

THE ESSENTIAL IVAN SHEARER: SCHOLAR, TEACHER AND PRACTITIONER OF INTERNATIONAL LAW*

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CONTENTS

I Ivan Shearer And His Times.....	1
II Ivan Shearer’s Professional Life.....	5
III Shearer: The Spiritual Man	8
IV Continuing Shearer’s Legacy.....	16

I IVAN SHEARER AND HIS TIMES

As an accomplished professional and academic lawyer, Ivan Shearer learned the importance of context for an understanding of law and also the lives of its practitioners. He knew how important for every lawyer is the context in which he or she has grown up and first experienced law’s dilemmas. He was a scholar who reflected his times but also foresaw the growth and importance of international law.

He was born on 9 December 1938. A reflection upon his life and work was convened on the eightieth anniversary of his birth. He knew that study of the law was a branch of the study of public affairs. Law’s history is part of the history of the world, the country and the city in which individuals experience their lives. We now know that Shearer’s embrace of the law began initially as a result of a chance meeting with a friend of his father, who happened to be senior counsel.¹ The circumstances of his choice of law as a vocation was extremely interesting. It was as if the times were beckoning the youthful Ivan

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¹ Hossein Esmaili, ‘Vale Professor Ivan Shearer AM RFD: An Australian Icon and a Citizen of the World’ 41(10) *Bulletin (Law Society of South Australia)* 28.

to engage in the challenges of peace and security, order justice and human rights. These became the themes of his life.²

Shearer was the first-born child and only son of Bruce and Iris Shearer. He was brother to his sisters Jan and Sara, born after him. His early life was spent in Gilberton and later Joslin in South Australia. As those who derive from that State never cease to remind others, South Australia had its peculiarities from the start. Its settlers were free of the stain, sometimes now the pride, of convict origins. Some were escaping from religious and other prejudice in Europe. Alone of the Australian colonies, later States, this was a place with a large German immigrant population and a significant Lutheran presence.

The Adelaide War Memorial to the Great War against the German Kaiser and his allies contains the names of many German families whose sons died fighting for the British Empire. Shearer's family was amongst these immigrants. At school, he studied and always enjoyed, an excellent command of the German language.³ He would often switch to German when conversing with his faculty colleague and friend, Professor Horst Lücke.⁴ Some of his adult studies were later undertaken at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. His talent in German helped his advancement in international law. His love of music also focussed on Wagner and Mahler. Throughout his life, he displayed many of the qualities that show the Germans to best advantage: courtesy in personal relations,⁵ modesty and seriousness; hard work and devotion to duty.

The world into which he was born was very different from the world in which he died. This was true on the national scene; and even more so internationally.

In October 1938, when he was born, a Government of the original United Australia Party, led by Joseph Lyons, had been returned to office as the federal government. A brilliant young lawyer and King's Counsel from Melbourne, R.G. Menzies, was appointed Attorney-General. Menzies was biding his time for another year, when he would make his first bid to become Prime Minister of Australia. Ultimately, Menzies was to serve for the longest continuous term of any federal parliamentarian in that office. In November 1938, Mr Lyons's ministry resigned in order for the Government to be reconstituted. However, this could not long delay its demise. Dr Earle Page became Prime Minister, serving for a short time before Menzies replaced him to commence his first

² The dates below are derived from the *Macquarie Encyclopedia of Australian Events*, Macquarie Library, revised edition, 1997.

³ H. Lücke, 'Ivan Shearer, Tribute' (2019) 40(2) *Adelaide Law Review* 405.

⁴ *Ibid* 406.

⁵ *Ibid* 407.

term in the highest elected office. Given the challenges that Australia was facing in its region and in the world, it was a somewhat lacklustre scene in federal politics; not for the first or last time.

On the other hand, state politics was about to enter a period of supreme calm. On 19 March 1938 a State election had returned a Liberal Country League government which was reliant on a surprisingly large number of Independent members elected to the South Australian Parliament.⁶ The Australian Labor Party was divided and weak. On 11 November 1938, for the first time, Thomas Playford was invited to form a government. This he did. He was putting the final touches on his first ministry at the moment that Ivan Shearer was born. Playford was to remain Premier for 27 years, dominating State politics and exuding stability helped by favourable electoral distributions that advantaged Playford's country voters.

The Australian Broadcasting Commission had just achieved its goal of offering two radio ('wireless') stations in each Australian State: one highbrow and the other more popular. Already the ABC was playing a vital part in binding the Federation. Each State had a single university. But in 1938, a college at Armidale had been established by the University of Sydney. It was later to become the University of New England, gaining independence in 1954.

Professor A.P. Elkin, an anthropologist, endeavoured to educate Australians into a new era of thinking about the First Nations people, suggesting that they were not all uncivilised nomads, undeserving of equal rights. Elkin published a book in 1938 on how Australians should try harder to understand the Aborigines.⁷ For the most part his words fell on deaf ears, including in South Australia where, more than in other States, there was a significant Aboriginal population living after traditional customs. The majority of Australians were proudly British. In 1936, the nation had survived the abdication of its monarch King Edward VIII. King George VI had been crowned in 1937. The British Empire coloured a quarter of the world's land surface pink on the school room maps and atlases of those days. It boasted that the sun never set on the Empire. Yet, in that Empire, only the settler dominions of Canada, Australia, New Zealand and the Union of South Africa had achieved national independence by 1938. Newfoundland had joined the Canadian Confederation in 1933. But independence for India was repeatedly delayed, until eventually postponed

⁶ In the South Australian Parliament, in the House of Assembly 15 LCL Members were returned; 9 ALP and 13 Independents.

⁷ A.P. Elkin, *The Australian Aborigines – How to understand them*, Angus & Robertson, Sydney, First Ed. 1938; and A.P. Elkin, *Aboriginal Men of High Degree – Initiation and Sorcery in the World's Oldest Tradition*, Angus & Robertson, Sydney, 1945.

until after the Second World War. Great changes were then to disrupt the seemingly stable world as Ivan Shearer first found it.

In the world at large, many developments were happening in the year of Shearer's birth. In March 1938, the *Anschluss*, or amalgamation, saw the absorption of the previously independent state of Austria into the German Third Reich. It took place with surprisingly little resistance. The seemingly peaceful achievement of this amalgamation gave way, in April 1938, to the earliest rounding up of gypsies and Jews, as the initially benign face of the Nazi leadership was beginning to display its true colours.

Throughout 1938, the British Prime Minister (Neville Chamberlain) made errands of appeasement to Hitler, flying successively to Berchtesgaden; then to Godesburg; and then, on 30 September 1938, to Munich where Czechoslovakia was divided and eventually eliminated. That action, and the leaders' signatures to "a piece of paper" left the world, and Australia full of anxiety about the future. Territories of the former Czechoslovakia were distributed between Germany and Hungary, with part of the territory comprising mainly of Slavic peoples, brought into a Germany as a protectorate on 15 March 1939. I was born three days later.

On 9 December 1938, the Nobel Prizes for that year were announced in Stockholm and Oslo. The Nobel Prize for Peace was awarded to the Nansen Office for Refugees. This was in recognition of work for the people seeking to escape tyranny that came with the successive German acts of conquest and absorption. A conference held in Evian in France in July 1938 sought to respond to the *Nuremberg Laws* that had stripped German Jews of their citizenship and classified them as stateless subjects in the land of their birth. The Evian conference was a failure. In these desperate circumstances, the United States and the United Kingdom reached an agreement to exclude the British mandated territory of Palestine as a possibility for the resettlement of Jewish refugees. The agenda for the "Final Solution" to Hitler's "Jewish Problem" was becoming clear. With shameless precision it was soon to be recorded by the high officials of the German State convened at the Wannsee Conference in January 1942.

On 14 December 1938, less than a week after Shearer's birth, Nazi Germany adopted a law cancelling all existing government contracts with Jewish firms. In Rome, at that time, Pope Pius XI, was concentrating on negotiating Concordats with governments deemed hostile to the Roman Catholic Church. One of these was the *Reichskonkordat* with Nazi Germany.⁸ It was in protest at what he saw the betrayals of the German Government in its promises that Pope Pius XI issued a passionate encyclical which, unusually adopted the

⁸ J.R. Fishel, *The Holocaust*, (1986), 28-29.

German language, rather than Latin, to express his condemnation: *Mit Brennender Sorge*.⁹ The encyclical stated that race was a fundamental value of the human community. It declared that race was necessary and honourable. However, it condemned the exaltation of race or the people or the state to an idolatrous level. And in words that were later to find elements of resonance in some of the language of universal human rights, it declared that “man as a person possesses rights that he holds from God, at which any collectivity must protect him against denial, suppression or neglect”.

Pope Pius XI died on 10 February 1939, within two months of Shearer’s birth. He was 81 at his passing. Some have suggested that, had he survived longer, the Catholic Church would have taken a stronger stand against the dictators than was to happen in the reign of his successor, Pope Pius XII. At the age of 20 in 1958 Ivan Shearer was to convert his religious affiliation to Catholicism. I do not doubt that he would have often pondered on the passionate call for human rights made by Pope Pius XI. And the disappointing response to the call for universal human rights reflecting human dignity, for which his church and several states were partly responsible in the years that followed his birth.

Shearer lived not only through the horrors of war, death, destruction and misery; but also of the Cold War, the post-War creation of the United Nations Organisation, the International Court of Justice and other courts, tribunals and agencies. As a boy he would surely have heard about the United Nations *Charter*, the UDHR and the renaissance of international law. Given his age, outstanding school and university education and his talents, it was natural that Shearer would gravitate towards the quest for justice and the rule of law which the new global body identified as one of its critical objectives in the new world order.

II IVAN SHEARER’S PROFESSIONAL LIFE

The professional story of Shearer’s life has been recounted several times both before¹⁰ and after¹¹ his death. However, it is important that this reflection should contain at least an outline of his life’s journey.

Following local primary education, he attended St Peter’s College in Adelaide: a privileged boys’ school organised by the Church of England in Australia. He commenced his legal studies at the University of Adelaide in 1956 and graduated Bachelor of Laws in 1960. It was in these years that he embraced

⁹ *Mit Brennender Sorge*, [With Burning Concern] reported in *The Tablet* (UK), 14 April 1937, 13.

¹⁰ J.R. Crawford (2019) 40 *Adelaide Law Review* 393 and earlier published works referred to.

¹¹ Hossein Esmacili (n 1) and *Adelaide Law Review* loc cit.

the Catholic Church. He remained faithful to that denomination of Christianity to the end of his life; but he became a liberal adherent.

Soon after his university graduation, Shearer was appointed associate (clerk) to Justice [Sir] Bruce Ross, one of the six judges of the Supreme Court of South Australia. This experience was invaluable for his training. Many were later to write of his capacity and skill as a presiding judge and tribunal member in the international sphere.¹² He had watched serving judges closely and had learned from them.

He joined the Faculty of Law in the University of Adelaide as a lecturer and in 1964 he graduated Master of Laws. Whilst a teacher, he fell under the spell of Professor Daniel O'Connell, an important scholar of international law, who steered him towards the fields of state succession, land locked states and the law of the sea.¹³ O'Connell, himself a devout Catholic, was probably influential in Shearer's religious conversion. O'Connell's strong adherence to natural law theory was to influence not only Shearer but also [Professor] John Finnis, another significant graduate of the Adelaide Law School.¹⁴ In 1966, Ivan Shearer taught the young James Crawford (later a Judge at the International Court of Justice). Their friendship endured as long as Shearer lived. It did not lead to Crawford's religious conversion.

In 1968, at the age of 30, Ivan Shearer undertook the *Juris Doctor* studies at the Northwestern University in the United States of America. He did this on a scholarship awarded by the Ford Foundation.¹⁵ When this concluded, he returned to teaching law at the Adelaide Law School. In 1973 he was appointed Dean of Law in that School. However, in 1975 he moved to Sydney on his appointment as Professor of Law at the University of New South Wales. He served in that post for 17 years, during 7 of them serving as Dean of Law. In 1993 Shearer transferred again, this time to the University of Sydney, where he was appointed Challis Professor of Law and Dean from 1993 to 2003. Each

¹² P. Sands QC, Tribute (2019) 40 *Adelaide Law Review*, 401 at 402 ("A wonderful presiding arbitrator").

¹³ James Crawford (n 10) 393.

¹⁴ M. Finnis AC QC FBA, now a Professor of Law at Notre Dame Law School in the United States, went on to teach at the University of Oxford, amongst others, Neil Gorsuch, Rhodes Scholar, now a Justice of the Supreme Court of the United States of America.

¹⁵ On the so-called Martens Clause. See Andru E. Wall, Tribute (2019) 40 *Adelaide Law Review*, 399 at 400. Cf D. Stephens and M. Stubbs, 'Law, War, Ethics and Conscience: an Enduring Conundrum' (2019) 40 *Adelaide Law Review* 419 at 421. According to Professor Rüdiger Wolfrum, "he was researching the origins of *Opinio Juris Sive Necessitatis* at the time of his death". See (2019) 40 *Adelaide Law Review* 403.

of his Sydney universities later conferred on him the title of Emeritus Professor of Law.

In 1995 Shearer was appointed a Member of the Order of Australia, the rank he held to his demise. He also received honours for his concurrent part-time service in the Australian Defence Force, notably his appointment as captain in the Royal Australian Navy in 2008. In addition to appointment as an Adjunct Professor of Law by the University of South Australia in 2009, Shearer was appointed to the same rank by the University of Adelaide in 2013. He served in several overseas universities teaching law, including as visiting Fellow of All Souls College, Oxford (1978); and as the G.P. Smith Professor of Law at Indiana University (2004).

Shearer's involvement in international bodies multiplied after 2000. He served two terms as member of the United Nations Human Rights Committee, International Covenant on Civil and Political Rights. At the same time he was elected President of the Australian Branch of the International Law Association (2003-07). He also served as a judge ad hoc for Australia and New Zealand on the International Tribunal for the Law of the Sea and as an arbitrator in two appointments from the Panel of Arbitrators in 1999. He held consultative appointments received in international law both in Australia and overseas. He participated in the Advisory Boards of the International Institute on Humanitarian Law and of the Castan Centre for Human Rights, Monash University in Melbourne. He was rapporteur of many conferences and meetings on issues of international law and international humanitarian law. At the author's request, Shearer completed Professor O'Connell's book on the international law of the seas. He completed his own important text on extradition law. He also published an update of Professor J.G. Starke's excellent student text on international law.¹⁶

For all these varied, expert, painstaking functions, after concluding his academic career, Shearer was rewarded modestly with further civil honours, the Centenary Medal (2003) and the Defence Force Medal (2008). He was proud of his multiple contributions to the law and to society. But he was not one to blow his own trumpet. Seriousness, duty and service were his characteristics. Reportedly, when dying, he rejected the idea of a *Festschrift* to celebrate his scholarship and life in the law. For him, a well-planned funeral service on his demise and an academic workshop were enough. He required those organising his funeral to include in its Order of Service a prayer for the Queen's Majesty. Perhaps this was a left-over from his Anglican school days.

¹⁶ His texts were *Extradition in International Law*, (1971); *International Law of the Sea* (ed) (1982, 1984); and *Starke's International Law* (ed).

He was loyal to his country, to the Sovereign, to his family and to his friends and the idea of international law with a large and growing ambit.

The Republic of Malta appointed Shearer to its sovereign military order of Malta as an honorary knight. Australia is generally parsimonious in acknowledging the contribution of its university teachers and scholars. Yet Shearer knew his scholarly worth. I question whether the value of what he accomplished in worldly terms was properly reflected in the civil honours he received. However, I consider it most unlikely that this troubled him much. He paid a price often extracted from modest people in the scramble for worldly recognition. He lost no sleep over the parsimonious public recognition.

III SHEARER: THE SPIRITUAL MAN

We know that Ivan Shearer had a developed inner life. This was apparent in the importance that he attached to his religious beliefs, although some of his colleagues found these curious and puzzling. Many (perhaps most) intellectual people express scepticism about religion, seeing a commitment to faith as an anti-rational vice. Richard Dawkins (quoted on this point by Horst Lücke)¹⁷ expressed his well-publicised views clearly:

Religion is an insult to human dignity. With or without it, you'd have good people doing good things and evil people doing evil things. But for good people to do evil things, it takes religion.

For countless millions throughout the world, including many who are members of well-known minorities, religions have sometimes occasioned deadly calumny and hostility, fear and suffering by reason of their religious beliefs. For all that, feeling deeply about religion often indicates a strong inner life, and sometimes a search for the meaning for human existence and consciousness. There is much evidence since his death of the reflections of Shearer's life to indicate that he embraced sincerely the search for spiritual and ethical meaning.

In one of his several reflections on Shearer, James Crawford¹⁸ pulled himself away from the facile task of describing anew the well-known aspects of Shearer's professional life, to renounce that purpose.¹⁹ Instead, Shearer then being still alive and active, Crawford insisted, "I should like to focus... on Ivan himself." Once again, there were the descriptions (oft repeated) of the external *indicia* of his inner life. His love of music, wine, rural Australia and his home

¹⁷ Ibid at 409 citing Richard Dawkins, *The God Delusion* (Bantam Press, 2006, 249) quoting Steven Weinberg (physicist), *Theoretical Physicist and Nobel Laureate in Physics* (1979).

¹⁸ James Crawford (2019), 40 *Adelaide Law Review*, 393 at 394.

¹⁹ He declared that it had been adequately fulfilled in earlier accounts: (2005) 24 *Australian Year Book in International Law*, 1 in the 13 essays on different aspects of his work

city of Adelaide. His love of cats and dogs and his “wicked sense of humour” were mentioned.²⁰ But even this was not really digging as deep as might be done to reach the bedrock of Shearer’s personality.

When a greatly respected colleague, who was a friend, dies it is inevitable, where two or three of his acquaintances gather together, that their thoughts and words will stray to talk of the essential person whom they knew and whose passing they lament. They ponder on the painful reality that they will not see that friend again in bodily form. Yet they can readily conjure him up, as if he were in a nearby room whose door is locked. On the mention of his name, they recall vividly his appearance, his distinctive voice, his strong opinions, and his loyalty to special friends. It was in search of the inner man that I went for dialogue with those who had known Shearer longer and deeper than I had done. After all, a number of mutual friends had been invited to his terrace home in Paddington, Sydney (which by all accounts he loved) in the decades that we were both living in that city. Although we had dined and conversed together at restaurants in Sydney on many happy occasions, an invitation to his home had never been extended to me.

I therefore dug more deeply into James Crawford’s essays,²¹ because these revealed facets of the diamond and, with the exception of Shearer’s family and the memories of Professor Horst Lücke, they extended over the longest interval. Did Crawford’s warning that Ivan Shearer had strong likes and dislikes – many more of the former – hint at passions unknown to me?²² Did this friend’s recollection of a “gentle and generous” nature “but nonetheless with a clear sense of regular process and procedure” or his allusion to “reservations” when dealing with the “very youngest” students whom he taught or mentored suggest a classical remoteness in his personality. Indeed, specifically James Crawford asserted that “he was in the world, though distant”.²³ Was this an inherited reserve of his family, traced ultimately to German forbears? Was it something ethnic, deep in his DNA? Or simply an attempt to find words to explain an elusive element in his personality?

With my partner, Johan van Vloten, I dined after Shearer’s death with old friends of his, Ambassador Richard Broinowski and his wife, Professor Alison Broinowski. Ivan Shearer had been best man at their wedding in Adelaide long before, on 14 December 1963. They described him as a “close friend”. They insisted that he was always “discreet”. They had travelled with him in his

²⁰ Ibid 395.

²¹ Crawford (n 19) 395.

²² Crawford, loc cit, (n 19).

²³ Ibid, loc cit.

Morris 8 “woody station wagon” to many a country pub around South Australia and on to Melbourne for a footlights review at Melbourne University. Their recollection was of “great fun, punctuated regularly by Shearer’s booming laugh” to which many others also referred.²⁴ They recorded how their paths crossed many times after their years together at the University of Adelaide.

Richard Broinowski had entered a career in the Department of External Affairs in 1963; rising to important posts as head of mission. Shearer became a consultant to the International Law Division of that Department in 1991. At about the same time, their closeness was renewed when the old friends became neighbours again in Paddington in Sydney. Yet Shearer returned from Sydney to Adelaide in 2012. He gave away a large stock of accumulated wines in the course of a “house cooling party” as he called it, when quit his Paddington terrace. The Broinowskis were amongst the chief beneficiaries of his wines. In place of dinners in Paddington, the new Shearer home in North Adelaide became a regular destination for reunions. Yet carefully the Broinowskis did not discuss in plain terms the personal dimensions of his life. Still, they were clearly of the opinion that “ he never let it become a burden to him or to his delight in life”.²⁵

I went in further search for an elaboration of James Crawford’s assessment that “Ivan Shearer was naturally good natured and equable with young and old. Although about the very youngest he had some reservations.”²⁶ Some of the commentators on his work as a teacher and a leading law scholar in international law elaborated on his devoted engagement to his students for whom he became an admired and trusted mentor. Professor Donald Rothwell of the Australian National University remarked that Ivan Shearer was famous for his “caring attitude” to these charges.²⁷

These remarks took me to a conversation in Geneva where I was visiting at that time for United Nations duties. My informants included one of those former students, earlier also an Australian ambassador and now a senior official of an international body based in Geneva, Crispin Conroy was one. He elaborated on the professor’s love of cars, with the technical skill and inquisitiveness which probably derived from his father’s business, making and selling farm tractors. He was a “petrol head” as the expression goes. He displayed a love for the personal independence that cars can give to human

²⁴ Email to the author from Richard Broinowski, dated 2 December 2019.

²⁵ R. Broinowski, *ibid*.

²⁶ Crawford (n 18), 395.

²⁷ Rothwell, ‘Ivan Shearer’ (2005) 24 *Australian Year Book of International Law*, i-iv.

beings. It is a mystery for some fellow intellectuals for whom motor vehicles are not more than a means of transport from A to B. Shearer held a special love of a *Bentley* motor car that he had acquired in Sydney. He knew that its grandeur was impressive to young people. It pleased him to drive those for whom he was a mentor.²⁸ These journeys too were filled with loud laughter. According to Crispin Conroy, the students knew that he loved their company. They were happy to share it with him. The boundaries were known to, and observed, by each.

At the same dinner in Geneva, Emerita Professor Gillian Triggs, at one time herself a teacher of international law in Sydney and Melbourne and long-time spouse to another Australian Ambassador, spoke of his appointment to, and work in, the UN Human Rights Committee (HRC). Like James Crawford, Professor Triggs was aware that Shearer's expertise in international law had not earlier been specific to human rights law. This had made his appointment to the HRC by the Howard Government in 2001 "controversial". It was feared at the time, in some anxious circles, that he had been chosen in the hope that he would reflect the Howard Government's "sceptical position on international human rights".²⁹ Professor Triggs agreed with Judge Crawford's opinion that, to the contrary, Shearer had "served with distinction" and had made real contribution to the growing jurisprudence of international human rights law. This assessment derives much force from her own distinguished service as President of the Australian Human Rights Commission, when she confronted constant governmental rhetoric and sometimes vitriolic resistance. And from her new position as Deputy UN High Commissioner for Refugees. However, she spoke with evident joy of the happy dinner parties in Paddington to which, when Dean of Law in the University of Sydney, she had often been invited by Shearer, as a guest with keen common interests and a sense of humour.

I searched out another occasion for a lunchtime discussion with Sir Kenneth Keith and his wife Jocelyn when they were passing through Sydney. They too had known Shearer well when Keith and Shearer were each Professors of Law, he in Australia and Keith at the Victoria University of Wellington in New Zealand. Keith had served with Shearer as an arbitrator on the panel established under the *Law of the Sea Convention*. The point he wished to emphasise was that Shearer was an unusual expert in international law. He had a very strong *practical* bent. He knew the importance of the dynamics of tribunal hearings. In them, he displayed much more forensic talent than many of the academics later appointed to international tribunals, whose experience had generally been confined to their work as scholars. Perhaps his unforgotten experiences as a

²⁸ And not only them. He drove Phillippe Sands for a "short" tour of Adelaide lasting six and half hours.

²⁹ Crawford (n 18) 394.

clerk to Mr Justice Ross in Adelaide came to the fore when Shearer was in tribunal mode. Perhaps his later experience as a part-time member of the Administrative Appeals Tribunal in Australia helped.³⁰ Perhaps it was the decisiveness required of his Air Force and Naval commands.

Professor Keith had also moved seamlessly from a purely academic life to full-time engagement in the higher New Zealand courts. He obviously delighted in the memory of the discomfitures that Shearer's interrogation of witnesses in the *Bluefin Tuna* case had caused by the learned expert retained by Japan. Shearer was clearly a most decisive man whose appointment as a captain in the Royal Australian Navy, for his legal service in that discipline had not been made for decorative purposes alone.

A long-term colleague and friend at the Catholic University of America, Professor George Smith Jnr added to the insights into Ivan Shearer's inner being. He emphasised the depths of his spiritual feelings that warranted both a religious and secular reflection. For the religious, Professor Smith arranged for a Mass to be sung in his memory by Msgr. Charles Antonicelli, then Vicar-General of the Washington D.C. Archdiocese of the Catholic Church. Ivan Shearer's love of music (and of serious and spiritual music at that) also took him on a search for emotions and feelings that could not be put so readily into words.

It was Professor Smith who, from far away America, urged the inclusion in the Memorial Workshop, organised by the University of South Australia, of a soloist with harp, Emma Horwood. Never before, to my recollection, has a legal conference begun with musical interludes by J.S. Bach.³¹ The harpist chose a work of the great Lutheran composer, Bach. However, an irony of which neither Professors Smith nor Shearer would have been aware, the piece chosen was the background music for the service of *Angelus*, broadcast on the Sydney Catholic radio station (2SM) in the days of my youth. Cardinal Gilroy could be heard at noon and 6pm repeating the prayer to Mary "Mother of God". To my Protestant ears, this prayer always seemed unusual, and even possibly heretical. Such thoughts were going through my mind, as the harpist played. There was no selection from Shearer's beloved Wagner or Mahler. The chosen item had the merit of having been composed by an earlier and possibly the greatest German composer, favoured by Cardinal Gilroy in Sydney and I feel sure by the spirit of Shearer.

In the end, I concluded that it was not possible to dig further to find more explanations of the inner forces that motivated Shearer, the exemplary expert

³⁰ Part-time Senior Member of the Administrative Appeals Tribunal (2004-2008).

³¹ Derived from a meeting of the chorale from the J.S. Bach cantate, 'Herz und Mund und Tat und Leben', BWV 147, composed 1723.

in international law. However, I then turned to final clues from the writings of the master himself. When Challis Professor of International Law at the University of Sydney, and before he had been elected a member of the UN Human Rights Committee in 2000, Shearer wrote an explanatory note concerning the *Toonen case* then recently brought before the UN Human Rights Committee.³² Once written, the report of the memorable decision in that case was communicated to the Government of Australia by the Secretary-General of the United Nations. After that communication, the Federal Parliament enacted the *Human Rights (Sexual Conduct) Act 1974* (Cth) to give effect to the views expressed by the Committee. The substantive provisions of that *Act* were brief. They prayed in aid reliance on the powers conferred on the Federal Parliament by the external affairs power of the *Australian Constitution*.³³ They then forbade any law with respect to the sexual conduct of consenting adults acting in private involving arbitrary interference with their privacy within the meaning of the ICCPR. This was intended to invalidate the remaining provisions of Tasmanian law on so called “unnatural offences”.

A complaint by Mr Toonen and his domestic partner, Rodney Croome, had been addressed to the HRC concerning the provisions of the *Criminal Code of Tasmania*³⁴ that rendered criminal sexual acts between men, even if consensual, occurring in private and involving only adults. The Human Rights Committee found that this prohibition was a violation of the right to privacy (Art. 17) in the ICCPR. It could not be justified on the criteria of reasonableness and proportionality which therefore conditioned the term “arbitrary” as applied to the consequent interference with privacy. Specifically, the Committee concluded that no link had been demonstrated between the continued criminalisation of adult homosexual acts in private and the effective control of the spread of the newly revealed epidemic of HIV/AIDS virus.³⁵ Although Professor Shearer had published previously in the *Australian Law Journal*,³⁶ he never again published in the *Australian Law Journal* which is the general journal of record of the Australian legal profession. In particular, he never published there again on any of the communications of the UN Human

³² “United Nations Human Rights Committee: ‘The Toonen Case’” (1995) 69 *Australian Law Journal* 600. The Toonen case is reported as *Toonen v Australia* (1994) 1 *Int Hum Rts Reports* 97 (No.3) (*Toonen*). Views of the Human Rights Committee are published as part of the “Explanatory Note” by Professor Shearer (1995) 69 *Australian Law Journal* 600.

³³ *Australian Constitution* s 31(xxix).

³⁴ *Criminal Code 1933* (Tas) ss 122, 123.

³⁵ Shearer (1995) 60 *Australian Law Journal* 600.

³⁶ ‘Recognition and Enforcement of Foreign Judgments’ (1973) 47 *Australian Law Journal* 85 and ‘Extradition without Treaty’ (1974) 59 *Australian Law Journal* 16.

Rights Committee, decided during or after the period of his service on the Committee between 2000-2008.

Something had moved Ivan Shearer on this occasion to write as he did. Perhaps the general editor at the time, Justice P.W. Young, requested the contribution from him because of his high reputation as an expert in international law. A particular value of his article was that it annexed the “Views of the Human Rights Committee”.³⁷ Perhaps Shearer saw this as the opportunity to inform the general Australian legal profession about a case in which international law had enjoyed a swift and positive impact on the Australian legal system in a federal statute that was immediately enacted to give effect to the “views” of the Committee. Perhaps like most Australian scholars of “liberal” disposition, Shearer felt that the outcome was one that brought credit on the body of the United Nations system. He does not say what caused him to write his article. I never asked him. Whether Professor Shearer’s interest in the *Toonen case* was solely academic or confined to its impact in international law may never be known.

This present writer had some connections with *Toonen case*. They do not necessarily stand to his credit. Because of earlier acquaintance with Mr Toonen and Mr Croome, I was invited in the early 1990s, whilst still President of the Court of Appeal of New South Wales, a court with no relevant jurisdiction on Tasmanian law, to indicate privately whether Messrs Toonen and Croome should proceed with a communication to the UN Human Rights Committee complaining about the Tasmanian law. They indicated an inclination to exercise their right of such communication recently made possible. I advised against such communication. I did so on the basis that neither correspondent had actually been, or was being, prosecuted under the Tasmanian law. And that Australia had lodged reservations at the time of its ratification of the ICCPR, noting the nation’s federal system of government and limited constitutional powers to intervene in the laws of the constituent states of the Commonwealth,³⁸ Mr Toonen and Mr Croome sought financial contribution from me for their intended communication. This I provided.

The HRC proceeded to consider their communication. It did so immediately after Australia acceded to the *First Optional Protocol to the ICCPR*, allowing for individual communications to the UN Human Rights Committee. That right became available on 25 September 1991. They transmitted their

³⁷ Under ICCPR Art 5 para 4 quoted in *Toonen case* (n 32). The members of the UN Human Rights Committee included many distinguished jurists. One of them, Professor Rosalyn Higgins QC had, as Professor Shearer noted (ibid 601), “Recently been nominated to succeed Sir Robert Jennings as a Judge of the International Court of Justice. She was later elected judge and subsequently President of that Court.”

³⁸ Cf. Shearer (n 32), 602.

communication to the Committee a month later, on 25 December 1991. The Committee met on 31 March 1994 to consider the communication. It upheld the complaint set out in the communication. It rejected the reliance of the Tasmania Government on their democratic legislative privileges. It concluded that the state of the law affected Mr Toonen personally even though he had not been prosecuted and that he could therefore raise his objection to the law as a “victim” within the meaning of Part 1 of the *Optional Protocol*.³⁹

Soon after the federal law of 1994 was enacted, the writer was appointed a Justice of the High Court of Australia. Mr Croome commended proceedings in that court to challenge the constitutional validity of the relevant provisions of the Tasmanian *Criminal Code*, following the enactment of the federal law. The challenge was brought in that court against the constitutional validity of the federal law. That challenge was, in turn, contested by Mr Croome (then the domestic partner of Mr Toonen).⁴⁰ Because of my earlier engagement with the matter and my friendship with a party, I recused myself. I did not participate in any way in the case.⁴¹ In the outcome, the High Court of Australia unanimously rejected the Tasmanian Government’s challenge to the standing of Mr Croome in the matter.⁴² Soon afterwards, a federal Bill for the repeal of the relevant provisions of ss 122 and 123 of the *Criminal Code of Tasmania* was passed by the Legislative Council of the Parliament of Tasmania. A consequence of that step was the termination of the last criminal law provision in Australia penalising adult, private consensual homosexual acts.

The communication of views by the UN Human Rights Committee was not the first announcement of an international tribunal on the incompatibility of municipal criminal laws against sexual minorities with universal human rights law. There had been earlier such decisions under the European Convention on Human Rights.⁴³ Subsequently, there had been other court decisions; international resolutions; and United Nations initiatives.⁴⁴ However, the “Views” of the UN Human Rights Committee represented the first

³⁹ Shearer, *ibid* at 603, citing the UN Human Rights Committee.

⁴⁰ *Croome v Tasmania* (1998) 191 CLR 119.

⁴¹ There was another reason for recusal. The International Commission of Jurists (Australian Section) applied to intervene in the proceedings in support of Mr Croome. By that time, the author was the International President of that Commission.

⁴² See *Croome v Tasmania* (n 40).

⁴³ *Dudgeon v United Kingdom* (1982) 4 EHRR 149; *Norris v Ireland* (1991) 13 EHRR 196; *Modinos v Cyprus* (1994) 16 EHRR 485.

⁴⁴ M.D. Kirby, *Sexual Orientation & Gender Identity, a New Province of Law for India*, Tagore Law Lectures 2013, Universal Law Publishing, New Delhi, 2015, at 190-265 (Lecture VI, International Responses). See also *Johar v Union of India* (WP (Crl). No. 76 of 2016 (Supreme Court of India).

authoritative determination of the broad ambit of international law on this subject. It has influenced later municipal, regional and international rulings and initiatives on many fronts. Clearly, it became an important step in the direction of other reforms, including those beyond the removal of criminal laws; now including relationship recognition and relief from various forms of discrimination.

IV CONTINUING SHEARER'S LEGACY

It is not the purpose of his article to speculate on Shearer's personal interest (if any) on this topic. In the end, he remained silent, at least in public, on that matter. The views of the Church whose doctrines he had embraced at the age of 20 whilst a student of law in Adelaide could have been relevant. Had he wished to do so, Shearer could have taken a public position on this matter; but he never did. Yet his unique report to the *Australian Law Journal* on the *Toonen* case indicates that the inner man was certainly aware of the suffering occasioned to sexual minorities (sexual orientation and gender identity); the hostility towards queer people; and the discrimination, punishment and other harms recounted in the "Views" of the Human Rights Committee that affected many human beings.⁴⁵ His brief report on the case does not cast the slightest doubt on then correctness, both as a matter of legal moral reasoning and as a matter of interpreting and applying the ICCPR to the facts.

Much scientific research is now available that confirms the correctness of the HRC's views. Shearer's later acceptance of appointment to the Human Rights Committee, soon after the *Toonen* case was concluded, was an affirmation of the attitude he felt towards the Committee and specifically for its decision on that case that, uniquely, he reported to the general Australian legal community.

The usual things have followed the memorial event celebrating the life of Professor Ivan Shearer AM, RFD. A memorial lecture series has already been initiated. Scholarships in his name have already been launched. A moot court bearing his name operates in the University of South Australia. It is used in the training rounds for the Jessup Moot competition in Australia, that Shearer played such an important part in inaugurating. A chair of law in his name may be expected. Prizes bearing his name will be introduced at some of the several Law Schools where he studied and taught.

Perhaps the fact that Shearer somewhat unusually, had both close formal and informal connections with each of the three law schools in Adelaide might inspire the possibility of creating a joint centre for international law, sharing the not inconsiderable talents long evident in each of these Schools. Even if it were only created as an informal network, it could be a specifically fitting way

⁴⁵ Shearer (n 32), 606-7.

to record Shearer's contribution to the golden period of international law in Australia, towards which Adelaide and South Australia have contributed with special distinction.

It would be in harmony with these ideas if other informal links were created to contribute, in an ongoing way, to the leadership that has been given by the intellectual community of Australia and Adelaide to the ending of sexual and other discrimination that has long been a blight on both Australian and international law.⁴⁶ These laws, still in force in many other countries and especially in Australia's region are, with the laws and attitudes upholding racial discrimination, wrongs that Australian lawyers should be in the vanguard to call out and terminate. Let us therefore not forget the longstanding and distinguished contribution to the law and the world of Ivan Anthony Shearer.

⁴⁶ South Australia was the first state of Australia to repeal criminal laws against homosexuals. See M.D. Kirby, 'Dr George Ian Duncan Remembered' (2016) 37 *Adelaide Law Review* 1.