Obituary: Professor D. P. O'Connell

All international lawyers and Australian international lawyers in particular, felt a special sense of loss in the death in Oxford on 8 June 1979, at the early age of 54, of Daniel Patrick O'Connell, QC, LLD (Cantab), DCL (Oxon). Although he was born and educated in New Zealand, and at the time of his death occupied one of the most prestigious international law chairs in England, it was in Australia that O'Connell spent the major part of his working life and it was here that he achieved stature as one of the outstanding scholars of his generation in international law.

After completing his undergraduate studies in law and arts in Auckland, O'Connell won a scholarship to Cambridge where he was accepted as a doctoral candidate by Professor (later Judge Sir Hersch) Lauterpacht. The topic providentially suggested by Lauterpacht was the law of state succession, which suited O'Connell's intellectual and temperamental qualities admirably. The topic was conceptually demanding, drew the student into the interaction of international law with a variety of domestic legal systems, called for a knowledge and sense of history, and presented a challenge of contemporary relevance as the decolonisation process began to run inexorably forward. O'Connell succeeded in obtaining his PhD, later published the thesis as a book (*The Law of State Succession,* 1956) and became the acknowledged international authority on the subject.

O'Connell returned to New Zealand from Cambridge and spent a period in general practice as a barrister and solicitor in Auckland. This period is reflected in his early writings for journals on a wide variety of legal subjects. His interest in international law, however, remained paramount and, when offered a post as Reader in Law in the University of Adelaide, he decided to devote himself to an academic career.

The Faculty of Law at Adelaide in 1952 was a small one consisting of only three full-time members of staff: the Bonython Professor and Dean R. A. (now Mr. Justice) Blackburn, G. H. L. Fridman and O'Connell. The remaining teachers were practitioners who taught on a part-time basis. International law had not been taught since before World War II but there had been some distinguished past teachers of the subject in Adelaide: Coleman Phillipson, Jethro Brown and Sir John Salmond. They had established an excellent collection of international law texts in the library on which O'Connell was able to build. It was not until 1959 that international law was restored to the curriculum, but O'Connell was able to devote himself to research and writing in that field while teaching jurisprudence and constitutional law. Again this may have been a stroke of providence; the enforced immersion into the mysteries of a federal constitutional system of a lawyer trained in two unitary systems led not

only to a comprehension of the rigorous principles and subtle complexities of that subject (and to the analogies which can be drawn with international law) but also to a political awareness which was later so important in O'Connell's advice to Newfoundland and to the Australian States in Federal-State matters and to the Conservative Party in the United Kingdom on the devolution issue.

In 1962 O'Connell was promoted to a personal chair in Adelaide and in the same year was awarded a grant from the Ford Foundation to continue his work in the field of state succession through a specially constituted committee of the International Law Association. By now decolonisation had become a flood and the committee under O'Connell's leadership was able to exercise influence on the legal shape of events. In place of the clean slate theory propounded by earlier authors with regard to the treaty rights and obligations (other than those of a dispositive nature) applied by a colonial power to its dependencies, O'Connell proposed a modified universal succession theory which sought to achieve a continuity of rights and obligations save where such succession was contrary to some other clearly established rule. Many newly emerging countries turned to O'Connell for advice and the succession formulae used by at least ten countries were personally drafted by him. The full significance of his influence in this sphere may not yet be perceived; for in rejecting the clean slate approach those countries that followed his lead were made especially conscious of the relevance and importance of maintinaing the international treaty network at a very early moment in their history as independent nations. This consciousness, it may not be fanciful to believe, provided elements of stability and responsibility at a crucial stage in world affairs. In this sense O'Connell's work could not be said to have been ineffective despite the later espousal by the International Law Commission, impelled by the doctrine of national self-determination, of the opposing succession philosophy (albeit with modifications dictated by O'Connell-inspired State practice) in the Vienna Convention on State Succession in Relation to Treaties of 1978. In an address to the Polish Academy of International Law in Warsaw in September 1978 O'Connell critically analysed the Commission's work and defended and developed his earlier views.

As a teacher in Adelaide O'Connell was liked and respected by students, even if that respect was tinged with more than a degree of awe. His style as a lecturer (complete with academic gown) was lucid, fluent and compelling. The extent of his involvement in the practice of international law set the stamp of authority on his expositions and induced in his students the feeling that they were immediately engaged at the centre of the philosophical and diplomatic arenas of international law. The standards he set were high; he had no time for the lazy or the uncouth but was sympathetic and helpful towards the honest struggler. To many students he may have seemed lofty and detached, but this concealed an innate shyness. He was, to those to whom he revealed himself in all his many

enthusiasms and unexpected practical interests, a loyal and generous friend.

The decade of the 1960's saw O'Connell's reputation as a scholar firmly established. He published in 1965 the first edition of his two volume treatise *International Law* which attempted a systematic exposition of the law of peace in a form which drew heavily on state practice and the decisions of municipal courts. No ambitious project such as this was likely to escape criticism, but the work was generally warmly approved and, now in its second edition (1970) has come to replace Oppenheim-Lauterpacht as the standard English language reference work. Also in 1965 O'Connell edited a series of essays *International Law in Australia* which was the first major effort by any scholar since the days of the short-lived Australian and New Zealand Society of International Law (1936-40) to collect and present Australian practice in significant areas of international law. *International Law* was followed in 1967 by the publication of *State Succession in Municipal Law and International Law* in two volumes. This was much more than a revised and expanded version of the 1956 work; it brought together the body of practice of the post-colonial period in a wider framework and, in place of the orthodox theoretical propositions of the earlier work, advanced the modified universal succession theory which O'Connell saw emerging from more recent practice.

O'Connell's writings in international law, prolific and influential though they are, inadequately reveal the range of his intellectual powers. His acute memory of detail and his ability to distill the essence of a problem, a movement or a mood from disparate facts, personalities and events, which so delighted his friends in conversation, did not enjoy sufficient scope for expression within the austere restraints of legal monographs. In *Richelieu*, however, O'Connell was able to give free rein to his vision and imagination. The central theme of the eternal dilemma of the moral uses of power is pursued against the rich backdrop of baroque life and manners; deft touches of the pen bring immediate contemporary analogies to mind in Richelieu's life and the crisis of conscience through which he passed. The writing is vivid but elegant and restrained with a nice sense for counterpoint and irony.

The late 1960's might have signalled a period of relative relaxation and consolidation, but O'Connell's intellectual vigour and immense energies were already absorbed in the law of the sea. His childhood passion in New Zealand was the sea, but he was dissuaded from his ambition to join the Navy to study law. This may, in retrospect, have been the most significant intervention of providence in his career, for in following first a career in law he was later able to blend his knowledge and love of both in a rare systhesis offering new and perceptive insights into the international law of the sea. He joined the Royal Australian Navy as a Commander in the Legal Reserve, and devoted himself passionately to the mastery of maritime navigation, naval tactics, weapon capability and strategy. He spent a brief period of service in Vietnam where he observed

naval operations at first hand aboard American and Australian warships. His influence on thinking within both the Australian and Royal Navies was profound, to which his book *The Influence of Law on Seapower* (1972) only partly attests. His substantially complete two-volume work *The Law of the Sea*, on which he was engaged at the time of his death and which will be published towards the end of 1980 will, as one who has read the draft manuscript has said, be 'a monument to his genius'.

O'Connell was not only a theoretician but also a tactician whose general legal knowledge and sensitive grasp of the wider implications of a proposed course of action made him an adviser much sought after by governments and corporations. He was the architect of Australia's action against France in the *Nuclear Tests* case. The genesis of this action is not widely known and might usefully be recounted here. During a break in proceedings at the Conference of the State Attorneys-General in Brisbane in July 1972 the Attorney-General for South Australia, the Hon. L. J. King QC (now Chief Justice of South Australia), discussed with his Tasmanian and Western Australian colleagues the possibility of the States initiating some action against France to stop atmospheric nuclear tests in the Pacific. The Federal Government had previously announced that it had considered the possibility of taking France to the International Court but had been advised that there was no ground of jurisdiction. Mr King promised to seek the opinion of O'Connell when he returned to Adelaide. O'Connell had, of course, to reject the idea of any locus standi on the part of the Australian States before the Court. But as a by-product of his work on state succession, O'Connell had long been conscious of the latent potentialities of the dormant General Act for the Pacific Settlement of International Disputes of 1928. He produced a 99-page opinion for Mr King who passed it on to the then Prime Minister (Sir William McMahon) and Opposition Leader (Mr Gough Whitlam). The McMahon Government rejected the opinion, but Gough Whitlam was persuaded by it and promised an International Court action by Australia against France in his 1972 policy speech. The jurisdictional ground proposed by O'Connell had to be kept secret for fear that France might denounce the General Act before Australia had instituted proceedings. The secret was kept and, on the advent of the Whitlam Government to power, directions were given for the institution of proceedings on the basis of the O'Connell opinion.

As is well-known O'Connell appeared as one of Australia's counsel before the International Court in the *Nuclear Tests* case to present oral argument on the jurisdictional issue. He appeared again before the Court in the *Aegean Sea* case to argue the same jurisdictional issue as well as to urge upon the Court the necessity of dealing firmly with non-appearing respondent States. The avoidance by the majority of the Court of both these issues is a matter of continuing concern. He appeared before the High Court of Australia as junior counsel for Queensland in the *Seas and Submerged Lands* case in 1975; although he took no part in the oral argument, his earlier work, on behalf of all the States, was central to the presentation of the States' case against exclusive federal control of

off-shore areas and resources. In England he appeared as junior counsel before the Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria* and helped to bring about a result which altered not only the law relating to sovereign immunity (anticipating the State Immunity Act of 1978) but, even more significantly, advanced the definition of the relationship between international law and municipal law. In 1977 O'Connell took silk in England, and was sought after by an increasing number of clients as counsel in international arbitrations and by governments for opinions.

As Director of Studies O'Connell crowned a life-time of service to the International Law Association, a body that occupied a special place in his energies and dedication. The broad character of the Association as a meeting ground of academics, diplomatists and general legal practitioners was important to him, for it promised in yet another practical way the achievement of his vision of the unity of all knowledge. As President of the Australian Branch he welcomed the participation in it of lawyers whose day to day contact with international law was small but whose interest and support were real and continuing. No member was allowed to feel that international law was an esoteric science practised on an elevated plane by the chosen few but all were led to see it as a living part of all law in which they could conceive for themselves a role, or at least a relevance; O'Connell was especially keen to enlist the participation in the Association, and in the affairs of the local legal professions, of immigrant lawyers from other legal traditions. In more recent years, after his move to England, O'Connell revitalised the Association's Committees and was the dominant figure at the biennial Conferences. Notable among his recent contributions to the work of the ILA was his participation in the working group on the Theory and Methodology of International Law.

No account of O'Connell's life, however brief, would be adequate without reference to his religious and political beliefs. O'Connell was a devoted and life-long Catholic of what is now regarded by some as the old-fashioned kind. He regretted very much the decline of Latin in the liturgy, the advent of 'liberation theology' and of certain other trends in the contemporary church which he considered to be based on woolly thinking. While strict in his own life and conscious of the need to keep in balanced perspective God the Judge and Gentle Christ, he was no bigot; he was tolerant and immensely charitable towards others and deeply respected conscientiously held beliefs different from his own. He delighted in philosophical and theological debate, but was always moderate in the expression of opinions and ready to concede a point. In political matters he was generally to be found on the conservative wing but he did not always support the policies of conservative governments, eg in relation to the Vietnam war. Although he was the architect of the Whitlam Government's action against France over atmospheric nuclear testing he later publicly supported the powers of the Governor-General to dismiss that Government. He had friends among, and enjoyed the company of, politicians of various loyalties, but he always maintained for himself a

scholarly independence and freedom to criticise. For O'Connell to uphold the integrity of the discipline of the law was always more important than the political exigencies of the moment.

His distrust of emotion and of uncritical espousal of policies, whether by the Right or the Left, led O'Connell also to view with reserve the United Nations and law-making activities by international conferences. The coherence and intellectual integrity of international law had to depend on something more stable and morally sound than the fragile consensus of diplomats. In his view the decline of custom as a source of law lay at the heart of the problem of modern international law. The rational natural law foundations to be found in Suarez gave way to eclecticism in Grotius and finally to power politics in Rousseau and Vattel. In his 1975 O'Sullivan Memorial Lecture in London O'Connell summed up his attitude as follows:

> 'The Vattelian composition is the dominant theoretical strain in modern international law. It stands in fundamental contrast to any explanation of the moral order tolerable to the Catholic viewpoint, at least to the same extent as Rousseauism in any other field of social behaviour. From the Catholic viewpoint, international law on Vattelian premises is fundamentally flawed, because it offers an insufficient basis for obligation where a superior is not available and because it puts intolerable power in the hands of a majority, merely because it is a majority.'[1]

In 1972 O'Connell was elected to succeed Sir Humphrey Waldock in the Chichele Chair of International Law in Oxford. He was also elected to a Fellowship of All Souls College, an institution unique in the academic world. In Oxford he found ready acceptance and respect, and a congenial environment in which to continue his work. His reputation was such that he was the object of visits by countless persons from all over the world to the extent that he sometimes complained wistfully that he had become one of Oxford's ancient monuments. But he was unfailingly courteous in giving of his precious time and indefatigable in coping with the ever mounting demand for his services and advice.

Despite his happiness in England, which his wife and five children shared, it was to Australia that O'Connell intended to return for his retirement. In his case 'retirement' could have meant little more than a technical change of status, for even in relaxation his mind was ever active. O'Connell was greatly interested in art and architecture and, with his deep knowledge of European history of the 17th century, he had long had in mind to attempt a political and artistic synthesis of the Baroque period. His keen wit and sense for the ridiculous made him an excellent raconteur and it was possible that a semi-autobiographical novel would also have emerged. There is certainly no doubt that he would have continued his contribution to the literature of international law.

In Australia, where tall poppies quickly feel the impending wind of the scythe, one hesitates to acclaim a genius. O'Connell did not pretend to

1. 'The Law of Nature and the Law of Nations' [1975] *Law and Justice* 48, at 57.

any false modesty, but neither did he harbour unrealistic illusions or deceive himself. He worked to the limits of his immense capabilities and gave copiously of his gifts. May his soul rest in peace.

I.A.S.