# *The European Tradition in International Law: Charles de Visscher*

## *By Way of an Introduction*

Pierre-Marie Dupuy*


## Abstract

*Charles de Visscher, in direct contrast to Hans Kelsen, did not believe in any 'pure theory of law', since for him the relationship between law and politics is a key feature of international law. However, contrary to certain current tendencies, his work does not start from an evasive 'sociological' perspective, the scientific status of which can barely be traced. Trained in the most classical humanistic tradition, but, at the same time, deeply influenced by the 'Personalism' of Emmanuel Mounier, a prominent figure of Christian existentialism, Charles de Visscher remains a jurist, in the technical sense of the term, able to master every aspect of legal interstate relations. Being a formal technician, law is both a tool for international politics and for the promotion of common values. Nevertheless, he provides one of the best examples, among the diverse European internationalists, of the fact that one can (and, I would add, should), be both a technician of the law and an analyst of what de Visscher called its 'human ends', emphasizing, more than 60 years ago, but, even more, after the adoption of the UN Charter in 1945, the bsic role played by the protection of human rights as one of the fundaments of international law. Reconciling consideration of political reality, formal analysis and fundamental ethics, Charles de Visscher still provides us with an answer to current trends which schematically oppose 'realists' and 'liberals'. Charles de Visscher would probably have agreed that the analysis of international law should give greater respect to nuance. This remains, in general, the prevailing view among European internationalists.*


Why Charles de Visscher, and why now? For many young internationalists, and not only those across the Atlantic, his name does not necessarily mean a great deal. Yet for almost 50 years, in the century just closed, he continued the great humanist tradition of *jus gentium*. He did so in certainly the worthiest, noblest fashion, manifested in the sober elegance of his language. His philosophical roots may be sought in a period even

* European University Institute; Member of the Editorial Board.

*EJIL* (2000), Vol. 11 No. 4, 871–875

earlier than the Spanish theologians of the sixteenth century, Vitoria and Suarez, in Saint Thomas.

A previous issue of the *European Journal of International Law* was devoted to the exemplary work of a great European internationalist, Hans Kelsen.[1] In this shift from Kelsen to Charles de Visscher, our journal could not better display the diversity, richness and above all the contrasts in European doctrine of international law of the last century. For in a particular way Charles de Visscher was the exact opposite of the Viennese master.

Kelsen was utterly inspired by the idea of building a system both of law and of the analysis of law, detached from any ideological or material contingency. He believed in the possibility of a theory of law that was truly *pure*. Nothing could be further from the concerns of Charles de Visscher, who brought severe judgment to bear on Kelsen's work. For him 'the pure theory of law ... is the most significant manifestation of certain contemporary tendencies to arbitrarily delimit, under the pretext of science or the unity of method, the object of law, to shrink or deform legal reality'.[2] Mistrusting the spirit of systematization more than anything, de Visscher added that 'there is no branch of law that lends itself less than international law to this reduction to a system ordered by the imperatives of abstract logic alone'.[3]

For de Visscher, a conceptualist schematization could not be applied to international legal relations without thereby ignoring the great diversity of particular situations and the effective weight that politics brings to bear on the formation and application of law. Even more so, law could not be envisaged as being cut off from its ethical substrate. De Visscher further noted one of the paradoxes in Kelsen's thought: the entirely formal representation he sought for the legal order led Kelsen to identify the will of the state with the norms, while at the same time taking advantage of an essentially objectivist conception of law.

Kelsen starts from a relativization of values and willingly divests himself of any teleological representation of law in order to reduce it to a form, even when, by his own admission, the question of the ends of law never ceased to dominate his thought, as his later writings in particular betray.

De Visscher, on the contrary, concerned himself right from his first writings with the human ends of power and their legal means. In connection with this, he wrote: 'when the notion of common good ceases to be ordered by human ends, we see an alteration of the ends of power. Diverted from its mission, which is to serve men not to enslave them, the extrapersonal goals it takes on drag it to excess, sometimes to tyranny.'[4] Taking up Sieyès' phrase that consideration for the human person is 'the end of every public establishment', he looked to the United Nations Charter and found that its authors displayed a respect for human rights as a 'founding idea of the whole

[1] 9 *EJIL* (1998) 287.
[2] C. de Visscher, *Théories et réalités en droit international public* (4th ed., 1970) 83.
[3] *Ibid.*
[4] *Ibid.* at 150.

ideological structure of the new organization'.[5] In relation to the safeguarding of fundamental freedoms, de Visscher saw in the United Nations Charter a new encounter between ethics and law. 'Thus we find fixed in the order of values the place of human rights: they appear there from the political viewpoint as one of the guarantees of peace; from a legal viewpoint as closely linked with respect for international law.'

To continue the comparison between Kelsen and de Visscher, one can draw inspiration from Norberto Bobbio's analysis of Kelsen's theories. Along with Adolf Merkl, Bobbio claimed that Kelsen's work was 'the first conscious application of a method of systematically thinking about the world of legal phenomena';[6] this very reductive concept was to appeal to many people, thus explaining Kelsen's popularity and his continuing influence. But this challenge was to come about, in Bobbio's own view, 'at the expense of the functional analysis' of law.[7] In complete contrast to Kelsen, de Visscher's entire approach was guided by the functional analysis of law, or its being placed in perspective with reference to the human ends assigned to it more by ethical necessity than by social constraint. Rejecting systematization in principle, he invites us at most to take an approach which respects the close relationship between a liberal political ideology and a legal technique which takes account of the ends toward which it aims. This explains why de Visscher is less highly regarded today, since it is easier to yield to the intellectual seduction of formal logic than to regain the cultural roots of a humanist tradition which today is suffering a loss of meaning.

De Visscher finds no difficulty in reading and analysing any theoretical approach in relation to law, but he mistrusts them;[8] first, because abstraction causes one to lose sight of the sense of reality and the hard weight of fact bearing down upon the imperfect application of norms, and, secondly, because formal logic and ethical relativism enable the state to abuse power, and may even encourage a degeneration of the state into totalitarianism.

Contrary to Kelsen's thought, and contrary in general to the various branches of legal positivism, de Visscher's thinking on law is based on historical realities, from which he draws lessons. His masterwork was called *Theories and Realities in Public International Law* simply because he wanted to prevent 'theories' (Léon Duguit's or Georges Scelle's,[9] just as much as Kelsen's) from being built at the expense of 'realities'.

An impeccable technician, de Visscher, professor at the Catholic University of

[5] In the words of André Salomon, *Le Préambule de la Charte, base idéologique de l'ONU*, cited in de Visscher, *supra* note 2, at 157.

[6] A. Merkl, *Die Lehre der Rechtskraft entwickelt aus dem Rechtsbegriff*, cited in Bobbio, 'Structure et fonction dans la théorie du droit de Kelsen', in *Essais de théorie du droit* (1998) 218.

[7] *Ibid*, at 222.

[8] One might also note that Kelsen and de Visscher are both rationalists, but refer to two opposing conceptions of reason. One is the logician's, the other that of the humanist, anxious, if not always to find in everything a 'golden mean', at least to avoid the excesses of a radical formalism.

[9] He reproached both Duguit and Scelle for 'taking to extremes ideas whose foundation is generally right, and still more, easily taking as given what was the object of their convictions or their hopes' (de Visscher, *supra* note 2, at 81). On Georges Scelle, see 1 *EJIL* (1990) 193.

Louvain, had no difficulty in analysing the law of reservations on treaties or that of the attribution or delimitation of territories in his *Problèmes de confins en droit international public*.[10] But he always did so in relation to the elucidation of 'legal policies' which explain the concept of the state or the evolution of a particular legal institution and which animate 'the actualities of public international law'.[11]

As he became a judge at the International Court of Justice, Charles de Visscher was not unlike Hersch Lauterpacht, both in terms of his conception of the judge's role and his awareness of the requirements of 'equity in the arbitrational or judicial settlement of disputes in public international law'.[12] Like Lauterpacht, he combined technical ease and depth of views — an exceptional gift — and could, like Lauterpacht, have remarked that international law is made by and for states, while not forgetting that states are made for man; not the other away around.[13]

De Visscher certainly shared many views with the proponents of sociological positivism, sometimes also termed the objectivist trend, inspired in particular by Georges Scelle and Maurice Bourquin. Nor was he very far removed from the last natural law advocates, such as Albert de Jouffre de la Pradelle in France between the two wars, or Alfred Verdross in Austria.[14] However, de Visscher is hard to place in either category. He belongs first and foremost in a category of his own, typified by a 'well-tempered' doctrine, ever hostile to the excesses of radical systematization and careful to draw lessons from the concrete relationships that law maintains with politics.

The law certainly draws its legitimacy from being aimed at the common good, but this is at most an aspiration, one that can never be completely realized. An ethical inspiration is constantly balanced by a lucid observation of reality. The sovereignty of the state remains the indisputable element which, by maintaining the legal order within its decentralized structure, prevents international law from effectively promoting the proclaimed rights of the human person, or building the social solidarity essential to the creation of an 'international community' truly worthy of the name.[15]

For his moral inspiration and the deep imprint left on his mind by the French philosopher Emmanuel Mounier, the founder of Personalism,[16] de Visscher appears as a true representative of humanism in international law. He exercised a profound influence over such authors as Wolfgang Friedmann,[17] Michel Virally and René-Jean

[10] 1969.
[11] 1967.
[12] 1972.
[13] H. Lauterpacht, *The Function of Law in the International Community* (1933), at 430–431. On Lauterpacht, see 8 *EJIL* (1997) 215.
[14] On Verdross, see 6 *EJIL* (1995) 32.
[15] On the denial of the existence of an international community, cf. de Visscher, *supra* note 2, at Chapter II, 110 *et seq*.
[16] Which may be defined without excessive simplification as a Christian existentialism.
[17] On Friedmann, cf. Leben, 'By Way of Introduction', 8 *EJIL* (1997) 399. For Virally, see in particular Virally, 'Panorama du droit international contemporain, Cours général de droit international public', 183 *RdC* (1985) 9. For Dupuy, see the collection of articles republished in *Dialectiques du droit international* (1999).

Dupuy, this last delighted in recalling his admiration for the Louvain master. They each mistrusted systems, were attentive to the evolution of a law which did not have to be immutable in order to declare it faithful to itself, and concentrated on the shifting relationship maintained among ideologies, international law and politics. Each refused to reduce the law to a sterile apparatus of formal constraints.

The journey through Kelsen's work remains indispensable for those who seek to understand the essence of the law *in itself*. A detour through de Visscher's work offers, for its part, the possibility of understanding the law *as applied to situations*, without cutting it off from its moral bases, its social substrate or the actual contradictions that oppose its application.

That, then, is *why* Charles de Visscher. Because he was and remains a great man!

And why now? Quite simply, because the turn of the century seems indeed to be proving him right. Is not our new millennium now marked by the growing — albeit chaotic, incoherent and contradictory, but nonetheless determinant — affirmation of the dignity of the human person as the ultimate foundation of international law?

De Visscher would, however, invite us to be vigilant in the unceasing search for signs to confirm this tendency. He had the greatest horror, in fact, of his desires, perhaps theorized, being taken for reality. This invites us to meditate on this phrase by Bossuet:

> [T]he greatest derangement of the mind is to believe things because one wants them to be, not because one has seen what they actually are.