Ivan Shearer:
International Lawyer and Teacher

James Crawford[*]

Ivan Shearer was one of my first law teachers at Adelaide Law School in 1966, and has since become a close friend. It is correspondingly difficult to provide a critique of his contribution to Australian law teaching and to international law, unaffected by personal ties of affection and respect. But a review of that contribution does enable us to see something of the man, his beliefs and his influence.

Ivan Shearer's contribution has been remarkably diverse. It has extended to the law of extradition, the relation between international and Australian law, the law of the sea, human rights law in the broad sense (including refugee and immigration law), naval law and the law of war, to name only the main fields. In several of these areas he is a specialist, and yet he always gives the impression of addressing any legal issue from the perspective of a general international lawyer – indeed, a lawyer *tout court* – and in doing so, of somehow combining basic principle, established law and common sense.

Life and Work

Ivan Anthony Shearer was born in Adelaide, South Australia on 9 December 1938. He was the eldest child and only son of parents who were comfortably off; the family name is associated with a significant brand of tractor manufacturer, and there were family homes both in Adelaide and in the south-east of South Australia. He attended St Peter's Collegiate College, the leading Anglican boys' school in Adelaide, leading on to Adelaide University where he studied law between 1956 and 1959.

At that time the law degree consisted of three years of course work (mainly common law subjects but including Roman law and jurisprudence). This was followed by a part-time year which was combined with being an articled clerk; a further year of articles led to admission to the local profession which was fused, there being no separate bar.[1] The Australian legal profession was then organised very much on a state basis with little movement between states and no automatic recognition of qualifications.

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1 He was articled to the law firm of Genders Wilson Bray, of which John Bray QC was a partner.

The relatively confined horizons of 1950s Adelaide did not mean that quality could not be nurtured. This was the arena of the younger Don Dunstan,[2] Roma Mitchell,[3] John Bray[4] and others. But the efflorescence which was to be associated with their names had still to happen. The state was dominated politically by Sir Thomas Playford's Liberal Country Party coalition, still working its way through a 37-year term;[5] legally it was dominated by the Supreme Court of Sir Mellis Napier (Chief Justice 1942-1967).[6]

The Law School, like the city, was a small place.[7] The teaching staff at Adelaide was a mixture of a British expatriates, Australasians who had studied abroad and local practitioners teaching part-time. Shearer studied Roman law under Leo Blair (father of the British Prime Minister to be). He did not take international law as an undergraduate; except at Sydney and Melbourne, few undergraduates did at that time.[8] But D P O'Connell, the New Zealand-born international lawyer, was already teaching at Adelaide, having moved there in 1954 following the completion of his Cambridge doctorate.[9] He taught Shearer jurisprudence as well as federal constitutional law (the two, federal and state, being seen as largely disjoined).

In 1960 Shearer served as Judge's Associate to Mr Justice Ross of the Supreme Court. There were then six judges; no District Court, no Federal or Family Court. The work was general in character – a few murders, the odd *cause célèbre*.[10]

There is chance in most legal careers – certainly in all that venture abroad. Shearer's first chance of this kind came in 1961, when he began work for O'Connell in his continuing work on state succession (the subject of O'Connell's Cambridge thesis and first book). Shearer visited the Max Planck

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2 D Jaensch, *The Government of South Australia* (1971) esp 19-22.

3 M McGinness, 'Hon Dame Roma Mitchell AC, DBE, CVO, QC' (2000) 74 *Australian Law Journal* 332.

4 See R Mitchell and P Kelly, 'John Bray: the Man and the Judge' (1980) 7 *Adelaide Law Review* 1; C Bright, 'Dr John Bray in Context' (1980) 7 *Adelaide Law Review* 7; W Prest (ed), *A Portrait of John Bray* (1997).

5 Jaensch, above n 2, 3-4. More generally see D Jaensch (ed), *The Flinders History of South Australia: Political History* (1986) 243-338.

6 W Prest, K Round and C Fort (eds), *The Wakefield Companion to South Australian History* (2001) 373.

7 See generally V A Edgeloe, 'The Adelaide Law School, 1883-1983' (1983) 9 *Adelaide Law Review* 1, 36-7.

8 As Shearer points out, international law was a normal part of the law school curriculum until the 1920s, then faded away except at Sydney, not to be revived until the late 1950s, and then only gradually: 'The Teaching of International Law in Australian Law Schools' (1983) 9 *Adelaide Law Review* 61, 69-77.

9 See, for a brief appreciation of O'Connell, Shearer's obituary, (1981) 7 *Aust YBIL* xxiii. For O'Connell's work see J Crawford, 'The Contribution of Professor D P O'Connell to the Discipline of International Law' (1980) 51 *British Yearbook of International Law* 1.

10 Most notably the *Stuart Case* (see K S Inglis, *The Stuart Case* (1961)) and its sequel, the trial of Rohan Rivett for seditious libel and malicious defamation (ibid 279-92). Rivett was editor of *The News*, managed by the young Rupert Murdoch. Bray successfully defended Rivett.

Institute at Heidelberg, consolidating his already good German; read everything written in the nineteenth century on the subject (a great deal); attended the Hague Academy course where Ignaz Seidl-Hohenveldern was his Director of Studies; worked with Charles Rousseau, who he remembers as a sentimental man with a passion for the stories of Katharine Mansfield; and virtually wrote the *Handbook on State Succession*[11] under O'Connell's direction.

At the same time Shearer started an LLM thesis on extradition in the Commonwealth; completed in 1964, this laid the foundations for his interest in the links between international and domestic law, in Commonwealth relations and in history rather than theory as the key to understanding legal processes and institutions. It also led to a further degree, a JSD at Northwestern in 1964-5, written under Brunson McChesney, a no-nonsense lawyer who was to be Stockton Professor at the Naval War College in the late 1950s, anticipating Shearer in that respect by four decades. Shearer's SJD thesis was eventually published (in 1977) as *Extradition in International Law*.

At Adelaide Law School Shearer held a succession of positions, tutor, lecturer, senior lecturer, reader (the progress from tutor to reader in nine years). His teaching was thorough, methodical and caring – perhaps more vibrant in small groups than lectures, but he is not alone in that; and even in larger lectures, what he said stayed with the listener. In 1975 he moved to a chair in law at the University of New South Wales, whose law school in the period 1975-1990 had claims to being the best in Australia and certainly regarded itself as such. Having been Dean at Adelaide for two years he was twice Dean at UNSW (1984-7, 1988-90); in that essentially unsought capacity he quietly made a significant contribution to legal education. Somewhat to the right of the centre of gravity of his law colleagues at UNSW, Shearer was widely trusted, lending support to the view that what unites or divides law faculties is not politics but personalities. The Faculties he served – Adelaide, UNSW and Sydney, where he held the Challis Chair from 1992 until his retirement in 2004 – were generally happy places while he was there, and in significant part because he was there. He was throughout a collegial and supportive colleague.

In addition to his regular Australian teaching positions, Shearer held visiting positions at Heidelberg (1962), Oxford (1978), Thessaloniki (1985, 1992) and the Stockton Chair at Newport in 2000-1. He served successively in the RAAF Reserve (reaching the rank of Squadron Leader) before transferring to the RANR (retiring at the rank of Captain); 40 years of reserve service, with much experience gained into the bargain.

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11 *The Effect of Independence of Treaties* (1965), prepared by the ILA Committee on State Succession to Treaties and Other Governmental Obligations.

Areas of Influence

As noted, some of Shearer's earliest work in international law concerned the law of extradition – fugitive offenders, as they have been termed in the Commonwealth. Extradition is an institution of international law that lacks substantive customary prohibitions; in Shearer's view only the political offenders exception among the classical rules of extradition law is even arguably a rule of general international law. Rather, the standard principles of extradition law, based on common but by no means universal provisions of extradition treaties, are underwritten by human rights and due process considerations that nonetheless remain distinct from extradition law as set out in treaties or statutes. In short, they operate as external constraints.

Another major interest, derived in part from Shearer's work on extradition, has been the links between international law and national law. Here he helpfully avoids the doctrinaire: terms such as 'monism' and 'dualism' shed little or no light on the problem, especially from the perspective of common law systems which are (presumptively) monist on custom and dualist on treaties.[12] Rather one should infer the relationship between international law and the common law by reference to actual decisions, whether of Lord Mansfield or Lord Denning; the ebb and flow of decisional law reveals a dynamic that cannot be captured by the standard labels. As to treaties, Shearer follows O'Connell in taking a 'transformationist' approach; indeed this is the only possible one considering the distribution of constitutional authority over law-making. But he also emphasises that if the statute is ambiguous, courts will construe it in accordance with international obligations. That treaties are not part of the law of the land should not be allowed to obscure the proposition that general international law is so – and nor does it mean that treaties come like visitors from some outer juridical space.[13]

A main field of writing has been the law of the sea. A significant item among the published works for which Shearer was responsible is his edition of *O'Connell's International Law of the Sea*, which had been left unfinished on O'Connell's sudden death in 1979. This was a work of devoted memory, but it was also one of unobstrusive scholarship; the work required editing and updating on a significant scale. Volume 1 appeared in the same year as the United Nations Convention on the Law of the Sea was concluded, and the two volumes stand as a canonical statement of the codification law of the sea by a lawyer who strongly disliked codification. Shearer, with characteristic modesty and grace, suggests in the preface that 'what merits the book has are the

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12 See generally I A Shearer, 'The Relationship Between International Law and Domestic Law' in B R Opeskin and D R Rothwell (eds), *International Law and Australian Federalism* (1997) 34.

13 This nuanced approach is captured very clearly in I A Shearer, 'The Implications of Non-treaty Law-making: Customary Law and its Implications' in P Alston and M Chiam (eds), *Treaty-Making and Australia. Globalization versus Sovereignty?* (1995) 93, esp 102-3.

author's, and what faults it may contain are the editor's'.[14] But the editor had much to do and did it very well, falsifying his own disclaimer.

Of course there is as much of Shearer's own work on the law of the sea, focusing on naval warfare, on enforcement and policing, on transit rights and on jurisdiction. For example, in one piece published in 1986, he argues that the freedom of the high seas has never been as absolute as may have been presented.[15] Relevant provisions in the law of the sea treaties allow for measures of enforcement, not only in traditional contexts such as piracy but also as concerns fisheries jurisdiction or enforcement powers against marine pollution. A presumption favouring the right of states to take enforcement measures in such areas remains, notwithstanding the freedom of the seas and even though the prohibition of the abuse of those rights does not provide an effective restraint.[16]

In other work Shearer emphasises Australia's leadership role in law of the sea matters,[17] in particular as chair of the committee on territorial sea and contiguous zone. There is a distinct regional element, given such things as the importance of maritime navigation in the Asia-Pacific in the context of the uncertain customary law.[18] For law of the sea purposes Asia is full of experience as well as incident, but it is often discounted by Eurocentric commentators.[19]

An area of law and practice with which Shearer has been closely and even affectionately associated is the law of naval operations – likewise an interest of O'Connell. An example of his published work is the masterly, understated commentary on the Hague Convention XI of 1907, dealing with restrictions on the right to capture.[20] He discusses the limitations on the scope of Hague Convention XI, such as the general participation clause, but considers that these shortcomings can be mitigated by the concordant development of state practice and *opinio juris* resulting in parallel customary law. Shearer refers to practice of the United States during the Vietnam War where Vietnam was not the party to the Convention but nevertheless respected the immunity of coastal fishing vessels. He notes that article 6 modifies customary law in favour of the enemy crews of the captured vessel; the captain and crew should not be made POWs if they undertake in writing that they will not, while hostilities last, undertake any service connected with the operation of the war. On the other hand this

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14 D P O'Connell, *The International Law of the Sea* (ed Shearer, 2 vols) (vol 1, 1982) viiii.

15 I A Shearer, 'Problems of jurisdiction and law enforcement against delinquent vessels' (1986) 35 *International and Comparative Law Quarterly* 320.

16 Convention on the Law of the Sea 1982 art 300.

17 I A Shearer, 'Australia and the law of the sea' (1986) 24 *Archiv des Völkerrechts* 22.

18 I A Shearer, 'Navigation Issues in the Asia-Pacific Region' in J Crawford and D R Rothwell (eds), *The Law of the Sea in the Asian Pacific Region* (1994) 199.

19 For a particular Asian foray of his see I A Shearer, 'The Mekong Basin Agreement' (1995) 69 *Australian Law Journal* 491.

20 'Restrictions on the Right of Capture' in N Ronzitti (ed), *The Law of Naval Warfare* (1988) 183.

requirement has not been complied with, as World War II practice shows. This suggests that articles 5 and 6 are not in accordance with modern realities and that article 5 should be interpreted as prohibiting the service of neutral seamen, after they are released on parole, on any ship of the enemy, not just warships.

With regard to coastal trade, Shearer tries to locate the principles of the Convention in the case-law on this subject. The exemption of small fishing and trading boats had its origins in pre-1907 practice, and is based on the need to ensure that populations are not deprived of subsistence fishing and that local trade is not endangered. He notes, however, that Britain accepted this restriction only as a matter of comity. Realistic as well as respectful of existing institutions, Shearer concludes that the Convention still retains some utility, despite its age.

With his interests and roles (not least on the United Nations Human Rights Committee) Shearer could not have avoided taking positions on such key issues as the balance between human rights and suppression of terrorism. In his contribution to the *festschrift* in honour of Alice Tay – late Challis Professor of Jurisprudence and a Sydney Faculty colleague for whom he retained throughout a bemused respect – he is again clear and balanced.[21] Despite President G W Bush, war is not waged on abstractions:

> To invoke the term "war" does not in itself give the United States, or any other country, belligerent rights to attack terrorists wherever they may be found. The relevant rights must be founded on both international law and national laws as measures of prevention and enforcement.[22]

And despite the pressure to enlarge the scope of executive discretion to deal with suspected terrorists, the law must be allowed a role:

> it is an unsatisfactory state of affairs to allow so much discretion to reside in the executive and so little scope for inquiry by the extradition court. It is much harder for a government to resist pressures from other governments when they have a discretion than if all the essential powers are held by an independent judiciary.[23]

This has been a point-source survey rather than a comprehensive account. Other contributions to this volume consider some of Shearer's work in more detail. But after all one is left with the impression of thorough good sense, of an often intuitive understanding of legal structure associated with a robust realism, but at the same time an unobtrusive sense of law as the pursuit of an ideal of order.

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21 I A Shearer, 'Human Rights in an Age of Terrorism' in G Doeker-Mach and K A Ziegert (eds), *Law, Legal Culture and Politics in the Twenty First Century* (2004) 89.

22 Ibid.

23 Ibid 94, referring with approval to the comments of Lord Scott in *In re Al-Fawwaz* [2002] 1 AC 556 [121]. See also the analysis by Aughterson in this volume.

Professional Service

Turning from his contributions to the literature of international law to Shearer's contribution to public service, this has been cosmopolitan as much as international – continuous in its aims, diverse in its manifestations. He was an Adviser on treaty succession to the government of the Kingdom of Lesotho under the United Nations Development Programme in 1971-72 and again in 1974, vastly enjoying the experience and the luminous quality of the light in that mountainous landlocked country. He also represented Lesotho at the Third United Nations Conference on the Law of the Sea in Caracas in 1974; but feels that the provisions in the 1982 Convention apparently benefiting land-locked and geographically disadvantaged countries are optical rather than real. Much later (in 1991) he spent a year in residence with the Australian Department of Foreign Affairs and Trade, being involved in a range of current problems.

He was nominated to replace Justice Elizabeth Evatt as member of the United Nations Human Rights Committee, not without controversy as his international profile and reputation had been made in other fields than human rights. But in the event he has proved (as anyone knowing him would have predicted) a most effective member of the Committee, collegial, able to get on with colleagues, clear-headed and constructive. He was comfortably reelected for a second term in 2004. Experience on the Committee has left him uncertain, if not sceptical, as to whether the Committee can do anything to change patterns of abuse. But he feels that the Committee's practice gives encouragement and support to those fighting domestically for basic rights; the real heroes in the struggle are local heroes, but their support at the international level justifies institutions such as the Committee, weak and under-resourced as they are.

Shearer acted as consultant on treaty succession to the governments of Nauru (1979) and Kiribati (1981), and later engaged in a number of technical assistance assignments in South East Asia.

Within Australia he has been a leader of the international law profession. For many years a loyal member of the International Law Association (Australian Branch), Shearer became its President in 2003. He has served on a range of international committees for the ILA, including as rapporteur. He has held office on the Australian and New Zealand Society of International Law, the Australian Institute of International Affairs and the Australian Red Cross Society.

As a member of the Australian bar he has appeared as counsel in a number of cases, especially in extradition matters.[24]

Shearer is a Member of the Panel of Arbitrators maintained by the Permanent Court of Arbitration, and also of the Australian National Group

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24 *Riley v Commonwealth* (1985) 159 CLR 1; *Schlieske v Federal Republic of Germany (No 1)* (1987) 71 ALR 215; *Schlieske v Federal Republic of Germany (No 2)* (1988) 84 ALR 719; *Wiest v DPP* (1988) 23 FCR 472; *Sanko Steamship Co Ltd v Sumitomo Australia Ltd* (1995) 183 CLR 628; *Attorney-General for the Commonwealth v Tse Chu-Fai* (1998) 153 ALR 128.

which nominates persons for election to the International Court of Justice. He is also on the list of arbitrators under the United Nations Convention on the Law of the Sea of 1982. He has exercised judicial functions three times under the Convention.

First, he was the judge *ad hoc* for Australia and New Zealand in the *Southern Bluefin Tuna Cases* brought by those two countries against Japan at a low point for cooperation in fisheries matters. Australia and New Zealand were in the same interest in the cases; it was therefore agreed that Australia would nominate the *ad hoc* judge for the provisional measures phase before the International Tribunal for the Law of the Sea (ITLOS) while New Zealand would nominate the party-appointed arbitrator for the Annex VII Tribunal, if the case went so far. The provisional measures stage was particularly important and went spectacularly well for the claimants. The Tribunal by an overwhelming majority upheld its *prima facie* jurisdiction and decided on strong provisional measures to protect what the claimants saw as over-fishing of a still depleted and extremely valuable species. Being in the majority, Shearer could easily have chosen to stay quiet. But in fact he delivered a sensible and measured separate opinion explaining the reasoning underlying the view that *prima facie* jurisdiction existed and why provisional measures were justified.[25] Indeed, he would have supported stronger measures, within the limits of what the parties had sought.[26] Most judgments of *ad hoc* judges are immediately discarded as partisan but this one is frequently read and quite often cited. It shows a measure of what was lost when, for reasons entirely outside Shearer's control, he failed to be elected to the International Tribunal, on the nomination of Australia, as a permanent judge.[27]

Unfortunately when the case reached the Annex VII tribunal – Japan having refused an offer to refer it to ITLOS – it was rather surprisingly held that the Tribunal lacked jurisdiction under the 1982 Convention because a provision of the 1993 Southern Blue-fin Tuna Convention provided that disputes under it could only be referred to third-party settlement with the consent of both parties. Sir Kenneth Keith, the Australian and New Zealand party-appointed arbitrator, dissented.[28]

Second, Shearer was also the Australian judge *ad hoc* in prompt release proceedings brought by Russia against Australia in the *Volga Case*.[29] The case concerned illegal fishing of Patagonian toothfish within the Australian exclusive economic zone in the Southern Ocean; the Tribunal reduced the amount of the bond to the value of the ship at the time of its detention; since it

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25 (1999) 117 ILR 148, 181-9.

26 In particular he discusses the question whether the *ultra petita* principle applies to provisional measures, concluding by reference to art 290(3) of the 1982 Convention that it does: ibid, 187-9.

27 Unfortunately political capital has to be expended even on elections for international judicial office; at the time, all available capital had been used up in an unsuccessful Australian campaign for a two-year Security Council seat.

28 (2000) 119 ILR 508, 557-65.

29 (2002) 126 ILR 433.

had further deteriorated while under arrest this effectively ensured that it would not be released. From the Australian point of view, perhaps the most important issue was that the value of the catch not be taken into account in setting the bond and in this it was successful. Judge *ad hoc* Shearer dissented from the Tribunal's decision to reduce the bond set; in his view, the claim for prompt release should have been dismissed: the case concerned 'grave allegations of illegal fishing in a context of the protection of endangered fish stocks in a remote and inhospitable part of the seas'; furthermore no attempt had been made by the claimant state to refute the allegations.[30] Judge *ad hoc* Shearer concluded by calling for a moderate progressive interpretation of the 1982 Convention in light of changed circumstances,[31] a view which would have been welcomed by O'Connell himself, who was no devotee of literal interpretation.

The third occasion Shearer acted as an arbitrator was as one of the independent members of the Annex VII Tribunal in the *Land Reclamation Case* between Malaysia and Singapore. There ITLOS had ordered provisional measures including a joint scientific study;[32] the Annex VII Tribunal's own consideration of the case was stayed pending the outcome of the study. In the event the parties reached a satisfactory settlement shortly after the first formal meeting of the Tribunal, and the case was withdrawn. What was good for the parties was perhaps disappointing in terms of the development of the law – but it is to be hoped that Shearer will continue to act as one of the small group of trusted international arbitrators in law of the sea and other matters.

Conclusion

I am conscious that this is only a partial image of a whole man – a man, moreover, whose legal career continues as it has been, national[33] and international, domestic and foreign, naval and civil, forensic and academic. Ivan Shearer has contributed substantially to the range of values and institutions that reflect contemporary international law, from human rights to the law of the sea to international criminal law. He has contributed to an understanding of the impacts of international law on Australian law and Australian federalism. He has also contributed substantially to our University law schools, holding senior positions in three of them. At the same time Shearer has been open to friendship, to give help when it is needed, but help without intrusiveness. He has continued to take an active interest in the careers of generations of his students. Overall he has been a serious influence for good. He has made a balanced and sane contribution to Australian public life and to international law within Australia and on a broader stage.

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30 Ibid 482.
31 Ibid 486.
32 (2003) 126 ILR 487.
33 He has become a part-time member of the Administrative Appeals Tribunal, specialising in immigration matters.

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