11</sup> See further Nys 1910; Koskenniemi 2004.

<sup>12</sup> See further AJIL Editorial Comment 1913.

<sup>13</sup> See Sect. 1.2.2 below.

<sup>14</sup> See Sect. 1.3.1 below.

<sup>15</sup> See Sect. 1.3.3 below.

<sup>16</sup> See Sect. 1.4.5 below.

<sup>17</sup> See Sects. 1.4.2 and 1.4.4 below.

<sup>18</sup> See Sect. 1.4.1 below.

<sup>19</sup> See Sect. 1.2.1 below.

Arbitration ('PCA'),<sup>20</sup> and sat as an arbiter in its first case: the Pious Fund dispute between the United States and Mexico (1902).<sup>21</sup> Asser had a reputation for pragmatism, a skill that allowed him to broker compromises and break stalemates in international negotiations. An interesting example is the 'reverse' ratification process designed by him for the 1912 Opium Convention, which involved accession first by other invited states and only afterwards by the state parties who negotiated the text.<sup>22</sup> The grace and seeming effortless with which Asser moved in international circles will have been aided by the fact that, by all accounts, he was a gifted linguist, speaking 'German with ease and grace, French with the accent, fluency and precision of a native, and English with little or no trace of a foreign accent',<sup>23</sup> as well as his native Dutch.

Asser also participated in the political life of The Netherlands. In 1875, minister Van der Does de Willebois appointed him legal adviser to The Netherlands Ministry of Foreign Affairs, a position he kept until 1893, when he became a member of the Council of State. He served as the first president of the Standing Government Committee on Private International Law, established in 1897 by Queen regent Emma, until his death in 1913, and was also President of the State Commission for International Law from 1898. He even stood for election to the Dutch parliament in 1891, but failed to get elected.<sup>24</sup> He was appointed minister of state (without portfolio) by the Dutch government in 1904, a position he also held until his death.

He received numerous honours, including Cross of a Commander of the Order of The Netherlands Lion; of the Order of Orange-Nassau; and of the Baden Order of the Lion of Zähringen; Order of the Crown of Italy; and the Luxemburg Order of the Oak Crown. He also became an officer of the Belgian Order of Leopold, and Knight of the Legion of Honour. He received honorary doctorates from the Universities of Cambridge, Edinburgh, Bologna, and Berlin, and a posthumous honorary doctorate from the University of Leiden, at the occasion of the opening of the Peace Palace in The Hague in 1913. A library of international law, which he gathered with the help of contributions from 20 countries, has been named 'The Asser Collection' and is housed in the Peace Palace. Asser was also involved in the efforts to establish what would become the Academy of International Law in the same Peace Palace, although died before being able to witness its establishment.<sup>25</sup>

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<sup>20</sup> See Sect. 1.4.2 below.

<sup>21</sup> See Sect. 1.4.3 below.

<sup>22</sup> van der Mandere 1946, pp. 195–197.

<sup>23</sup> AJIL Editorial Comment 1914a, p. 344.

<sup>24</sup> Asser's run for office was satirised by Johan Braakensiek with a cartoon in the journal *De Groene Amsterdammer* of 6 September 1891. It depicts Asser in courtly dress with ermine cape, with the superscript 'Prof. Asser's Candidatuur voor de Tweede Kamer' and the subscript: 'Tobi or not Tobi—that is the question'.

<sup>25</sup> See Sect. 1.3.5 below.

Tobias Asser passed away in The Hague on 29 July 1913, precisely 14 years to the day after the adoption of the 1899 Hague Convention and just under a month before the inauguration of the Peace Palace on 28 August 1913.

### *1.1.2 The Nobel Peace Prize*

When Alfred Nobel drew up his will in Paris on 27 November 1895,<sup>26</sup> he provided for part of his estate to constitute a fund, the interest on which was to be annually distributed in the form of prizes ‘to those who, during the preceding year, shall have conferred the greatest benefit on mankind’.<sup>27</sup> The said interest was to be divided into five equal parts, one of which was to go to ‘the person who shall have done the most or the best work for fraternity between nations, for the abolition or reduction of standing armies and for the holding and promotion of peace congresses’.<sup>28</sup> Asser appears to fit the ticket admirably.

The award ceremony was held on 10 December 1911 in the auditorium of the Nobel Institute. Jørgen Gunnarsson Løvland, Chairman of the Nobel Committee, welcomed the audience. He then called upon Professor Fredrik Stang,<sup>29</sup> who addressed the assembly on ‘Nordic Cooperation in Unifying Civil Law’. This address was followed by Mr. Løvland’s announcement that the Nobel Peace Prize for 1911 was to be shared by Mr. Asser and Mr. Fried, neither of whom was able to be present at the ceremony and neither of whom delivered a Nobel lecture. Mr. Løvland then gave a biographical account of each laureate and, since 1911 was the tenth anniversary of the first prize presentation, concluded with some brief comments on the basis for awarding the prizes. After a brief biographical sketch, Løvland emphasised the fact that Asser was above all ‘a practical legal statesman’, comparing his position in the sphere of international private law to that enjoyed by Louis Renault in international public law.<sup>30</sup> While Løvland placed most emphasis on Asser’s public activity, he noted that Asser’s scholarly writing was ‘of great importance in its own right’. He described Asser as ‘a pioneer in the field of international legal relations’ with a reputation ‘as one of the leaders in modern

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<sup>26</sup> The full text of Alfred Nobel’s will in the original Swedish is available at [http://nobelprize.org/alfred\\_nobel/will/testamente.html](http://nobelprize.org/alfred_nobel/will/testamente.html) and in English translation at [http://nobelprize.org/alfred\\_nobel/will/will-full.html](http://nobelprize.org/alfred_nobel/will/will-full.html).

<sup>27</sup> In the original Swedish: ‘åt dem, som under det förlupne året hafva gjort menskligheten den största nytta’.

<sup>28</sup> In the original Swedish: ‘åt den som har verkat mest eller best för folkens förbrödande och afskaffande eller minskning af stående armeer samt bildande och spridande af fredskongresser’.

<sup>29</sup> Himself a member of the Committee since 1921 and its chairman from 1922 to 1941.

<sup>30</sup> Louis Renault (1843–1918) was a professor of international law at the University of Paris and, like Asser, also involved in the practice of international law, becoming the ‘one authority in international law upon whom the Republic relied’ and even ‘the very oracle of international law’, Scott 1918, pp. 607 and 610. He was awarded the 1907 Nobel Peace Prize.

jurisprudence', and concluded that it was 'only natural' that his countrymen should see him as a successor to or reviver of The Netherlands' pioneer work in international law in the seventeenth century by the likes of Hugo Grotius;<sup>31</sup> an assessment which appears still to hold a century on.<sup>32</sup> Løvland then turned to what, judging from Nobel's will, would appear to have been the core of the reason why Asser was awarded the Peace Prize: the fact that it was at his instigation that the Dutch government summoned the four Hague conferences in 1893, 1894, 1900 and 1904 on private international law; all of which he presided over.<sup>33</sup> These conferences prepared the ground for conventions which would establish uniformity in international private law 'and thus lead to greater public security and justice in international relations'. As a result, Løvland noted before the lecture rather abruptly ends, seven Conventions had been concluded on different aspects of civil procedure and of family law. It is perhaps rather striking that Løvland nowhere mentions Asser's important (though granted less central) role in the two major Peace Conferences held in The Hague in 1899 and 1907.<sup>34</sup>

## 1.2 Scholarship

### 1.2.1 A Selection of Asser's Scholarly Writings

Asser approached legal scholarship and writing in the same manner in which he approached law as a discipline in general: as first and foremost a practical tool, rather than an object of abstract analysis. He was more interested in how law could be used in practice than in systemic questions pertaining to areas of law or to law in general.<sup>35</sup> Asser's approach to legal scholarship was therefore one inspired by his own combination of practice and academia. The following contains a selection of his writings that illustrate that approach. Asser's own selection of his scholarly work between 1858 and 1888 was published in 1889 under the title *Studiën op het Gebied van Recht en Staat*.<sup>36</sup> It contained a rather wide selection of writings, ranging from an excerpt of his prizewinning 1858 thesis on the economic conception of value to extracts from his doctoral dissertation and various articles on

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<sup>31</sup> However, Koskenniemi points out that Asser (like the other men behind the *Revue de droit international et de législation comparée*) did not come from the tradition of Grotius, Koskenniemi 2002, p. 17. Note that Asser himself wrote an essay at the occasion of the tercentenary of Grotius' birth, Asser 1883.

<sup>32</sup> See, for example, Vlas 2010, p. 169.

<sup>33</sup> See Sect. 1.3.3 below.

<sup>34</sup> See Sects. 1.4.2 and 1.4.4 below.

<sup>35</sup> Voskuil 1995, p. 8.

<sup>36</sup> Asser 1889.

private international law, but equally on such subjects as corporate law, criminal law, the life of Grotius or the revision of the Dutch constitution.

His celebrated *Schets van het Nederlandsche Handelsrecht* offers some insights into Asser's approach to scholarship. Rather than an exhaustive theoretical account of Dutch commercial law, it limits itself to a clear and concise exposition of the key concepts, avoiding 'lofty legal reasoning or historical reflections or comparative legal considerations'.<sup>37</sup> He continued defending this approach to teaching and scholarship in his farewell lecture, arguing that 'no thorough, i.e. scientific approach to trade law is possible without having clearly understood trade itself'.<sup>38</sup> However, another theme in Asser's work is present in the *Schets*: Asser emphasises the importance of international commerce and of unification of commercial laws, as trade is hindered by divergence of laws. Asser's international interest and his practical orientation may also be gleaned from the fact that one of the three parts of the *Schets van het Nederlandsche Handelsrecht* is devoted to shipping law, which is both an internationally oriented part of the law and at the same time formed an important part of Asser's practice as a lawyer.<sup>39</sup> It is therefore unsurprising that Asser would go on to write a similarly concise and practically oriented *Schets* of private international law. The two *Schetsen* combine these features with a further important virtue: clarity of exposition. Especially as regards private international law or conflict of laws, which has the (not entirely unmerited) reputation 'of being a specialized, somewhat strange and very complicated legal discipline',<sup>40</sup> that is quite a feat. In his foreword to the French translation by his hand, Alphonse Rivier notes that Asser's *Schets* is characterised by a focus on the principles of the law without losing sight of the necessities of legal practice, and without committing the error of confusing expositions *de lege lata* with reflections *de lege ferenda*.<sup>41</sup> Although the Dutch have played a significant role in the development of private international law,<sup>42</sup> the *Schets van het internationaal privaatrecht* was the first Dutch textbook on the subject and was, in addition to French, translated in German, Romanian, Serbian and Spanish.<sup>43</sup> The book does more or less precisely what one might expect from Asser: it provides a rather exhaustive sketch of private international law as it stood at the time, without going very deep into any particular topic.

<sup>37</sup> In the original: 'breedvoerige juridische redeneeringen of geschiedkundige bespiegelingen of vergelijkende rechtsbeschouwingen', Asser 1885a, p. v.

<sup>38</sup> Quoted in van der Mandere 1946, pp. 172–173 (translation by authors).

<sup>39</sup> See further Sect. 1.3.4 below.

<sup>40</sup> Remien 2001, p. 79.

<sup>41</sup> Asser 1884, p. II.

<sup>42</sup> Which Asser explains by the fact that the autonomy of the cities in the Republic of the United Netherlands (1581 to 1795) as regards civil and commercial law was thus that it caused no end of conflicts between the different sets of laws: Asser 1880a, p. 6; Asser 1885a, pp. 5–6. See further e.g. Mills 2009, p. 45 *et seq.*

<sup>43</sup> Voskuil 1995, p. 10.

Asser's scholarship was, however, by no means predominantly descriptive. In one of the first articles published in the newly established RDI, entitled 'De l'effet ou de l'exécution des jugements rendus à l'étranger en matière civile et commerciale', Asser addresses the issue of the recognition and enforcement of judgments in civil and commercial matters.<sup>44</sup> He does so in a manner characteristic of the double role he would later develop as a lawyer and a political figure, by combining analysis with a clear plea for his project of unification of private international law. The analysis in the article leads up to a conclusion in twelve points, in which Asser argues that the execution of judgments without revision cannot be stipulated in a law which applies equally to judgments originating from every different country, but must rather be provided for in international agreements. An important aspect of Asser's proposal is that these agreements must be accompanied by a further international understanding on the jurisdiction of courts, the principal procedural formalities, and the laws with respect to private international law. The result must be that the court seised with the request for execution of a judgment with the authority of *res judicata* should not examine whether the judgment was rendered by a court having jurisdiction, nor whether it infringes provisions of public order, public morality or the public law of the State in which the execution is requested. Asser adds that it is to be understood that these rules only apply *inter partes* and not to judgments delivered by States not party to the treaties he proposes, which will remain subject to a complete revision before being granted a *pareatis*.<sup>45</sup> In other words, when an agreement whereby two States grant each other's judgments the benefit of reciprocal execution without revision goes together with the adoption of uniform rules on jurisdiction, the foreign judgment must be treated equally with judgments rendered by a national court. Any other solution would, according to Asser, not be in accordance with the confidence that must underlie international agreements on the execution of judgments without revision.<sup>46</sup>

Asser seems well aware of the fact that this is a rather revolutionary proposal. He recounts how, at the 1863 conference of the International Association for the Progress of Social Sciences,<sup>47</sup> everyone was in agreement that execution of a foreign judgment could only be granted after an examination of the competence of the foreign court. Undaunted, Asser tried to argue the contrary position, referring to a law of the North German Confederation of 5 June 1869, which obliged the courts of the confederation to execute judgments of other courts in the confederation without examining their competence.<sup>48</sup> Moreover, by defending the position that a court asked to enforce a foreign judgment need not examine whether the award infringes provisions of public order, public morality or the public law of the

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<sup>44</sup> Asser 1869.

<sup>45</sup> *Ibid.*, pp. 490–492. 'Pareatis' is a term used by Asser as a synonym for 'exequatur', which is now in desuetude. For an extensive analysis of Asser's article, see Laufer 1992, pp. 39–65.

<sup>46</sup> Asser 1869, p. 477.

<sup>47</sup> See Sect. 1.2.2 below.

<sup>48</sup> Asser 1869, pp. 478–479.

State in which the execution is requested, Asser expected to encounter ‘vivid protestations’. ‘That will not’, he declared, ‘prevent me from developing entirely freely my ideas on this subject’.<sup>49</sup> Asser’s fundamental proposition is therefore that unification of private international law must be brought about through international agreements, which would form the core of what Asser calls a ‘Judicial Union’ (*Union Judiciaire*). There is a striking parallel between Asser’s ideas and some of the fundamental principles underlying the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,<sup>50</sup> concluded almost 100 years later on 27 September 1968, and its successor Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>51</sup> Asser’s strong belief in the necessity for unification of private international law through international agreements would perhaps become the *Leitmotiv* of his career, driving for example his instigation of the Hague Conferences on Private International Law,<sup>52</sup> and eventually leading to his receipt of the Nobel Peace Prize.

Asser would return to this idea on many occasions. For example, the twelfth year of the RDI opens with an article by his hand entitled ‘Droit international privé et droit uniforme’.<sup>53</sup> Voskuil has observed that it signifies a shift away from the scholar, and more in the direction of the fulltime diplomat and civil servant he would become.<sup>54</sup> The article, which both outlines the activities of the International Law Association,<sup>55</sup> the RDI and the *Institut de Droit International*, and sets out a strategy for the codification of private international law,<sup>56</sup> is certainly a step along the way from his early writing, including his still rather scholarly and theoretically inclined doctoral dissertation, towards finding his own voice as a practical legal scholar and statesman. Recalling Rolin-Jaequemyns’ description of the progress of solidarity between peoples as ‘*l’esprit d’internationalité*’,<sup>57</sup> Asser proposes a pragmatic examination of whether ‘esprit’ has led to any great achievements in private international law, but not before explaining why public international law

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<sup>49</sup> *Ibid.*, pp. 481–482 (translation by authors).

<sup>50</sup> [1972] OJ L299/32. On the parallel with the Brussels Convention, see Laufer 1992, pp. 131–158.

<sup>51</sup> [2001] OJ L12/1. The Regulation and Convention permit only very limited review of the jurisdiction of the judgment court under Article 35. Although they do allow for review of a judgment for compatibility with the public policy of the enforcing state under Article 34(1), this has been interpreted narrowly in practice. See *e.g.* Case C-7/98 *Krombach v Bamberski* [2000] ECR I-1935, para 21; Case C-420/07 *Apostolides* [2009] ECR I-3571, para 55. See De Baere 2010, pp. 1145–1149 and 1151–1155.

<sup>52</sup> See Sect. 1.3.3 below.

<sup>53</sup> Asser 1880b.

<sup>54</sup> Voskuil 1995, pp. 13–14.

<sup>55</sup> See Sect. 1.3.2 below.

<sup>56</sup> As Asser himself indicates in his introduction to the reproduction of the article in Asser 1889, p. 314.

<sup>57</sup> See Sect. 1.2.2 below.

will not be the subject of his enquiry. No progress in that respect is possible, says Asser, as long as ‘ambitions, jealousy, and secular antipathies masked as State interest continue to dominate the notions of justice and right in important international questions’.<sup>58</sup> However, he continues, ‘let us not despair of the future—far away though it may be’. Academic lawyers, Asser adds, may even in public international law eventually convince Statesmen of the necessity of subjecting interest to justice by preparing general rules that may be accepted by governments in their external relations.<sup>59</sup> Asser then turns to the topic of private international law and its unification. After a historical overview, he considers and accepts the benefits that uniform laws would provide. At the same time, his practical mind militates against adding to the many resolutions and declarations adopted by various international fora calling for such uniform laws, which have not had any significant results. He therefore takes the view that the primary means of resolving international conflicts must be the adoption of uniform rules of private international law, and that uniform legislation is only to be used as an exception, to regulate certain matters in which the need for uniformity is particularly acute. Asser’s conclusion is that an international conference should be called, or several of them with regard to specific topics, to reach an agreement on the principles of private international law, with national laws following as needed to ratify and implement those treaties. Only in that manner, says Asser, may we hope to gain sympathy with statesmen, whose fear of ‘exaggerations’ has led to the failure of previous attempts at unification. It would then be permitted to hope for ‘practical results’.<sup>60</sup> It is characteristic of Asser’s career that he took action to turn this proposal into a reality, by initiating the Hague Conferences on Private International Law, as discussed below.<sup>61</sup>

In 1901, Asser had the satisfaction of reporting on one of the successes of his approach by publishing an account of the 1896 Hague Convention on Civil Procedure, which had emerged out of the first two conferences.<sup>62</sup> Written, as Asser notes in his foreword, ‘more with my scissors than with my pen’, it is essentially a guide to the convention and the *travaux préparatoires*, with the addition of Asser’s personal reflections. Asser emphasises the historical importance of the entry into force, on 25 May 1899, of The Hague Convention of 14 November 1896, establishing common rules regarding several matters pertaining to civil procedure. He also takes the opportunity to confirm his hands-on approach to law, by explaining that, for many lawyers, the difficulties for the codification of private international law seemed insurmountable. However, Asser argues, postponing the codification of private international law until all authors were agreed on uniform rules would be like the farmer who, wanting to cross the Seine, waited patiently on the riverbank until the water would finally stop flowing. That would clearly not do for

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<sup>58</sup> Asser 1880b, pp. 5–6 (translation by authors).

<sup>59</sup> *Ibid.*, p. 6.

<sup>60</sup> *Ibid.*, p. 22.

<sup>61</sup> See Sect. 1.3.3 below.

<sup>62</sup> Asser 1901. See further Sect. 1.3.3 below.

Asser. The results of research on private international law were, he argues, already enough to ‘cross without fear’.<sup>63</sup>

A final and perhaps rather peculiar example of Asser’s combination of statesmanship and scholarship can be found in the piece Asser published in May 1885 on the General Act of the Berlin Conference on West Africa of 26 February 1885.<sup>64</sup> It sets out Asser’s experiences as part of The Netherlands delegation—one of the many international conferences at which he represented The Netherlands following his appointment as Legal Advisor in 1875.<sup>65</sup> At the Berlin Conference, he was principally responsible in particular for matters pertaining to shipping, and his article provides an analytical account of the Act. For present-day readers, the article has at least two rather striking features. First, it describes the proceedings and the result of the conference from the rather detached standpoint of the diplomat assigned to perform a particular task and assessing the outcome. Second, Asser appears to be quite positive about the Berlin Conference and about the recognition of the *Association internationale du Congo* as possessing sovereignty over the Congolese territory, describing the future state as having been founded ‘not with the usual narrow-minded intent to which European statecraft has accustomed us, but to ensure civilization and wealth in general’, which are, Asser adds, ‘the best guardians of the freedoms which the Conference wished to guarantee to trade and shipping for all’.<sup>66</sup> Asser also credits German Chancellor Otto von Bismarck, who had taken the initiative for the conference, with having brought the conference to a successful result. He describes how Bismarck, who had no interest in the legal debate on the status of the *Association*, lobbied for the recognition of its sovereignty, which was first recognised by the United States of America on 10 April 1884, followed by Germany on 3 November 1884, and the United Kingdom on 16 December 1884.<sup>67</sup> The *Association* would, of course, become the vehicle for the foundation of King Leopold II of the Belgians’ Congo Free State, and the system of wealth-extraction and servitude that characterised his rule.<sup>68</sup> The Berlin Conference would later be sarcastically referred to by Joseph Conrad in his *Heart of Darkness* as ‘The International Society for the Suppression of Savage Customs’.<sup>69</sup> It would, however, be unfair to reproach Asser’s lack of prescience as regards the tragic turn events in the Congo would take. He was at the conference to negotiate free navigation of the river Congo and that is what he did and reported on in this article.<sup>70</sup>

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<sup>63</sup> Ibid., pp. 4–5.

<sup>64</sup> Asser 1885b.

<sup>65</sup> See further Sect. 1.4.1 below.

<sup>66</sup> Asser 1885b, p. 373 (translation by authors).

<sup>67</sup> Ibid., pp. 372–373 and 392.

<sup>68</sup> Koskenniemi 2002, pp. 156–157.

<sup>69</sup> Conrad 1902, p. 71.

<sup>70</sup> Moreover, Rolin-Jaequemyns, Asser’s friend and co-founder of the RDI, had written favourably in the *Revue* about what he perceived to be the scientific and philanthropic endeavours of King Leopold II, Rolin-Jaequemyns 1877. See further the account of the Berlin Conference in Koskenniemi 2002, pp. 121–127.

## 1.2.2 *The Foundation of the Revue de Droit International et de Législation Comparée*

It might be argued that Asser's most important contribution to scholarship in public or private international law was not his own writings, but his role as a co-founder, with John Westlake and Gustave Rolin-Jaequemyns, of the first international law review,<sup>71</sup> the *Revue de droit international et de législation comparée*. The three founders had met at the first session of the *Association internationale pour le progrès des sciences sociales* (International Association for the Progress of Social Sciences) in September 1862.<sup>72</sup> The Association had been established, in the words of its secretary-general Couvreur, as a 'vast instrument of enquiry' to examine the opinions in different countries as regards questions of general interest in the social sciences, especially regarding civil and criminal law.<sup>73</sup> Koskenniemi notes that certain French members of the Association wished to use it for 'revolutionary purposes', which led to the break-up of the society after four conferences.<sup>74</sup> However, Asser, Rolin-Jaequemyns and Westlake kept in contact, and it was during a walk in Haarlem along the *Dreef* to the woods of the *Haarlemmerhout* when Rolin was in The Netherlands for business in July 1867 that he and Asser came up with the plan of an international legal journal.<sup>75</sup> After enlisting the support of Westlake and of Pasquale Mancini, professor of public, foreign and international law in Turin, on the basis of a prospectus drawn up by Asser, the journal was founded with Asser, Rolin-Jaequemyns and Westlake as principal editors.

In an essay in the inaugural 1869 volume, Rolin-Jaequemyns explains the importance of the study of international and comparative law, thereby setting out the programme for the RDI. After referring to Grotius, Montesquieu and Bentham,<sup>76</sup> to make the point that not just statesmen can have an impact on what is to be done for the good of humanity, Rolin argues that nowadays everyone is a statesman in some way and not 'absolutely incompetent' to engage in debates over 'a science that forms, after all, the supreme *desideratum* of every straight and honest soul.' That science must, however, neither remain vague or abstract, nor limit itself to one single existing legislation. The object of study must therefore be the comparative legislation of various civilised countries.<sup>77</sup> The time at which

<sup>71</sup> AJIL Editorial Comment 1914a, p. 344.

<sup>72</sup> See Association Internationale pour le Progrès des Sciences Sociales 1863, pp. 3–5. Westlake and Asser are listed as secretaries of their respective national associations, and Rolin-Jaequemyns is also mentioned as attending in various places throughout the report.

<sup>73</sup> Asser 1880a, p. 7.

<sup>74</sup> Koskenniemi 2002, p. 13. Note, however, that Asser proposed the unification of the law relating to negotiable instruments during the second session. See Hudson and Feller 1931, p. 339.

<sup>75</sup> Asser 1902, p. 111; van der Mandere 1946, p. 176.

<sup>76</sup> Note that Asser published the text of and a brief commentary on an unedited letter from Jeremy Bentham to King William I of The Netherlands, Asser 1893.

<sup>77</sup> Rolin-Jaequemyns 1869, p. 3.

Rolin was writing was, in his assessment, also characterised by a cosmopolitan movement, whereby ideas come into existence through interactions between civilised nations, which take each other as examples and thereby learn from each other. Indeed, says Rolin, sometimes the same issues arise simultaneously and almost in the same terms in countries that have nothing apparent in common. Some of these issues have already been resolved, such as the abolition of slavery. Other issues, however, require the attention of the legislators, such as the utility of the death penalty and the equality between the sexes as regards civil and political rights. Still other issues require more study and raise particular difficulties. It is especially this category of issues that is susceptible to learning from experiences acquired by other peoples. Examples range from the organisation of the penitentiary system to the organisation of representative government and of the judiciary. The RDI, argues Rolin, ought to be the forum for the free discussion of all such issues, regardless of whether they have become part of the political debate.<sup>78</sup> The study of comparative legislation makes every nation conscious of the fact that it is morally obliged to act in accordance with the principles of universal justice, and it reinforces what Rolin calls '*l'esprit d'internationalité*'.<sup>79</sup> Rolin argued for the necessity of reconciling 'the legal and historical spirit, which takes into account *what has been* and *what is* with the philosophical spirit, which is concerned with *what ought to be*', and this both in the comparative study of legislations and even more in the study of international law.<sup>80</sup> As regards the latter, Rolin takes its ultimate source to be the conscience of humanity as manifested through public opinion, that is to say the opinion of enlightened men. The fact that that opinion is constantly subject to evolution makes international law eminently progressive.<sup>81</sup>

It should be noted that, as was typically the case for Asser, this reference to public opinion at the inception of the RDI could not remain a purely theoretical matter. Together with the Russian delegate Friedrich Von Martens, Asser urged the German delegation at the 1899 Hague Conference to consider the pressure of world public opinion and accept the establishment of an arbitral tribunal.<sup>82</sup> In his inaugural essay to the RDI, Rolin further notes that public opinion is, albeit unanimous on certain issues, far from set as regards many others. The double aim of the study of international law is therefore to register the agreement between men on a given question and to derive the principles from that agreement, and to clarify other issues that are subject to doubt. Rolin lists a number of issues in international law that may be of interest for the RDI to study, including: what is a nation or a State and what rights attach to that status? What is the status of property under international law? And even, rather topically even for the twenty first century: is there a right to intervene abroad for the benefit of non-nationals and in the general

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<sup>78</sup> *Ibid.*, pp. 11–12.

<sup>79</sup> *Ibid.*, p. 17.

<sup>80</sup> *Ibid.*, p. 225.

<sup>81</sup> *Ibid.*, pp. 225–228.

<sup>82</sup> See Caron 2000, p. 16. See further [Sects. 1.4.2](#) and [1.4.4](#) below.

interest of humanity? Apart from these issues of public international law, most issues of private international law remain to be settled.<sup>83</sup> All these issues, concludes Rolin, are part of the field that the new RDI aims to study through the calm pursuit of truth and justice, which is ‘stronger than revolutions, diplomatic intrigues or war’.<sup>84</sup>

The RDI reflected the interests and intentions of its founders, by featuring articles on such varied subjects as the reform of penal law and social law (*e.g.* child labour), as well as articles on various aspects of private international law, such as jurisdiction and the recognition of judgments, among which of course several were by Asser. The RDI’s reformist agenda was also pursued by reporting on various proposals for peaceful settlement of disputes through arbitration and on various meetings of international societies. It became a successful forum for publications within its purview from across the world. However, it gradually moved more in the direction of public international law. Unfortunately, the number of different contributors remained low, and further decreased after the establishment of the *Revue générale de droit international public* in 1894 in Paris. By the time the final issue of the *Revue* appeared in 1939, it had become identified as a mostly Belgian journal.<sup>85</sup> Nonetheless, as the first international law journal, the RDI left behind a lasting contribution to the scholarly analysis of public and private international law and to their development as academic disciplines. Moreover, the RDI led to the establishment of networks of scholars and diplomats from around the world, which precipitated the founding of the *Institut de Droit International* in 1873 (see below), which in turn would have a lasting impact on international law.<sup>86</sup>

### 1.3 International Institution Building

The most significant and enduring contribution which Asser has made to international law is not, perhaps, his scholarship, but his role in establishing leading international institutions dedicated to furthering international law and dispute resolution. In the speech given at his Nobel award ceremony, it was indeed observed that ‘his public activity has overshadowed his scholarly writing’.<sup>87</sup>

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<sup>83</sup> *Ibid.*, pp. 238–245.

<sup>84</sup> *Ibid.*, p. 245.

<sup>85</sup> For the account see Koskenniemi 2002, pp. 12–19. Note that Gustave Rolin-Jaequemyns was succeeded as editor by his son Edouard and his brother Albéric Rolin, whose son, Henri Rolin, in turn co-founded the still-running *Revue belge de droit international/Belgisch Tijdschrift voor Internationaal Recht* in 1965.

<sup>86</sup> Indeed, it has even been argued that together the founding of the RDI and of the IDI marked the beginning of international law as we know it today, Koskenniemi 2004, p. 5.

<sup>87</sup> See [http://nobelprize.org/nobel\\_prizes/peace/laureates/1911/press.html](http://nobelprize.org/nobel_prizes/peace/laureates/1911/press.html). As previously noted, his scholarly work was, however, also considered worthy of praise. See Sect. 1.1.2 above.

The continued success of a number of the institutions he played a part in establishing in making a positive contribution to the development and furtherance of international law is testament to both the skill with which they were established, and the importance of the role which each institution plays.

### *1.3.1 Institut de Droit International*

One of the immediate impetuses for international institution building in Asser's time was the Franco-Prussian War of 1870–1871. In some ways the war was a predictable consequence of long-running balance of power concerns in Western Europe, with a unifying Germany matched against Napoleon III of France. Advances in military technology, however, made the conflict particularly bloody, culminating in the brutality of the Siege of Paris and the indiscriminate shelling of the besieged city by Prussian artillery to damage French morale. The events of this conflict would have stood in stark contrast to the success of the Alabama Claims Arbitration between Great Britain and the United States, which handed down its final award on 14 September 1872. The arbitral award peacefully resolved a highly contentious and politically charged dispute which had arisen out of British violations of neutrality in the American Civil War, through a failure to exercise due diligence in allowing the construction of Confederate vessels in British territory. In the aftermath of these events, desiring to facilitate more peaceful means of managing international relations or at least regulating the conduct of warfare, Asser and 10 other like-minded academics, lawyers and diplomats<sup>88</sup> convened in Ghent on 8 September 1873, and founded the 'Institut de Droit International' ('IDI'), in order 'to encourage progress in international law'.

Although a relatively informal academic body, the IDI has played a very important role in the progressive development of international law, as a forum for discussion and a focus for efforts towards codification. It is notable that its influence has, from its beginning, encompassed matters of both public and private international law. The first resolution passed on 5 September 1874 by the IDI at its inaugural meeting in Geneva (held in the very same room used by the Alabama Claims Arbitration) called for international agreement on the unification of rules of private international law—a project at the heart of Asser's scholarship, as discussed above, and to which he would make an extremely significant further contribution through the Hague Conferences on Private International Law, discussed below. At the same meeting, the Institut also established a committee to

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<sup>88</sup> See generally Koskenniemi 2002, p. 39 *et seq.* Other notable founders of the IDI included Rolin-Jaequemyns (co-founder with Asser of the *Revue de droit international et de législation comparée*—see Sect. 1.2.2 above; Westlake was unable to attend), Mancini, Calvo, Field (see *infra*, note 92), Bluntschli, Lorimer, and Moynier (co-founder of the 'International Committee for Relief to the Wounded' in 1863, which changed its name to the 'International Committee of the Red Cross' in 1876. See further *e.g.* Durand 1994.

study and develop proposals for furthering the ‘Brussels Declaration’ of 27 July 1874 concerning the laws and customs of war, the result of an international conference which had met on the initiative of Tsar Alexander II of Russia. The IDI’s work on the matter led to the adoption of a ‘Manual of the Laws of War on Land’ at its meeting in Oxford on 9 September 1880.<sup>89</sup> This in turn formed the foundation of the Hague Conventions on land warfare adopted at the Peace Conferences in The Hague in 1899 and 1907, in which Asser also played a leading role, as discussed below.<sup>90</sup> As a mark of its early successes, the IDI was itself awarded the Nobel Peace Prize in 1904.

### 1.3.2 *International Law Association*

The founding of the IDI was quickly followed by the establishment of another major international organisation on 10 October 1873 in Brussels, the ‘Association for the Reform and Codification of the Law of Nations’, later renamed the ‘International Law Association’ (‘ILA’).<sup>91</sup> Although overlapping with the IDI in its concerns, and more of an American initiative (directly inspired by the success of the Alabama Claims arbitration), the ILA was consciously intended to complement rather than compete with the IDI, which would remain the principal ‘scientific’ international legal codification body. The ILA was indeed founded with the support of the IDI (who had agreed at their first meeting a month earlier to send a delegation to Brussels), and the first president of the ILA, the American supporter of international legal codification David Dudley Field,<sup>92</sup> was also one of the founders of the IDI. It was envisaged that the ILA would have a much broader membership, not limited to leading academics, but ‘to consist of Jurists, Economists, Legislators, Politicians and others taking an interest in the question of the reform and Codification of Public and Private International Law, the Settlement of Disputes by Arbitration, and the assimilation of the laws, practice and procedure of the Nations in reference to such laws’<sup>93</sup>—in summary, anyone ‘interested in the improvement of international relations’.<sup>94</sup> It is notable that, like the IDI, the ILA was and remains concerned with the progressive development of both public and private international law.

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<sup>89</sup> Available at [http://www.idi-iil.org/idiF/resolutionsF/1880\\_oxf\\_02\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1880_oxf_02_fr.pdf). Note also, *e.g.*, the IDI’s 1877 Resolution on the laws of war, adopted in response to the commencement of hostilities between Russia and Turkey, available at [http://www.idi-iil.org/idiF/resolutionsF/1877\\_zur\\_04\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1877_zur_04_fr.pdf).

<sup>90</sup> See *Sects. 1.4.2 and 1.4.4* below.

<sup>91</sup> See generally *e.g.* Abrams 1957.

<sup>92</sup> Perhaps best known for Field 1876—a proposed international code dealing with both public and private international law.

<sup>93</sup> See generally *e.g.* Bewes 1925.

<sup>94</sup> *Ibid.*

The first national sub-branch of the ILA was The Netherlands Society of International Law, established in 1910. The Centenary of the Society was celebrated in the hosting of the ILA biennial meeting in The Hague in 2010, for the fourth time in its history, and in a number of articles in a special edition of *The Netherlands International Law Review* (volume 57(2), 2010), examining the development of international law in The Netherlands, with one article specifically dealing with the history of The Netherlands Society of International Law.<sup>95</sup> Although Asser had no role (or at least no public role) in the founding of the ILA in general, it is no surprise that he was one of the 33 founding members of the board of The Netherlands Society. Further proof of his strong support for the Society may be found in the report that he donated to it part of the proceeds of his Nobel Prize award.<sup>96</sup> While Asser's direct influence on The Netherlands Society of International Law was of course curtailed by his death in 1913, his legacy was nevertheless extended and may easily be identified through his influence on others. The President of the Society for its first 15 years was Daniel Josephus Jitta, who had succeeded Asser at the University of Amsterdam when the latter had retired from academic office in 1893, and had also succeeded him as a member of The Netherlands Council of State in 1903. Jitta inherited and furthered Asser's legacy as a scholar and practitioner of both public and private international law. His successor in turn as President of the Society in 1926 was another student of Asser, Bernard Cornelia Johannes Loder, who had significantly contributed to the drafting of the Statute of the Permanent Court of International Justice, and then served as the Court's first President from 1922 to 1924. The international impact of Dutch international lawyers during this period must surely be attributed to some degree to the role played by Asser in establishing The Netherlands as a leading centre of international law.

### 1.3.3 *The 'Hague Conferences on International Private Law'*

As noted above, in September 1874 the IDI passed a resolution calling for international agreement on the unification of rules of private international law, felt by Asser among others to be an important and realistically achievable objective in the progressive development of international law. In February 1874, the government of The Netherlands had indeed already issued an international call for action on the matter, noting:

how desirable it would be for the conclusion of arrangements relative to the reciprocal execution of judicial decisions pronounced in civil and commercial cases to be rendered possible, or at least facilitated, by the adoption, on the part of the governments interested, of uniform rules in regard to judicial competence.<sup>97</sup>

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<sup>95</sup> Eyffinger 2010.

<sup>96</sup> *Ibid.*, p. 149.

<sup>97</sup> United States Department of State 1874–1875, p. 790.

In particular, The Netherlands proposed that:

[i]n order to attain this end, which consists in rendering possible ... the conclusion of conventions regulating the reciprocal execution of decisions pronounced in civil and commercial cases ... the best way would be to confide this important and difficult matter to an international commission, whose duty it should be to draw up a body of rules which the governments interested should pledge themselves to introduce into their legislation or to follow in their treaties.<sup>98</sup>

While the call was specifically directed to the governments of Germany, England, Austria, Belgium, France and Italy, it was also more widely distributed—a copy was, for instance, forwarded by the Ambassador of The Netherlands to the United States<sup>99</sup> to the US Secretary of State, Hamilton Fish (who had, incidentally, also negotiated the terms of the Alabama Arbitration with Great Britain). The accompanying memorandum drew particular attention to the importance of the issue in light of what we might today describe as ‘globalisation’, making the strikingly modern argument that:

[t]he extension of international relations of all kinds, the improvement and the multiplication of the means of transportation and communication, have, by facilitating the removal of individuals and of fortunes, and by giving a truly cosmopolitan character to commercial and industrial relations, rendered most desirable the adoption of a reform based upon the solidarity of the interests of all civilised nations.

The rapidity with which it is now possible to travel from one end of the world to the other is by no means in harmony with the tardy movements of judicial decisions, which, in principle, do not go beyond the frontier of the country in which they were rendered.<sup>100</sup>

If this memorandum was not at least in part the product of Asser’s pen, it bears very clear evidence of his influence, not just in the fact that it cites his academic writing to support its analysis—his 1869 article in the first edition of the *Revue de droit international et de législation comparée*<sup>101</sup> noted above—but also in its broader appreciation of the importance of the issue. This particular initiative did not, however, proceed further. On the part of the United States, Hamilton Fish replied that ‘the difficulties are so great in the way of carrying into effect the project, arising from the nature of the organic Constitution of the United States and the relations of the States to the Federal Government, that it is not thought best to attempt it’<sup>102</sup>—an objection which again has a strikingly modern tone, resonating in the present federalism difficulties facing the United States in implementing treaties, including treaties of private international law harmonisation.<sup>103</sup>

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<sup>98</sup> Ibid.

<sup>99</sup> Ibid., p. 789 *et seq.*

<sup>100</sup> Ibid., p. 791.

<sup>101</sup> See Sect. 1.1 above. The US record (p. 791) is slightly inaccurate, citing to ‘F.M.C. Asser [sic] on the effect or the execution of decisions rendered in a foreign country in civil and commercial cases. (*Revue de droit international et de législation comparée*, 1869.)’.

<sup>102</sup> United States Department of State 1874–1875, p. 795. See further *e.g.* Alexander 1928, p. 222 *et seq.*

<sup>103</sup> See *e.g.* Mills 2010, p. 451; Brand 2009, p. 368; Ku 2008.

The perceived importance of the issue was, however, such that it received continued and frequent attention. The issue of the harmonisation of international rules for the recognition of foreign judgments was discussed periodically by the IDI,<sup>104</sup> and at almost every ILA meeting from 1877 until the end of the century, but with little progress. An inter-state conference to replace the failed Dutch effort of 1874 was proposed to be held in Rome in 1884, with the support of Mancini<sup>105</sup> (the then Italian Minister of Foreign Affairs), but apparently cancelled due to a cholera outbreak.<sup>106</sup> Greater progress was made in South America, with the adoption of a regional private international law harmonisation treaty at a Congress in Montevideo in 1889.<sup>107</sup> Although in part this achievement may have been assisted by pre-existing similarities in the legal systems of the states involved, its significance as a model for later projects, not just American but also European and international, should not be underestimated. Partially inspired by this development,<sup>108</sup> at Asser's initiative and with Asser presiding, a conference to consider the issue of international harmonisation of private international law was convened in 1893 in The Hague, and attended by almost all European states (with the perhaps notable exception of Great Britain). This was, in fact, to be the first of four conferences held over the next decade or so,<sup>109</sup> with further meetings in 1894, 1900 and 1904, at each of which Asser was re-elected as President. All were widely attended by European states, with the interesting appearance of Japan at the 1904 meeting, but with no British or American participation. Although intended to engage generally with harmonisation of private international law, the conferences in practice focused on quite particular issues as realistic starting points. The major product of the first two conferences, for example, was the 1896 Convention on Civil Procedure (which came into effect in 1899), focusing on coordination of rules dealing with such matters as the communication of judicial and non-judicial acts and the execution of letters rogatory, and outlawing discrimination against foreign nationals regarding the provision of security in civil proceedings or the possibility of imprisonment for debt. The 1900 conference produced treaties dealing more with choice of law issues, focused on the validity of marriage, divorce, and guardianship of infants, all of which came into force in 1904. At the 1904 conference, further treaties were prepared on such matters as succession,

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<sup>104</sup> See e.g. the 1878 Resolution on 'Execution of Judgments', with Asser as the reporter, available at [http://www.idi-iiil.org/jidiF/resolutionsF/1878\\_paris\\_01\\_fr.pdf](http://www.idi-iiil.org/jidiF/resolutionsF/1878_paris_01_fr.pdf).

<sup>105</sup> See e.g. Lipstein 1993, p. 554 *et seq.*; the initiative is also mentioned in the *Mémoire* annexed to the 'Note pour Messieurs les Délégués à la Conférence de Droit International Privé' of August 1893', in *Actes de la Conférence de La Haye 1893*, p. 6.

<sup>106</sup> See International Law Association 1885, p. 48. Later reports suggest that this may have provided convenient diplomatic cover for failure in the efforts to establish the conference.

<sup>107</sup> See e.g. Bewes 1920.

<sup>108</sup> The work of the Montevideo conference is discussed in the *Mémoire* annexed to the 'Note pour Messieurs les Délégués à la Conférence de Droit International Privé' of August 1893', in *Actes de la Conférence de La Haye 1893*, p. 6.

<sup>109</sup> See generally e.g. van Loon 2005; Lipstein 1993.

marital relations, lunacy, and bankruptcy, as well as an amendment to the 1896 Convention on Civil Procedure.

These conferences thus marked an important and successful shift in strategy in the harmonisation of private international law. Where the ILA and IDI had struggled to make progress in the general project of harmonisation of jurisdiction and the recognition and enforcement of civil judgments, the success of Asser's initiative could be attributed to a change in both forum (an inter-governmental rather than academic conference) and approach (a focus on achievable fragments rather than an all-embracing but unattainable ideal). Although this change may have been the product of necessity rather than intention,<sup>110</sup> it was nevertheless to Asser's credit in presiding over these conferences that he was able to judge the limits of possible consensus. The success of the conferences thus clearly owed a great deal to Asser's skill as a diplomat as well as his technical expertise—he was described by one participant as 'so much the soul of the whole enterprise as always to discover a solution at the proper time'.<sup>111</sup>

The Hague conferences were to meet again in 1925 and 1928, but without great success. It was not until 1951 that the project was re-established, this time with the adoption of a Statute which came into force in 1955—largely again under a Dutch initiative.<sup>112</sup> The modern Hague Conference on Private International Law, a formal international organisation dedicated 'to work for the progressive unification of the rules of private international law',<sup>113</sup> is thus a direct and worthy legacy of Asser's initiative more than a century ago.

### ***1.3.4 Comité Maritime International***

One of the other projects which received significant attention in the early years of the ILA and IDI was the international codification or harmonisation of maritime law. The subject was considered to be a particularly appropriate area for such attention because of its necessarily international subject matter, and because, as a result, national law had already developed very much with an international consciousness of the need for coordinated rules. After limited progress was made through diplomatic conferences in the 1880s or within the ILA, it was agreed that a separate organisation should be formed to continue the project. Around 1897, the 'Comité Maritime International' (CMI) was thus established, with Asser's

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<sup>110</sup> At the 1893 Conference, Asser initially proposed the development of general principles, but quickly accepted the proposal of the French and Swiss delegates for an approach that was more concrete, practical and tangible: see *Actes de la Conférence de La Haye 1893*, pp. 29–31; van Loon 1989, p. 1134.

<sup>111</sup> *Universal Congress of Lawyers and Jurists 1904*, p. 137.

<sup>112</sup> Note also Gutzwiller 1945.

<sup>113</sup> Statute of the Hague Conference on Private International Law, Article 1, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=29](http://www.hcch.net/index_en.php?act=conventions.text&cid=29).

involvement once again, for the purpose of encouraging and supporting codification of international maritime laws. As an aspect of this, it was envisaged that one of the functions of the CMI was to serve as an umbrella association for national maritime law associations, who are counted among its membership. As a body more focused on industry and commercial interests, it continued to draw upon the expertise of academic and practising members of the ILA, to aid its codification efforts.<sup>114</sup> With the emergence of this institution we can again see the evidence of Asser's astuteness, in his recognition of the role that focused and specialised institutions can play in the progressive development of international law.

### 1.3.5 *Hague Academy of International Law*

Although the Hague Academy of International Law did not hold its first session until 1923, Asser may also certainly be credited with contributing significantly to its establishment.<sup>115</sup> Prior to the First World War, he was president of the Dutch committee which negotiated the founding of the Academy.<sup>116</sup> It was agreed that the Academy should operate, like the Permanent Court of Arbitration (established in 1902 as a product of diplomatic efforts in the 1899 Hague Peace Conference, as discussed below<sup>117</sup>), from the Peace Palace, built in The Hague from 1907 to 1913, to whose library Asser also contributed.<sup>118</sup> The idea for such an academy had long been supported by the IDI and ILA, but it was Asser who finally planned and shaped its practical formation, contributing further a part of his Nobel Prize award to the project,<sup>119</sup> and apparently even contributing part of his estate to its foundation.<sup>120</sup> Funding for the Academy came principally from the Carnegie Endowment for International Peace, established in 1910. The first President of the Endowment, the renowned international lawyer Elihu Root (a former US Secretary of State and also at the time a Senator and President of the American Society of International Law), was himself awarded the Nobel Peace Prize in 1912.

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<sup>114</sup> See International Law Association 1899, p. 91.

<sup>115</sup> Asser also wrote an essay on the establishment of the Academy: Asser 1912, pp. 282–292.

<sup>116</sup> See *e.g.* AJIL Editorial Comment 1914b, p. 353.

<sup>117</sup> See Sect. 1.4.2 below.

<sup>118</sup> See [http://nobelprize.org/nobel\\_prizes/peace/laureates/1911/asser.html](http://nobelprize.org/nobel_prizes/peace/laureates/1911/asser.html).

<sup>119</sup> See <http://www.vredespaleis.nl/default.asp?pid=101&tl=1>.

<sup>120</sup> See *e.g.* AJIL Editorial Comment 1914b, p. 356 (thanking 'the heirs of Mr. Asser'), and also noting Asser's contribution to the drafting of the Statutes of the Academy (a copy of which is at p. 357 *et seq.*). A memorial to Asser's passing is, rather sadly, found in the same volume of the journal, p. 343.

## 1.4 Legal and Diplomatic Practice

It is a defining characteristic of Asser's life that he pursued a diversity of interests and activities. During his time at the University of Amsterdam, for example, he was an active practitioner and a prominent figure in the Amsterdam business and banking community. While his private practice was an enduring part of his career, over time it was increasingly dominated by a sense of public service, particularly following his appointment as Legal Advisor to The Netherlands Ministry of Foreign Affairs in 1875. As noted above, he became a part-time professor in 1877 to allow him to continue these activities alongside his academic work.

### 1.4.1 *Legal Advisor*

As Legal Advisor, Asser counselled and represented The Netherlands in a variety of contexts. As noted above, he was, for example, a member of the Dutch delegation to the Congo conference of 1884–1885 in Berlin.<sup>121</sup> This conference attempted to establish legal regulation of European claims to African colonial territory, although its major effects were an acceleration of the colonial 'Scramble for Africa' and the establishment in 1885 of the (ultimately notorious) quasi-privatised 'Congo Free State' (under the control of the Belgian 'International Association of the Congo'). Asser played a more significant role in the contemporaneous negotiations to neutralise the Suez Canal (following British occupation in 1882), securing a seat for The Netherlands on the Suez Canal Commission, which drew up the Convention of Constantinople in 1888.<sup>122</sup> Continuing an early interest in problems of international communications and transport regulation, Asser also served as a representative to the International Conference for the Protection of Submarine Cables in 1882,<sup>123</sup> the International Conference on International Legislation Governing the Transport of Goods by Rail (which adopted the International Convention concerning the Carriage of Goods by Rail in 1890), and (as noted above) the Central Commission for Navigation on the Rhine.

### 1.4.2 *1899 Hague Peace Conference*

The establishment of the IDI and ILA were, as previously noted, directly inspired by the success of the Alabama Claims Arbitration, and consequently these

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<sup>121</sup> See generally *e.g.* Koskenniemi 2002, p. 121 *et seq.* See further Sect. 1.2.1 above.

<sup>122</sup> See [http://nobelprize.org/nobel\\_prizes/peace/laureates/1911/asser.html](http://nobelprize.org/nobel_prizes/peace/laureates/1911/asser.html). Note also the 1879 Resolution of the IDI on the neutrality of the Suez Canal, available at [http://www.idi-iil.org/idiF/resolutionsF/1879\\_bru\\_x\\_01\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1879_bru_x_01_fr.pdf). See further Asser 1888.

<sup>123</sup> Once again, drawing on the work of the IDI, in its 1879 Resolution on the subject, available at [http://www.idi-iil.org/idiF/resolutionsF/1879\\_bru\\_x\\_02\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/1879_bru_x_02_fr.pdf).

organisations gave particular attention during their early years to the development of the possibility for the arbitration of international disputes. This issue, alongside questions of disarmament and the conduct of warfare, was considered at two major ‘Peace Conferences’ held in The Hague in 1899 and 1907 (a third conference scheduled for 1915<sup>124</sup> was, for obvious reasons, never held), in which Asser played an important role.<sup>125</sup> Although neither conference successfully established any form of compulsory arbitration, one of the major successes of the 1899 conference, a product of Asser’s direct involvement and skill as a negotiator, was the adoption of a Convention for the Pacific Settlement of International Disputes,<sup>126</sup> which founded the Permanent Court of Arbitration (‘PCA’). The PCA is of course not a ‘court’, but an international organisation dedicated to assisting states (and increasingly also international organisations and private parties) in the peaceful resolution of their disputes.<sup>127</sup> To this end, it provides a facility including a panel of potential arbitrators to assist in resolving disputes through binding arbitration, where the parties to the dispute consent, which remains active and important today.<sup>128</sup>

### 1.4.3 Arbitrator

In 1902, Asser served as an arbitrator in two very important inter-state disputes—a sign of the great esteem in which he was held as (in the words of a US diplomat) ‘an unimpeachable authority upon international law’.<sup>129</sup> The first was as sole arbitrator (with the agreement and at the joint request of the United States and Russia)<sup>130</sup> in the *US-Russian Sealing Arbitration*,<sup>131</sup> a claim made by the United States on behalf of US sealing ship owners for compensation for the seizure of four US ships by Russia outside Russian territorial waters. Russia admitted that one

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<sup>124</sup> See *e.g.* Scott 1908a.

<sup>125</sup> See generally *e.g.* Aldrich and Chinkin 2000.

<sup>126</sup> See *e.g.* Eyffinger 1999, including the Convention, p. 416 *et seq.*; United States Department of State 1899, p. 521.

<sup>127</sup> Asser was rather critical of the PCA: ‘Instead of a Permanent Court, the Convention of 1899 only created the phantom of a Court, an impalpable ghost, or, to speak more plainly, it created a clerk’s office with a list’, cited in Kebede Tiba 2006, p. 203; Spiermann 2005, p. 4.

<sup>128</sup> See further <http://www.pca-cpa.org/>.

<sup>129</sup> See *e.g.* United States Department of State 1900, p. 859.

<sup>130</sup> See *e.g.* United States Department of State 1900, p. 799. The US Ambassador to The Netherlands reported back that Asser, when asked what compensation he would require to act as arbitrator, ‘assured us he regarded it as a great honor to be selected, and that the honor was more to him than any consideration of money, and that he preferred to leave the amount of his compensation to be determined by the parties’, p. 800.

<sup>131</sup> See generally United States Department of State 1902. *Appendix I—Whaling and sealing claims against Russia.*

ship was mistakenly seized, and another had its cargo seized without proof of illegality, and the only issue for these cases was calculation of compensation. The justification for the seizure of the other two ships, that Russia was in ‘hot pursuit’ from illegal sealing within its territorial waters, was rejected by Asser as unfounded in international law, and compensation was awarded to the US. Although the US had unsuccessfully argued for extensive territorial seas in the region in its pleadings for the 1893 *Bering Sea Arbitration* with Great Britain (in which the US had itself seized British ships on the high seas, and been found liable for compensation), it was held not to be ‘estopped’ by these claims, and the generally accepted 3 mile territorial limit was applied. The amount of compensation was calculated with the assistance of commercial experts, nominated by the parties at Asser’s request, and included damages for lost profits for the time the ships were out of service. The arbitral award appears to have been happily accepted by both states as a successful resolution of a difficult diplomatic problem.

The second dispute in which Asser served as an arbitrator in 1902 was the PCA’s very first case, the *US-Mexico Pious Fund Arbitration*.<sup>132</sup> Asser was appointed by Mexico and served as one of five arbitrators, each appointed from the permanent panel of arbitrators (nominated by states) which had been established for the PCA. This dispute arose out of a trust fund established in the seventeenth and eighteenth centuries, to support religious activities in the Californias, which came ultimately under the control of the Mexican government.<sup>133</sup> With the cession of ‘Upper California’ from Mexico to the United States in 1848, the fund ceased payments to churches based in Upper California. After those churches complained to the United States, the dispute was submitted to a ‘mixed claims commission’ in 1869, finally resulting in an 1875 award of 21 annuities, covering the years from 1848 to 1869, which were paid to the church by Mexico. Subsequent annuities were, however, not paid, and a later dispute then arose as to whether the payment obligation continued. In 1902 the US and Mexico agreed to refer the claim to an arbitral tribunal established under the auspices of the PCA, authorised ‘to render such judgment or award as may be meet and proper under all the circumstances of the case’. The tribunal ultimately found (unanimously) that the amount of annuity determined in the 1875 award was payable by Mexico in perpetuity, and thus ordered payment of past dues (since 1869) as well as a continuing annual contribution.<sup>134</sup> Two aspects of the decision are particularly notable. The first is the exclusion by the tribunal of Mexico’s reliance on its domestic law as a defence against an international obligation—an early affirmation of a now well-accepted

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<sup>132</sup> The Pious Fund Case. *United States of America v. the United Mexican States*. Protocol signed at Washington, 22 May 1902. Decision at The Hague, 4 October 1902. UN Reports of International Arbitral Awards, Vol. IX, p.1. See generally United States Department of State 1902. *Appendix II—United States vs. Mexico. In the matter of the case of the Pious Fund of the Californias*; Penfield 1902.

<sup>133</sup> See generally Weber 1963.

<sup>134</sup> Payments lapsed during the Mexican Revolution; a final settlement was only made in 1967. See Weber 1969.

principle of international law.<sup>135</sup> The second is the fact that the award drew heavily on the private law (and private international law) principle of *res judicata*, determined to be a general principle of international law, to find that the decisions of fact and law under the 1875 award should continue to determine Mexican obligations under the fund. While it may be impossible to attribute any of this reasoning to individual arbitrators, it is not unreasonable to suppose that Asser's particular interest in the harmonisation of private international law principles played a role in the approach of the arbitral award.

#### 1.4.4 1907 Hague Peace Conference

The second Hague Peace Conference, held in 1907,<sup>136</sup> focused predominantly on regulating the conduct of warfare, particularly at sea. The conference also, however, gave significant attention to the further development of inter-state arbitration, and produced a revised Convention on the Pacific Settlement of International Disputes.<sup>137</sup> A further Convention dealing with the Limitation of Employment of Force for Recovery of Contract Debts was also established, which essentially made international arbitration compulsory for the recovery of debts owed by foreign states to private parties, with force only permissible if an offer to arbitrate were refused or an arbitral award not complied with.<sup>138</sup> While this may not seem a major development when viewed with modern eyes, the use of force to reclaim private debts was considered at the time a significant potential source of international conflict. It had, for example, been one of the issues at the heart of the 1902 Venezuela Crisis, in which Great Britain, Germany and Italy imposed a naval blockade on Venezuela for several months.<sup>139</sup> Consideration was also given at the 1907 Conference, but without success, to a 'Treaty of Arbitration', through which states would give general consent and thereby more widely commit themselves to compulsory arbitration.<sup>140</sup>

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<sup>135</sup> Reflected in *e.g.* Articles 3 and 32 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001).

<sup>136</sup> See generally *e.g.* Scott 1908a; Eyffinger 2007; AJIL Colloquium 2007; Daudet 2008.

<sup>137</sup> See generally *e.g.* Hershey 1908.

<sup>138</sup> See generally *e.g.* Scott 1908b.

<sup>139</sup> Venezuela accepted the validity of the claims of the blockading powers; a copy of the protocol is available at 2 American Journal of International Law 1908, p. 902. A further dispute arose as to whether the blockading powers should have priority over other Venezuelan creditors, and under US pressure this was submitted to the PCA in 1903; a copy of this further protocol is available at 2 American Journal of International Law 1908, p. 905. The dispute was resolved by an arbitral award on 22 February 1904, somewhat surprisingly in favour of the blockading powers.

<sup>140</sup> The mechanism is supported by Article 53 of the 1907 Convention on the Pacific Settlement of International Disputes. See further *e.g.* Hull 1908.

Substantial progress was also made at the conference on the establishment of a 'Court of Arbitral Justice',<sup>141</sup> with a permanent membership representative of the international community, to complement the more flexible but ephemeral PCA. Agreement on the formation of the Court was reached in principle, and 35 articles forming the basis of a convention for this purpose were endorsed at the conference. However, progress was frustrated by a lack of agreement on the means of appointing judges, and how states were to be represented on the court without its membership becoming unwieldy or their sovereign equality unacceptably compromised. Nevertheless, it is evident that at this conference and in many of the articles it discussed and agreed the seeds were sown for the foundation of the Permanent Court of International Justice in 1922,<sup>142</sup> and its successor the International Court of Justice.

### *1.4.5 Conferences on Unification of the Law of International Bills of Exchange*

The account above should by no means be taken to indicate a complete shift in Asser's interests, away from private international law considerations to matters of greater concern to the public international stage. Asser continued to be interested in and emphasise the importance of matters of private international law, reaffirmed by his presiding role in two conferences, hosted in The Hague in 1910 and 1912, on the unification of the law relating to international bills of exchange.<sup>143</sup> The result of the second conference was the adoption of a convention on the subject, which was widely signed, not only by European and South American states, but also by China and Japan,<sup>144</sup> perhaps signifying a growing internationalisation of the project of legal harmonisation. Although ultimately not widely ratified, the uniform rules which were agreed at the conference formed the basis of future legal codification efforts, including the Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes negotiated under the auspices of the League of Nations at Geneva in 1930.<sup>145</sup> The 1912 Convention was printed, with a posthumous introduction by Asser,<sup>146</sup> perhaps his final publication, in the inaugural 1913 edition of the *Grotius Internationaal Jaarboek*, renamed in subsequent editions as the *Grotius Annuaire International*, which from 1913 to 1946 essentially served as

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<sup>141</sup> See e.g. Scott 1908a, 1916.

<sup>142</sup> See e.g. the many references to the 1907 draft convention and discussions in the documents and proceedings of the 1920 Advisory Committee of Jurists, available at <http://www.icj-cij.org/pcij/other-documents.php?p1=9&p2=8>; Spiermann 2003.

<sup>143</sup> See e.g. Ellinger 2000, pp. 35–36.

<sup>144</sup> Lorenzen 1916, p. 138.

<sup>145</sup> See e.g. Guerrico 1944, p. 3.

<sup>146</sup> Noted in Engert 1914.

one of the distinguished predecessors to *The Netherlands Yearbook of International Law*.

## 1.5 A Legacy in Public and Private International Law

It should be readily apparent from the outline above that Asser was at the heart of much of the development of international law in the critically formative period of the late nineteenth and early twentieth centuries. His ‘fingerprints’ may be found on almost any area of international law, public or private, and summarising this legacy necessarily involves omission and simplification. But with these provisos, we may perhaps identify four key legacies of Asser’s professional life.

First, Asser played a critical role in the development and gradual institutionalisation of legal internationalism. At a time of growing European nationalism, with the emergence of unified German and Italian states, he shared with a number of his key contemporaries a belief in the importance of a global perspective and the potential importance of law in regulating relations between nations. With them, he established informal global networks of like-minded scholars and diplomats (including the *Institut de Droit International*), largely academic groups who would work for the expansion of the scope and influence of these ideas. Seeking to give these initiatives a greater impact and effect, he would also be involved in the establishment of associations of international lawyers (including the *International Law Association*), and the growth of ‘international law’ itself as a new field of academic and practical work devoted to the legalisation of international relations. Finally, progressing the development of this field further, he would be heavily involved in building enduring international institutions (including the *Hague Conference on Private International Law*, and *The Hague Academy of International Law*) which today continue to embody those ideas of internationalism. One aspect of Asser’s professional life is therefore the transformation of the idea of internationalism, through socialisation and legalisation, into concrete institutions with real social products, designed to outlast and overshadow their founders. Asser would, one might suspect, be delighted that it is today so difficult to believe that one man was at the heart of the foundation of so many of the key institutions of legal internationalism.

Second, Asser was not simply an organiser or facilitator of these organisations or conferences; he was a very active contributor to their work. In so doing, he played a further central role in the early emergence of formalised dispute resolution on the international plane. In the 1899 Hague Peace Conference, he played an important part in the establishment of the *Permanent Court of Arbitration*, and his work as an arbitrator in two major international disputes in 1902 contributed to the credibility of the institutionalisation of international dispute resolution. Asser was involved in further work on a proposal to augment the *PCA* with the establishment of an additional, more judicial, international institution during the 1907 Hague Peace Conference, which very much laid the foundations for the emergence

of the Permanent Court of International Justice in the aftermath of the First World War. Asser was, however, by no means a naïve internationalist. He made it quite clear that, if international arbitration as a means of peaceful settlement of disputes was to flourish, the ‘fantastical-sentimental’ attitude that divests the institution of its legal character and thus of its true meaning was to be strongly opposed. Part of that was Asser’s plea for a careful examination of the applicable law, arguing against an automatic preference of international over national law in that respect. ‘Nobody’, stated Asser, ‘will suspect me of not caring for international law. However, it would be difficult to deny that this part of law does not yet deserve the palm when it comes to legal certainty’.<sup>147</sup> Nonetheless, the development of institutions of international dispute settlement was a key complement to the development of substantive international law during this period. Without them, international law might struggle to differentiate itself from politics, as no distinctly legal forum or procedure would be available to engage with disagreements over the interpretation or application of substantive rules of international law. In them, we see the beginnings of a conception of an international ‘rule of law’, where disputes over the rules governing international relations may be peacefully resolved through legal processes.

Third, Asser played a major role in establishing the reputation of The Netherlands as an important neutral power in the development of international law, and of The Hague as a capital of international law and legal institutions, a status which it continues to have and promote today.<sup>148</sup> The relationship between The Hague and international law has long been somewhat symbiotic—international law has perhaps contributed as much to The Hague as The Hague has contributed to international law. As one scholar has put it, ‘it was the law that, around 1900, gave a new lease of life to the dreamy, backward township’.<sup>149</sup> The success of The Hague in attracting international conferences and institutions during Asser’s time has continued to serve it well, giving it a natural prominence when a location is being considered for any new institution. It has equally given The Netherlands an impetus to participate fully in international lawmaking activities, to justify its geographic centrality. This is, of course, a role which The Netherlands has long played, reflected in its ‘Grotian tradition’, as a small and somewhat vulnerably positioned state with a great strategic interest in the promotion of international peace and free trade, including through the progressive development of both public and private international law. The significance of The Hague as a centre of international law and institutions cannot of course be attributed to any one individual. It may nevertheless be suggested that the decision to hold the 1899 Peace Conference in The Hague, which went some way to establishing or confirming its status, was likely to have been influenced at least to some extent by the successful

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<sup>147</sup> Asser 1903, pp. 245–258, especially p. 258.

<sup>148</sup> Celebrated in van Krieken and McKay 2005.

<sup>149</sup> Eyffinger 2010, p. 144.

hosting in The Hague, at Asser's instigation, of the Conferences on Private International Law held in 1893 and 1894.

Fourth and finally, Asser may be viewed as having a particularly important legacy in the field of private international law, through The Hague Conference on Private International Law and more broadly the internationalist perspective it embodies. One of Asser's principal areas of work was on the international harmonisation of rules of private international law, which he clearly viewed as an important matter of international concern. But in this he was swimming against a tide. In the late nineteenth century, the traditional understanding of private international law as part of the law of nations was being eroded by a range of factors, including the rise of 'positivist' international legal theory.<sup>150</sup> Although legal practitioners like Asser have always remained more conscious of the functional and practical entanglement of public and private international law, Asser's lifetime saw a growing doctrinal division between the two subjects, as public international law was increasingly viewed as a formal system for documenting agreements between equal and sovereign states. In contrast, by the middle of the twentieth century, much of private international law had been reconceptualised (perhaps even misconceptualised) as a matter of purely national concern—as part of the law of civil procedure, or private law seeking to determine the just outcome in individual cases. This has perhaps left its strongest legacy in the various states of the United States, where private international law rules are frequently viewed as serving substantive domestic policy interests. In Europe, however, this understanding has been overturned in recent decades by the development of European private international law rules, focused on systemic objectives principally associated with the efficient functioning of the internal market. In the modern era, private international law is in the process of re-emerging, in something like its original conceptualisation, as a form of public law dealing with the distribution of national regulatory authority between states. On the international stage, this means it is closely linked with public international law rules of jurisdiction and their shaping of national sovereignty. The Hague Conference on Private International Law, refounded as a permanent international institution in the 1950s, carries the torch for this internationalist perspective on private international law, through the support it provides for private international law harmonisation efforts. It is not merely the direct inheritor of the forum for negotiation provided by the conferences hosted by Asser in The Hague in 1893, 1894, 1900 and 1904, but an inheritor of the spirit of internationalism, and the internationalist perspective on private international law, which inspired those conferences. It is no coincidence that other international bodies which Asser contributed to creating, including the Institut de Droit International, the International Law Association and The Hague Academy of International Law, are all at least formally engaged in both public and private international law. These all continue to carry the hallmarks of the beliefs of Asser and his collaborators—the importance of the development of both public

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<sup>150</sup> See further *e.g.* Mills 2009, Chap. 2.

and private international law as a matter of international justice and the peaceful relations between states.

Tobias Michael Carel Asser's legacy in public and private international law is both broad and deep. He had an impact on the substantive development of international law, the professionalisation of the study and practice of international law, and on its institutionalisation. His obituarist in the *American Journal of International Law* in 1914 summed up Asser's contribution well in the following tribute:

[i]t is not given to many men to take part in such important creations, and the evidences of his constructive imagination and his well directed zeal will long survive him and make his name one to conjure with in the international world.<sup>151</sup>

Asser's professional life coincided with a period of great change in the development of international law, and we should of course be wary of attributing too much significance to the contribution made by any individual in such large and global social transformations. Nevertheless, his individual contribution as a 'practical legal statesman' was indisputably worthy of the distinction it received through the award of the Nobel Peace Prize in 1911.

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<sup>151</sup> AJIL Editorial Comment 1914a, p. 344.

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