

Commemorative Conference
Inspiration and Innovation in International Law and Politics -100 Years Nobel Peace
Prize Tobias Asser

***The Hague Conference on Private International Law: Asser's vision and an
evolving mission***

Tobias Asser was awarded the Nobel Peace Prize on 10 December 1911, as the Chair of the Norwegian Nobel Committee put it, for having “*above all been a practical legal statesman*”, and a “*pioneer in the field of international legal relations*”, comparable to Grotius. “*It was at his instigation that the Dutch Government summoned the four conferences at The Hague in 1893, 1894, 1900 and 1904 on international private law...all presided over by Asser*” – the crown on his “*public activity*”, as a diplomat, lawyer, and scholar. The seven Conventions on private international law that these diplomatic sessions produced – five of which Norway had joined – according to the Nobel Committee would establish uniformity in private international law, “*and thus lead to greater public security and justice in international relations.*”

The *laudatio* by the Nobel Committee continues, mentioning Asser’s strategy as he had defined it at the third Hague session in 1900. After the international adoption of a Convention, Asser had remarked, the responsibility passes to individual countries. If each country would set up a permanent commission to prepare the work of future diplomatic Conferences, “*the foundations will be laid for an international organization which, without interfering with the complete autonomy of the nations in the domain of legislation, would contribute to the codification of private international law within the not too distant future.*”

“*Within the not too distant future*” – and here we are, one hundred years later. With a permanent intergovernmental organisation with over 70 Members including the European Union, 70 more States Parties to almost 40 Hague Conventions adopted since 1951, a broad range of activities around the globe and a wide influence across the planet, and yet – with Asser’s agenda still far from finished. Quite obviously, we have to deal with a moving target!

But then, what a difference between *la belle époque* and our world today:

- First, just in terms of volume, frequency and complexity of cross-border relationships and transactions, private international law had an infinitely more modest role in Asser’s days than it has in our age of globalisation and regional integration and cooperation.
- Second, while private international law in Asser’s time was largely the concern of the elites, nowadays, as a *gesunkenes Kulturgut*, it is increasingly the concern of all the different strata of society, including millions of economic and other migrants across the planet.
- Third, while Asser was a true cosmopolitan thinker and had general human society, i.e. the community of “civilized countries” in mind, the reality was that the stakeholders in the first four Hague Conferences were representatives – all men, of course, speaking French, *bien entendu* – of a handful of European continental nations. The sole exception was Japan which only attended the last session in 1904.

The United Kingdom and the United States of America did not take part; Latin America, where the unification of private international law had started, was still a world far away. It was a very small, homogeneous group, hardly comparable to today's Hague Conference which has become a truly global, multifaceted organisation.

So, to what extent can we consider the current Hague Conference on Private International Law to be Asser's legacy? Can we still recognize Asser's fingerprint on this institution? Are we justified in boasting that the Conference is the oldest of the Hague international legal institutions thanks to Asser's initiative?

Let us take a closer look at Asser's vision, the spirit that was the start of it all, and then look at three aspects which in fact form part of the vision: the forum of negotiations he created; the method of work for which he laid the foundation; and finally the programme – the content of what he had in mind.

The Vision

First – his vision. Famous and often quoted are Asser's words at the beginning of the first session of the Hague Conference: « *C'est un des rêves de ma jeunesse qui, si tous les présages ne nous trompent, vient d'entrer dans la voie de la réalisation* ». Beyond the conscious realization of an intellectual idea, a dream was about to come true. Hence Asser's emotion, which he – an otherwise reserved man – shared openly with his audience. One senses a drive deep down in Asser, which could express itself to some extent in different shades of ideas in the course of his life – ideas that often built on those of others, such as the Italian jurist and statesman Pasquale Mancini. For example, Asser followed Mancini's preference for nationality rather than domicile as the principal connecting factor to determine which court in an international situation should have jurisdiction and which law should apply. But, contrary to Mancini, Asser did so without much concern for its philosophical or ideological basis. His choice was pragmatic, and he was the first to find an ingenious way to accommodate the concerns of Switzerland and Denmark when they expressed a preference for the domicile criterion at the negotiations in The Hague.

Asser's vision went deeper, and his drive was to achieve agreement at the international level to remove unnecessary obstacles to human activity across borders. To Asser it was unacceptable that a judgment rendered in one country was a mere piece of paper in another. And the same went for marriages and other legal relationships that were not recognised abroad. From early on, Asser had the intuition that the international – not the domestic – legal order was to be the universe of discourse to resolve such issues. Therefore, solutions had to be found in an *international* forum. At the same time, he knew from experience, that legal diversity was deeply entrenched in the fabric of societies and that therefore *unification of conflict rules* was generally a more realistic aim, at least at the outset, than harmonization of substantive laws.

Asser was acutely aware, more than many others, of the continuing contradictions between the “*esprit d'internationalité*” and nationalistic tendencies, the latter of which became stronger during his lifetime. He constantly sought intelligent, pragmatic ways to bring these two forces into harmony. It was in spite of his efforts

that the Conventions adopted did not contain an exception to reserve for the fundamental norms and values of each participating State – the imperatives of public policy (*ordre public*). The adverse effects of that omission would appear in the interbellum years when German racist marriage laws were applied under the Hague Marriage Convention. Only after the Second World War did the public policy exception find its place in Hague Conventions.

Despite the colossal changes that have occurred since early last century, Asser's vision as it developed during the first four Hague Conferences can still be recognised in today's Hague Conference and its work. The Conference operates as an intergovernmental institution, and its primary tool is still the multilateral treaty. The Hague Conventions have found acceptance even in countries, such the United States of America, which initially expressed reservations with regard to the very notion of binding treaties on private international law. Of course, the Conventions have evolved, in some respects in a direction that Asser had unsuccessfully fought for, e.g. towards the principle of universal application of laws, no matter whether those laws are those of a State Party to the treaty of another State.

In other respects there have been quite dramatic changes of orientation. The challenge to reconcile not only different systems of private international law, but also different legal traditions has expanded greatly. Bridging the divide between the civil and the common law, which was not represented during the earlier period, has been, and still is, a major task for the Conference. This has led to a large number of innovations. The notion of habitual residence as a connecting factor (which one finds already in some of the early Conventions) has gained prominence and found wide acceptance even beyond Hague Conventions. Freedom of choice of law, and of choice of court, by parties – not only only in international commercial contracts, but also in the context of cross border property arrangements and even family law relations – has made its way into Hague Conventions and the work of other global and regional bodies.

Sometimes the Convention as a binding instrument may be too ambitious, at least at an early stage of examination of a given legal topic by some countries. A number of States whose legal systems are based on or includes Shar'iah law traditions have so far been hesitant to join certain Hague treaties. This inspired us in 2004 to start the so-called "Malta Process" on transfrontier family relations including countries South and East of the Mediterranean and beyond. Here the hope is that common ground can be found on at least certain principles of jurisdiction and administrative cooperation, even if ratification of the relevant Hague Conventions is, at this point, a bridge too far for some of these countries.

The Convention as an instrument has been particularly effective when it comes to establishing stable international cooperation among courts and administrative agencies. There was a hint of this development in some of the early Hague Conventions. But what Asser could not foresee is the creation of national governmental bodies, under a specific treaty, with special responsibilities for cross-border communication and cooperation. In Asser's days diplomats and consuls acted as the *trait d'union* in international civil matters. He would be truly amazed at the development of global and regional networks which now include more than 3000 Central and competent authorities in well over 100 countries. In parallel, networks of liaison judges designated by their countries have developed, in particular in the

context of the Hague Child Abduction and Child Protection Conventions, in ways unthinkable a century ago. The foundation provided by the treaties gives such expanding networks of administrative agencies and judges throughout the world a permanency as well as a status under international law with tremendous potential to support, and learn from, each other.

Although some Conventions have introduced elements of substantive unification, the intuition that legal diversity is an important aspect of our world, and largely to be respected, is still preeminent in the work of the Hague Conference. Indeed, unification of rules of coordination, communication and cooperation, respecting the variety of substantive laws, has enabled continuous and even exponential success in a widening circle of participating countries and legal cultures in Hague Conference work and Hague Conventions.

The Forum

Asser's vision included an international legal forum. Asser saw his scientific work in publications and at the *Institut de Droit International* and other academic bodies essentially as preparation for intergovernmental negotiations involving "statesmen" assembled in "*une conférence internationale ou (...) plusieurs conférences quand il s'agirait des parties spéciales*" – the question of whether one or more conferences would suffice he initially left open, quite wisely. After the first two sessions of the Hague Conference, permanency of the forum became a clear and realistic objective, and Asser succeeded in obtaining the creation of a standing Netherlands Government Committee in 1879. One of its functions was to prepare the next sessions of the Hague Conference "*pending the creation of an international body*". It would take until after the Second World War before the Hague Conference was established as a permanent intergovernmental organisation.

A continual contact between the Organisation and its Members is vital for its successful operation and often for the effective operation of its Conventions. Asser's idea of permanent commissions lives on in the requirement that National Organs of each Member State must be designated to communicate with the Organisations' Secretariat, the Permanent Bureau. An important new feature in this context is the establishment of a regional office of the Hague Conference for Latin America in Buenos Aires, and now the prospective establishment of another office for the Asia Pacific Region in Hong Kong, which the Conference may be able to open in the near future.

The Method

As Asser saw it, the forum was a type of "market" where ideas were exchanged but also where tough deals had to be made. Reciprocal concessions were inevitable. Here he showed great leadership himself by willingly giving up even major parts of his own original ideas. Initially Asser had in mind a series of principles or rules, which would form the basis for further legislative work by the States on a variety of topics. But on the very first day of the first session – 12 September 1893 – he met with rather fierce opposition from the French delegate. Mr Renault found Asser's proposal impractical, and urged the conference to limit itself to a few topics only – marriage and civil procedure. Asser, slightly blessed by the rebuke of the "impractical" nature

of his proposals, but with his eye set on the do-able, suspended the meeting for consultations. The next day he announced a compromise: the conference would first tackle the two topics mentioned by Renault but without prejudice to the rest of Asser's agenda. Here lies the origin of the idea of progressive unification of private international law, topic by topic, which is still a hallmark of the Conference's approach.

Diplomacy and flexibility coupled with scientific rigor have remained characteristics of the work of the Conference until today. Even when the Conference proceeded by voting – some ten years ago we switched to the consensus method – there was a good tradition of finding compromise solutions so that everyone would ultimately go home satisfied.

Asser's scientific approach was always oriented towards practice. Early in his career he had already declared: "A scientific approach to trade is not possible without clearly having understood trade itself". A strong empirical approach, including with regard to the practical implementation and application of Conventions, has also remained a characteristic of the Hague Conference. Asser foresaw that this could lead to periodic revisions of Conventions. Indeed, some Hague Conventions now live their third or fourth incarnations, every time adapted to evolving needs and potentials, including those of modern technologies.

The Programme

Asser's interests in law evolved from commercial law to private international law, and, as a practicing lawyer for thirty years, international civil procedure attracted his special interest. He was an early defender of the idea that if a treaty provides bases of jurisdiction for the court of origin, then enforcement of the resulting decision abroad should be granted without examination of the jurisdiction of that original court. The connoisseurs know that this is one of the basic ideas underlying the Brussels Convention, now European Union Regulation on jurisdiction and enforcement of judgments. Asser has been rightly called the "*visionnaire de la Convention de Bruxelles*".

The programme he had in mind for the first session in 1893 did not only include the enforcement of judgments, but a great deal more: the status and capacity of physical persons, family relationships, property law, inheritance, the law applicable to contracts and non-contractual obligations, the forms of legal acts, international judicial cooperation, and legal aid. The essence of what is still the core topical programme of the Conference is already there. At the same time, Asser would have been amazed at the rich tree that has grown from the original seed, with three main branches: protection of vulnerable persons and family relations, legal cooperation and litigation, and commercial and finance law.

One of the most notable developments in my view is the ongoing process which makes private international law continuously more relevant to everyday life and at the same time ties it more to globally shared values and indeed, policies. We see this very clearly within the European Union, where work in private international law, often based on the previous work of the Hague Conference, has become a means, initially to promote the internal market, and more recently also to further and support European

Union citizenship. At the global level, we see the increasing relevance of Hague work to trade policies and economic development but also, in particular, to human right agendas. Fifty years after its birth, the Hague Apostille Convention continues to attract new States parties, including from Latin America which long cherished the ribbons of cumbersome legalisation processes. Recently, the World Bank has begun to recommend joining this Convention as part of national reforms to improve performance in facilitating foreign investment. The Hague Child Abduction and Intercountry Adoption Conventions have tangibly contributed to cross-border protection of children and families, and have been widely recognized as powerful instruments to give hands and feet to the broad norms of United Nations and regional human rights instruments, such as the Convention on the Rights of the Child and the European Convention on Human Rights. Practical forms of cooperation, with the support of Member States of the Conference and international organizations such as UNICEF, in countries as diverse as Romania, Guatemala, Kenya and Cambodia have developed to ensure correct application of Hague Conventions as part of global child protection policies.

All in all, one may say that increasingly, Hague Conventions are operating as vital components of the global legal architecture.

Thus, looking back at Asser's vision, the forum he had in mind, his methodology and his programme, I have no hesitation to say that Asser's vision continues to inspire the current mission of the Hague Conference, and will continue to inspire the Conference for years to come.