

# INTERNATIONAL JUSTICE UNDER LAW AS CONCEIVED BY JOHN BASSETT MOORE

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John Bassett Moore was born in Smyrna, Delaware, December 3, 1860, on the eve of the Civil War. He knew and loved his state and the society into which he was born. As I have seen it through his eyes it was a society which esteemed leisure for the gracious side of life, for the love of English literature and the too much neglected art of conversation at which he was a master, both in give and take, and which he loved. Mark Twain is reported to have said that the time to go to bed is when there is no one left to talk with, and I am sure the Judge was of the same opinion. It was a society which also was guided by its appreciation of honesty in word and deed and by its respect for the State of Delaware and for the Federal Union of which Delaware formed a part. He took pride as a Delawarean in the fact "memorable in the history of our State that we were the first to ratify the Constitution on which our government rests."<sup>1</sup>

As one of his students and friends, I feel myself indebted to the people of your state, whose influence upon me has been as a reflection from my association with John Bassett Moore. Let me quote from his address in memory of his old tutor in law and close friend, Judge Edward Green Bradford, of Wilmington, to show his own appreciation of the influence which that upright and clear-minded lawyer exercised on him, and add that, influenced by Judge Moore's reminiscences of his early friends and by his own character, I can repeat his words as my tribute, not only to the Judge himself but to the people from whom in his turn he had learned much: "We also are subject, especially in our earlier years, to influences of the effects of which we are at the time and ever afterwards conscious, and for which we are always grateful."<sup>2</sup>

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<sup>1</sup> *The Collected Papers of John Bassett Moore* (New Haven, 1944), II, 476. Quotations are by permission of the publishers, the Yale University Press.

<sup>2</sup> *Ibid.*, VI, 318.

It was not Judge Bradford who was his first preceptor. That honor goes to his father, whose practice of medicine in a large agricultural community kept him driving along the country roads and lanes. Often his son accompanied him. In a letter to me the Judge remarks anent these drives: "My father kept two horses, one fast and one slow. I was never sorry when I learned that the slow horse was to be used on one of our drives." I should have said the same of the son had my acquaintance been in the leisurely horse and buggy days when men perhaps acted less but thought more. It was in the long quiet talks during these drives that the boy's mind was first developed and that he got his first understanding of the language in the use of which he became a master and in his appreciation of the works of the great writers on history, on politics, as well as of general literature, which he so loved to quote. He learned more in these drives. His father had taken an active part at the eve of the Civil War in holding Delaware within the Union. He had lived through the war and through the period of reconstruction and had not only seen the wreckage and brutality of war, but he had also seen its devastating effects on society, not only material but mental and spiritual as well. I cannot but believe that here was born in the Judge's mind his strong feeling against war as a means of settling disputes between nations, as well as disputes within nations, and his constant urging of arbitration and judicial settlement as a means of arriving at justice in the affairs of nations, and of lessening the dreadful possibilities inherent in an appeal to arms.

It was through another son of Delaware to whom the nation owes a large debt, Thomas F. Bayard, Sr., that Mr. Moore was called to the Department of State as a young man in 1885, thus beginning a long period of service to the government, either as a member of the Department or as unofficial adviser to Presidents and responsible public men. His service was to the nation, without consideration of his own interest and without thought of party. Republican presidents called him in as freely as Democrats and drew as freely on his great fund of knowledge and experience. They trusted him and he served the Republic through them. His position is well illustrated by a story he used to tell of going to Washington to see Theodore Roosevelt, who had asked his advice on a matter involving international law and international relations. On meeting the President, Mr. Moore said, "I am not sure, Mr.



President, that you will want to listen to me, because I must tell you that I do not agree entirely with the position which you are proposing to take." Roosevelt said, "Mr. Moore, that is just why I asked you to come. I know that you know what you are talking about and that you will frankly tell me what is wrong with my proposal."<sup>3</sup> With that introduction the interview proceeded amicably and the proposal was altered to take into consideration Mr. Moore's suggestions. It was a Republican President, William McKinley, who appointed Mr. Moore as Counselor and Secretary to the American Commission to Negotiate Peace with Spain. He had been previously called in by McKinley as the man most competent to advise him in respect to the law which should govern the administration during the war, and both men had learned to respect and appreciate one another during their relationship. Through the confidence in his judgment of Presidents and leaders in American public life, Mr. Moore exerted a great influence on the foreign relations of the United States in the formative period of the last decades of the nineteenth and first decades of the twentieth century. He can say that he never "asked for any of the public positions" he held, but government officials called on him freely for counsel, realizing that if such a request was made he "let no consideration of convenience or of personal comfort, or welfare stand in the way of performing it."<sup>4</sup>

It was with this long and intimate experience with men and affairs that Mr. Moore approached both the study and practice of international law. He was second to no one in his knowledge of the law. I have never known a man who studied more carefully and analyzed more keenly the books and cases dealing with the law. But he knew that law is not an exact science, to be developed in the study and the library, important as these aids to its understanding may be. He observed that law is "the great regulator of human relations."<sup>5</sup> and in working out its rules experience must play an important role. To make the experience of the United States available to practitioners and scholars, and to show the practice as well as the rule, he devoted days and nights of work to his *International Law Digest*. These volumes have been a major influence on the point of view of American scholars and

<sup>3</sup> Mr. Moore in conversation with the author.

<sup>4</sup> *Collected Papers*, VII, 72.

<sup>5</sup> *Ibid.*, VI, 319.

practitioners of international law. He was called to Columbia in 1891 to fill a newly created chair in International Law and accepted the call although he was asked to remain as Assistant Secretary of State. His courtesy and friendliness made him beloved by his students, who acquired in talking with him privately that understanding which, we are warned in the Proverbs, must be gained with wisdom. He remained at Columbia until 1924, when the pressure of work as Judge on the Permanent Court of International Justice caused him to resign.

Men do not live through or for law, however; law exists because of the need for order in any human society. It is based on the realization of human beings that there must be rules if there is to be order, and without order there can be no satisfactory international society, any more than a society is conceivable nationally without respect for and observance generally of the law. There must be respect for the law; but to assure that respect the rules of the law must be reasonable and, more than that, they must be conceived as just. The law, while the first servant of mankind, must not be allowed to be its master and to limit the development in human relations, economic and political, which is constantly going on in "the world, which knows no repose," with the revolutionary development of mechanical appliances and the harnessing to the service of mankind of the forces of nature which have had a controlling effect on the social developments, and through them on the political developments, which have been so striking in the past century. Judge Moore would agree with Justice Holmes that the common law "is not a brooding omnipresence in the sky";<sup>6</sup> nor is the common international law. He put this point well: "As the subjects of law are human beings, laws can be adequately framed only in the light of human conduct in its various manifestations through the ages."<sup>7</sup> The only static element in society, as he always insisted, is human nature. "The nature of man changes not," however social ideals may affect his conduct.<sup>8</sup>

Nonetheless, international law is law. All rules of conduct have not been given the force of positive obligation as laws but

In the course of history, men, acting in various ways and through varied forms, have worked out and have come to ac-

<sup>6</sup> *Southern Pacific Company v. Jensen*, 244 U. S. 205, 222 (1917).

<sup>7</sup> *Collected Papers*, VII, 136; *Virginia Law Review*, XXIII (1937), 863.

<sup>8</sup> *Collected Papers*, VI, 319.



cept certain rules for the government of their conduct. In a general sense all such rules may be called laws; but with a view to preserve that freedom of action which is essential to self-development, it has been deemed expedient to give to only a part of such rules the force of positive obligation. . . .

To the rules lying within the sphere in which observance is deemed to be essential to the general welfare and is therefore admitted to be obligatory, we give the name of law. . . .

For this reason, the world has come to regard the rules governing the intercourse of nations as constituting a system of law, for the maintenance of which even the use of coercion is justified. . . .<sup>9</sup>

And, may I add, the payment of damages in case of breach is a lawful remedy.

The adjustment of the rules of international law to changing conditions of the international society is brought about by the practices and the reasoning of men, accepted through the usage of governments.

In the development of international law, we find that the same forces have operated and to a certain extent the same methods have prevailed as in municipal law. Till a comparatively recent day international law developed chiefly through the gradual evolution of opinion and practice; and, just as in the case of municipal law, the prevailing opinion and practice would from time to time be embodied in some notable declaration or decision, which would be received as the authoritative formulation of accepted usage. . . .<sup>10</sup>

He observed, however, the shift to the legislature as a source of law nationally and noticed its counterpart in the international society. He wrote:

But, just as, in the case of municipal law, the statutory element has increased at the expense of the customary, so, in international law, there has been an increasing tendency to introduce modifications and improvements by acts in their nature legislative.<sup>11</sup>

The statutory element has become so important that in nearly all cases before the Permanent Court of International Justice the interpretation and application of a convention or treaty is at issue.

<sup>9</sup> *Ibid.*, 229-230; *International Law and Some Current Illusions* (New York, 1924), 294.

<sup>10</sup> *Collected Papers*, VI, 231; *International Law and Some Current Illusions*, 295.

<sup>11</sup> *Collected Papers*, VI, 231; *International Law and Some Current Illusions*, 296.

The practice of judicial settlement of treaty disputes had been so far recognized before the recent war that it was customary to insert in a treaty the provision that differences arising under it should be referred to the Permanent Court, and some treaties, especially those setting up widespread international administrative organizations like the Postal Union, included provisions for special administrative courts to interpret and apply the treaty. It is a discouraging sign of the state of mind of at least some important members of the society of states that, at a conference on the Danube when the British delegate asked that a legal question arising be submitted to the International Court of Justice, Vishinsky, chief Soviet delegate,

bitterly attacked the International Court as an instrument of the political pressure of the Western Powers. He questioned the right and competence of jurists from Mexico, Egypt, China, San Salvador, or other nonriparian countries to pass on the problems of the Danube through the International Court and challenged the impartiality of the Court.<sup>12</sup>

Judge Moore was an idealist but not a dreamer. He might be termed a realistic idealist. He did not believe that peace could be achieved by law and respect for law alone.

It will not do to rely in fancied security upon any device for the avoidance of the use of force, unless we practise moderation and self-restraint, and see to it that we do not allow our feelings to carry us beyond the point where differences can be discussed in the light of reason.<sup>13</sup>

He has pointed out that even the government of the United States, under the Constitution and the elaborate system of law spread over the country, did not prevent the Civil War from breaking out; and that in many of their relations, individuals resort to violence, sometimes with too little regard for the interests of their fellow citizens and good order, and are unwilling to subject themselves to the process of law and judicial or arbitral procedure for the settlement of their disputes. These, however, Judge Moore believed to be exceptions. He thought that "it is a great mistake to suppose that the peace and good order of society are preserved

<sup>12</sup> U. S. Department of State, *Documents and State Papers*, I, Nos. 8 and 9 (1948), 493. See also *International Organization*, III, No. 1 (Feb. 1949), 63-65.

<sup>13</sup> *Collected Papers*, VII, 273-274.



by the penalties prescribed in the criminal codes.”<sup>14</sup> He rejected completely the idea that “the basis of social order is force. This idea [is] not new, nor need we believe it to be true.” In reality, “people generally obey the law because they are disposed to do so, and not because they fear to violate it; and it is in this fact that society finds its chief assurance against violence and disorder.” So it is with international law. In 1914 he observed: “In respect of actual observance, I venture to say that international law is on the whole as well observed as municipal law. Perhaps one would not go too far in saying that it is better observed, at any rate in time of peace.” Not only does mutual international and material advantage persuade governments and national courts to apply international law and to respect treaties, but “the regard which nations are accustomed to feel for their reputation and dignity strongly influences them, perhaps quite as much as does the dread of retaliation, to respect the rules by which their intercourse is confessedly regulated.”<sup>15</sup>

At the present time the international society is under the strain of the application of new political and social theories and practices applied to the organization of national societies, which brings about grave new problems of practice and of law, which may alter even the customary rules of international law in peacetime. Our international law was based on the legal and social organization of Europe, relatively similar in all countries on that continent, influenced as they were by Roman law and legal organization, with individual rights, including that of property, fundamental in their legal order. At its best, the Roman ideal as expressed by the Emperor Marcus Aurelius was that of “a commonwealth governed by equitable laws and founded upon equality of rights and freedom of speech.”<sup>16</sup> This law and organization spread to the Americas and Africa and has been in the process of covering Asia. A new social system challenges its ideal, and if that system succeeds in its ambition to bring all mankind within its orbit, there must be a rethinking of international law, the force of which it contests. Let us trust that no such catastrophe will overwhelm us. Even if it does, and if national states survive, as I believe they must, the old

<sup>14</sup> *Ibid.*, II, 26.

<sup>15</sup> *Ibid.*, I, 98; VI, 234; *International Law and Some Current Illusions*, 300.

<sup>16</sup> *Selections from the Meditations of Marcus Aurelius* (New York, 1927), 8.

constitutional rules of international law will remain in force; indeed the new society will need them the more that economic interests will immediately, not mediately as now, be those of governments and so will need more, not less, regulation by law.

The general disposition to obey the rules of law and the habit of obeying them, however, do not prevent disputes which arise from the conflicting interests of groups of men and which are often believed to be based on lawful rights. In international relations, which are the relations of governments seeking their own interests or those of their peoples, disputes are frequent. Usually, as Judge Moore has said, the disputants recognize the paramount need for order under law, and diplomacy is the usual method of adjustment. Diplomacy may not succeed in a particular instance, and then a regime of order under law requires the instrumentality of the judge or the arbiter to settle the dispute. Disputes between nations may contain the germ of war; and the international society as well as the national society needs a judicial institution to lessen the danger of armed conflict. As Judge Moore has said:

The cause of peace will be conserved rather than injured by dealing with things as they actually are and ever have been. There always have been and there always will be conflicts of interest and of ambition between nations . . . , just as there are and always have been between individual human beings. . . . In case diplomacy fails to bring an adjustment, we should cultivate the habit of submitting these conflicts to judicial settlement.<sup>17</sup>

Throughout his life the Judge was an ardent advocate of arbitration as a means of assuring the functioning of law in the international society and of lessening the chances of an appeal to force to settle a difference. He said in 1896: "The great end at which the advocates of international arbitration aim is the substitution of reason for force—of judicial methods for methods of violence."<sup>18</sup> And again,

Arbitration . . . represents a principle as yet only occasionally acted upon, namely, the application of law and of judicial methods to the determination of disputes between nations. Its object is to displace . . . war as a means of obtaining national redress, by the judgments of international judicial tribunals.

<sup>17</sup> *Collected Papers*, VI, 337-338.

<sup>18</sup> *Ibid.*, II, 24.



For, he always insisted, "arbitration [is] a judicial function. . . . Arbitration decides."<sup>19</sup>

Believing so firmly in the principle of arbitration, he early advocated the importance of extending it and of establishing a permanent system of international arbitration. "The adoption of a permanent system of arbitration would provide beforehand at least the means of judicial decision, and thus tend to prevent disputes."<sup>20</sup>

There was another purpose a permanent tribunal could serve. I have already noted Judge Moore's belief in international law as a developing body of rules. The common lawyer speaks when he writes that one of the great advantages of a permanent system of arbitration "would be a means of developing international law. . . . Arbitrators, proceeding under a permanent system, would consider their decisions with reference to their effect on the development of international law."<sup>21</sup> They would therefore contribute greatly to the application of reason and principle as developed in contested cases before them. The Judge believed that, both to do justice in particular cases and to contribute to the upbuilding of the law, arbitrators should have access to the proceedings in prior arbitrations, and it was to provide them with this important tool of their work that he undertook the collection of arbitrations to which he devoted the resources of his wide scholarship with unflagging energy and even with serious risk to his health and his eyesight.

Judge Moore was not a man to merely urge a great cause in which he felt strongly. Good intentions were not enough; good works must support good intentions if they are to develop into good results. And, believing firmly as he did in arbitration, he set himself to work to supply a tool for the use of the permanent tribunal he envisaged and as a means of persuading governments that agreeing to an arbitration was not embarking on an uncharted sea. The better it could be shown to them that arbitration was the application of law and reason to the settlement of international disputes, that there were rules on which they could depend, the more readily would governments submit their differences to judicial settlement. In 1937 he commented that "prior to the publication

<sup>19</sup> *Ibid.*, 339, 337.

<sup>20</sup> *Ibid.*, 25.

<sup>21</sup> *Ibid.*, 26.

of my History and Digest of International Arbitrations, in 1898, the decisions of international boards of arbitration were rarely mentioned among the sources of international law, solely because, being practically inaccessible, they were unknown.”<sup>22</sup>

Convinced as he was of the importance of the judicial settlement of international disputes, Mr. Moore welcomed the agreement signed July 29, 1899, creating the Permanent Court of Arbitration at the Hague, of which he wrote in 1922: “Of the Permanent Court of Arbitration I have naught to say but in commendation.”<sup>23</sup> That institution was not a bench of judges, but it did set up a permanent arbitration system with a panel of distinguished lawyers from signatory powers, from which governments could select arbitrators for any case they chose to submit. Mr. Moore was appointed as one of the American members of the panel, a recognition of his reputation as a lawyer and of his sense of justice.

The effort, in 1907, to establish a Court of Arbitral Justice, composed of “judges who are judicial officers and nothing else,”<sup>24</sup> paid adequate salaries and devoting all their time to their duties, failed because the Powers could not agree on a method of choosing judges, although there was general approval of the idea. This difficulty was met after the formation of the League of Nations by vesting the election of judges in the Assembly and Council of the League, and the Permanent Court of International Justice came into being. The draftsmen of the Covenant were well aware that a world order based on law required the institution of a court of justice and, in Art. 14, had required that the Council “shall formulate and submit to the members of the League for adoption plans for the establishment of a Permanent Court of International Justice.” This charge was carried out through the appointment of an Advisory Committee of Jurists, one of whose members was Elihu Root. After full discussion in the Council and Assembly, in which substantial changes were made, the draft of the Committee amended in some points was approved by unanimous vote of the Assembly on December 13, 1920, submitted to the Members of the League and by their approval became the Statute of the

<sup>22</sup> *Ibid.*, VII, 87; *The Arbitration Journal*, I, No. 2 (April, 1937), 116.

<sup>23</sup> *Collected Papers*, VI, 81; *International Law and Some Current Illusions*, 99.

<sup>24</sup> *Collected Papers*, VI, 82, quoting Mr. Elihu Root, Secretary of State; *International Law and Some Current Illusions*, 100.



Permanent Court of International Justice. The judges were to be elected by the Assembly and the Council acting separately, from lists submitted by the national groups on the panel set up for the Hague Court of Arbitration. There was no limitation to nationals of the Members of the League or to recommendations by groups of non-member states, but the American group judged it best not to make recommendations. The Italian group, however, nominated Mr. Moore, a nomination in which Mr. Elihu Root may have played a part during a conference with Signor Orlando, a former Prime Minister of Italy, who had a short time before visited New York. Mr. Moore was elected Judge on September 14, 1921, and accepted the election "with due sense of the honor and of the responsibilities." He resigned on April 11, 1928.

Mr. Root had been asked to accept nomination, but instead recommended John Bassett Moore, "who," he said, "would be more useful than I. He has an accurate mind, great learning in International Law and practical experience in International affairs."<sup>25</sup> Mr. Root expressed his appreciation in a letter to Mr. Moore in which he said: "There could not have been a better contribution by America to the dignity and competency of the tribunal."

Judge Moore was confronted soon after taking office with a question which to him seemed vital to the usefulness of the Court. The first duty of the Judges was to draft the rules of the Court, and in the course of that work the problem of advisory opinions had to be decided. The problem had practical importance. It was known that there were questions upon which advisory opinions would be asked, and it was important that the Court in its rules should make preparation for the action which it would take when the requests were presented. Art. 14 of the Covenant of the League, in the English version, provided that "the Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly." There was no mention of advisory opinions in the Statute of the Court, and therefore there was doubt as to whether advisory opinions should be given at all. Judge Moore prepared an elaborate memorandum submitted to the Court on February 18, 1922, in which he observed:

No subject connected with the organisation of the Permanent Court of International Justice has caused so much confusion and proved to be so baffling as the question whether and under

<sup>25</sup> Philip C. Jessup, *Elihu Root* (New York, 1938), II, 424.

what conditions the Court shall undertake to give "advisory" opinions.

This state of doubt and uncertainty may in large measure be ascribed to the nature of the proposal.<sup>26</sup>

Brought up as a common lawyer, and convinced as he was of the importance of maintaining the judicial character of the Court, he felt that the usefulness of the Court was bound up with "the obligatory force and the effective performance of its decisions or judgments," that the design of the Court was "to cultivate and to enlarge the application between nations of the principle and method of judicial decision," and, as was said in the report of the Assembly Committee, that it should contribute, "through its jurisprudence, to the development of international law." The influence of his early convictions is apparent in his attitude. He recommended to the Court that "it may be preferable that there should be no special regulation concerning advisory opinions, but that, if an application for such an opinion be presented, the Court should then deal with the application according to what should be found to be the nature and the merits of the case." By Art. 1 of the Statute, the Court was established in accordance with Art. 14 of the Covenant, and under Art. 36 of the Statute "the jurisdiction of the Court comprises . . . all matters specially provided for in Treaties and Conventions in force." Art. 14 authorized the Council or Assembly to request advisory opinions but did not impose "on the Court an obligation to render such opinions unconditionally and on request." He examined, with his usual penetration, the history of the drafting of the Statute and was confirmed in this opinion. At a later state of the drafting of the rules, answering an erroneous interpretation of his memorandum, the Judge said that "his intention had not been to contend that the Court was not entitled to give advisory opinions; he only desired to prove that this power could and should be exercised according to the discretion of the Court."<sup>27</sup>

The Judge believed that the giving of advisory opinions "having no obligatory character either on actual disputes or on theoretical questions," was "not an appropriate function of a Court of Justice" and would tend "to change the character of the Court."<sup>28</sup>

<sup>26</sup> *Publications of the Permanent Court of International Justice, Series D, Acts and Documents, Concerning the Organization of the Court, No. 2, 383.*

<sup>27</sup> *Ibid.*, 383, 397, 398, 164.

<sup>28</sup> *Ibid.*, 397-398.



Recognizing the power of the Assembly and Council to request advisory opinions and the power of the Court to give them, he devoted himself to assuring a procedure which would guard the essential character of the Court as a judicial body. He thought fatal the tendency to allow the Assembly or the Council to request that the procedure for advisory opinions be secret and that the opinions be not published. It was urged by one of the best of the continental judges that, in the interest of the peace of the world, the Council have this right, but Judge Moore and Lord Finlay, the British Judge, thought secrecy was "incompatible with the Statute, and that the practice of giving opinions which were not made public would be a death blow to the Court as a judicial body."<sup>29</sup> Nor would they accept another suggestion that an opinion be submitted to the body requesting it before being published, although it should be read at a public meeting of the Court. The opposition was strong. Early texts of the rules contained the provision that if Assembly or Council expressly request that an advisory opinion be not published without its consent, the request shall be granted. However, Judge Moore's opinion prevailed and the rules as adopted required publicity.

Only after discussion did the Court determine that advisory opinions should be given by the full Court, like judgments, thus taking another step toward assimilating the procedure to that of cases between states. This he argued followed from Art. 36 of the Statute, which made no distinction between cases and "matters specially provided for in treaties and conventions." It had been proposed that for this special function, as for that of adopting the Rules, there be a meeting of both regular Judges and deputy Judges, who under the Statute sat only to fill the places of absent Judges in cases between states. Such a procedure would set up a special bench for the consideration of an advisory opinion and distinguish it from the judicial function.

Judge Moore wrote a strong memorandum<sup>30</sup> against this proposal, based on the Statute and on principle. The Court disapproved it and adopted a rule that the full Court of regular Judges must sit as required by the Statute for cases between states. Judge Moore carried the Court with him, too, in his argument that making the rules of a court was a judicial function, so the move

<sup>29</sup> *Ibid.*, 160.

<sup>30</sup> *Ibid.*, 509-513.

for a general meeting of Judges and deputy Judges was lost, fortunately for the future of the Court. It was thought better not to put in the Rules a section expressly reserving the right of the Court to refuse to give an advisory opinion; but from the record it may be concluded that the majority of Judges agreed the Court had that right.

Judge Moore felt strongly the value of the Permanent Court to the international society. It was this conviction which made him stand firmly for the principles which finally triumphed, and he was on the whole satisfied not only with the rules but with their application. In an article in which he takes account of the early experience of the Court with advisory opinions, he wrote:

These decisions, by which judicial methods are applied to the rendering of advisory opinions, have been fully carried out. The Court has not thought it feasible to fill a dual role, acting at one moment as a judicial body rendering judgments on international differences, and at the next moment as a board of counselors giving private and *ex parte* advice on such matters. Indeed, an auditor or spectator would detect no difference between a proceeding for a judgment and a proceeding for an advisory opinion. Moreover, the Court has in all its proceedings shown an appreciation of the fact that the very breath of its life is the public confidence, and that this confidence could not exist if it should fail to observe in its conduct that openness by which the conduct of courts is supposed to be characterized. The Court has carried this principle to the point of publishing even the full minutes of the private discussions at the preliminary session at which its rules were adopted. All its opinions and decisions have been read from the printed text on the day of their delivery, and the proofs and arguments have also been printed and published.<sup>31</sup>

A crucial test of the right of the Court to refuse to give an opinion came up when the Council, on April 21, 1923, asked for an advisory opinion on the interpretation of the treaty of Dorpat between Finland and the Soviets regarding the autonomy of Eastern Carelia.<sup>32</sup> The two countries disagreed on the meaning of certain sections of the treaty, and Finland took the matter to the Council. Failing to persuade the Soviet government to take part in the discussion in the Council, the Council asked the Court for an advisory opinion on the construction of the treaty. The Court requested the Soviet government to appear, but it peremptorily

<sup>31</sup> *Collected Papers*, VI, 104; *International Law and Some Current Illusions*, 131-132.

<sup>32</sup> *League of Nations Official Journal*, 1923, pp. 577-578.



refused. The Court then informed the Council that it could not comply with its request. "The refusals which Russia had already opposed to the steps suggested by the Council have been renewed upon the receipt by it of the notification of the request for an advisory opinion." Its refusal to take part in the inquiry, furthermore, would make it doubtful if the Court could get the necessary information on the facts. "Answering the question would be substantially equivalent to deciding the dispute between the parties. The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court." A fundamental principle of international law is that a sovereign state cannot without its consent be subjected to an international tribunal. The Court divided seven to four; the minority were "unable to share the views of the majority of the Court as to the impossibility of giving an advisory opinion in the Eastern Carelia case."<sup>33</sup> Judge Moore had filed a memorandum taking the position that the Court should not give the opinion requested.

When the refusal was submitted to the Council, strong feeling was aroused. The Council did not agree with the Court's reasoning and was prepared to sharply criticise the Court, but it finally passed a toned-down resolution to avoid giving the impression of a quarrel with the Court.<sup>34</sup> The position of the Court was accepted and the Council continued to request advisory opinions.

Maintaining the rules and the independence of the Court was not an easy matter from the outset. A minority of the Court had never agreed with Judge Moore's position on the rules, and after the criticism of the Court by the Council in respect to the Eastern Carelia matter, the opposition became stronger. The Eastern Carelia action was in July 1923, and as early as September 1923, one of the Judges suggested that the rules be changed so that the Court, when giving advisory opinions, should hold no public sittings, that documents or information submitted should be used solely for the private information of the Court, and that the opinion should be communicated only to the League body, the Council or the Assembly, asking for the opinion.<sup>35</sup> Judge Moore vigor-

<sup>33</sup> *Publications of the Permanent Court of International Justice*, Series B, *Collection of Advisory Opinions*, No. 5.

<sup>34</sup> *League of Nations Official Journal*, 1923, pp. 1335-1337.

<sup>35</sup> *Publications of the Permanent Court of International Justice*, Series D, *Acts and Documents Concerning the Organization of the Court, Addendum to No. 2*, 293.

ously opposed the proposed changes. He filed a memorandum<sup>36</sup> in which he said:

By the rules adopted at its Preliminary Session in 1922, the Court unmistakeably indicated that in rendering advisory opinions it would follow judicial methods and preserve the same judicial independence as the world would necessarily expect it to maintain in deciding differences brought before it in a contentious way. The rules as adopted presupposed, (1) that the Court would decide for itself in each instance whether and to what effect it would answer the questions put to it, and (2) that in no event would it give any secret or private advice.

Furthermore, he argued that action under these Rules had "inspired a general feeling of confidence and respect," resulting in "an abundance rather than a dearth" of requests for such opinions. He concluded:

For my own part I can only declare the belief that the reputation which the Court now enjoys as an independent, judicial body, rests upon its maintenance of that character in the matter of advisory opinions, first by its rules and later by the open and judicial conduct of its proceedings.

If, in an unguarded moment, the Court should permit its relations with governments, collectively or individually, to be shrouded in mystery or in any other way to become the subject of surmise and suspicion, at that moment the Court would inevitably forfeit the world's confidence. The effect would be suicidal. The Court has no compulsive powers. The breath of its life is the public confidence.

The effort to change the rules at that time failed, but had not in his opinion ended; in fact, the tendency was increasing.

It would take only a majority of the Court to change the rules, and a majority of the Court could set aside the decision in the Eastern Carelia matter, thus allowing the Court to give secret opinions at the request of the Council or of the Assembly, or even requiring it to do so. Judge Moore believed that if this came about the independence of the Court would be destroyed and with it "all possibility of [its] ever being more than a mere subordinate and subservient agency of the Council of the League."<sup>37</sup> Nor would he have remained a member of such a Court. This conviction affected his advice to prominent leaders in the Administration and the Senate when the issue of adhering to the Statute creating

<sup>36</sup> *Ibid.*, 294, 296.

<sup>37</sup> Letter to the author.



the Court was being discussed and which ended in the resolution approving adhesion to the Statute, which passed the Senate on January 27, 1926, by a vote of 76-17.<sup>38</sup>

Believing as he wrote that

no effort should be omitted to cultivate a public sentiment that will induce governments, instead of resorting to violence, to come before the tribunal which has now been established, which is continuously organized and always open to them, and submit their controversies to its final and peaceful decision,<sup>39</sup>

Mr. Moore had early advised leading men in the United States to bring about the adhesion of the United States to the Court Statute. In 1922, he had written to several leading Americans explaining the position of the Court as independent of the League, and it is probable that his words had effect in President Harding's message on February 24, 1923, urging the Senate's consent to "adhesion to the Protocol under which the Permanent Court of International Justice has been erected at The Hague."<sup>40</sup> Strong objection was made that the Court was subject to the League and that joining the Court would be getting into the League by the back door. The opposition finally persuaded the President to require such changes in the Statute as practically amounted to an abandonment of his position.

President Coolidge, however took up the fight and recommended adhesion to the Protocol setting up the Court. Judge Moore, at the request of President Coolidge, had visited him at the White House and had also met Mr. Hughes, then Secretary of State. It is probable that the President's recommendation for adhesion to the Court, in his message of December 6, 1923,<sup>41</sup> was affected by Judge Moore's conviction that the United States should take a part in strengthening the first effective effort to establish an international court of justice, the kind of institution which he had so long advocated. He felt, however, that there were "certain reservations that are as essential to the safety of the Court as they are to the protection of the just interests of the United States," and thought that the United States would adhere "only with res-

<sup>38</sup> *Congressional Record*, LXVII, Pt. 3, 2824-2825.

<sup>39</sup> *Collected Papers*, VI, 115; *International Law and Some Current Illustrations*, 146.

<sup>40</sup> *Senate Document No. 309*, 67th Cong., 4th Sess.

<sup>41</sup> *Congressional Record*, LXV, Pt. 1, 96-97.

ervations.”<sup>42</sup> The reservations were intended to protect the situation set up in the rules and in the Eastern Carelia case, as regards advisory opinions. The Court should be free to decide in each case “whether the advice shall be given.”<sup>43</sup> The Court should not give any secret or confidential advice, and no advisory opinion should be given on a question in which the United States is interested, without its consent. The third point was covered by the Eastern Carelia case, since the United States was not a member of the League; but the Judge felt that in view of the possibility of a change “the matter should be so settled not only that the Court cannot reverse itself but also that the Council cannot ask it to do so.”<sup>44</sup>

While American adherence to the Protocol was being vigorously debated in the Senate, Mr. Moore was in contact with influential senators as well as with Administration leaders. Several of the senators carrying the fight referred to Judge Moore with high appreciation, indicating their regard for him and their respect for his opinion. His memorandum to the Court on the question of advisory opinions was printed in the *Congressional Record* of January 4, 1926. His insistence that there be no change in the position of the Court on advisory opinions may be traced in the fifth amendment to the resolution of approval.<sup>45</sup> It read:

5. That the Court shall not render any advisory opinion except publicly after due notice to all states adhering to the Court and to all interested states and after public hearing or opportunity for hearing given to any state concerned; nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.

The Judges of the Permanent Court revised the preparatory rules of the Court in the summer of 1926, Judge Moore being a member of the committee. The revision strengthened the requirement of publicity of advisory opinions. There was no provision changing the rule of the Eastern Carelia case under which the Court was free to determine whether it would entertain a request for an advisory opinion. The American resolution with the reservations was referred to a conference of the states signatory to the

<sup>42</sup> Letter to the author, cited in note 37.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Congressional Record*, LXVII, Pt. 3, 2825.



Court Statute, held on September 1, 1926.<sup>46</sup> In its final act the conference made an express declaration that hearings should be public and opinions delivered at public session. The conference, however, believed that the Eastern Carelia decision was enough to satisfy the United States that the Court would not render an advisory opinion on a question in which the United States was a party without its consent. So it refused to accept that part of the fifth reservation under which the United States might prevent the Court's giving an advisory opinion on the mere claim of an interest in the question at issue.

It is typical of John Bassett Moore that, with a deep conviction of the importance of the Court, he used the resources of a strong will, a clear mind, skill in diplomacy, and widespread influence to protect it from what he believed would prejudice its usefulness as a court. His success, it is not too much to say, was a vital factor in the maintenance of the Court as an independent tribunal for the nations. His conviction has been incorporated in Articles 67 and 68 of the Statute of the present International Court of Justice, which require that the Court deliver its advisory opinions in open court and that in the exercise of its advisory functions the Court "shall further be guided by the provisions of the present Statute which apply in contentious cases to the extent to which it recognizes them to be applicable."

In closing, let me quote from Mr. Moore's address at your Commencement in 1900.<sup>47</sup> It applies today, half a century later:

To the young men of Delaware I may be permitted in this place to make a particular appeal. They are the inheritors of the glorious traditions of a commonwealth which has borne in the history of our common country an honorable and important part. Its future is in their keeping. The State, though small in area and in population, is rich in the memories of its sons. In peace and in war, they have ever been found in the foremost ranks; and if, in the hour of trial, they held its name upon their lips in proud remembrance, it was because they cherished for it that true affection which renders sacrifice a pleasure as well as a duty. Guard, then, with jealous care its fair fame. Resent and oppose, not only as a public wrong, but as a personal injury, every act that may tend to degrade it. And see to it that none shall wear its honors who cannot truly swear upon its altars that they have paid it the due of an honest and sincere devotion.

<sup>46</sup> Manley O. Hudson, *The Permanent Court of International Justice* (New York, 1934), § 231, p. 213.

<sup>47</sup> *Collected Papers*, II, 275.