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# *Charles de Visscher: Living and Thinking International Law*

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## **Abstract**

*Theories and Realities in International Law is Charles de Visscher's best known book. Its very title makes clear that he was concerned with both the effective conditions of international relations and the requirements of legal theory. De Visscher was in fact originally mostly a practitioner of the law, becoming a member of the PCIJ in the late 1930s. This part of his career came to an end in 1952 when he was not re-elected to the ICJ. He then returned to the academic world. At nearly 70, he began writing and published several books, universally praised, directly benefiting from his exceptional knowledge of international life. His writings showed a clear dislike for formalistic constructions disconnected with realities; his preference was for a 'method' over a doctrine or a theory and for moral standards over positivist requirements. Most of his writing is fascinating, despite the fact that it is often — which is no surprise — dated.*

Can a person's philosophy be dissociated from his life? Undoubtedly not. Is it, then, possible to know the person without knowing his philosophy, and *vice versa*? That is doubtful, at least where the philosophy has not been systematically studied. Charles de Visscher's life is undoubtedly a life constructed around a fundamental philosophy. Thus it is more than usually necessary to understand his philosophy in order to understand his life.

I should here admit that I am scarcely knowledgeable about Charles de Visscher's life, apart from a familiarity with the rather hagiographical obituaries — typical of the genre — written on his death. Not that I lack all personal memories, but those memories are too tenuous to be useful in understanding his scholarly work. This explains why I am giving only 'impressions' of his life and work, without in any way claiming that my impressions are well founded.

## **1**

De Visscher was not interested in international law from the outset of his career as a lawyer. The circumstances that guided him to international law are somewhat

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accidental. It took the war and exile in Britain for him to turn away from questions of civil law that had hitherto been the centre of his attention. In 1911, he had published a major work on ‘the collective labour contract’,<sup>1</sup> in which he considered the rather chaotic evolution of bourgeois society, in which workers’ movements had not yet found their undisputed place. In this book he demonstrates his ‘social Christianity’, to be evidenced again two years later in a short article on ‘the coach-work lock-out and the principle of trade union freedom’ published in a Louvain journal.<sup>2</sup> In his work, de Visscher analyses the many ‘legal theories’ — these words appear in the title — that this new type of contract had given rise to, without displaying towards them the mistrust or indeed disdain he was later to show towards those theories current in international law. His doctrinal arguments testify to the technical mastery of the subject he acquired very early while still only a fledgling lawyer. In his preface to the work, Raymond Saleilles congratulated de Visscher on being always concerned to ‘come back to the facts and the realities they reveal to us’.<sup>3</sup>

All this remains very foreign to international law. De Visscher was a direct heir of civil law thinking, attentive to the innovations unceasingly required by social concerns. There is nothing to show that he paid any special attention to intergovernmental relations or the law governing them. The fact that in 1913 he taught the course in private international law at the University of Ghent does not disprove this, as it was merely a part of the teaching duties he inherited from Professor Albéric Rolin whom he succeeded. Even though, 20 years later, he became professor of that course at the Catholic University of Louvain, he never paid very great attention to this discipline; and his publications in this area remained rather few.

(Public) international law was thus plainly outside the original concerns of the brilliant young advocate embarking on a promising university career in one of the most reputable Belgian faculties of the time. The interesting thing, however, is that one may nevertheless find in his early work the keys to what would later become his international ‘philosophy’: a profound attachment to Christian values, minute observation of changing realities, and an innate sense of legal controversies, even if he thereby gave credence to ‘theories’ about which he would be notably more measured 40 years later.

## 2

It was the first war to be called a world war which brought de Visscher to *jus gentium*. It was not so much that this unleashing of violence suddenly led him to contemplate relations between states. It was more a ‘patriotic’ sentiment that incited him when, as a refugee in Oxford following demobilization of the civil guards of which he was a member, he met up there with several compatriots anxious like him to defend

<sup>1</sup> *Le Contrat collectif de travail. Théories juridiques et projets législatifs* (1911).

<sup>2</sup> 17 *Rev. cath. Droit* (1912–1913) 273–281.

<sup>3</sup> *Le Contrat collectif de travail. Théories juridiques et projets législatifs* (1911), at XII.

Belgium's honour. Their main objective was to establish beyond doubt that Germany's breach of Belgian neutrality was contrary to international law, which in particular would lead to reparations. This explains the publication in 1916 of a work entitled *Belgium and the German Lawyers*, accompanied by a preface by J. van den Heuvel. Translated the same year into English<sup>4</sup> and the year after into German, it immediately brought its author considerable notoriety. The study clearly involved international law, since neutrality has to do with that. What it said, however, still remains very much based in civil law. The basis of his argument relied on the principles of the law of contract, even if he fully perceived the importance of 'power' in a system whose originality he did not yet fully appreciate. Be that as it may, from that date onwards de Visscher followed a new path he was never to leave, abandoning for ever the civil law with which he had hitherto been concerned. And by following this path, he enjoyed the practice of law no less than the theory.

Having become legal advisor to the Ministry of Foreign Affairs, de Visscher participated directly in the setting up of the League of Nations, in particular sitting on many expert committees called on to give opinions on the delicate questions raised by the reorganization of a 'family of nations' traumatized by war. His reputation rapidly grew. No one was surprised, then, when he repeatedly appeared before the Permanent Court of International Justice to uphold there the cause of the authorities — especially the Belgian authorities — which approached the Court to have disputes settled. His noteworthy talents as a lawyer were brilliantly exemplified here. Again, there was no surprise when he was elected judge at the Permanent Court in 1937 and (re-)elected to the International Court of Justice when, once the UN had succeeded the League of Nations, the International Court of Justice replaced the Permanent Court. He remained there as judge until 1952.

Though the war interrupted his judicial activity for five years, de Visscher nevertheless did not remain inactive. He was directly involved in resistance to the German occupation, and played a decisive part in its organization while remaining in permanent contact with the Belgian Government in exile in London. Immediately after the withdrawal of the German troops, he became for a few months a minister without portfolio, before taking part in the San Francisco Conference to negotiate the definitive text of the UN Charter. In other words, when he left the ICJ in 1952, de Visscher knew more or less the whole practice of international law. Nor did he (any longer) ignore the weight of power and of politics. His mature scholarly writings are ample evidence of this.

The 'practical' man was at the same time an academic who took as of right his place in international academic circles. In 1920, he succeeded Albéric Rolin as the head of the *Revue de droit international et de législation comparée*, at the time a leading academic journal. The following year he was at the Institute of International Law, originally a Ghent institution, and six years later became its secretary-general. From 1923, he was teaching at the Hague Academy of International Law during its early years: he became a member of its curatorium less than 10 years later. De Visscher sat on all

<sup>4</sup> Under a slightly different title, *Belgium's Case: A Juridical Enquiry*.

these bodies in his dual capacity as practitioner and academic. He was at the same time still at the University of Ghent, but its Flemicization led in 1931 to his resignation. He immediately found a home at the Catholic University of Louvain, where he chiefly taught *jus gentium* until the end of his academic career. That came in 1954, two years after the end of his tenure as judge at the ICJ. De Visscher was then 70 years old, a great age for that time. Yet it was then that his truly ‘academic’ career began.

### 3

De Visscher’s writings did not begin in the mid-1950s, however. His first study — relating to abuse of law — goes back to the very year he took his doctorate in law at Ghent. Even taking account of his ‘war’ writings, which were very precisely targeted, his publications nonetheless remained relatively few in number. This is not surprising: until his election to the PCIJ, he was too busy to spare the time to write much, and thereafter a basic requirement of confidentiality constrained him to silence. Between 1917 and 1937 his work consisted essentially of notes, always of quality but overall rather short, which he published generally in the *Revue de droit international et de législation comparée*, of which he was editor-in-chief.

During that period, only two studies were of broader scope. The first, entitled *The Stabilization of Europe*, was a report of the courses given in 1924 at the University of Chicago in connection with the Harris Foundation. De Visscher dwelt in these reports in particular on the question of ‘nationalities’, and especially of minorities, which questions lay at the root of the rearrangement of the European landscape, as well as on problems of (military) security. The subject of security always enthused him, since he regarded insecurity as the major obstacle to a harmonious relationship between states. Here, there were already evident the concerns of the ‘practitioner’, letting some irritation with ‘theory’ show through:

But what is the use of shutting one’s eyes to unavoidable realities? High-sounding formulas have never settled a political problem; they are the refuge of those who dare not look at facts.<sup>5</sup>

One might naturally have expected him to dwell in his study on the League of Nations, which had recently been set up. Curiously enough, he says practically nothing about it. There is no doubt that, despite his great attachment to balancing the excesses of unrestrained sovereignty, he found it hard to imagine that a state would ever agree to become part of a structure which could, even if only in theory, come to dominate that state. Instead, it was to a fundamental morality that he appealed in order to pacify relations among sovereigns. Giving an account of a speech by the Pope in December 1939, he wrote: ‘Moral regeneration is, ultimately, the remedy to the current evils.’<sup>6</sup> He seems not to have given great credit to the formulas of

<sup>5</sup> *The Stabilization of Europe*, at 124.

<sup>6</sup> *RDILC* (1939) 799.

intergovernmental organization, much discussed at the time, apart from the immediate benefits that justified the development of such formulas. Half a century later, he had no, or few, illusions about the United Nations. His attitude to the UN is no surprise: after all, de Visscher was by then an old man and had known the failure — a crushing one — of the League of Nations, and could not fail to note the paralysis of the Security Council. Who would not in such a context have been inclined to believe that nothing could change? It is perhaps more surprising for a man in his early twenties. The League of Nations had only just begun, de Visscher was in the prime of his life, and the age was full of the generous illusions cherished by those who bravely denounced the errors that caused the ‘Great War’. De Visscher was not in truth such a one. Might he have been too wise too early? The fact is that Utopia, which is one of the few catalysts for change in a profoundly conservative environment, did not tempt him overmuch.

The same year, de Visscher taught at The Hague on the codification of international law,<sup>7</sup> the longest of the four courses he was to give at the Academy of International Law before the Second World War. His concern was always that of a ‘practitioner’, someone active in the circles where the attempt was being made to agree on and codify the existence and content of rules of international law, an exercise that seemed all the more imperative since, at the same time, the search was on to strengthen recourse to judicial settlement in international relations. It must be acknowledged that judicial settlement is impossible unless judges are aware of the rules for exercising their judicial office without abusing power. Yet these lacunae in international law were patent to de Visscher. And he was not to fail subsequently to denounce forcibly the pernicious myth of the alleged ‘completeness’ of the codification in which legal scholars indulged. The interesting point here nonetheless is that it is hard to talk about codification without raising the more general problem of the sources of international law, thus necessarily bringing in some sort of ‘theory’. This was the sort of question that de Visscher had hitherto never raised. What he had to say showed no great originality; one senses in his ideas the strong influence of Duguit, though more by way of a useful reference point than as a true inspiration:

Like the most recent authors, particularly Mr Duguit, we believe that international norms have their primary origin in the common sentiment existing among individuals that certain rules of conduct apply not just to them but also to social groups in their mutual relationships. We believe here again that these rules take on the nature of legal norms, become rules of law, where their needfulness for the maintenance of international relations impresses itself on individual consciousnesses clearly enough, imperatively enough, for it to appear that a sanction ought to be arranged in relation to them.<sup>8</sup>

These ‘beliefs’ are not without their interest, if only because their foundations are scarcely made explicit. It is likely that de Visscher’s primary concern was to introduce the course in a more or less ‘authoritative’ manner, in line with academic canons. He

<sup>7</sup> 6 *RCADI* (1924-V) 325–455.

<sup>8</sup> Offprint, at 12.

seems not to have wished to sketch out a new theory of sources. The point is more that this offered him the opportunity to reject the *Willenstheorie* brilliantly defended in particular by Jellinek, and assert the existence of rules whose binding power is independent of the will of states. Referring to the ‘distinction so masterfully formulated by Mr Duguit between *primary* or *normative* rules and *secondary, constructive or technical* rules’, de Visscher finds that:

There are in the international legal order, as in the domestic legal order, certain principles or certain norms whose authority is independent of the State’s command, in other words, is above any explicit or tacit prescription by the will of governments. These primary or normative rules have not been created by States; of themselves they impose themselves on States.<sup>9</sup>

And he continues:

The will of States can do nothing against these norms that dominate them, since it plays no part in their formation: these norms are not the product of international practice; they are based neither on custom nor on treaties; they rest directly on that which is the ultimate foundation of any rule of law, the individual conviction of their social (international) necessity.<sup>10</sup>

Only the ‘constructive’ rules depend on the will of states. They respond to the ‘technical’ necessity to ‘ensure the realization’ of the primary norms which, ‘by the very fact that they are fundamental . . . are too abstract and too theoretical in style . . . too distant and remote to be incorporated as they are into positive law and receive immediate and direct application in international practice’.<sup>11</sup> This statement is not very clear (which is unusual in de Visscher’s writings). It contrasts with the clarity and precision the expression of his thoughts habitually shows. It is, moreover, oddly ‘doctrinal’. To say that de Visscher was none too fond of theories is to put it mildly, and where he decries them he takes care not to replace them with his own, preferring instead to give an account of the ‘realities’. His course on codification is an exception in this respect, but this precedent has remained entirely isolated. De Visscher was not to return to it. When 30 years later he came more systematically to set out his conception of international law, in successive editions of *Theories and Realities in International Law*,<sup>12</sup> or in his general course at the Academy of International Law (which is in a sense a distillation of the first of the three editions),<sup>13</sup> he no longer refers in any way to these authoritative *distinguos*. He contents himself with treaty and custom, as well as with general principles, while also discussing (the failures of) codification. His tone has regained its sobriety, and his writing its precision. His use of theory was no more.

Apart from his courses at the University of Chicago and the Hague Academy, de Visscher’s writings before his appointment to the PCIJ tended to be short pieces. They were always very relevant, but expressed only fragments of a scientific thought that scarcely revealed itself in its totality. This did not prevent de Visscher from sometimes

<sup>9</sup> *Ibid.*, at 13.

<sup>10</sup> *Ibid.*, at 15.

<sup>11</sup> *Ibid.*

<sup>12</sup> 1st edition, 1953; 2nd edition, 1955; 3rd edition, 1960; 4th edition, 1970.

<sup>13</sup> 86 RCADI (1954-II) 445–556.

displaying great originality in his choice of subjects. In particular, we owe to him a major contribution (86 pages!) on the 'international protection of art objects and historical monuments',<sup>14</sup> which he was to supplement two years later by a study on the 'International Conference on Excavations (Cairo, 9–15 November 1937) and the Work of the International Museums Office'.<sup>15</sup> This was a very new topic at the time. He seems to have been very involved in it, chairing, for instance, the committee of experts that drafted the draft international convention on the protection of national artistic and historic heritage adopted in 1938 by the International Museums Office, a subsidiary body of the International Institute for Intellectual Cooperation, a predecessor of UNESCO. The influence of his brother Fernand, who was at the same time acquiring an undisputed reputation as an archaeologist, probably accounts for this detour through the international safeguarding of cultural heritage, to which, however, he was never again to return. Though it is no less interesting for that, for there is nothing in de Visscher's writings which would have led one to believe that he had any particular enthusiasm for 'art'. To be sure, he was a very cultured man, and it was at that time scarcely conceivable that anyone in Ghent could have been recognized as a great academic without being so. But it was to history that his preferences clearly turned when he occasionally strayed from specifically legal paths. His construction of international law, and especially his — sometimes ambiguous — analysis of the links between law and power, were constantly nourished by his knowledge of history.

#### 4

In 1937, de Visscher practically stopped writing, for he felt it unsuitable for the judge he had become to express himself, outside his judgments, on the often delicate questions on which he might soon be called to pronounce. He observed the same reserve when in 1946 he resumed his judicial functions, and stayed silent until he left the ICJ in 1952. De Visscher left the ICJ with great regret. He had apparently twice (1951 and 1954) been a candidate for re-election. But his hopes were in vain, and the small world of international law was scandalized by the failure to re-elect him. We do not know too much about the reasons for his non-re-election, as they were not discussed at the time: it is quite possible that some states, dissatisfied at this or that ruling handed down by the ICJ, carried on a 'symbolic' campaign against a judge whose authority was great. De Visscher once again became the subject of the 'politics' he constantly endeavoured to reconcile with the law. Only Charles Rousseau was openly indignant, saying that 'there [was] considerable feeling that in the person of [de Visscher, there] was one of the great judges of The Hague who [was] being hit by this repeated exclusion — and in him [there were] the qualities of firmness and independence that are the [hallmark] of the international magistracy'.<sup>16</sup>

<sup>14</sup> *RDILC* (1935) 32 *et seq* and 246 *et seq*.

<sup>15</sup> *RDILC* (1937) 1–33.

<sup>16</sup> *RGDIP* (1955) 149.

De Visscher went back to teaching, though not for long, since he became emeritus in 1954. Returning from practice to a sort of ‘theory’, he took up his pen again and, at almost 70, embarked on an outstanding academic career. His *magnum opus* here is *Théories et réalités en droit international public*, already mentioned above. The first edition dates from 1953, a full year after he left the ICJ. It is not impossible he had the secret hope that its publication might bring him a second chance at the Court. Who knows? In any event, the book’s success was immediate. The second edition appeared in 1955, the third in 1960 and the fourth (and last) in 1970. In 1957, an English translation of the second edition was made by P. Corbett, who in 1968 also translated the third edition. In 1962, a Spanish translation was made by P.S. Riera, based on the second edition. By themselves, these translations show the wide audience the work had attained in just a few years, and the enormous credit this brought to him.

*Théories et réalités* was not the only product of his exceptional labours. Apart from a few small articles mainly published in collective works (H. Wehberg, T. Perassi, J. Basdevant, etc.), de Visscher was also the author of several monographs — all published by Pedone of Paris — which were on the whole similarly well acclaimed; the last, on equity,<sup>17</sup> came out in 1972, a few months before his death at the age of 88. The best known are *Problèmes d’interprétation judiciaire en droit international public* (*Problems of Judicial Interpretation in Public International Law*) and *Aspects récents du droit procédural de la CIJ* (*Recent Aspects of the Procedural Law of the ICJ*), dating from 1963 and 1966 respectively, as well as *Les effectivités en droit international public* (*Effectualities in Public International Law*), which appeared in 1967. The first two works display the immense experience in judicial regulations de Visscher had acquired during his exceptional career. The third is more original in tone, even if it makes explicit propositions the principles of which were already in the first editions of *Théories et réalités*. It was the irritation caused him at the time by certain recent studies — which he hardly mentions in his work — that was at the origin of what he regarded as a sort of restatement. To him we owe in particular a distinction that has become famous between structural effectualities and effectualities in motion. Dare I confess that I am today still not exactly clear on what this distinction covers precisely, apart from the obvious things that separate still from running waters, however tempting at first sight may be the sort of foundational ‘intimacy’ established thereby among rules, institutions and facts?

## 5

De Visscher’s monographs published after 1960 have a specific aim. They constitute classical specialized studies giving an account of the state of the law in a given area, while anticipating developments where appropriate. *Théories et réalités* is of a different nature, or, to be more precise, the work does not belong to any particular genre. Readers of the first edition did not conceal some perplexity. Answering them in the preface to the second edition, de Visscher admitted that ‘the work offers neither a

<sup>17</sup> *De l’équité dans le règlement arbitral ou judiciaire des litiges de droit international* (1972).



general theory nor a solid systematization of international law'.<sup>18</sup> But he does not say what it positively is either. In truth, it is very hard to determine its proper place. It is clearly neither a work of 'theory', nor a handbook or other treatise. It is more of a personal stock-taking of knowledge gained in international law, done in some haste — the first edition dates from 1953 — without pursuing any specific aim. The second edition is of special interest in this connection, for de Visscher took note of the observations, if not criticisms — since the praise is universal — that the first edition aroused, and endeavoured to answer them by questioning himself about the scope of an undertaking — originally presumably a very spontaneous work — not meeting any easily identifiable need, of teaching or otherwise. The third and fourth editions are, however, nothing but updates, though no less meritorious for that. This may explain why only the second edition opens with a preface, while all the other editions have only a foreword.

Behind what de Visscher actually says in his work, it is interesting to look at the people he based himself on to establish the authority of his statements. Curiously, up to a certain point they are scarcely identifiable. De Visscher acknowledges no particular school. He does not pretend to be the heir or disciple of anyone. To a certain extent he was self-taught. He learned international law on the job, and in part rather late, without the need of any 'teacher' to provide him with a master's knowledge of it. To be sure, there are names that occur more often than others: D. Anzilotti, J. Brierly, M. Huber, C. Hyde, H. Lauterpacht, G. Scelle, and so forth, but they are few. And de Visscher in no way pretends to be an heir to their thoughts. He contents himself with basing his ideas on them — not failing to criticize them vigorously, as for instance with Hans Kelsen — to formulate his own judgments, without in any way using their authority to corroborate their soundness. Only Max Huber, to whom he dedicated the four editions of *Théories et réalités*, seems to occupy a special place. Undoubtedly, this is mostly as a result of their personal friendship. It is likely, though, that de Visscher's insistence on giving an account of the realities of power and politics had been influenced by Max Huber's work on the sociological foundations of international law (1928), all the more so since both shared the idea that ethical concerns ought to remain at the heart of what is today called legal discourse. Yet this looks more like the reflection of complicity than of discipleship.

It is one thing to fall in with a current of thought, to pursue it, to bend it, to correct it, etc.; it is something else to find in the science of others, without claiming to, the essential technical support in order to construct one's own discourse. De Visscher is in this connection rather sparing with references, particularly in *Théories et réalités*. The age when a multiplicity of references was commonplace had not yet arrived, and de Visscher's authority was such when he left his judicial post as to allow him largely to do without. It is no less interesting to note that the bulk of the references he does supply are to studies dating from before 1955, even before 1940. This shows that his philosophy was nurtured principally by works published before he became judge at the PCIJ. As editor-in-chief of the *Revue de droit international et de législation comparée*,

<sup>18</sup> *Théories et réalités* (2nd ed., 1955) 10.

he received most works concerned with international law, which constituted the basis of the extraordinary personal library he had. Once he became a judge, it was the practice of giving judgment that fed his thought much more than his colleagues' works. And that was the capital he continued to feed on almost exclusively when he went back to writing after retiring from the ICJ. This certainly does not mean that he totally neglected other people's books after that date. The irritation underlying his work on effectualities is a sufficient example to refute that. The fact nonetheless remains that he rarely cites authorities from after 1955, and thus ran the risk of overlooking works that threw new light on a given subject. For instance, de Visscher was always interested in the recognition of states and governments, something that displays remarkably the links between law and politics, a matter in which he sought to dispel the ambiguities. This topic is dealt with in all editions of *Théories et réalités*, yet there is no reference in any of the editions to Jean Charpentier's thesis, which was generally considered to be the work that most basically renewed the approach up to 1970. This confirms, unsurprisingly, that once he — reluctantly — abandoned the 'practice' of international law, de Visscher sought less to learn in order to understand what he did not perfectly master, than to explicate what he had learnt in order to let others understand it. This is something halfway between maturity and wisdom.

## 6

It is perhaps in the foreword to the third edition of *Théories et réalités* that de Visscher most clearly sets out his fundamental conceptions. He deserves to be listened to attentively on this point:

The friendly reception the work received confirmed us in the idea that had inspired it: what is lacking in the study of international law is not so much a doctrine as a method, not so much a general theory as closer observation of the realities of every sort which, in a social environment still often resistant to law, hamper its development rather than encourage its progress.

By reducing to manifestations of the will of States any criterion for the validity of norms, voluntarist positivism had bled international law dry. . . . As to the normativist monism of the pure theory of law, it supplied neither the justification for the mandatory rule of law nor that of the primacy of international law over domestic law.

The ambition to make international law the object of a rigorously autonomous academic discipline, and the fear of contaminating it from contact with the data of politics, contributed much to the abuse of abstract reasoning to the detriment of the spirit of observation. They dangerously veiled the action of power on the orientations of positive international law. But above all, they caused the ultimate justification of any law to be lost sight of, namely the human ends of power, the only thing capable through the universal assent they command to bring the State to a moderating conception of its power. It is not by ignoring the realities that determine the action of power that one strengthens international law; it is by becoming aware of the place they have in it, the needs that they arouse and the values they bring into play. An independent critique can only win minds to a functional conception of power, as the true guarantee of its conversion to the service of humanity.<sup>19</sup>

<sup>19</sup> *Théories et réalités* (3rd ed., 1960) 9–10.

In these few lines one can find the key features which de Visscher regards as fundamental to a correct understanding of international law: the preference for method over doctrine, the primacy of realities over theories, the rejection of formalism and the abstract constructions it feeds on, and the attachment to the 'human ends' of power, which alone can in the final analysis justify the commandments of law. The determining nature of 'method' is certainly the major feature of de Visscher's academic work, at least subsequent to his terms of office at the PCIJ and the ICJ. It is as if he had had to await his exercise of judicial office in order to assess fully the dangers of the spirit of 'system'. In the speech he wrote a few months before his death, in preparation for the fiftieth anniversary of the Academy of International Law, he came back to this subject, very symbolically, for a last time:

By method in international law I mean that aspect of our discipline that seeks through patient enquiry to identify with the greatest possible precision the historical and social data that constitute the living content, the subject matter, of the legal rule. At the basis of any valid method there is observation, submission to the object. The exact knowledge of the subject matter precedes any logical construction. Method nonetheless raises the problem of the participation of human understanding and reasoning in elaborating positive law ... I resolutely refuse to assert that intellectual reasoning, whatever form it may take, can lead to shutting up the social matter in a conceptual armoury without guarding against the risk of deforming it ...

A method narrowly subject to the conceptual orientation reduces international law to a formal technical order; it deprives it of that which in our contemporary view is essential to it: its finality, its teleological direction, its functional nature, to the detriment of its social goal which is the *raison d'être* and the supreme law of any legal organization.

There is no branch of law that lends itself less than international law to this formal schematization. For its dangers are clearer here than elsewhere, since in international relations specific or individual situations have very much the upper hand over general situations, norms of general application here being very far from having the place that they have in the domestic order.

A well understood and properly pursued method takes account through constant return to respect for the facts, of the often profound differentiations which in international relations derive from the specific ethnic and historic individuality of the various nations, the inequalities of their resources, the irregularity, or else regularity, of their mutual relations, the new requirements of international organization which, far from being satisfied with formal representations, call for increasingly considered adherence to the social content of norms, as well as of value judgments ordered towards a common goal.<sup>20</sup>

These propositions reflect a profound realism and 'utilitarianism'. De Visscher was a realist because law had to be constructed above all else upon realities, and public international law more so than any other kind since it was even less able to ignore those realities. And law may be regarded as 'utilitarian' to the extent that it can exist and be justified only because of the 'social goal' which is both its '*raison d'être* and supreme law'. But, let there be no mistake, this social goal cannot be reduced to a set of political and economic advantages human groups might seek to secure, according to the circumstances. It has everything to do with a certain idea of the 'human ends' of power at which de Visscher had arrived as from the first edition of *Théories et réalités*.

<sup>20</sup> 'Méthode et système en droit international', 138 *RCADI* (1973-1) 75-76.

He never pronounced very clearly on the nature of these ends he calls ‘human’. However ‘realistic’ he may be, they nonetheless have as much to do with ideas — with ‘abstraction’ — as with facts. And these ideas themselves reflect ‘moral’ conceptions much more than political ones. The epithet ‘moral’ is ubiquitous in the successive editions of *Théories et réalités*, without it being too clear what it covers, apart from certain references, not otherwise clarified, to ‘Christian teaching’.<sup>21</sup> That reveals a very classical foundation to his ideas.

There is in this ‘concrete’ approach to international law something very tempting, for it allows, over and above the generalizations that are hard to avoid, the multiplicity of situations involved and their richness to be grasped. This does not prevent there being something unusual about setting facts against theory, or method against doctrine. After all, a doctrine always presupposes a method, just as a theory presupposes the ‘realities’ it seeks to give an account of, or claims to order; they are in no way incompatible. In his last speech to the Hague Academy, he did not dispute this:

This warning concerns the risks of method subjected to the sole imperatives of abstract logic. It is in no way a barrier to academic synthesis, which by bringing species together seeks to group norms in doctrinal terms into a coherent whole founded not on the postulates of abstract logic but on the observation of the organic links which in social terms nourish the relationships of interests involved.

But it would be seriously to transgress the limits of a healthy method and to abandon oneself to the dangerous attractions of the spirit of system were one, under the pressure of unremitting logic, to claim to bring the whole of relationships among States under one formal technical order, [and] were one to refuse to take into consideration the social content of the norms as long as they have not been first enveloped in and — it has been added — legitimated by a formal State procedure.<sup>22</sup>

De Visscher looks to the ‘pure theory of law as professed by Hans Kelsen’ for ‘the most blatant examples of the deformations brought by systematization pushed to extremes’.<sup>23</sup> This was not, however, the only target of his thunderbolts. More generally, it was all the (voluntarist) positivisms, against the ‘errors’ of which Leibnitz had argued in earlier times,<sup>24</sup> that he condemned. Why? The basic reason is the ‘disposition, so frequent among lawyers, to see the law only through the formal procedures for arriving at it . . . deliberately dropping from view the ethical, political and social factors that are its foundation and its profound explanation’.<sup>25</sup> More superficially, it is an ‘excess of trust in the virtue of abstract reasoning’,<sup>26</sup> on the basis of which this doctrine seeks to palliate these fundamental shortcomings, that explains its lack of credibility. As if ‘theoretical’ specializations could ever fill a ‘moral’ void! De Visscher accordingly unremittingly condemned the ‘temptation to formalism’, the fallacious ‘completeness of international law’ and ‘legal totalism’.<sup>27</sup>

<sup>21</sup> See e.g. *Théories et réalités* (1st ed., 1953) 167; *ibid* (4th ed., 1970) 162.

<sup>22</sup> ‘Méthode et système en droit international’, 138 *RCADI* (1973–I) 76.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Théories et réalités* (4th ed., 1970) 30.

<sup>25</sup> *Ibid.*, at 67.

<sup>26</sup> *Ibid.*, at 79.

<sup>27</sup> *Ibid.*, at 168–170.

Does this mean that all ‘theory’ is impossible? De Visscher certainly mistrusted ‘systematizations’ that he regarded as premature as long as the ‘value judgments . . . have not in general terms acquired the [essential] degree of firmness and concentration’.<sup>28</sup> Is this enough to condemn any attempt at theorization? De Visscher’s desire to defend a proper method seems to refute this. One must look at the realities, respecting the circumstances of individual situations that makes generalizing the solutions they reveal haphazard. Nothing seems to suggest that this method is supported on some particular theory of language reflecting a very personal conception of the relationship between word and reality. It seems more the fruit of experience of a man who practised international law at the highest level and realized the mischief that could be done to it by formalized constructions aimed at subjecting to abstract rules realities that they thereby caricatured. The method in a way allows the ‘real’ questions to be raised empirically; it does not seem to imply any other particular theory, even if it runs counter to a then dominant subjectivism that elevated mind over reality. But if he does not, properly speaking, formulate a theory, whether of law or of language, de Visscher seems not to deny that it might have some sense, at least virtually. It is those theories which he finds deeply artificial that he particularly attacks, especially where these theories or doctrines — the distinction is not always very clear — feed exclusively on purely logical correspondences established among abstract propositions that do not echo the ‘realities’. In its principle, the criticism is relevant, even if it may be difficult to form a clear perception of those realities. This does not prevent its application sometimes seeming rather unfair. This is in particular the case with Hans Kelsen, who never pretended that the law was pure; his purpose was only to determine the conditions for its science being such. De Visscher, for instance, stresses that ‘it is in no way as complexes of norms that one sees States entering into relationships with each other, acquiring rights and assuming responsibilities. The State is first and foremost a social reality: neither its elements nor its activities can be reduced to however transcendental a reality.’<sup>29</sup> Kelsen would probably not disagree, and would certainly, like de Visscher, deplore the ‘scientific auto-suggestion’ that takes a change in the science for a change in the law that de Visscher stigmatizes.<sup>30</sup> In truth, he displays ill-concealed irritation towards Kelsen’s philosophy, while usually ignoring rather than condemning those whose views he disagreed with, apart from generically condemning the ‘authors . . . whose attempts at systematization have often led only to obscuring the problem’.<sup>31</sup> Why is Kelsen in particular the subject of his criticisms? Undoubtedly because Kelsen was dominant in the inter-war period in which de Visscher established his academic authority. Undoubtedly, too, because de Visscher could basically do nothing more than reject Kelsen’s claim to establish the legality of a system outside of any reference to founding moral values. Perhaps also because Kelsen impelled the theory of law onto over-philosophical paths on which de Visscher, accustomed to more sociological

<sup>28</sup> ‘Méthode et système en droit international’, 138 *RCADI* (1973–I) 77.

<sup>29</sup> *Ibid.*, at 76.

<sup>30</sup> *Théories et réalités* (4th ed., 1970) 79.

<sup>31</sup> *Ibid.*, at 249.

considerations, got rather lost. In any case, de Visscher no longer condemned the legal theoreticians who in the years following the Second World War established their discipline with extraordinary speed.

If he does not defend any theory, does de Visscher, apart from his method, profess any ‘doctrine’? Probably not. What lies behind what he has to say comes from a very broad historical knowledge of international relations and very ‘direct’ experience, as jurist, advocate or judge, and of the ambiguous links between law and power, and between the legal and the political. The essential point is nevertheless moral:

Neither politics nor law can assure the world of balance and peace without this ‘moral infrastructure’ to which an eminent contemporary jurist, facing the supreme disappointment of his life, devoted his last work.<sup>32</sup> When everything has been said on the rule of law and the barriers put in its way by the political inspiration of power, it is to morality that one must come back.<sup>33</sup>

What is there between the two? A sort of wisdom that ranges from aphorism to denunciation, from specific judgments to general exhortations, from political statements to ethical references, and so forth. That is what constitutes both the extraordinary charm and the disarming simplicity of his thought.

## 7

Before being elected judge at the PCIJ, and thereby regarding himself as bound by a special duty of confidentiality and silence, de Visscher had, as we have said, tackled a fairly wide variety of themes, generally associated with his activities as a practitioner, which, particularly as legal advisor to the foreign ministry, brought manifold problems to his attention. Among these problems were, for instance, the dispute between Belgium and the Netherlands in connection with the Wielingen pass,<sup>34</sup> the standing of foreign authorities before national courts at a time when the West obstinately refused to recognize the Soviet Union,<sup>35</sup> or the law of international responsibility, on the codification of which the nascent League of Nations was cautiously embarking.<sup>36</sup> Some of these studies, moreover, show great originality, like those, already mentioned devoted to the safeguarding of historical and cultural heritage in international law.

However diverse this work may have been, it scarcely allowed de Visscher to set out even succinctly his views on public international law as a whole. It was not until his retirement from the ICJ and the publication of the first edition of *Théories et réalités* that he was able to do so. *Théories et réalités* does not pretend to constitute a handbook or a treatise, which explains why it does not cover all aspects of international law. Also, de

<sup>32</sup> N. Politis, *La morale internationale* (1942).

<sup>33</sup> *Théories et réalités* (4th ed., 1970) 116.

<sup>34</sup> *RDILC* (1920) 293–328 (with F.L. Ganshof).

<sup>35</sup> *RDILC* (1922) 149–170 and 300–335.

<sup>36</sup> 2 *Bibliotheca Visseriana* (1924–V) 86–119.

Visscher mistrusted and generally denounced ‘systematizations’. Nonetheless, he was for the first time presenting his general ideas regarding international law. It is interesting to note what de Visscher actually talks about when thus explaining his ideas, reticent as he is towards ‘theories’ and the abstractions they are based on. From the outset, *Théories et réalités* was divided into four ‘books’, the titles of which remained almost identical in the four editions: namely ‘Political power in external relations from the origins of the modern State to the present’ (Book I), ‘General relationships of power and law in international relations’ (Book II), ‘Convergences and tensions between law and power in positive international law’ (Book III) and ‘The settlement of international disputes’ (Book IV), with the title of this fourth book in the first two editions being ‘The judicial settlement of disputes’.

The first book remained totally unchanged during the four successive editions of *Théories et réalités*. Its subject is not entirely clear. Its subject is partly to recount the evolution of international relations since the emergence of modern times; but it is more to retrace the way international relations of states have been thought about in the course of that evolution. Thus it is both a history of political thought and of the doctrines of international law, here emphasizing or there diminishing the weight of international ‘events’. Curiously, the account stops at the prolegomena to the Second World War. De Visscher does not speak about the war’s consequences or the consequences of the Cold War that followed, for the ‘external relations’ of political power. Or, at least, he did not feel it useful to dwell on those consequences in Book I of *Théories et réalités*, preferring in that context to stick to a rather shortened version of history. It would be false to maintain that he displayed any great enthusiasm for the changes that came after 1945 whenever he mentioned them, which he never did at any great length. The last edition of *Théories et réalités*, however, ends on an optimistic note. De Visscher in particular welcomes the ‘vitality’ of the international organizations and the success of ‘a doctrine rendered wise by experience, [which] has definitively turned away from sterile constructions’. This explains the kind of confidence to which the last sentence of his conclusion attests: ‘One cannot despair of a society which, on the verge of the abyss, intends to get a grip on itself to build a better future on human foundations.’<sup>37</sup> The grandiloquence of the formula ought not to blind one to its sincerity.

Book II proceeds to a ‘direct comparison of international law and politics’, which ‘doctrine has for long dodged’;<sup>38</sup> de Visscher, here citing J. Ray, does not conceal that ‘the law has everything to gain from gradually dispelling “the dangerous mystery that surrounds the antithesis between the political and the legal”’.<sup>39</sup> His text remained almost unchanged throughout the four editions. One should note only the appearance in 1970 of a section devoted to ‘political doctrines’ he regarded as important for international law — somewhat overlapping with Book I — and another on ‘sovereignty in the European Communities’, to which he had hitherto referred only

<sup>37</sup> *Théories et réalités* (4th ed., 1970) 426.

<sup>38</sup> *Ibid.*, at 84.

<sup>39</sup> *Ibid.*

marginally. More than on the general relationships between law and power, de Visscher here dwells on what he regarded as ‘politics’ and the influence that politics or policies has on international law. In this context, without the link being fully established, he expresses his doubts at the existence of an ‘international community’, which he regards as ‘an order with power in men’s minds . . . not correspond[ing] to any actually established order’.<sup>40</sup> Yet there is more than the really rather obvious finding that there is no organized society among states. Implicitly, what shows through is some difficulty in accepting that there can be any such organized society among states, which is a sign of a mind still deeply rooted in a deference towards sovereignties, the principle of which is not basically challenged, however terrifying the results of its exercise may at times be. This ‘social’ vacuum does not really frighten de Visscher. The reason is simple: ‘The ultimate explanation of both society and law is to be found beyond society: in individual consciences.’<sup>41</sup> It is of little importance, then, if the society were to fall short. It is enough for the consciences to exist and for them to be ‘moral’, which in particular implies that the ‘human ends of power’ be preserved. This is a sort of act of faith. One might, then, have expected de Visscher to dwell at length on the positive rules where this humanization or moralization of international relations might *a priori* be fully expressed, such as *jus cogens* or human rights. Yet he contents himself with very briefly mentioning them without apparently attributing special importance to them. As if they were rather useless — which they undoubtedly are in his conception of law and power.

The first two books set out, at the intersection between law, philosophy and politics, de Visscher’s ‘views’ on what international law should or could be. They say nothing about what it is. The last two books, covering (almost) two-thirds of the work, are the only ones that come to more ‘positivity’. Book IV is the most homogeneous and the shortest (50 pages). It concerns the peaceful settlement of disputes. The subject had always particularly held de Visscher’s attention. There are, unsurprisingly, long commentaries on judicial settlement, of which his knowledge was exceptional. One might have believed he would be inclined to idealize it in some way. Nothing of the sort. His political experience left him without much illusion as to the development of judicial settlement, the limitations of which he fully assessed. Book III is by contrast much more heterogeneous. It approaches very diverse questions, without it being easy to see what justifies those questions being chosen rather than others. It is likely that de Visscher started mainly by including in the book questions he had particularly studied or had dealings with as part of his practice before becoming judge in the PCIJ. The link, to that extent, is very ‘personal’. It seems venturesome to see it as reflecting unusual coherence. Book III is the one that was most revised between the 1960 and the 1970 editions. This revision testifies either to new reading by de Visscher (in 1960 he brought in a chapter on effectualities, which he greatly changed in 1970 after publishing his monograph on the subject) or to developments in practice (treaty law, etc.), of which he kept himself informed. Great technical mastery and exceptional

<sup>40</sup> *Ibid.*, at 123.

<sup>41</sup> *Ibid.*



experience of international relations are to be found in the book. At least from the third edition (1960) what is said nonetheless often seems to have aged somewhat. This is simply because the themes taken by de Visscher to illustrate 'the convergences and tensions between law and power in positive law', and the doctrinal or case law support he used for that, have grown older, despite obvious efforts at updating. There is not surprising — it would have been more surprising had it been the other way round.

## 8

De Visscher was undoubtedly a 'life' as much as a 'thought'. Not of course that he did not think about international law, the ins and outs of which he knew admirably. Yet he talks about what he had lived through as much as what he had thought, namely, his immense experience as patriot, professor, counsellor, advocate or judge. Without saying so openly, he recounts what his life had been, what he believed in, what he had learnt, what he had not forgotten etc.; this covers practically the whole of international law, but he refuses to make a theory out of what for him too is a sequence of 'realities'.

This experience is inevitably highly personal. It is the reflection of de Visscher's life and belongs only to him. Coming to international law by accident, he did not really have any teachers apart from those that had taught him civil law; nor did he really have any disciples, despite the great success of his works. That need not be surprising; by contrast with knowledge, experience if acquired cannot be transmitted, or hardly so. What remains is advice, exhortations, warnings and so forth; they reflect a wisdom that more than once arouses admiration, without thereby constituting the reflection of any transmissible 'doctrine'.

De Visscher naturally possessed great authority. 'President' de Visscher, one might have said, without knowing exactly what body or agency he might have been president of. This authority was founded on his exceptional stature, where intelligence yielded nothing to culture, nor professional integrity to moral rigour, nor courage to fidelity — nor essence to form. His pen ran by itself, clearly, simply and soberly, without needless flourishes or purple prose. What remains? That is hard to assess. De Visscher counts among the last great representatives of a world that is now past, a world that had been frequented by generations of 'Christian' jurists. In today's world, his thoughts sound a little dated, and even his writing sometimes seems a bit heavy. It is not that what he says is no longer accurate or important; but rather no longer what is being worked on. That is what the 'realities' — always so dear to him — have brought.

Will he some day return to fashion, just as forgotten poets are sometimes periodically brought back? That is possible, even if the law does not lend itself very well to such come-backs. It is not certain that the primacy given to a 'life' over 'thought' is a handicap from this viewpoint. For theories age more irremediably than men unless genius has touched them. De Visscher is not, it must be repeated, a 'theoretician', even

a disguised one. Behind his exceptional mastery of international law, he has more to do with the moralists who abound in maxims and sententiae directly constructed on lived experience. He is very untypical among jurists, even if these are often moralizers. De Visscher is in a way a distant relation of La Rochefoucauld, who like him loved ‘the conversation of honest people’ and found in it the opportunity to recall without fuss truths that greatly transcend his personal history.