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# *Charles de Visscher and International Justice*

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## **Abstract**

*Charles de Visscher began to take an interest in international justice immediately after the First World War. He embarked upon a brilliant career as an advocate before the Permanent Court of International Justice, where he was highly respected for his vigorous capacity for analysis, his precise and illuminating style and thorough understanding of all aspects of the cases he was involved in. Having sat as an ad hoc judge on the PCIJ, he was elected to it in 1937. He sat on the International Court of Justice from 1946 to 1952. While it may be difficult to assess his contribution to the work of the two Courts, as his thought was generally included in the majority opinion, it is indisputable that he exercised great influence there. His authority was great. Despite his natural discretion, Judge de Visscher was always in the front line of struggle for an international order founded upon law and justice. The judicial function occupied an exceptional place in his life and work, a function that he exercised with a distinction, skill and devotion acknowledged by all.*

## **1 Introduction**

Seeking to evaluate Charles de Visscher's contribution to international justice is a formidable undertaking. For the work of justice is necessarily a work of discretion; judicial deliberation is in essence secret.<sup>1</sup> Moreover, even if the statutes of certain judicial bodies — like the Permanent Court of International Justice (PCIJ) and the

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<sup>1</sup> This fundamental principle is expressed in Article 54(3) of the Statutes of the PCIJ and ICJ as follows: 'The Court's deliberations are and shall remain secret.' That text derives directly from Article 78(1) of the Hague Convention of 1907, and Article 27 of the draft for a court of arbitration and Article 43 of the draft for a prize court.

It has always been understood that the membership of the drafting committees responsible for preparing the preliminary drafts of decisions of the PCIJ and ICJ (see Article 6 of the Resolution concerning the Internal Judicial Practice of the Court) was an integral part of the secrecy of deliberations.

International Court of Justice (ICJ) — authorize their members to attach opinions to their decisions, judges of the ‘continental system’ have traditionally tended to make use of this facility sparingly. According to Procurator-General Ganshof van der Meersch, de Visscher was himself:

A convinced supporter of conciliation. . . [H]e professed that separate opinions of judges of the [Permanent Court], still in its infancy, ought as far as possible to be expressed within the Court’s deliberations, and that there was an interest in avoiding individual opinions or dissenting opinions. For him, the Court ought not to put on show its divisions, which could only erode its credit and attenuate the clarity of its doctrine.<sup>2</sup>

It should further be noted that, at the time when de Visscher was a member of the two courts, the names of the judges constituting the majority were not noted in the decisions.<sup>3</sup> If we add to this that de Visscher was by nature ‘discreet and reserved’<sup>4</sup> in character, we can understand the difficulties that we would face from the outset in any attempt to identify and systematize the positions he took on the various questions raised in the cases heard by him as a member of the PCIJ and subsequently the ICJ. It would certainly seem, as several testimonies have stated, that de Visscher exercised no small influence on the judgments of the PCIJ and the ICJ. Professor Henri Rolin, for instance, states that ‘several of the judgments handed down while he sat indisputably bear the mark of his thought and his style’.<sup>5</sup>

It is nonetheless no easy matter to determine ‘scientifically’ the precise nature of his contribution. We shall therefore, more modestly, attempt to build up a picture, through a succession of examples, of the broad relationship that de Visscher — whose life and scholarly work are discussed elsewhere in this issue of the journal by Rigaux and Verhoeven — maintained with international justice, with the sole aim of enlightening the reader on a perhaps less well-known part of this distinguished jurist’s career.

It is common knowledge that the latter years of the nineteenth century and the first years of the twentieth were crucial in terms of developing procedures for the peaceful settlement of international disputes. Belgium’s contribution in this area was

<sup>2</sup> Ganshof van der Meersch, ‘Notice sur Charles De Visscher’, in Académie royale de Belgique, *Annuaire* (1981) 28. In *Théories et réalités en droit international public* (4th ed., 1970) 388. De Visscher wrote in this regard: ‘One would hope that the Court’s judgments, which always bear the mark of laborious, scholarly study, would refrain from the dispersion of ideas sometimes displayed by overnumerous or overlong individual or dissenting opinions, and that by means of the broadest possible consensus as between the members [of the Court] they will furnish States with what for them is the real value of judicial settlement, namely the simplicity which, by achieving true economy of thought and action, tends to produce a feeling of certainty.’

<sup>3</sup> It is only since 1978 that, pursuant to Article 95(1) of the Rules of Court, judgments, and by extension advisory opinions and indeed orders, have included ‘a statement of the number and names of the judges constituting the majority’. In 1926, the PCIJ felt it would be useful for states, anxious to know whether a decision was likely to set a precedent, to know the number of judges that had supported it; by contrast it had considered that any indication of these judges’ names would have broken the secrecy of deliberations (see 1922 PCIJ Series D, No. 2, at 214–223).

<sup>4</sup> Van der Meersch, *supra* note 2, at 2.

<sup>5</sup> Cited by Rigaux, ‘In Memoriam: Charles De Visscher 1884–1973’, *Annales de droit* (1973-1) 4.

considerable. Towards the end of the nineteenth century Belgium was one of the states that had concluded the largest number of treaties which contained arbitration clauses. Belgium's contribution to the Hague Peace Conferences of 1899 and 1907 are well known, as is the important part it played in creating the League of Nations and drafting the Covenant, Article 14 of which provided for the creation of a Permanent Court of International Justice. Belgium was among the first to sign and ratify the PCIJ's Statute, drafted under the chairmanship of Baron Descamps, and to recognize by a declaration dated 25 September 1925 its compulsory jurisdiction, for a period of 15 years, in relation to any other state accepting the same obligation.

It was in this climate of national enthusiasm for judicial settlement that de Visscher turned his attention towards public international law. His interest in this mode of peaceful settlement of international disputes is therefore hardly surprising. Starting in 1922, he gave a course at the School of Political and Social Sciences in Louvain on 'International Arbitration', as holder of the Bonnevie Chair. The following year he published a first short work on the PCIJ,<sup>6</sup> which was followed by other studies<sup>7</sup> including a much-noted course given at the Academy of International Law on advisory opinions,<sup>8</sup> which is still considered authoritative today.

## 2 De Visscher as Advocate before the Permanent Court of International Justice

### A *The Danube Commission Case*

Charles de Visscher was called on to plead before the PCIJ for the first time in 1927, as counsel to the Romanian Government in the consultative procedure embarked on by the Council of the League of Nations regarding the *Jurisdiction of the European Commission of the Danube Between Galatz and Braïla*.<sup>9</sup> The principal question the PCIJ was asked to give an opinion on was whether the European Commission of the Danube, created in 1856, whose powers had been extended to the whole of the lower Danube (or maritime Danube) up to Galatz by the 1878 Treaty of Berlin, had the same powers on that part of the river upstream from Galatz to Braïla, given the relevant provisions of the 1883 Treaty of London, the Treaty of Versailles and the Danube Statute signed in 1921. The problem centred particularly on the fact that, while Article 1 of the Treaty of London had extended the Commission's powers from Galatz to Braïla, Romania was not a party to this treaty and had not taken part in the conference that drafted it. Moreover, both Article 346 of the Treaty of Versailles and

<sup>6</sup> *La Cour permanente de Justice internationale* (1923).

<sup>7</sup> For instance, 'Justice et médiation internationales', 55 *Revue de droit international et de législation comparée* (1928) 33–82 and 243–262; 'La Cour permanente de Justice internationale', 4 *Nordisk Tidsskrift for Intern. Rel., Acta Scandinavica juris gentium* (1933) 147–157; and 'Observation sur la compétence du juge international en équité', 38 *Ann. Inst. Droit Intern.* (1934) 238–244.

<sup>8</sup> 'Les avis consultatifs de la Cour permanente de Justice internationale', 1 *Ac. Droit Intern., Recueil des Cours* (1929) 1–76.

<sup>9</sup> See 1927 PCIJ Series C, No. 13 (IV), at 173–194.

Article 5 of the 1921 Statute specified that the Commission would exercise ‘the powers it had before the war’. Romania maintained, in opposition to France, the UK and Italy, that the Commission had no power to promulgate regulations affecting the Galatz–Braïla sector, nor to enforce their application.

De Visscher’s speech is easy to read despite the complexity of the questions dealt with: it is clear, concise and perfectly logically articulated. The basic principle is stated as follows:

A sovereign State cannot be expected to undergo on its territory restrictions on the exercise of its sovereignty other than those resulting either from general principles of international law, or from its own consent, as it emerges either from an international act (treaty or convention) or from constant, undisputed practice.

It is indisputable that in principle the establishment of international jurisdiction over the territory of a State can be the outcome only of a manifestation of will freely consented to by that State; in the event of dispute as to the existence of this consent, it is for those who allege it, those who make use of it, to prove what they claim.<sup>10</sup>

In consequence, he defined his task in the following terms:

I shall have to examine whether the treaties, conventions or other international acts of whatever nature may be invoked in favour of the thesis that the Commission’s jurisdictional powers extend to Braïla,<sup>11</sup>

not without stressing that:

in order to examine a question in the light of treaty terms, that treaty must be read as a whole, and a provision cannot be detached from its context without risking altering its meaning and scope.<sup>12</sup>

Similarly, he states, referring to intentions attributed to the framers of such a treaty:

It is a principle of interpretation which I need not recall that one cannot without certain proof attribute to the High Contracting Parties mutually irreconcilable intentions.<sup>13</sup>

De Visscher sees Romania’s exclusion from the 1883 London Conference as very harsh; he views it as a ‘negation of a fundamental principle, the equality of States before the law’.<sup>14</sup> Moreover, he rejects the argument that Romania had by its later attitude accepted the decisions of the Conference and could accordingly no longer challenge the extension of the Commission’s territorial powers:

This is, Gentlemen, a theory which amounts, in brief, to an objection of inadmissibility; the Romanian government, it is being said, may not be permitted to plead the nullity of the Treaty of London since its conduct denies this position. This might, I think, be termed a French estoppel by reason of contrary conduct.

The applicability of this English theory to international relations, Gentlemen, is not a settled issue. Undoubtedly I can accept, and I shall here use the terms of a British decision, *Smith v. Baker* [(1873) LR 8 CP 350, at 357], that a State cannot, any more than an individual, at the

<sup>10</sup> *Ibid.*, at 173.

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

<sup>12</sup> *Ibid.*, at 176.

<sup>13</sup> *Ibid.*, at 179.

<sup>14</sup> *Ibid.*, at 180.

same time blow hot and cold. A State cannot, according to the interest of the moment, make use of contradictory attitudes. But this is not the case.

The inadmissibility raised against us, this objection of inadmissibility being brandished, could not in the opinion of the British courts themselves be accepted save on two conditions that are absolutely lacking here.

First, and this is indisputably the essential condition for accepting an objection of inadmissibility, there must be a real and clear contradiction between the position currently put forward by a government and its previous conduct. The contradiction must be such that the previous conduct by the government must in some way absolutely deny what it now maintains: this is in no way the case here.

A further condition is required in order for the objection of inadmissibility to be accepted, and this second condition is also absent here. The objection can be upheld only if those invoking it, those seeking to rely on it, are liable to suffer unjust damage should their opponents prove their case. In other words, those raising the objection of inadmissibility must be able to say to their adversaries: 'your previous conduct led me into error, I was mistaken: it is because of this that I acted this way or that; you cannot, today, make a claim against me which, if held to be well-founded, would cause damage to me'.

I am, Gentlemen, saying that this second condition is also absent here.<sup>15</sup>

De Visscher maintained, on the contrary, that it was 'the obstinate silence by the Powers, in the presence of the Romanian declarations [that should] be interpreted . . . as renunciation by the Powers of the imposition of the Treaty of London on Romania'.<sup>16</sup> This silence by the Powers further comes to his attention when he considers the preparatory work on Article 346 of the Treaty of Versailles; referring to a declaration by the Romanian delegate that '[until then] the European [Danube] Commission's jurisdiction end[ed] at Galatz and not at Braila', he explains:

This absolutely clear declaration did not raise any notable objection or even the least reservation from the governments represented on the other side of the bar. The Treaty of London was not invoked. This obstinate silence by the Powers can bear only two interpretations: calculated silence, loaded with ulterior motives and belligerent intentions; or else quite simply the silence of acquiescence. I persist in believing that this second interpretation, which from different viewpoints is the more favourable to all parties to the case, is also the only right one; it is, I believe, the only one that can be accepted.<sup>17</sup>

The final conclusion is eloquent:

By deciding in favour of the Romanian position the Court will once again confirm two great principles that are basic to the international order: the principle of the equality of States before the law, and the principle of due respect for commitments freely entered into.

The Court will be saying that a State cannot because of its weakness have imposed on it a treaty — the Treaty of London — that openly ignores its most sacred rights.

The Court will be adding that when a State has set as a condition *sine qua non* of its signature of an international document a particular interpretation — and I here have in mind the interpretative protocol — this interpretation binds all the contracting parties: *pacta sunt servanda*.<sup>18</sup>

<sup>15</sup> *Ibid.*, at 182–183.

<sup>16</sup> *Ibid.*, at 183.

<sup>17</sup> *Ibid.*, at 189.

<sup>18</sup> *Ibid.*, at 194.

Following a lengthy advisory opinion given on 8 December 1927, the PCIJ nonetheless held that ‘under the law at present in force the European Commission of the Danube [had] the same powers on the maritime sector of the Danube from Galatz to Braïla as on the sector below Galatz’.<sup>19</sup>

### B *The International Oder Commission Case*

Once again, it was on matters to do with the powers of a river commission that Charles de Visscher was asked to plead before the PCIJ in 1929, in the *Case concerning the Jurisdiction of the International Commission of the Oder*.<sup>20</sup> More specifically, the dispute concerned the interpretation of the texts that had established the international arrangements for the Oder. The ‘six governments’ — Germany, Denmark, France, the UK, Sweden and Czechoslovakia — based their arguments on the 1921 Barcelona Convention and subsidiarily on the Treaty of Versailles, which had brought the Oder and its ‘river network’ under the administration of an international commission. The six governments maintained that the Commission’s powers also extended to tributaries whose courses were exclusively on Polish territory. Poland challenged this, rejecting any application to its territory of the Barcelona Convention, which it had not ratified.

De Visscher’s speeches are once again striking for their sobriety, elegance and power of persuasion. Having given Poland credit for its collaboration on internationalizing communications, he stated the precise nature of the dispute in these terms:

If today the Polish government takes a stance against a thesis that seems to want to appeal to these new ideas, that is because the question that is the subject of debate was definitively settled and resolved by precise treaty texts. It is only the interpretation of these texts that is at issue here; it is the sole object of the proceedings.<sup>21</sup>

This interpretation must necessarily start by considering a question of principle, in his view fundamental, which he accused the other parties of having neglected: the ‘relation to be established between the general notion of internationalization and [the issue] of the form of administration [of a] watercourse’.<sup>22</sup>

According to de Visscher:

In itself internationalization involves only the application to a watercourse of a set of guarantees able to ensure on that watercourse free exercise of navigation, and also, to an extent hitherto less well defined, equality of treatment in this exercise of navigation. These guarantees given to navigation are the only consequences essentially bound up with the notion of internationalization. Legal tradition designates the whole set of these guarantees by a term that has long taken on well-defined technical meaning: free international navigation. That is what constitutes the substance, the very essence, of internationalization.

By contrast, the institution of international administration, of an international commission appointed to run the waterway, has no necessary or essential link with the notion of

<sup>19</sup> 1927 PCIJ Series B, No. 14, at 69. The Court’s reasoning on this point is set out at *ibid.*, at 22–55.

<sup>20</sup> See 1929 PCIJ Series C, No. 17 (II), at 161–182 and 234–237.

<sup>21</sup> *Ibid.*, at 161.

<sup>22</sup> *Ibid.*

internationalization. For it is accepted that, failing express agreement to the contrary, an internationalized waterway remains under the administration of the riverine State. Why? Because administration or management of a waterway involves powers of decision, sometimes even of enforcement, that fall within the attributes of territorial sovereignty. Administration by an international commission is thus only an occasional, incidental mode, by nature exceptional; it is a notion that is in any case entirely independent of that which constitutes the substance or very essence of internationalization.

The whole evolution of international river law demonstrates the soundness of the distinction I am endeavouring to draw here between internationalization on the one hand and international administration on the other . . .

In conclusion it is indisputable that these principles contained in Articles 108–117 of Vienna, covering only navigation arrangements, have for long been recognized by European States as a whole and have come to form part of what is called general international law.

By contrast, when it comes to the question of the administration or management of the waterway, the situation is totally different. As soon as we move onto this ground, we manifestly leave the domain of general international law to enter the area of specific international law, founded exclusively on strictly conventional provisions.

One must here, Gentlemen, guard against an optical illusion . . . The existence of international commissions for a number of major European rivers has caught the imagination and attracted attention, to the point of sometimes giving rise to the quite erroneous, totally incorrect notion of seeing the existence or creation of international commissions as the condition, or at least one of the essential features, for internationalization. Nothing could be less true. If instead of repeating, as authors sometimes do, facile generalities one takes the trouble to go to the text of the agreements setting up international commissions, one finds two things: first that the establishment of these commissions always derives from explicit agreement among the States involved, that the creation of such commissions has never been regarded as the consequence of a principle of international law, and that, quite the contrary, this management by commissions has always been regarded as a treaty derogation from the principle that still remains the dominant one, management by the riverine State.

Moreover, reading these agreements, we realize that the term international commission is often used in them to designate bodies quite different from each other.<sup>23</sup>

The conclusions he draws in relation to the case in point are put thus:

First conclusion: since administration by a permanent international commission is in no way implied in the notion of internationalization, it follows that a mere declaration of internationalization such as that appearing in Article 331 [of the Versailles Treaty] does not of and by itself entail any more than the application to the Oder of a regime of free international navigation. Equally, it is by a provision both separate and specific, Article 341, that the Treaty of Versailles brought the Oder under the management of an international commission.

Second conclusion: administration by international commission is an exceptional way of running a waterway, especially where non-riverine States are represented on it, so that it is incumbent on the opposing party to show that the territorial powers of the Oder Commission extend to the parts of the river network where these powers are clearly challenged by Poland. It is the opposing party, represented by the six governments, on which the full burden of proof falls.

Third conclusion: this concerns the interpretation of the texts that have been invoked by the other side. This proof, which the opposing party has to furnish, can be regarded as adequately furnished in law only on the basis of an absolutely clear and unambiguous provision . . . In the

<sup>23</sup> *Ibid.*, at 162–164.

face of a claim that manifestly falls outside general international law by going beyond the normal consequences of internationalization, there can be no question of either extensive interpretation or argument by analogy: the texts must be interpreted very strictly . . . [If there is doubt, there can be no] other consequence than a return to general international law: management by the riverine State.<sup>24</sup>

And Charles de Visscher ends his speech with a few final considerations that deserve to be cited *in extenso*, given the interest they have in relation to treaty interpretation rules:

The question before the Court for decision is essentially one of interpretation, of textual exegesis. If these texts presented the least ambiguity, if their interpretation could raise the least doubt in the Court's mind, I would recall a fundamental rule of interpretation applicable to each of these articles: between two contrary interpretations preference should always be given, other things being equal, to the one that least derogates from general international law, and applying this principle to the case in point, the one that involves the least restriction of the sovereignty of States over a portion of their territory.

But the Court will no doubt feel that this principle of interpretation, though unchallenged, does not apply in the case in point. For the texts are clear and unambiguous; it suffices to read them without preconceived ideas, bearing in mind merely their overall scheme, which is, moreover, perfectly plain.<sup>25</sup>

In its judgment of 10 September 1929, the Court recognized the soundness of the distinction in principle drawn by counsel for Poland between 'internationalization of rivers' and 'administration by an international commission'. It nonetheless found that:

when a Commission is set up, it is natural to suppose that the territorial limits of the 'régime' and of the 'administration' by the Commission whose function is to make practical application of the principles of the régime, are coincident. Failing any contrary indication drawn from the context, it must therefore be understood that the competence of a river commission with such a function extends to all the internationalized portions of river system.<sup>26</sup>

### C *The Polish Warships in Danzig Case*

Having become professor at Louvain after the 'Flemicization' of the University of Ghent, Charles de Visscher was able on two further occasions to represent Poland's interests before the PCIJ. Both cases were advisory procedures; each had to do with the status of the Free City of Danzig.

De Visscher represented Poland first, in 1931, on the question of *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels*.<sup>27</sup> In this case, the Council of the League of Nations had asked for the Court's opinion on the following points:

Do the Treaty of Peace of Versailles, Part III, Section XI, the Danzig–Poland Convention concluded at Paris on 9 November 1920, and the relevant decisions of the Council of the League of Nations and of the High Commissioner confer on Poland rights or attributions as

<sup>24</sup> *Ibid.*, at 167–168.

<sup>25</sup> *Ibid.*, at 181–182.

<sup>26</sup> 1929 PCIJ Series A, No. 23, at 23.

<sup>27</sup> See 1924 PCIJ Series C, No. 5, at 293–332 and 365–378.



regards access to, or anchorage in, the port and waterways of Danzig of Polish war vessels? If so, what are these rights or attributions?<sup>28</sup>

Danzig had been made a Free City by the Treaty of Versailles, to enable Poland to have free and secure access to the sea. In negotiations for the Convention of Paris that was to ensure Poland the necessary rights to guarantee its position in Danzig, the Polish delegation had sought in vain the insertion of certain military and naval clauses, one of which would have explicitly conferred on Poland the right to use the port of Danzig for its warships. In October 1921, a provisional arrangement had nonetheless been reached between the Free City and Poland by which Polish warships were authorized in certain circumstances to use the port of Danzig; the arrangement was to remain in force until September 1931. In the meantime, the Senate of the Free City had repeatedly asked for the arrangement to be ended, arguing that, since the construction of the Polish port of Gdynia, Polish ships could find anchorage there.

De Visscher's argument, insisting on the *sui generis* nature of the arrangements applying to Poland–Danzig relations, was broadly aimed at establishing that the right of access by Polish warships to the port of Danzig derived from a resolution adopted by the Council of the League of Nations on 22 June 1921, as interpreted in the light of the principles that had governed the creation of the Free City. The relevant passages of this resolution read as follows:

1. The Council does not consider it necessary to decide at the present moment under what conditions the defence of Danzig by sea should be secured.
2. The High Commissioner should, however, be asked to examine the means of providing in the port of Danzig, without establishing there a naval base, for a 'port d'attache' for Polish warships.<sup>29</sup>

De Visscher argues that:

In order to interpret these resolutions correctly ... one must first carefully consider the negotiations that led to them, of which they in a sense represent the end-result.

One must then consider how these resolutions have been construed by those who had official capacity to interpret or apply them.<sup>30</sup>

From the negotiations that led to the adoption of the resolution, he concluded that three ideas had dominated discussion, first at the Ambassadors' Conference and then at the League of Nations:

The first idea is the fundamental one of free and secure access for Poland to the sea; this was the very idea that gave birth to the Free City of Danzig ...

The second idea is this: in order to achieve the foregoing objective of assuring free and secure access to the sea, the Powers intended to establish very close links between the Free City and Poland ...

But these two ideas ... are immediately joined by a third which, in the language of the Ambassadors' Conference, appears as the immediate consequence, the corollary, of the two previous ones. This is how Monsieur Cambon [put it]:

'Both because of the close links thus established between the Free City and Poland and in the

<sup>28</sup> 1931 PCIJ Series A/B, No. 43, at 129.

<sup>29</sup> PCIJ Series C, No. 5, at 295.

<sup>30</sup> *Ibid.*

light of the clearly expressed wish of the signatory Powers of the Versailles Treaty to give Poland free access to the sea, the Polish government thus appears designated to receive from the League of Nations a mandate to ensure if necessary the defence of the Free City.<sup>31</sup>

According to de Visscher, these three ideas are fundamental to interpreting the resolution in question. Examining its text, he notes that ‘the right to a home port implies privileged treatment for the warships over those of other States’,<sup>32</sup> and notes also that ‘the Council’s decision would have no sense if creating a home port did not entail certain privileges’.<sup>33</sup> And he rejects the argument that this resolution amounts only to ‘a mere instruction given the High Commissioner to consider whether it was possible to create a home port for Polish warships in Danzig’:<sup>34</sup>

Let us remain within the terms of the resolution. The Council said: the means of providing a home port should be studied. The Council thus very clearly distinguished between two things: first, the principle of providing the port; secondly, the practical arrangements for organizing this.

On the first point, the question of principle, the Council took an immediate decision. What it asked the High Commissioner to do was simply to study the means of providing a home port, the practical arrangements for achieving this. The High Commissioner was asked to research and present a set of specific proposals enabling the idea of a home port accepted by the Council to be implemented. It seems obvious to us that a request so worded implies a decision taken as to the actual principle of creating the port.<sup>35</sup>

The remainder of de Visscher’s speech aims to show that his interpretation ‘was fully shared . . . by all those who had official capacity to interpret the resolution or apply it’.<sup>36</sup>

In its advisory opinion of 11 December 1931, the Court rejected the Polish arguments.<sup>37</sup> It found in particular that the principles inherent in the creation of Danzig as a Free City could not prevail over the texts in force and that ‘neither the Treaty of Versailles nor the Convention of Paris, either by the terms of the provisions they contain or by necessary implication, confer on Poland the right she is claiming’.<sup>38</sup> In relation to the resolution of 22 June 1921, the Court concluded as follows:

The correct view of . . . the Resolution of June 22nd 1921, is that it is no more than what its terms imply—a direction to the High Commissioner to examine how Poland could be given at Danzig a ‘port d’attache’ for her war vessels without constituting a naval base. Until that question had been properly investigated, it would have been difficult for the Council to take any decision of principle. The Resolution constituted the initiation of a study which was interrupted

<sup>31</sup> *Ibid.*, at 296.

<sup>32</sup> *Ibid.*, at 308.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, at 309.

<sup>36</sup> *Ibid.*, at 311.

<sup>37</sup> See 1931 PCIJ Series A/B, No. 43, at 148.

<sup>38</sup> *Ibid.*, at 145.

by the conclusion of the Provisional Arrangement of October 1921, an interruption which has resulted in the fact that no final and definitive decision has ever yet been taken.<sup>39</sup>

#### D *The Treatment of Polish Nationals in Danzig Case*

The other advisory procedure in which Charles de Visscher was asked to represent the Polish Government concerned the *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory*.<sup>40</sup> The case originated in a request by Poland asking the High Commissioner to take a decision 'regarding the unfavourable treatment of Polish nationals and other persons of Polish origin or language in the territory of the Free City of Danzig'.<sup>41</sup> Since such varied areas as private and public education, the unrestricted use of the Polish language, employment, the purchase of property, and the freedom of settlement and establishment etc. were at issue, the High Commissioner deferred his decision until the PCIJ had given its opinion on the legal basis for resolving the question of the treatment of Polish nationals. Accordingly, the Council of the League of Nations brought before the Court the following request for an opinion:

(1) Is the question of the treatment of Polish nationals and other persons of Polish origin or speech in the territory of the Free City of Danzig to be decided solely by reference to Article 104(5) of the Treaty of Versailles and Article 33(1) of the Convention of Paris (and any other treaty provisions which may be in force), or also by reference to the Constitution of the Free City; and is the Polish government accordingly entitled to submit to the organs of League of Nations disputes concerning the application to the aforesaid persons of the Danzig constitution and other Danzig laws through the channels laid down in Article 103 of the Treaty of Versailles and Article 39 of the Paris Agreement?

(2) What is the exact interpretation of Article 104(5) of the Treaty of Versailles and Article 33(1) of the Paris Agreement, and in the event of an affirmative answer to question (1), of the relevant provisions of the Constitution of the Free City?<sup>42</sup>

As de Visscher stressed from the outset:

The question . . . brought before the Court raises . . . the problem of the exact relations that exist between Danzig and the League of Nations and between Danzig and Poland. It highlights the close links that are common to all the restrictions that have been placed on the independence of the Free City . . . those organic limitations that are one of the essential features of the political structure of the Free City.<sup>43</sup>

His opening speech as counsel for Poland in the case was devoted to developing the 'general principles' he considered ought to be applied to the relationship between Poland and the Free City.<sup>44</sup> In this connection he insisted in particular on the following points:

The system of protection and guarantee by the League of Nations cannot be separated from the

<sup>39</sup> *Ibid.*, at 147–148.

<sup>40</sup> See 1932 PCIJ Series C, No. 56, at 234–283 and 357–371.

<sup>41</sup> 1932 PCIJ Series A/B, No. 44, at 8–9.

<sup>42</sup> *Ibid.*, at 5.

<sup>43</sup> 1932 PCIJ Series C, No. 56, at 234.

<sup>44</sup> *Ibid.*, at 247.

treaty arrangements provided for by the Treaty of Versailles and organized by the Convention of Paris. The restrictions on the Free City's independence resulting from the League's powers and from the treaties (the Versailles Treaty and Convention of Paris) are intimately, inseparably linked. The League, because of its rights and duties of protection towards Danzig, has a certain and indisputable interest in any system of legal relations that may exist between Poland and Danzig. But conversely, Poland cannot consider its treaty rights to be truly safeguarded and assured unless the League's protection and guarantee in relation to the Free City of Danzig remain inviolate. This protection and guarantee is for Poland the most valuable safeguard of its treaty rights.<sup>45</sup>

And, in relation to the case in point, de Visscher states:

Poland has never claimed to act by itself as a protector of the Free City; it has never claimed to act on its own behalf as guarantor of the Danzig Constitution. Poland has no wish whatever to interfere in the internal affairs of the Free City, which are outside the protection of its treaty rights. What Poland claims is purely and simply its right to appeal to the League of Nations, the guarantor of the Danzig Constitution, to secure the regular and consistent application of the Articles in the Danzig Constitution that have the object of ensuring in the domestic order respect for the rights assured to it internationally by treaty.<sup>46</sup>

He moreover rejects the argument that the Danzig Constitution could not be the subject of international proceedings :

When a State has assumed an international commitment imposing on it a specific course of conduct, breach of that international commitment can result from any act whatever, even if that act, considered from the viewpoint of domestic law, would merely represent constitutional, legislative, administrative or judicial activity. The nature of the act that results in the breach of a course of conduct, or breach of an internationally mandated arrangement, is irrelevant in terms of international law . . .

In a question similar to the one that concerns us here, the Court recognized that where a treaty barred any differential treatment the nature of the act resulting in such differential treatment was irrelevant from the viewpoint of international law. Consequently, [the Court] recognized that proceedings could be based on a State activity which taken by itself was of a purely domestic-law character.<sup>47</sup>

De Visscher's subsequent speeches relate to the interpretation of Article 104(5) of the Treaty of Versailles and Article 33 of the Convention of Paris prohibiting any discrimination 'to the detriment of Polish nationals and other persons of Polish origin or speech'. De Visscher began by explaining the relationship between these texts:

Because of its participation in the Versailles Treaty, Poland acquired a direct right to the full and complete enforcement of Article 104(5) . . . and Poland finds in that text a legal title that is sufficient in itself. The Convention of Paris defined the scope of that Article in respect of Poland–Danzig relations, but did not *ipso facto* become the basis of Poland's rights in relation to the Free City; the conclusion of the Convention of Paris added nothing new to the rights and obligations resulting from Article 104 of the Treaty. It is accordingly Article 104 that remains the basis of Poland's rights, both towards Danzig and towards the signatory powers of the Treaty of Versailles. For as the Danzig Memorandum moreover recognized, Danzig, as well as

<sup>45</sup> *Ibid.*, at 241–242.

<sup>46</sup> *Ibid.*, at 242–243.

<sup>47</sup> *Ibid.*, at 246–247.

the signatory powers of the Treaty, is bound by the provisions of Article 104, since Danzig recognized them when it was created a Free City on 9 November 1920.<sup>48</sup>

He then considers the interpretation of those texts in the light of their object and purpose. The dispute, he notes, 'essentially concerns the relationship of comparison implied by the ban on discrimination'.<sup>49</sup> For, he says, while, according to the Free City, the texts in question ban only discrimination as between, on the one hand, Polish nationals and other persons of Polish origin or language and, on the other hand, 'ordinary foreigners' in Danzig, according to Poland the comparison must instead be drawn as between persons of Polish origin and 'the mass of the Danzig population, i.e. . . . Danzig nationals of German origin'.<sup>50</sup> Thus he defends the interpretation of the Versailles Treaty put forward by Poland in the following terms:

For anyone aware, however slightly, of the *de facto* and *de jure* position that exists in Danzig, this interpretation is the only one that can meet the concern that the allied and associated powers must have had at the time when they drafted Article 104 of the Treaty . . . It is absolutely clear that this ban on discrimination against Poles was regarded by the allied and associated powers as the logical, inseparable consequence of the rights recognized to Poland in the territory of Danzig . . . [O]nly one danger threatened Polish persons established in Danzig: that of seeing the city favour its own nationals of German origin to the detriment of the Polish elements . . . and what the Treaty of Versailles desired was to prevent Polishness, in whatever specific form . . . from becoming . . . the motive or pretext for inequality of treatment in relation to the only group the Free City of Danzig might be tempted to favour . . . To conclude on this point, it . . . seems impossible to conceive that Article 104 of the Versailles Treaty constitutes a mere reference to arrangements which would be glaringly inadequate to the relations the Treaties have established between Poland and Danzig.<sup>51</sup>

This conclusion does not seem to him to be denied by Article 33 of the Convention of Paris. In accordance with the 'rules of interpretation that require that a text be read as a whole and the two parts that make it up as far as possible [to be] reconciled with each other',<sup>52</sup> the wording of Article 33 seems to him to confirm that 'the authors of the Convention of Paris wished to affirm in the clearest fashion that the provision of the Versailles Treaty remained fully in force between the parties',<sup>53</sup> and that the corresponding provisions of the Convention of Paris and of the Versailles Treaty 'have an identical meaning, in that the arrangements provided for in Article 33 and in Article 104 are provisions for equal treatment with nationals'.<sup>54</sup>

In its advisory opinion of 4 February 1932, the PCIJ rejected the interpretation given by Poland to the Articles cited, and rejected its arguments. Moreover, on the interesting question of whether the City authorities could invoke the Danzig Constitution, the PCIJ took the following line:

[In the Court's] opinion, the fact that the legal status of Danzig is *sui generis* does not authorize it

<sup>48</sup> *Ibid.* at 249.

<sup>49</sup> *Ibid.* at 254.

<sup>50</sup> *Ibid.* at 255.

<sup>51</sup> *Ibid.* at 255–259.

<sup>52</sup> *Ibid.* at 278.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

to depart from the ordinary rules governing relations between States and to establish new rules for the relations between Poland and Danzig ... The peculiar character of the Danzig Constitution, as has been said above, affects only the relations between Danzig and the League. A violation or an erroneous application of the Constitution by Danzig is, therefore, so far as international relations are concerned, a matter solely between the League, as guarantor, and Danzig. With regard to Poland, the Danzig Constitution, despite its peculiarities, is and remains the Constitution of a foreign State. Any grievance which Poland may allege against the Free City arising out of the application by the latter of its Constitution as such cannot therefore give rise between Poland and the Free City of Danzig to differences in regard to a matter affecting the relations between Poland and the Free City within the meaning of Article 39 of the Convention of Paris; differences submitted to the High Commissioner under these conditions cannot therefore be entertained by him.

It should however be observed that, while on the one hand, according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter's Constitution, but only on international law and international obligations duly accepted, on the other hand and conversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.

The application of the Danzig Constitution may however result in the violation of an international obligation incumbent on Danzig towards Poland, whether under treaty stipulations or under general international law, as for instance in the case of a denial of justice in the generally accepted sense of that term in international law.<sup>55</sup>

### **E *The Legal Status of Eastern Greenland Case***

In 1933, Charles de Visscher appeared for the last time as counsel, on this occasion for Denmark, before the PCIJ, in the famous case of the *Legal Status of Eastern Greenland*.<sup>56</sup> His pleadings in this case were by far his longest, and, having regard to the nature of the questions raised, the richest in theory. Suffice it to recall that the case originated in a royal proclamation dated 10 July 1931 whereby Norway declared it had occupied certain territories of Eastern Greenland. However, Denmark claimed sovereignty over the whole of Greenland, including the areas claimed by Norway. In essence, it maintained that its title was based on the peaceful, uninterrupted exercise of state authority since 1721, a position recognized by various foreign governments after 1915; and it further alleged that on no less than three occasions — the conclusion of the Treaty of Kiel in 1814, the conclusion of various bilateral treaties after 1886 and the famous declaration made by its foreign minister Mr Ihlen in 1919 — Norway had itself recognized Danish sovereignty over Greenland. It is scarcely possible within the limits of this article to give a systematic account of the positions of principle taken by de Visscher on the questions raised in the case, numerous and complex as they are. Some passages from his pleadings are, however, worth citing.

Noting that the Norwegian declaration of occupation was based on the position

<sup>55</sup> 1932 PCIJ Series A/B, No. 44, at 23–25.

<sup>56</sup> See 1933 PCIJ Series C, No. 66, at 2793–2913 and 3401–3477.

that the territory in question was *terra nullius*, de Visscher started by formulating some interesting observations on the very notion of ‘*terra nullius*’ and its relationship with the notion of recognition:

In law, the question of whether a region is to be regarded as *terra nullius* or instead as subject to sovereignty is a question that by its very nature arises in relation to all States. It arises *erga omnes*, not in the light of the special relations that may exist between one State and another. When over a long period the community of States has given its consent to the exercise of sovereignty by one State over a given territory, that sovereignty must be taken as acquired: for this general assent reflects the international community’s intention to regard this state of affairs as legitimate. It implies that in the eyes of the community of States sovereignty asserted over a given territory by a State satisfies the required conditions; it is a form of international recognition. It can be deduced either from positive acts with well-defined international scope or from indisputable tacit consent.

It follows that a region can be regarded as *terra nullius* only if one can find an absence of general consent in favour of the exercise of any sovereignty whatever over this region.<sup>57</sup>

Going on to examine ‘the treaty title that is directly opposed to the Norwegian claim’<sup>58</sup> — the Treaty of Kiel of 14 January 1814 and the additional agreements to that treaty — de Visscher seeks to establish that ‘by the effect of these treaty arrangements the question of sovereignty over Greenland, and the whole of Greenland, was definitively settled in relations between the two countries’.<sup>59</sup> In his eyes Article 4 of the Treaty of Kiel is absolutely clear and its scope indisputable:

[It] provides for the cession by the King of Denmark to the King of Sweden of the whole territory of Norway, that is the bishoprics, bailiwicks and provinces embracing the totality of the Kingdom of Norway and all its dependencies. Greenland is explicitly mentioned as not included among the dependencies of Norway. In virtue of this provision, Greenland remained under Denmark’s sovereignty.<sup>60</sup>

The arguments put forward by Norway to deprive this provision of effect are methodically refuted by de Visscher:

It emerges very clearly from the very terms of the agreements between the Powers with the aim of bringing about the cession of Norway that the Powers considered this cession to depend only on the agreement to be imposed upon the King of Denmark. There is no question anywhere of consulting the Norwegian people. There is no question anywhere of consent by the Norwegian nation to this cession, ideas then totally foreign to the political system of the times. Quite the contrary, the agreements between the Powers explicitly provide that Norway, detached from Denmark, shall form — these are the actual terms — an integral part of the Kingdom of Sweden.<sup>61</sup>

And he adds:

The Norwegian thesis seeks to oppose directly to an international treaty, the work of governments charged with the conduct of external affairs, the will and sovereignty of the

<sup>57</sup> *Ibid.*, at 2794.

<sup>58</sup> *Ibid.*, at 2796.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, at 2798–2799.

<sup>61</sup> *Ibid.*, at 2804–2805.

Norwegian people. The notions of people and nation have a precise legal meaning in domestic laws. But under positive international law account is taken only of acts accomplished by States, the only subjects of international legal relations, duly represented by their governments. It is in the name of *jus gentium* that the Norwegian government claims to challenge the validity of an international treaty concluded by the duly qualified government organs of the two High Contracting Parties. It is in the name of this law that it seeks to challenge a treaty that the whole of Europe has never ceased to regard as valid.

I do not feel I need insist further. This appeal to *jus gentium* against a diplomatic act that has received general international recognition has no chance of being accepted. It would in any case be hard to conceive of a more dangerous thesis for the security, order and stability of international relations.<sup>62</sup>

Going on to consider what international recognition there had been of Danish sovereignty over Greenland, de Visscher states:

Greenland, the whole of it, has, by everyone and for all time, been treated as Danish territory, and it has always been with Denmark, and Denmark only, that the foreign Powers have dealt. This emerges clearly in the long series of international agreements subsequently concluded by Denmark with almost all States of the world in relation to Greenland.<sup>63</sup>

In relation to the recognition requested by Denmark after 1916, de Visscher further explains that these acts ‘never had any scope beyond that attributed in private law to a title of recognition or confirmation’.<sup>64</sup> He further refutes in the following terms Norway’s argument that it was ‘in no way bound by declarations made by foreign States [since these could not] . . . make a present of a territory to Denmark in a way operative in [its] regard’:<sup>65</sup>

This thesis is doubly wrong. First, in its application to the case in point. As has been shown, the declarations do not have the effect of establishing a new sovereignty over Greenland but only of giving explicit confirmation to a pre-existing sovereignty already recognized even by Norway. It is therefore incorrect to talk about a ‘present to Denmark’ here.

The thesis is again wrong from a more general viewpoint. It is incorrect to affirm in absolute terms that sovereignty can be established over a region only on condition that it should from the outset have secured recognition from all States concerned, without exception. International practice on the contrary shows that many international positions have regularly been established throughout history from the effect of an agreement among a restricted number of Powers. In particular, it is well known that the collective action of the Great Powers has given rise in terms of sovereignty to positions that have gradually become consolidated and gradually imposed adherence by all States.

In any case it is certain that the isolated rejection of recognition by a single State cannot prevail over recognition granted by the international community. This is true especially where the recognition granted by the community of States is not faced with a positive claim to sovereignty by a given State.<sup>66</sup>

<sup>62</sup> *Ibid.*, at 2808.

<sup>63</sup> *Ibid.*, at 2823.

<sup>64</sup> *Ibid.*, at 2845.

<sup>65</sup> *Ibid.*, at 2855.

<sup>66</sup> *Ibid.*, at 2855–2856.



The question of safeguarding the rights allegedly acquired by Norwegian nationals in Eastern Greenland and of the relationship between these rights and Danish sovereignty over this territory are then considered at length:

There are few notions harder to define than acquired rights. One eminent French jurist, de Vareille-Sommière, 'challenged the sharpest-minded civil lawyer' to give a satisfactory definition of acquired rights. I shall not go that far. The notion of acquired rights has been sufficiently well defined in practice for one to be able, at least in specific cases, to reach agreement. It is nonetheless true that there are few notions so often abused as that of acquired rights. The use made here by the Norwegian government is a quite striking example.

It goes without saying that the Danish government accepts, and fully accepts, the principle of respect for acquired rights. The point is whether the notion is applicable to our case in point.

What is the Norwegian government here calling acquired rights, allegedly infringed by the 1921 decree?

It is the activity engaged in, though rather rarely before 1921, by Norwegian hunters on the coast of Eastern Greenland. Can one really regard as an acquired right the ability, the freedom, the possibility that anyone whatever, let us note, had before 1921 to hunt occasionally in Eastern Greenland?

An acquired right implies one thing: the existence of a specific, well-determined bearer in whom the right is vested. One cannot see here in whom this right is supposed to be vested. All there was was general freedom for all without distinction on a precarious basis, resulting merely from an absence of prohibition by the sovereign power. The most one can speak of in such a case is interests, not rights. But the distinction between the notions of interest and of right is quite fundamental in the theory of acquired rights . . .

But in reality this whole discussion of acquired rights has no relationship with the sole question of interest to us here. This question is the following. Let us suppose, even for an instant, that there might be acquired rights in this case; could the existence of acquired rights vested in private persons, in individuals, give the Norwegian government a valid reason for challenging Denmark's sovereignty over Greenland?

Obviously not. Acquired rights of individuals and sovereignty are two concepts having to do with essentially different legal orders: one of private law, the other of international law. A State disregarding the acquired rights of foreigners on its territory may thus be guilty of breach of an international obligation and internationally liable. It nonetheless remains fully sovereign over its territory.

Had Norwegian nationals hypothetically acquired rights on Greenland, rights breached by the Danish decree, it was for their government, the Norwegian government, to ensure the protection of these rights through diplomatic channels or by any other legal means. But this protection could in no case take the form it has taken here, protest against an already established sovereignty, explicitly recognized by the community of States and by Norway itself. In the Norwegian arguments here, there is manifestly a glaring lack of consistency and logic.<sup>67</sup>

It is in this context that de Visscher once again seeks to set out his views on the applicability in international law of the Anglo-Saxon theory of estoppel:

The fact is alleged that Norwegian hunters have engaged in hunting activities in Eastern Greenland. This fact is said no longer to allow the Danish government to assert its sovereignty over these regions.

<sup>67</sup> *Ibid.*, at 2864–2865.

Obviously there is an undoubted error here. One cannot see why the fact of mere individuals exercising in Eastern Greenland a purely private hunting activity would have the consequence of foreclosing Denmark's right to claim its sovereignty.

The Danish government's passive attitude, of abstention, is very natural to understand, since nothing in this purely private activity could be regarded by it as encroaching on its sovereign rights.

It is true that one can conceive of cases where the theory of foreclosure or *estoppel* is applicable in international law, doubtless not, I am willing to concede, together with the whole technical apparatus with which the institution is surrounded in the law of English-speaking countries, but in its principle, as a general principle of law. And indeed, the Danish government regards the principle as perfectly applicable in the case in point, but to an end quite different from that to which the Norwegian government seeks to apply it.<sup>68</sup>

Since the Danish Government founded its claims on immemorial occupation and possession, its counsel repeatedly made reference to the arbitral award given by his friend Max Huber in the *Island of Palmas* case.<sup>69</sup> He invoked its findings to establish, for instance, that it is not necessary for states to be able to 'show the precise facts that are at the origin of [their] sovereignty [or] to determine the exact date when these facts came about';<sup>70</sup> that 'a State's titles to sovereignty . . . must be evaluated according to the state of international law in force at the time when these titles arose';<sup>71</sup> or that 'one cannot require the same degree of *effectivité* in possession in the case of territories both extremely vast and almost completely uninhabited'.<sup>72</sup> Denying that Denmark's title to Eastern Greenland was in any way founded on the doctrines of acquisitive prescription or contiguity, he made the following interesting observations on these doctrines:

Acquisitive prescription, or *usucapio* in the proper sense of the term, implies two elements that are not to be found here. First, acquisition of the right by more or less automatic expiry of a specific, predetermined period of time, a lapse of ten or twenty years, for instance. Acquisitive prescription further implies the existence of a previous, pre-existing right, or the existence of a contrary claim against which the prescription operates.

By prescription one acquires a right against someone.

None of these elements are to be found here. The Danish government has never founded its sovereignty on the expiry of a predetermined time period, and it is wrong for the Norwegian pleadings to attribute this idea to it.

A predetermined time period is, in the institution of prescription, a condition of a technical nature that positive international law has to date not yet prescribed.

Moreover, for over two centuries, Denmark has never had a claim raised in Greenland against its sovereignty. There has thus never been anything in relation to which it might exercise acquisitive prescription.<sup>73</sup>

He continues:

<sup>68</sup> *Ibid.*, at 2870.

<sup>69</sup> Arbitration award of 4 April 1928, United Nations Reports of International Arbitral Awards, vol. II, 829.

<sup>70</sup> 1933 PCIJ Series C, No. 66, at 2876.

<sup>71</sup> *Ibid.*, at 2886.

<sup>72</sup> *Ibid.*, at 2887.

<sup>73</sup> *Ibid.*, at 2872–2873.

The notion of contiguity presupposes the following: a State that has sovereignty over a coast, say, claims sovereignty over an island located at a fairly large distance in the sea, beyond the territorial sea, on the sole ground that a certain geographical logic so requires.

This theory of contiguity, which has been invoked in practice, must be regarded in general as unfounded, at least as a principle of law. The fact is that the theory of contiguity often has as its sole foundation a theoretical connection which it is attempted to establish between certain regions. It is sought to group them artificially, to join them together on the basis of often purely speculative considerations. *Ipsa facto* and for this reason, the theory of contiguity is an imprecise and arbitrary one.

Moreover, in such a case there is neither *animus*, nor *corpus possessionis*, nor international recognition at stake.

The situation here is quite different. We are in the presence of an indisputable *de facto* unity, in which we have noted all the elements of a valid state of possession.<sup>74</sup>

Finally, referring to the adoption of the Norwegian decree after both parties had agreed to submit the question of the legal status of Eastern Greenland to the Court, de Visscher recalled in particularly clear terms the duty of 'judicial loyalty' incumbent on States in such circumstances:

Since both governments had indicated their agreement to submit the matter to the [PCIJ], it seems absolutely clear that each had from that point the strict, absolute duty to refrain from any unilateral measure capable of changing in any way the existing legal position. This is an elementary principle, a duty of loyalty, and also a condition for the sound administration of international justice.

Recourse to international justice would present much more serious risks of surprise, would sometimes even conceal a real trap, if governments that have mutually undertaken to have recourse to it could, having already made this commitment, at the last moment improve their legal position by taking unilateral measures. Such measures, such tactical manoeuvres, run counter to the very essence of international justice.<sup>75</sup>

The judgment handed down by the Court on 5 April 1933 is sufficiently well known for there to be no need here to dwell further on it. As we know, the Court in the main accepted the Danish arguments. It concluded that 'at the critical date, namely 10 July 1931, [Denmark] possessed a valid title to sovereignty over the whole of Greenland'<sup>76</sup> and added that '[t]his conclusion constitute[d] in itself sufficient reason to find that the occupation of 10 July 1931 and any steps taken in this respect by the Norwegian Government were unlawful and invalid'.<sup>77</sup> The Court further found that, by virtue of various undertakings (the Treaty of Kiel, bilateral and multilateral agreements and the Ihlen declaration), Norway had 'recognized Danish sovereignty over the whole of Greenland'.<sup>78</sup>

<sup>74</sup> *Ibid.*, at 2882.

<sup>75</sup> *Ibid.*, at 2899.

<sup>76</sup> 1933 PCIJ Series A/B, No. 53, at 64.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*, at 68; for the operative part, see *ibid.*, at 75.

### 3 De Visscher as Member of the PCIJ

At the first general renewal of the PCIJ, with effect from 1 January 1931, another noted lawyer from Ghent, Baron Edouard Rolin-Jaquemyns, son of the founder of the Institute of International Law and first cousin of Henri Rolin, had joined the bench. When Baron Rolin-Jaquemyns died on 11 July 1936, Belgium, in contrast with the opposing parties, had no judge of its own nationality as a member of the Court when the Court was seised on 1 August 1936 and 3 March 1937 respectively of the *Diversion of Water from the Meuse (Netherlands v. Belgium)* and the *Borchgrave (Belgium v. Spain)* cases. Using its powers under Article 31 of the Statute to choose an ad hoc judge to sit in each of these cases, Belgium nominated Charles de Visscher. Subsequently, on 27 May 1937, de Visscher was elected full judge by the Assembly and Council of the League of Nations, to complete the remainder of Baron Rolin-Jaquemyns's term of office.<sup>79</sup> This term of office would normally have ended on 31 December 1939. However, because of the international situation, the Assembly and Council, meeting on 11 and 14 December 1939 respectively, decided not to consider the question of renewing the Permanent Court: it was decided that, pursuant to Article 13(3) of the Statute, 'the present judges [would] continue to discharge their duties'<sup>80</sup> as long as the aforesaid renewal had not come about. The Court itself held its last public hearings in December 1939. Unable to function between 1940 and 1945,<sup>81</sup> it met for a closing session in October 1945; and its members subsequently sent their resignations to the Secretary-General of the League of Nations on 31 January 1946.

However, between 1937 and 1940 the Permanent Court's judicial activity was intense. De Visscher took part in decisions rendered by the Court in no less than seven cases: *Diversion of Water from the Meuse*,<sup>82</sup> *Lighthouses in Crete and Samos*,<sup>83</sup> *Borchgrave*,<sup>84</sup> *Phosphates in Morocco*,<sup>85</sup> *Panevezys–Saldutiskis Railway*,<sup>86</sup> *Electricity Company of Sofia and Bulgaria*<sup>87</sup> and *Société Commerciale de Belgique*.<sup>88</sup>

<sup>79</sup> A change thus came in the formal capacity in which de Visscher was called on to sit in the two cases cited. However, no question of incompatibility within the meaning of Article 17 of the Statute arose, since the ad hoc judge, though 'chosen' by a government, nonetheless once in office becomes an independent judge, making the same solemn declaration as the full judges and participating in the case considered on terms of complete equality with them (see Article 5 of the 1936 Rules of Court and Articles 7 and 8 of the current Rules).

<sup>80</sup> 1946 PCIJ Series E, No. 16, at 16.

<sup>81</sup> The President and Registrar had left The Hague for Geneva in July 1940, while the Dutch judge and a few officials of Dutch nationality had stayed in the Peace Palace; *ibid.* at 10–11.

<sup>82</sup> Judgment of 28 June 1937, 1937 PCIJ Series A/B, No. 70.

<sup>83</sup> Judgment of 8 October 1937, 1937 PCIJ Series A/B, No. 71.

<sup>84</sup> Judgment of 6 November 1937 (Preliminary Objections), 1937 PCIJ Series A/B, No. 72. Order of 30 April 1938, 1938 PCIJ Series A/B, No. 73.

<sup>85</sup> Judgment of 14 June 1938 (Preliminary Objections), 1938 PCIJ Series A/B, No. 74.

<sup>86</sup> Order of 30 June 1938 (Joinder with Main Case), 1938 PCIJ Series A/B, No. 75; Judgment of 28 February 1939, 1939 PCIJ Series A/B, No. 76.

<sup>87</sup> Judgment of 4 April 1939 (Preliminary Objection), 1939 PCIJ Series A/B, No. 77; Order of 5 December 1939 (interim measures), 1939 PCIJ Series A/B, No. 79; Order of 26 February 1940 (Opening of Oral Procedure), 1940 PCIJ Series A/B, No. 80.

<sup>88</sup> Judgment of 15 June 1939, 1939 PCIJ Series A/B, No. 78.

For the reasons already indicated,<sup>89</sup> it is not practicable to assess the contribution made by the new judge to the preparation of these decisions. However, it is notable that in his celebrated work published some 30 years later under the title *Aspects récents du droit procédural de la Cour Internationale de Justice (Recent Aspects of the Procedural Law of the International Court of Justice)*,<sup>90</sup> de Visscher, commenting on various points of procedure, showed himself to be in perfect agreement with the pronouncements of principle contained in several of these decisions. Thus, on the question of whether it was possible for the parties to alter their submissions during the proceedings, the Court, in its judgment of 15 June 1939 in the *Société Commerciale de Belgique* case, expressed itself as follows:

It is to be observed that the liberty accorded to the parties to amend their submissions up to until the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32(2) of the Rules, which provide that the application must indicate the subject of the dispute.<sup>91</sup>

De Visscher, in his *Aspects récents*, states the following:

While it is in principle always permissible for the parties to alter their submissions until the end of the oral proceedings, this rule must however be interpreted in a reasonable manner.<sup>92</sup>

As to the necessity for the applicant to establish the existence of the dispute at the date the Court was seised, we note the following in the judgment rendered on 4 April 1939 in the *Sofia and Bulgaria Electricity Company* case:

In the contention of the Belgian Government, the promulgation of the law constitutes a failure by the Bulgarian Government to observe its international obligations, owing to the discriminatory character of this law.

The Bulgarian Government argues that this contention of the Belgian Government is inadmissible because the claim respecting the law of February 3rd, 1936, did not form the subject of a dispute between the two Governments prior to the filing of the Belgian Application.

The Court considers this argument of the Bulgarian Government to be well-founded. Under either the Treaty of 1931 or the declarations of adherence to the Optional Clause, it rested with the Belgian Government to prove that, before the filing of the Application, a dispute had arisen between the Governments respecting the Bulgarian law of February 3rd, 1936. The Court holds that the Belgian Government has not established the existence of such a dispute and accordingly declares that the Belgian Application cannot be entertained in so far as concerns that part of the claim relating to this law.<sup>93</sup>

On this, de Visscher, in his *Aspects récents*, states:

The dispute must precede the filing of the application initiating proceedings. It is for the applicant State to establish this point.<sup>94</sup>

In the *Water from the Meuse* case, de Visscher indicated his dissent from the decision of the Court on the Belgian counterclaim in a brief declaration worded as follows:

<sup>89</sup> See pp. 1–2 above.

<sup>90</sup> De Visscher, *Aspects récents du droit procédural de la Cour Internationale de Justice* (1966).

<sup>91</sup> 1939 PCIJ Series A/B, No. 78, at 173.

<sup>92</sup> De Visscher, *supra* note 90, at 61; the author goes on to cite the Court's decision.

<sup>93</sup> 1939 PCIJ Series A/B, No. 77, at 83.

<sup>94</sup> De Visscher, *supra* note 90, at 39; the author goes on to refer to the Court's judgment.

Mr de Visscher declares that he is unable to concur in the findings of the Court's judgment in regard to the counter-claim by the Belgian Government.<sup>95</sup>

In the *Panevezys–Saldutiskis Railway* case, he appended, jointly with Count Rostworowski, a separate opinion to the Judgment of 28 February 1939.<sup>96</sup> It will be recalled that this case concerned a dispute relating to the taking of possession by Lithuania of a railway located in former Russian territory that had subsequently become part of Lithuania, which at the time of seizure (1919) belonged to a Russian company. The respondent, Lithuania, had raised two objections to Estonia's application, one based on the rule that the claim must be national not just at the moment of presentation, but also at the time of the damage suffered, and the other on failure first to exhaust domestic remedies. By Order of 30 June 1938 the Court had decided to join these preliminary objections to the merits of the main case, without deciding either on their preliminary nature or on their substance, questions on which it therefore had to decide as part of the main proceedings. De Visscher and Rostworowski found they could not follow the majority of the Court on this point. Their joint opinion included important passages on the notion of 'preliminary objection' and the procedural technique of 'joinder with the main case':

Article 62 of the Rules of Court deals with preliminary objections from the point of view of their submission during the course of the proceedings; it does not define them in such a way as to fix their essential features. Obviously, however, if under this Article the preliminary objection suspends procedure on the merits, that is because it aims at preventing *in limine litis* any examination of the merits, that is, any decision as to the justice or injustice of the claim.

It follows that an objection is *prima facie* preliminary when, by its nature or its purpose, it appears directed against the judicial proceedings, that is, against the conditions governing the institution of the proceedings and not against the law on which they rest. In order, however, that it may definitely be granted this character, it is necessary in each case to weigh the arguments cited in its support. The objection will be treated either as preliminary or as a defence of the merits, according as these arguments may or may not prejudice the justice or injustice of the claim.

It goes without saying, however, that an objection lodged *in limine litis* cannot be treated as an argument on merits, simply because the Court, in order to pass upon it, is obliged to refer to some extent to facts connected with the merits, when the examination of these facts is in the first place essential to a decision about the objection and, in the second place, does not prejudice the merits.<sup>97</sup>

Applying these principles to the case in point the authors of the opinion find that:

The objection made by the Lithuanian government based on the absence of the Estonian nationality of the interests injured at the time the injury was suffered is a preliminary objection: the Court could pass upon it without in any way prejudging the merits.<sup>98</sup>

They go on to explain themselves as follows:

In this matter Estonian Government has not intervened in the defence of any public or

<sup>95</sup> 1937 PCIJ Series A/B, No. 70, at 33.

<sup>96</sup> See 1939 PCIJ Series A/B, No. 76, at 24–29.

<sup>97</sup> *Ibid.*, at 24–25.

<sup>98</sup> *Ibid.*, at 25.

national interest; its intervention is solely intended to protect private interests against an act which is represented as a breach of international law. In these circumstances the relation of nationality is simply the title of a given State to submit a claim, and that title is independent of the merits of the claim itself. The merits of the question, in a case like this, do not consist of the title to intervene; they consist in the justice or injustice of the claim for reparation. In principle, therefore, and *prima facie*, the dispute over the relation of nationality, in an affair of this kind, does not involve any appraisal of the justice of the claim as such. Far from involving the merits, it aims at preventing their judicial examination.

It remains to be seen, however, whether, in this case, the character of the arguments invoked in support of the objection is not such as to prejudge certain matters upon which the justice or injustice of the claim depends . . .

In any event—and this fact is decisive on its own—in 1919 there was no Estonian company, and therefore the bond of nationality required by international law to have existed at the time the injury was suffered, was manifestly lacking.

The Estonian Government has tried in vain to attach this question of nationality to a question of merits, by arguing that a decision which denied Estonian character to the Company at the time of seizure, but recognized it at a later date, would constitute an implicit admission of the continuity of the Company, a question which forms an essential aspect of the merits of the case (oral statement by the Agent for the Estonian Government, June 14th, 1938, Oral Statements, p. 36). This argument, which turns rather upon words, has no relevance. The objection does not depend upon the continuity or lack of continuity of the First Company's legal personality. The decision to be taken upon it would be the same if we were to accept the Estonian argument and were to regard the *Esimene* Company as a continuation of the Russian company. For the question raised in the objection is not a question of identity, but a question of nationality. This question affects a company in the same way as an individual: an individual whose identity since suffering injury had never been disputed, would be equally without title to claim the diplomatic protection of a State, if, at the time the injury was sustained, he was not a national of that State.<sup>99</sup>

Charles de Visscher also appended a separate opinion to the judgment given by the Permanent Court on 4 April 1939 in the *Sofia and Bulgaria Electricity Company* case.<sup>100</sup> This case had been brought before the Court by an application from the Belgian government dated 26 January 1938 in which the Court was asked to declare that the Bulgarian state had breached its international obligations by taking a number of decisions such as the application of a tariff on coal, certain judicial decisions and the introduction of a special tax. Bulgaria had raised a preliminary objection relating to the two heads of jurisdiction invoked: the Treaty of Conciliation, Arbitration and Judicial Settlement between the parties of 1931, and the declarations accepting compulsory jurisdiction of the Court made by each of them. In its judgment of 4 April 1939, the Court concluded that it had jurisdiction in virtue of an optional provision in relation to the first two Belgian complaints, and declared the application inadmissible in relation to the third complaint, the tax law. In his opinion, de Visscher indicates that he cannot agree with certain grounds of the judgment 'which have from both a

<sup>99</sup> *Ibid.*, at 25–28.

<sup>100</sup> See 1939 PCIJ Series A/B, No. 77, at 136–139.

general viewpoint and from that of the present proceedings a considerable importance'.<sup>101</sup> The first point on which he disagrees with the judgment has to do with the relationship existing between the two heads of jurisdiction invoked. On this delicate question he expresses himself as follows:

The judgment treats the Belgian and Bulgarian declarations accepting the Court's compulsory jurisdiction and the Treaty of 23 June 1931 as two separate and independent sources of jurisdiction. In my opinion they are two co-ordinated instruments; their respective provisions settle different questions; they are on that account fully consistent one with the other and should be applied not as alternatives, but concurrently.

Although, like the judgment and in conformity with the views of both Parties, I admit that the declarations accepting the compulsory jurisdiction of the Court remained in force during the current period of the 1931 Treaty, I do so because I believe that, when they signed that Treaty, the two States did not intend to establish a new source of jurisdiction. Bound in their mutual relations, as from March 10th, 1926, by an obligation to accept the Court's jurisdiction—an obligation with a longer term of application than that of the Treaty—why should they have suspended it for the pre-arranged term of five years assigned to the application of the Treaty and have substituted during that period a new source of jurisdiction for the pre-existing source, reverting by law to the latter on the expiry of the Treaty? The argument based upon the Treaty's later date would be decisive in favour of the creation of a new source of jurisdiction only if it were clearly proved that the subject-matter of the undertaking resulting from its Article 4 was really wider in scope than that of the undertaking arising out of the declarations accepting the compulsory jurisdiction of the Court.<sup>102</sup>

The second point on which de Visscher departs from the judgment concerns the definition and determination of the content of the requirements formulated in Articles 1 (diplomatic negotiations) and 3 (prior exhaustion of local remedies) of the 1931 Treaty. On these important questions of principle he makes the following points:

The reference is no longer to the Court's jurisdiction, but to conditions upon which the Parties have agreed to allow recourse to that jurisdiction to depend.

The two conditions are applicable to the Belgian Government's Application; but, since the general spirit of the Treaty of June 23rd, 1931, is obviously in favour of extending methods of peaceful settlement in general, it is impossible to imagine that, when the contracting Parties embodied in treaty form the rules upon which these conditions were to rest, they intended to make them more binding in their effects than they are under ordinary international law. This remark applies especially to the local redress rule, which is formulated in Article 3 of the Treaty in the same terms as in Article 31 of the General Act of Geneva. The preparatory work of the Ninth Assembly (1928) of the League of Nations shows that the authors of the General Act intended, in this matter as in others, merely to unify the terms of the many previous arbitration conventions, which themselves had only given expression to a rule long sanctioned by international usage. This rule is in fact inscribed in Article 3 of the Treaty of June 23rd, 1931, in terms almost identical with those of Article 3 of the Treaty of arbitration and conciliation between Germany and Switzerland, dated December 3rd, 1921, the prototype of these conventions.

Finally, the conclusion to be drawn from a study of the various agreements mentioned above is that, in accordance, moreover, with the views of its most authoritative commentators, the General Act, in those of its provisions which apply to judicial settlement and which are

<sup>101</sup> *Ibid.*, at 136.

<sup>102</sup> *Ibid.*



reproduced in the 1931 Treaty, made little change in the system established by Article 36 of the Statute of the Court.

Understood in this sense, the combined application of the declarations accepting the Court's compulsory jurisdiction and of the 1931 Treaty cannot involve any contradiction, the jurisdiction of the Court continuing to be based upon the declarations, and the two conditions governing admissibility contained in Articles 1 and 3 of the Treaty being therein fixed in accordance with ordinary international law.

The judgment appears to me to have interpreted Article 3 of the 1931 Treaty relating to the need of exhausting local remedies with a strictness which seems to be in keeping neither with ordinary international law, of which in my view this Article is the mere expression, nor with the general spirit of the Treaty . . .

It is admitted that the rule requiring previous exhaustion of internal remedies shall be applied, not automatically, but having regard to the circumstances of the case and, more particularly, to any limitations which those circumstances may impose upon the effective nature of the remedy.<sup>103</sup>

#### 4 De Visscher and the International Court of Justice

In April 1945, Charles de Visscher represented Belgium on the Committee of Jurists meeting in Washington to prepare the draft statute of the new International Court of Justice. According to the minutes of the Committee's meetings,<sup>104</sup> he spoke in particular on two points under discussion: the number of judges who should constitute the future Court, and the definition of which disputes should be eligible for submission to it.

The first question concerned the advisability of increasing the number of judges on the bench to ensure better representation of the various members of the community of states or whether instead to reduce the number in order to facilitate the Court's functioning. De Visscher thought that it was best in this connection to reconcile the two requirements. Keeping the number of judges at 15 ultimately seemed to him most likely to satisfy the two requirements, and in particular to ensure close cooperation among members of the Court.<sup>105</sup>

The second point concerned the notion of a 'justiciable' dispute, and more particularly whether to define exhaustively in Article 36 of the Statute the kinds of dispute that could be decided by the Court under the optional clause. De Visscher here agreed with the opinion of Professor Basdevant that it was not desirable to introduce such restrictions into the text of Article 36, since if the parties were in agreement to

<sup>103</sup> *Ibid.*, at 137.

<sup>104</sup> See 'Summary of Ninth Meeting, Monday 16 April 1945', in *Official Documents of the United Nations Conference on International Organization* vol. XIV (1945), *Committee of Jurists of the United Nations* (United Nations Information Organization, London, New York, Document Jurist 57, Symbol G/45) 197; 'Summary of Tenth Meeting, Monday 16 April 1945', in *ibid* (Document Jurist 58, Symbol G/46) 204; 'Summary of Eleventh Meeting, Wednesday 18 April 1945', in *ibid* (Document Jurist 64, Symbol G/51) 217; 'Summary of Twelfth Meeting, Wednesday 18 April 1945', in *ibid* (Document Jurist 81, Symbol G/68) 230; 'Summary of Thirteenth Meeting, Thursday 19 April 1945', in *ibid* (Document Jurist 85, Symbol G/72) 237.

<sup>105</sup> See 'Summary of Ninth Meeting, Monday 16 April 1945', *supra* note 104, at 197.

submit a given dispute to the Court, the latter's competence ought not to be limited by the nature of the dispute.<sup>106</sup>

On 6 February 1946, in London, at the first election of members of the International Court of Justice, de Visscher once again gained the confidence of the community of states. In accordance with Article 13 of the new Statute, he was designated to serve a six-year term alongside Fabela, Hackworth, Klaestad and Krylov.<sup>107</sup>

Subsequently, between 1946 and 1952, de Visscher participated in the Court's decisions in eight contentious cases: *Corfu Channel*,<sup>108</sup> *Protection of French Nationals and Protected Persons in Egypt*,<sup>109</sup> *Asylum Case*,<sup>110</sup> *Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case*,<sup>111</sup> *Haya de la Torre*,<sup>112</sup> *Anglo-Iranian Oil Co.*,<sup>113</sup> *Rights of United States Nationals in Morocco*<sup>114</sup> and *Fisheries*.<sup>115</sup> He further participated in the Court's rulings in the following six advisory cases: *Conditions of Admission of a State to Membership of the United Nations (Article 4 of the Charter)*,<sup>116</sup> *Reparation for Injuries Suffered in the Service of the United Nations*,<sup>117</sup> *Competence of the General Assembly for Admission of a State to the United Nations*,<sup>118</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*,<sup>119</sup> *International Status of South-West Africa*,<sup>120</sup> and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.<sup>121</sup>

It should once again be emphasized how impossible it would be to attempt to evaluate de Visscher's contributions to the drafting of these judgments and opinions, given the secrecy surrounding the Court's deliberations.<sup>122</sup> In particular, one cannot

<sup>106</sup> See 'Summary of Eleventh Meeting, Wednesday 18 April 1945', *supra* note 104, at 227–228.

<sup>107</sup> The terms of office for the other members of the Court were as follows: nine years for Alvarez, Azevedo, Basdevant, Guerrero and McNair; and three years for Badawi Pacha, Hsu Mo, Read, Winiarski and Zoricic. See *ICJ Yearbook* (1946–1947) 34–35.

<sup>108</sup> Judgment of 25 March 1948 (Preliminary Objection), ICJ Reports (1948) 15; Order of 26 March 1948 (Setting of Time Limits), ICJ Reports (1948) 53; Order of 17 December 1948 (Designation of Experts), ICJ Reports (1948) 124; Judgment of 9 April 1949 (Merits), ICJ Reports (1949) 4; Order of 19 November 1949 (Designation of Experts to Assess the Amount of Compensation Due), ICJ Reports (1949) 237; Judgment of 15 December 1949 (Assessment of Amount of Compensation Due), ICJ Reports (1949) 244.

<sup>109</sup> The case was removed from the Court's list following the French Government's withdrawal from the case; Order of 29 March 1950, ICJ Reports (1950) 59.

<sup>110</sup> Judgment of 20 November 1950, ICJ Reports (1950) 266.

<sup>111</sup> Judgment of 27 November 1950, ICJ Reports (1950) 395.

<sup>112</sup> Judgment of 13 June 1951, ICJ Reports (1951) 71.

<sup>113</sup> Judgment of 5 July 1951, ICJ Reports (1951) 89.

<sup>114</sup> Order of 31 October 1951, ICJ Reports (1951) 109; by this Order the Court placed on record the discontinuance by the United States of the proceedings instituted by the Preliminary Objection filed on 21 June 1951, and fixed the time-limits for the filing of pleadings on the merits.

<sup>115</sup> Judgment of 18 December 1951, ICJ Reports (1951) 116.

<sup>116</sup> Advisory Opinion of 28 May 1948, ICJ Reports (1948) 57.

<sup>117</sup> Advisory Opinion of 11 April 1949, ICJ Reports (1949) 174.

<sup>118</sup> Advisory Opinion of 3 March 1950, ICJ Reports (1950) 4.

<sup>119</sup> Advisory Opinion of 30 March 1950 (First phase), ICJ Reports (1950) 65; Advisory Opinion of 18 July 1950 (Second phase), ICJ Reports (1950) 221.

<sup>120</sup> Advisory Opinion of 11 July 1950, ICJ Reports (1950) 128.

<sup>121</sup> Advisory Opinion of 28 May 1951, ICJ Reports (1951) 15.

<sup>122</sup> See pp. 1–2 above.

confirm or deny the statement made by Professor Paul Guggenheim that de Visscher was a member of several of the drafting committees elected by the Court in the period covered.<sup>123</sup> It is, however, not without interest here once again to note a number of points of agreement between de Visscher's legal thinking and some of the *dicta* of the Court in such varied areas as the admission of a state to the United Nations, the legal status of international civil servants or the protection of the rights of the human person.

It will be recalled that in 1947 the General Assembly asked the Court for an advisory opinion on the question of whether a member state of the United Nations, when called upon under Article 4 of the Charter to vote on the admission of a state as a new member, was legally entitled to make its consent dependent on conditions not explicitly provided for in that Article. Following a relatively short but closely argued reasoning, the Court answered the question raised in the negative, noting in particular that:

The terms [of the Charter that] 'Membership in the United Nations is open to all other peace-loving States which . . . ' indicate that States which fulfil the conditions stated have the qualifications requisite for admission. The natural meaning of the words used leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in paragraph 1 of Article 4 must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.<sup>124</sup>

The following passage, taken from the first edition of de Visscher's book, *Théories et réalités en droit international public*, shows de Visscher's unreserved support for the interpretation given by the Court to Article 4 of the Charter:

While recognition of a State, as an individual act, remains dependent on a political assessment, admission of a State to the United Nations, as a collective act of the organization's bodies, is a matter regulated by treaty in the Charter. The International Court of Justice drew the logical conclusion by rendering an opinion to the effect that the conditions set out in Article 4 of the Charter are to be seen not just as necessary conditions for admission, but also as sufficient conditions: that political considerations foreign to these conditions may not be superimposed on them, since this would mean allowing member States indefinite and practically unlimited discretionary power; that the political nature of the United Nations bodies called on to participate in the admission process could not simply ignore the treaty provisions governing such bodies where such provisions set limits on their power or specify limits on the exercise of their discretion.<sup>125</sup>

It will also be recalled that in December 1948 the Court was asked by the General Assembly to give an advisory opinion on the question of whether, when injury was caused to an agent of the United Nations in the performance of his duties, the Organization was entitled to make an international claim against the government

<sup>123</sup> See Guggenheim, 'Charles De Visscher In Memoriam', 24 *Österreichische Zeitschrift für Öffentliches Recht* (1973) 2.

<sup>124</sup> *Admission of a State to the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, ICJ Reports (1948) 62.

<sup>125</sup> De Visscher, *Théories et réalités en droit international public* (1st ed., 1953) 279.

responsible *de jure* or *de facto* to secure compensation for the injury caused both to the United Nations and to the victim or those entitled under him. In its advisory opinion of 11 April 1949, the Court pointed out in particular that the United Nations Charter did not explicitly give the Organization entitlement to include in its claim for compensation the injury caused to the victim or those entitled under him; it had consequently felt it necessary to consider whether the provisions of the Charter relating to the Organization's functions and the part played by its staff in carrying out such functions implied the power for the Organization to guarantee such staff some protection. The Court justified this protection by stressing the special nature of the mission of United Nations agents as follows:

Having regard to its purposes and functions already referred to, the Organization may find it necessary, and has in fact found it necessary, to entrust its agents with important missions to be performed in disturbed parts of the world. Many missions, from their very nature, involve the agents in unusual dangers to which ordinary persons are not exposed. For the same reason, the injuries suffered by its agents in these circumstances will sometimes have occurred in such a manner that their national State would not be justified in bringing a claim for reparation on the ground of diplomatic protection, or, at any rate, would not feel disposed to do so. Both to ensure the efficient and independent performance of these missions and to afford effective support to its agents, the Organization must provide them with adequate protection.<sup>126</sup>

The Court continued:

In order that the agent may perform his duties satisfactorily, he must feel that this protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization (save of course for the more direct and immediate protection due from the State in whose territory he may be). In particular, he should not have to rely on the protection of his own State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter.<sup>127</sup>

These selected passages from the Court's opinion are not dissimilar to the views set out by Charles de Visscher in his report on the diplomatic immunities of agents of the League of Nations presented to the Institute of International Law in 1924.<sup>128</sup>

Finally, one cannot fail to note the close convergence of ideas which inspired respectively the Court's famous *dicta* in its Advisory Opinion of 28 May 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* and de Visscher's report on fundamental human rights presented to the International Law Institute in 1947. As we know, in that case the Court had to decide as to the nature of the reservations a state could make when signing or ratifying the Convention on the Prevention and Punishment of the Crime of Genocide, as well as to the nature of the objections that might be raised against them by other states. To do so, it had to take into consideration the special nature of the Convention:

<sup>126</sup> *Compensation for Damage Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, ICJ Reports (1949) 183.

<sup>127</sup> *Ibid.*

<sup>128</sup> 'Rapport à l'Institut de droit international sur les privilèges et immunités diplomatiques des agents de la S.N', *Ann. Inst. Droit Intern.* 1924, xxx1, esp. at 3, 5 and 10.

The solution of these problems must be found in the special characteristics of the Genocide Convention. The origins and character of that Convention, the objects pursued by the General Assembly and the contracting parties, the relations which exist between the provisions of the Convention, *inter se*, and between those provisions and these objects, furnish elements of interpretation of the will of the General Assembly and the parties. The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96(1) of the General Assembly, December 11th, 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required “in order to liberate mankind from such an odious scourge” (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope. It was in fact approved on December 9th, 1948, by a resolution which was unanimously adopted by fifty-six States.

The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.<sup>129</sup>

As for de Visscher, the horrors of the Second World War had in particular brought him to the following reflections in his report to the Institute of International Law:

While no war has accumulated so many ruins, both material and moral, as the one just ended, none, undoubtedly, has left humanity with lessons of such a gripping clarity. It is for the Institute to draw the conclusions in terms of law. In doing so, it will be fulfilling the primary task assigned to it by its Statutes, to ‘work to formulate principles of the discipline in order to respond to the legal conscience of the civilized world’. What does this ‘legal conscience of the civilized world’ expect today? Undoubtedly something other than the technical perfection of rules whose formal validity is too often at variance with their lack of effective compliance. And something other than the indefinite development of organizations and procedures that are useful only as long as they are supported and made viable by a spirit of international solidarity.

25 years' experience have shown us human values mercilessly sacrificed to political values, and loyalty to the national group cultivated as the highest virtue. Formerly, it was only the rulers whose decisions were dictated by *raison d'Etat*; the morality of the contemporary State renders an entire nation complicit, covertly but passionately, in the quest for power

Everywhere, the elites are aware of the danger. It is from moral inspiration that they await salvation. Nothing is more striking than the agreement that may commonly be found among

<sup>129</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, ICJ Reports (1951) 23.

men divergent from each other in intellectual background, national tradition or social prejudice, yet now brought together in the defence of a civilization in danger . . .

The preamble to the San Francisco Charter embodies the resolve of the United Nations' to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. This passage comes between that where the United Nations state their wish to 'save succeeding generations from the scourge of war' and the passage where they declare they are resolved to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. The proximity of these provisions is significant; the ideas they express are closely correlated with each other.

This is what the whole evolution of international law demonstrates in doctrinal terms. It is what is stressed with cruel clarity at the political level by the experience of totalitarian regimes, and that of the horrors of the Second World War.<sup>130</sup>

We have noted above that separate and dissenting opinions were not favoured by de Visscher: he had recourse to them only twice in six years of office.

In the *Corfu Channel Case (Preliminary Objection)*, he signed a joint separate opinion with Basdevant, Alvarez, Winiarski, Zoricic, Badawi Pacha and Krylov. In this case, the UK Government had based the Court's jurisdiction on Article 36(1) of the Statute, putting forward the following arguments: the Security Council had recommended the UK and Albanian Governments to bring their dispute before the Court; the Albanian Government had accepted the invitation to be a party to the case, made to it by the Security Council under Article 32 of the Charter; at the same time the Albanian Government had undertaken to accept all the obligations a member of the United Nations would have to accept in such a situation; thus the Albanian Government was bound to accept and respect the decisions of the Security Council. In a letter to the Court of 2 July 1947 the Albanian Government for its part disputed the right of the UK Government to invoke the Security Council's decisions in the absence of any special agreement and on the sole basis of a Security Council recommendation; Albania nonetheless declared its willingness to present itself before the Court. The Court considered that this letter constituted a submission to compulsory jurisdiction and in consequence had not felt it necessary to take a position on the UK's above-mentioned argument. In the opinion of de Visscher and his six colleagues, the Court should have ruled on the validity of such an argument, which was not, in their view, convincing:

In particular, having regard (1) to the normal meaning of the word recommendation, a meaning which this word has retained in diplomatic language, as is borne out by the practice of the Pan-American Conferences, of the League of Nations, of the International Labour Organization, etc., (2) to the general structure of the Charter and of the Statute which founds the jurisdiction of the Court on the consent of States, and (3) to the terms used in Article 36, paragraph 3, of the Charter and to its object which is to remind the Security Council that legal disputes should normally be decided by judicial methods, it appears impossible to us to accept an interpretation according to which this article, without explicitly saying so, has introduced more or less surreptitiously, a new case of compulsory jurisdiction.<sup>131</sup>

De Visscher expressed more radical differences of opinion with the majority of the

<sup>130</sup> 'Rapport à l'Institut de droit international sur les droits fondamentaux de l'homme, base d'une restauration du droit international', *Ann. Inst. Droit intern., session de Lausanne* (1947) 1–3.

<sup>131</sup> *Corfu Channel Case (Preliminary Objection)*, Judgment of 25 March 1948, ICJ Reports (1948) 31–32.

members of the Court in the dissenting opinion he attached to the Advisory Opinion given by the Court on 11 July 1950 on the question of the *International Status of South-West Africa*. It will be recalled that, by its resolution of 6 December 1949, the General Assembly of the United Nations asked the Court to determine not only what was the international status of South-West Africa but also what international obligations resulted for the Union of South Africa. The Court decided unanimously that 'South-West Africa [was] a territory under the international Mandate assumed by the Union of South Africa on 17 December 1920' and, by eight votes to six, that 'the provisions of Chapter XII of the Charter [did] not impose on the Union of South Africa a legal obligation to place the Territory under the trusteeship system'. De Visscher found the second limb of this decision clearly inadequate. As he explains in his dissenting opinion:

I concede that the provisions of Chapter XII of the Charter do not impose on the Union of South Africa a legal obligation to conclude a Trusteeship Agreement, in the sense that the Union is free to accept or to refuse the particular terms of a draft agreement. On the other hand, I consider that these provisions impose on the Union of South Africa an obligation to take part in negotiations with a view to concluding an agreement. In this respect, the Court's answer falls short of my opinion on the obligations resulting from the Charter for the Mandatory Power. My opinion is based on an interpretation of texts which differs from that adopted in the Court's Opinion.<sup>132</sup>

And he clarifies:

The Charter has created an international system which would never have had more than theoretical existence if the mandatory Powers had considered themselves under no obligation to negotiate agreements to convert their Mandates into Trusteeship Agreements. In fact, apart from instances of accession to independence and from the case of Palestine, all mandatory Powers other than the Union of South Africa have consented to this conversion. The obligation to be ready to negotiate with a view to concluding an agreement represented the minimum of international co-operation without which the entire régime contemplated and regulated by the Charter would have been frustrated. In this connexion one must bear in mind that in the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice. Under Article 76 of the Charter, 'the basic objectives of the Trusteeship System "conform to" the purposes of the United Nations laid down in Article 1 of the present Charter'. In recognizing its obligation to be ready to negotiate with a view to concluding a Trusteeship Agreement, a mandatory Power, without thereby jeopardizing its freedom to accept or refuse the terms of such an Agreement, co-operates in a particularly important field in the attainment of the highest objectives of the United Nations.<sup>133</sup>

The Court's judicial decisions and opinions were not the only beneficiaries of de Visscher's knowledge and wisdom. He also applied his energy and skills in the service of various committees vested by the Court with important procedural or administrative functions, such as the Rules Committee (in 1946 and 1948), the Committee for the Examination of Questions of Diplomatic Precedence (1947), the Publications Committee (1947) and the Committee on Privileges and Immunities (1946). He was

<sup>132</sup> *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, ICJ Reports (1950) 186.

<sup>133</sup> *Ibid.*, at 189–190.

also an alternate member of the Chamber of Summary Procedure (1946–1952) and an alternate judge charged with staff appeals.

At the end of his six-year term at the Court, Charles de Visscher was not re-elected.<sup>134</sup> This unexpected setback was unanimously attributed to the subtle interplay of political equilibria; his intrinsic qualities were never questioned. The President of the Court, Sir Arnold McNair, paid tribute to de Visscher's competence and devotion at the first public session of the Court held in 1952.<sup>135</sup> For his part, Professor Charles Rousseau, expressing feelings which were very widely shared in the community of jurists, reported de Visscher's non-re-election in the following terms:

He was, one might say, a born international judge, and would have made an incomparable president. But to general surprise he was not re-elected at the renewal on 6 December 1951, with the obstinacy of a Nordic State in pushing its own candidate, dividing the European votes, and United States insistence on supporting the candidacy of a Latin-American judge definitively compromising his candidacy. This should never happen again, and one may say that this set-back was more serious for the institution than for the person concerned himself, who, freed of all outside burdens, could devote himself in complete freedom to his personal work.<sup>136</sup>

## 5 Return to Academic Life—Arbitration

Back in academic life, de Visscher again turned to writing. We are indebted to him for several monographs which immediately took their place as reference works. The

<sup>134</sup> At the election on 6 December 1951, a rather stormy debate took place at the Security Council on the procedure to follow, when six candidates had secured an absolute majority of votes (set at six), while the number of seats to be filled was five. De Visscher had secured seven votes (an absolute majority) on this first round of balloting, but was eliminated on the second (see the official minutes of the Security Council, 567th session, 6 December 1951, UN Doc. S/PV.567, 4 and 17). At the General Assembly, where the absolute majority was 32 votes, only four candidates took the requisite number of votes at the first round of balloting; de Visscher got 22 votes, thus coming in sixth place just behind Klaestad (Norway), who had 29. On the second round of voting, eight candidates were still in contention; de Visscher took 15 votes and Klaestad 29. In accordance with Article 94 of the Assembly's rules of procedure, a third round was held to decide between the two best placed candidates: De Visscher then took 15 votes and Klaestad was elected with 43 (see official documents of the General Assembly, 6th Session, 350th Plenary Session, 6 December 1951, UN Doc. A/PV.350, 222–223).

<sup>135</sup> The minutes of the session of 15 May 1952 read as follows: 'The President recalled that Mr Fabela, Mr De Visscher and Mr Krylov, who had been elected judges in 1946, had ceased to be Members of the Court. He undoubtedly reflected his colleagues' intentions in publicly expressing their gratitude to Mr Fabela, Mr De Visscher and Mr Krylov for the services they had rendered to the Court, and the satisfaction they had felt in working with them. He wished very particularly to say how valuable Mr De Visscher's collaboration had been, since as Vice-President he had been Member of the Permanent Court of International Justice, enabling the Court readily to benefit from the tradition and experience gained.' (*Ambatielos Case (Greece v. United Kingdom)*, ICJ *Pleadings, Oral Arguments, Documents*, 273).

<sup>136</sup> Charles Rousseau, 'Charles De Visscher (1884–1973)', 77 *Revue générale de droit international public* (1973) 6–7. Shabtai Rosenne's view of De Visscher's non-re-election was stated as follows: 'the undoubted efforts of the Security Council to maintain the balance between the criteria of the Statute in the membership of the Court have not been able to influence the general trend of voting in the General Assembly. These reflections are prompted particularly by the non-election of Judge de Visscher in 1951, for the non-election of a judge of considerable experience and proven competence, after he had received the required absolute majority in the Security Council, is a serious matter.' Shabtai Rosenne, *The Law and Practice of the International Court of Justice* (1985) 186.



International Court of Justice and judicial questions in general never ceased to have a privileged place there.<sup>137</sup>

Now devoting the bulk of his time to research, de Visscher had nonetheless not entirely given up judicial practice, as demonstrated by his participation in several arbitration or inquiry bodies. He chaired the arbitral tribunal to determine the question of sovereignty over the Buraïmi oasis between Saudi Arabia and the United Kingdom, which was representing the interests of the state of Abu Dhabi and the Sultanate of Muscat.<sup>138</sup> He was elected president of this tribunal by the tribunal members designated by the parties.<sup>139</sup> However, the tribunal never reached its verdict. After the holding of a preliminary hearing in Nice in January 1955, and then the opening of pleadings in Geneva on 11 September 1955, the UK arbitrator resigned because of the Saudi Arabian arbitrator's attitude which he regarded as biased. This brought sharp reactions from the Saudi Arabian Government and led to the resignation of de Visscher and the Cuban arbitrator. In a note sent to the Saudi Arabian Government on 21 November 1955, the UK Government turned down Saudi proposals to resume the arbitration.<sup>140</sup>

De Visscher also chaired the commission of inquiry and conciliation instituted on 5 January 1957 by France and Morocco to consider their dispute arising from the diversion to Algiers on 22 October 1956 of an aircraft of the *Compagnie chérifienne de transports aériens* that had left Rabat for Tunis with five members of the National Liberation Front on board.<sup>141</sup> In July 1957, the commission held a first meeting in Geneva, devoted to the organization of its work. The written procedure took place between 17 July 1957 and 16 January 1958 (filing of a memorial, a counter-memorial, a reply and a rejoinder) and oral proceedings were held in Geneva from 15 to 28 February 1958. The proceedings of this commission were, however, broken off by the withdrawal of the Moroccan commissioner on 28 February 1958.

Finally, de Visscher was again member of a commission of inquiry set up on 15 November 1961 by an exchange of notes between the UK and Danish Governments following seizure by the Danish navy of a UK trawler off the Faroe Islands.<sup>142</sup> Under the terms of the exchange of notes, the commission was asked to inquire into and report to the two governments on a number of facts related to this incident. It was composed, in

<sup>137</sup> See in particular the following works: *Problèmes d'interprétation judiciaire en droit international public* (1963); *Aspects récents du droit procédural de la Cour internationale de justice* (1966); and *De l'équité dans le règlement arbitral ou judiciaire des litiges de droit international public* (1972).

<sup>138</sup> 'Question de la souveraineté sur l'oasis de Buraïmi', in A.M. Stuyt, *Survey of International Arbitrations (1794–1989)* (3rd ed., 1990) 436.

<sup>139</sup> See Goy, 'L'affaire de l'oasis de Buraïmi', *Annuaire français de droit international* (1957) 188–205.

<sup>140</sup> *Ibid.*, at 204–205.

<sup>141</sup> 'Incident du 22 octobre 1956 relatif à l'avion F. OABV', in Stuyt, *supra* note 138, at 583. On this case, see also *Annuaire français de droit international* (1958) 282–295.

<sup>142</sup> 'The Red Crusader Incident'. See the 'Report of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on November 15, 1961 — Investigation of Certain Incidents Affecting the British Trawler *Red Crusader*' (Bureau international de la Cour permanente d'arbitrage, La Haye, Van Langenhuisen, March 1962). See also Timsit, 'Le fonctionnement de la procédure d'enquête dans l'affaire du *Red Crusader*', *Annuaire français de droit international* (1963) 460–472.

addition to de Visscher as president, of André Gros (France) and Captain C. Moleenburgh (Netherlands), all three appointed by common agreement between the two governments. Legal scholarship has not failed to note the importance of this joint designation, reflecting the ‘trust ... [of the parties] in the persons of the three commissioners, whom they [were] sure would, being independent of the two governments, decide the facts with the “maximum of conscientiousness and impartiality”’.<sup>143</sup> It is also notable that this commission of inquiry differed from other commissions set up on a bilateral basis in the following ways: the number of commissioners was three instead of five; the jurists outnumbered the technicians (two lawyers and one inspector-general of navigation); and the commission included no national of the parties to the case.<sup>144</sup> Memorials were exchanged on 5 December 1961 and Counter-Memorials on 6 January 1962. Hearings were held from 5 to 16 March 1962 at the Peace Palace in The Hague. The inquiry report, 24 pages long, was communicated to the parties on 23 March 1962, that is, a week after the hearings closed. The commission of inquiry’s conclusions showed a remarkable extension of the powers traditionally granted to this type of commission; for it did not content itself with merely establishing the facts but also pronounced indirectly on the liabilities of the parties, thus moving ‘imperceptibly from research of the facts to a decision in law’.<sup>145</sup>

## 6 Conclusions

To conclude this study, one cannot help but be struck by the exceptional place international justice occupied in Charles de Visscher’s life and work. His virtues of careful reflection and objectivity, allied with his great moral authority and acute sense of conciliation, undoubtedly predestined him for the judicial role. He exercised it at the highest level with a distinction, skill and devotion universally recognized.

<sup>143</sup> *Ibid.*, at 464.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, at 470.