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Artefacts of Empire and Geography: *The Australian Year Book of International Law* and Australia's Place in the International Community*

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I Introduction

'Australia remains remote, and it can be difficult to obtain the full range of information, on an up-to-date basis, as to what is happening in international affairs' James Crawford, *AYBIL* Vol 10 (1981-3).¹

'by 1879 the territory of the Colony of Queensland, and subsequently the territory of Australia, was extended as far northwards as was possible without Queensland attempting to annex part of the Island of Papua-New Guinea itself. What had been established was a situation ... from which at low tide it was possible for the inhabitants of the Colony of Queensland to wade across a shallow channel to mainland Papua-New Guinea and vice versa.' W. Ryan & M.W.D. White, *AYBIL* Vol 7 (1976-7).²

A yearbook of international law does more than just publish scholarship, it acts as a record of the practice of a state and provides scholarly commentary on that practice. In this, the

Australian Year Book of International Law (AYBIL) conforms to type.³ In this chapter, we join with

* This chapter was written and researched on the unceded lands of the Gadigal, Dharawal, and Kulin peoples. The authors acknowledge that Australia always was, always will be, Aboriginal land. We are grateful to the editors for the invitation to contribute to this volume and to participants at the volume workshop for engagement with the draft.

¹ James Crawford, 'Teaching and Research in International Law in Australia'. *Australian Year Book of International Law* 10 (1981-83) 176-201, 195. For the remaining footnotes, we refer to the Year Book as *AYBIL*.

² W. Ryan & M.W.D. White, 'The Torres Strait Treaty'. *AYBIL* 7 (1976-1977) 87-113, 87.

³ J.G. Starke, 'Preface'. *AYBIL* 1 (1965), 3. Later editors have also noted that one role of the *AYBIL* was to help 'carve out' a small state's distinctive international law contribution and approach, and doing so, helped to 'sustain' a yearbook. See Donald Rothwell and Kim Rubenstein, 'Introduction: Australia and international law during the Howard years'. *AYBIL* 27 (2008) 1-10, 3.

others writing on the journals and yearbooks of international law. We extricate these publications from the background of knowledge production, the assumed landscape of international law as a discipline and profession, and investigate their role, purpose, and impact both within, and beyond, their stated aims.⁴ While much of this newer scholarship is guided by social science methodologies and data analysis tools,⁵ we have taken a different approach. Our analysis of the AYBIL is guided by first, our familiarity with its reputation, publication practices, scope, and tone, gained through our status as international law scholars and teachers in Australia. We are general readers of the AYBIL, attentive to its practice section for research and teaching, and regularly encounter its authors and editors in our professional lives. Second, the chapter relies on a catalogue of the AYBIL's volumes since its launch. This involved compiling the contents of each volume, identifying authors, editors, advisory board members and other personnel associated with the AYBIL, as well as their institutional affiliations.⁶ Third, we have read more deeply into the AYBIL's archive, including its scholarly articles, editorials, named lectures, and sections on

⁴ On international law journals and the production of knowledge see, e.g., Bianca Anderson and Kathleen Claussen 'Foreword'. *Virginia Journal of International Law* 64(2) [2024] 349-56; Kathleen Claussen 'The world of international and comparative law journals'. *Georgetown Journal of International Law* 55 (2024) 61-79. Ignacio de la Rasilla, 'A very short history of international law journals (1869-2018)'. *European Journal of International Law* 29 (2018) 137; David J Bederman, 'Appraising a century of legal scholarship in the American Journal of International Law'. *American Journal of International Law* 100 (2006) 20; David J. Bederman and Jonathan C. Hamilton, 'Agents of international discourse: A conspectus on the future of international Law Journals'. *Virginia Journal of International Law* 40 (2000) 817; Luiza Leao Soares Pereira and Niccolo Ridi, 'Mapping the "invisible college of international law" through obituaries'. *Leiden Journal of International Law* 34(1) (2021) 69-71; James Thuo Gathii, 'Studying race in international law scholarship using a social science approach'. *Chinese Journal of International Law* 22 (2021) 71-86. The recently launched Consortium for the Study and Analysis of International Law Scholarship website includes a useful bibliography:

<https://coursesites.georgetown.domains/sails/>. With respect to yearbooks specifically, see the *Netherlands Yearbook of International Law* 50 (2019); The AYBIL has been explicitly discussed by the then and still current editor Don Rothwell, 'AYBIL'. *Netherlands Yearbook of International Law* 50 (2019) 75-84, and addressed briefly by James Hathaway in AYBIL 2008, in defence of the value of year books for their unique and 'vital' role in providing an authoritative recapitulation of state practice toward evidencing custom and general principles of international law', Hathaway, 'Value of year books', ii.

⁵ See, e.g., Claussen, 'World of international and comparative journals'; Soares Pereira and Ridi 'Mapping the "Invisible college"'.
⁶ Our thanks to Joey Cook for his excellent research assistance in preparing this catalogue.

Australian practice. In doing so, we have identified certain themes, which reinforce our understanding of the AYBIL as an artefact of Australian international law.⁷

In this chapter, we illuminate a particular story that the AYBIL tells about the Australian state's assumed and desired place in the international community and the global legal and political order, through a review of its internal elements - or organisational architecture – since its founding. This reveals the themes emerging from its published content, set within the social and political context in which it was launched, and in which it continues to publish. From this the AYBIL emerges as an artefact of Australian international legal life. This artefact helps to explain how Australia can understand itself as 'remote' and yet still be within wading distance of its neighbours,⁸ as the quotes that open this chapter illustrate. In fact, the story that emerges from the AYBIL is one that is underpinned by Australia's relationship with empire and Australian ambivalence to the world beyond its borders. Markers of Australia's history as a dominion of the British empire, as a sub-imperial power and as socially, intellectually, and diplomatically, oriented towards other settler colonial and western nations are evident throughout. This orientation is the – mostly unstated and unexamined – assumption that underlies the debates unfolding within the pages of the AYBIL, who contributes to them, and how they relate to Australia's international legal practice. This context also helps explain the tensions between the AYBIL's particular role as

⁷ In this, we build on previous work on the artefact, objects, and archive of international law. See Madelaine Chiam, 'Tom Barker's "To Arms!" poster: internationalism and resistance in First World War Australia'. *London Review of International Law* 5(1) (2017) 125-152; Madelaine Chiam et al., 'History, Anthropology and the Archive of International Law'. *London Review of International Law* (2017) 5(1) 3-5; Jessie Hohmann 'The Lives of Objects', in Jessie Hohmann and Daniel Joyce (eds.), *International Law's Objects* (Oxford: Oxford University Press 2018) 30-46; Jessie Hohmann, 'The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising, and Resisting Colonial Worlds'. *London Review of International Law* 5(3) (2017) 371-396; Jessie Hohmann and Christine Schwöbel-Patel, 'A monument to E.G. Wakefield: New and Historical Materialist Dialogues for a Posthuman International Law', in Matilda Arvidsson and Emily Jones (eds.), *International Law and Posthuman Theory* (Abingdon: Routledge 2024) 139-160.

⁸ The Torres Strait Treaty, the subject of Ryan and White's article quoted at the outset, resulted in a shift in boundaries, but Australia's mainland remains only 150km from New Guinea.

publication of record on Australian practice, and the critique of that practice within its pages, as well as the broader structures that constrain the AYBIL as a whole.

In part II, we set out the legal, social, and political context of Australia's emergence as a sovereign state, one capable of its own 'Australian practice' in international law. In the sections that follow, we look at two distinct aspects of Australia's interactions with the international legal system illustrated by the AYBIL, first by laying them out for the reader, and then by providing our observations. Given that very little attention has been paid to the history of AYBIL in the scholarship to date, we see value in bringing to light some of the key players and motivations of the publication, before applying our analytical frames to them. Part III looks to the AYBIL's structuring elements – its host institutions, its editors, publishers, and authors – to tell a story of the institutions and individuals who helped to construct Australian understandings of international law. In part IV, the AYBIL's contents provide a contemporary record of the issues of interest to international lawyers and their audiences in Australia, and reveal the ways in which international law issues were perceived at different points in Australian history. Throughout, we see an Australia that imagines itself 'in' Asia but not of it; that understands its place in international affairs as unfolding along similar trajectories to other Western, Anglo and European powers (with particular links to the United Kingdom as its former imperial power) and where international legal scholarly networks replicate themselves along those lines.

II Social, Legal and Political Context for the Australian Year Book of International Law

Jan Klabbbers has described the dual function of year books as making them 'both author and lead character' in the story of a national community.⁹ However, Australia, like other settler

⁹ Jan Klabbbers, 'On yearbooks'. *Netherlands Yearbook of International Law* 50 (2019) 45, 49.

colonies of the British Empire, did not set the scene, and for a long time was not the director of its story.

The modern state of Australia was established on 1 January 1901. It began as the (British) Dominion of Australia. British dominions did not have international legal personality, although they were able to deploy some powers of an independent state.¹⁰ For the first forty years of its existence, dominion Australia exercised many elements of self-government, but it did not formally exercise its own diplomatic relations, leaving management of its foreign affairs to the United Kingdom.¹¹ World War II provided an inflection point for Australia, as it did for so many places.¹² It was during the war that Australia formally severed ties between the Australian government and U.K. Parliament,¹³ which in turn allowed for the post-war development of an ‘Australian’ approach to foreign policy and diplomacy. Writing in 1951, Wolfgang Friedmann (professor of public law at Melbourne Law School between 1947-50) noted that an ‘Australian Foreign Policy’ was ‘a very recent growth, as sudden and as important as the profound changes in the world situation which have made it necessary’.¹⁴ By 1965, when the AYBIL was founded, Australia had embarked on its first international military operation without Great Britain, joining the United States in its war in Vietnam. Australia’s support for the U.S. in Vietnam consolidated the shift of Australia’s ‘great power’ alliance from Britain to the U.S. and forced a (partial) turning of Australian diplomacy

¹⁰ Lassa Oppenheim, *International Law: A Treatise* (New York and Bombay): Longmans 1912) vol 1, 110. See also M.H.M. Kidwai, ‘International personality and the British dominions: evolution and accomplishment’, *University of Queensland Law Journal* 9 (1975-76) 76; DP O’Connell, ‘The evolution of Australia’s international personality’, in D.P. O’Connell (ed.), *International Law in Australia* (Sydney: Lawbook, 1965) 1; Anne Twomey, ‘International law and the executive’, in Brian R. Opeskin and Donald R. Rothwell (eds.), *International Law and Australian Federalism* (Melbourne: Melbourne University Press 1997) 69; Leslie Zines, ‘The growth of Australian nationhood and its effect on the powers of the commonwealth’, in Leslie Zines (ed.), *Commentaries on the Australian Constitution* (Sydney: Butterworths 1977) 1.

¹¹ See, e.g., E.M. Andrews, ‘Patterns in Australian foreign policy’, *Australian Outlook* 26 (1972) 31.

¹² Prime Minister John Curtin address, 1 January 1942: ‘Without any inhibitions of any kind, I make it clear that Australia looks to American, free of any pangs to our traditional links or kinship with the United Kingdom.’

¹³ Australia, Statute of Westminster Adoption Act 1942 (Cth).

¹⁴ W. Friedmann, ‘Australian foreign policy’. *International Affairs* 27 (1951) 312-319. See also <https://mlslegalscholarshipdatabase.law.unimelb.edu.au/biogs/3132b.htm>.

towards Asia.¹⁵ In 1970, the Department of External Affairs, established in 1935 and given a name that was consistent with its dominion-derived constitutional powers, changed its name to the Australian Department of Foreign Affairs. This name change was a ‘small proclamation of independence’ from the U.K. and signaled a significant shift in how Australian governments and people were re-framing their place in the world.¹⁶

The relative narrowness of Australian interest in global matters before the 1960s was also reflected in universities and specialist government departments. International legal expertise in this period was structured around a handful of powerful men, with little scope for contributions from outside this circle.¹⁷ Between 1945 and 1960, few Australian universities taught international law and there were only a small number of international law scholars, most notably Julius Stone, Challis Chair of International Law and Jurisprudence at the University of Sydney (1942 to 1973), and D.P. O’Connell, reader then professor at the University of Adelaide (1953 to 1972).¹⁸ Advice to government on international law was dominated by Kenneth Bailey, Commonwealth Solicitor-General from 1946 to 1964.¹⁹ A number of Australian men also held significant roles in both Australian and international institutions.²⁰ H.V. Evatt is a towering figure in the history of Australian

¹⁵ See e.g., Department of Foreign Affairs and Trade, Australia and the United Kingdom, 1960-1975, 27 *Documents on Australian Foreign Policy* available at <https://www.dfat.gov.au/about-us/publications/historical-documents/volume-27/Pages/default>.

¹⁶ Graeme Dobell, ‘Fifty years of the Department of Foreign Affairs’, *The Strategist*, Australian Strategic Policy Institute, 23 November 2020. <https://www.aspistrategist.org.au/fifty-years-of-the-department-of-foreign-affairs/>

¹⁷ See James Crawford, “‘Dreamers of the Day’: Australia and the International Court of Justice”. *Melbourne Journal of International Law* 14 (2013) 520-549. On the exclusive practices of the Australian legal profession as a whole, and the profession’s resulting narrowness, see Sara Dehm ‘Legal Exclusions: Émigré Lawyers, Admission to Legal Practice and the Cultural Transformation of the Australian Legal Profession’. *Federal Law Review* 49(3) (2021) 327-351.

¹⁸ Crawford, ‘Teaching and Research’ 176-201; Ivan A Shearer, ‘The Teaching of International Law in Australian Law Schools’. *Adelaide Law Review* 9(1) (1983) 61-78.

¹⁹ Shearer, ‘The Teaching of International Law’, 75; Jack E. Richardson, ‘Sir Kenneth Hamilton Bailey (1898-1972)’. *Australian Dictionary of Biography* 13 (1993). available at <https://adb.anu.edu.au/biography/bailey-sir-kenneth-hamilton-9404>.

²⁰ Crawford, “‘Dreamers of the Day’”, 520.

international law because of roles as Minister for External Affairs during the Second World War, his influence in drafting the U.N. Charter, and subsequent extensive work at the U.N., including as first President of the Atomic Energy Commission.²¹ Percy Spender, judge on the International Court of Justice from 1958 to 1967, and president from 1964-1967, served as a member of a number of Australian governments before his judicial appointment, including time as Minister for External Territories (which included Australia's mandate territories of Nauru and New Guinea).²²

Since the 1960s, there has been enormous growth in the number and range of international law subjects and courses taught at Australian law schools, paralleled by significant developments in international law research within Australia.²³ Government departments too have significantly expanded their international legal expertise, with the introduction of an Office of International Law within the Attorney-General's Department (AGD) in 1989, and growth in the office of the Legal Adviser within the Department of Foreign Affairs and Trade (DFAT).²⁴ The establishment of the AYBIL in the mid-1960s was part of the broader push from Australian political elites to promote Australian experiences and expertise to audiences within and outside Australia. It provides a record of the matters these elites valued and sought to project, and we turn to look in more detail at its establishment and its organisation in the next section.

²¹ G. C. Bolton, 'Herbert Vere (Bert) Evatt (1894–1965)'. *Australian Dictionary of Biography* 14 (1996), available at <https://adb.anu.edu.au/biography/evatt-herbert-vere-bert-10131/text17885>. For an account of Evatt, and the Charter, see, e.g. Timothy L.H. McCormack, 'HV Evatt at San Francisco: A Lasting Contribution to International Law'. *AYBIL* 13 (1990-1991) 89.

²² David Lowe, 'Sir Percy Claude Spender (1897-1985)'. *Australian Dictionary of Biography* 18 (2012), available at <https://adb.anu.edu.au/biography/spender-sir-percy-claude-15475>.

²³ See Crawford, 'Teaching and Research', 176-201; Shearer, 'The Teaching of International Law', 61; Irene Baghoomians, Emily Crawford and Jacqueline Mowbray, 'The Teaching of Public International Law in Australian Law Schools: 2021 and Beyond'. *Adelaide Law Review* 43(1) (2022) 7-35. The development of the AYBIL alongside growth in international law teaching mirrors insights into journals in other regions. Contesse, e.g., shows that growth in international law journals in Latin America is closely linked to trends in legal education in the region. See J Contesse, 'International Law Scholarship in Latin American'. *Virginia Journal of International Law* 64 (2024) 357-401.

²⁴ See James Crawford, 'International law and the public service'. *AYBIL* 35 (2017) 17-40.

III The Structuring Elements of the Australian Year Book of International Law

The Founding of the AYBIL, its Institutional Affiliations and Editors

The AYBIL was founded by J.G. Starke, while based at the Institute of Advanced Studies at the Australian National University (ANU) in Canberra. Starke had worked at the Secretariat of the League of Nations, performed civilian service during the Second World War, and moved to the ANU after 20 years as a barrister.²⁵ Starke had wide-ranging legal experience but his ‘greatest love’, was international law.²⁶ At the time of the AYBIL’s founding, there were no other Australian periodicals that focused on international law. Two other publications from the same period, D.P. O’Connell’s *International Law* and his edited collection, *International Law in Australia*, combined with the creation of AYBIL to announce Australia’s ‘arrival’ as an independent participant in international legal scholarship.²⁷

Starke was editor for two years. The editorship then passed between a number of hands, before returning to the ANU, under the editorship of Professor DW (Don) Greig from volume 6. One of the most notable aspects of the AYBIL is the long tenure of Greig as editor, spanning almost the whole life of the year book. From 1967 (with a two-year interruption) until 1999, he served as lead editor, and he remains editor emeritus at the time of writing. When Greig took over from Starke in 1967, a small editorial board was established. Board members from 1967 until 1988 consisted of the following, with up to four people serving at any one time: J.G. Starke, R Burnett, J.P.L Fonteyne

²⁵ Michael Kirby, ‘Retirement of JG Starke QC: sixth editor of the Australian Law Journal’. *The Australian Law Journal* 66 (1992) 111-115.

²⁶ Kirby, ‘Retirement of JG Starke’, 113.

²⁷ D.P. O’Connell, *International Law* (London: Stevens & Sons 1965); D.P. O’Connell, *International Law in Australia*. The AYBIL is no longer the only journal dedicated to international law in Australia. The Australian Branch of the International Law Association has published *Australian International Law News*, now the *Australian International Law Journal*, since 1983. The *Melbourne Journal of International Law*, housed at Melbourne Law School, has been published since 2000. There are also a number of comparative law journals, and subject-specific international law journals such as the *Macquarie Journal of International and Comparative Environmental Law*.

(ANU), F.A Trindade, H.B. Connell (Monash); WR Edeson (Birmingham/ANU); H Burmester (ANU/AGD). Conforming to a familiar mold in international law scholarship, the board was closely tied to government (AGD and later DFAT).

The first three years of AYBIL (1965-1967) reflected an energetic start, with volumes running to several hundred pages of articles, book reviews, and entries on Australian practice. From 1968, the AYBIL published an issue that spanned between two to three years, evidently besieged by logistical difficulties. In the preface to the 1970-1973 volume, which ran to a modest 160 pages, the editor (Robert Miller) wrote that publication of the fifth AYBIL ‘has been beset with difficulties’²⁸, and, upon returning to his editorship in the 1974 volume, Grieg wrote with less reticence that ‘[t]he fact that the former commercial publishers were unwilling to continue to produce the year book placed its whole future in doubt.’²⁹ It was at this point that the ANU assumed responsibility for the expense of publishing AYBIL, cementing an already strong relationship and the fact that editors would be affiliated with the ANU.³⁰ It was only in 1992 that the AYBIL was published annually again.

From the beginning, the editors and editorial board members had significant educational and cultural links with Britain and Western Europe. Grieg had emigrated to Australia from the U.K.,³¹ Starke and Trindade had studied at Oxford (Starke as a Rhodes Scholar) and Trindade also in Strasbourg, and Starke had worked at the League of Nations in Geneva.³² Trindade was educated at

²⁸ R. H. Miller, ‘Preface’. *AYBIL* 5 (1970-73) vi, vi. Miller writes that this related to low sales of previous volumes, but the fact that the editors were able to publish only a much smaller volume, even across three years, must have factored into those difficulties.

²⁹ D.W. Grieg, ‘Preface’. *AYBIL* 6 (1974-5) vii-x, vii.

³⁰ *Ibid.*

³¹ Hilary Charlesworth and Robert McCorquodale ‘Introduction’. *AYBIL* 20 (1999) i, i. In addition, Burmester was born in the U.K. in 1949, see ‘Henry Clifford Burmester’, *People Australia*, available at <https://peopleaustralia.anu.edu.au/biography/burmester-henry-clifford-20392>.

³² On Starke, see Michael Kirby. ‘Obituary’. *AYBIL* 80 (2006) i-v; on Trindade, see ‘Tribute to Professor Francis Trindade’. *Monash University Law Review* 35(2) (2009) 190.

Karachi and had commenced his career with a short period at the University of Singapore.³³ Edeson was appointed at both Birmingham and the ANU.³⁴

In 1988 Philip Alston joined Grieg as editor until 1995 when Hilary Charlesworth replaced him, serving as editor with Grieg until 1999. This decade saw the AYBIL spearheaded by two Australian international lawyers who have since established global reputations and careers at the heights of the international legal profession. The editorial board was also expanded during this time. Gender diversity³⁵ and a modicum of further institutional diversity was achieved – editors and editorial board members were, and continue to be, associated with institutions in Canada and the U.K. as well as established Australian universities, government and the military.³⁶

2017 saw an important development when an advisory board was established. While previously almost all editors and editorial board members were affiliated with Australian institutions, the advisory board included international law experts based at universities in Western Europe, the U.K., the U.S., Aotearoa/NZ and at the ICC and ICJ.³⁷ Only one advisory board member is located in Asia (Singapore).³⁸ Thus, although the advisory board positions the AYBIL as a more

³³ 'Tribute to Trindade', 190.

³⁴ 'Professor William "Bill" Ross Edeson (1942-2021)'. *The International Journal of Marine and Coastal Law* 37 (2022) 1.

³⁵ Cristine Chinkin and Hilary Charlesworth became Editorial board members in 1988-9 and Judith Gardam joined in 1990-91. The assistant editors, a role established in the 1991 volume, have all been women until 2021.

³⁶ Judith Gardam (affiliated with University of Calgary), Ryszard Piotrowicz (affiliated with University of South Australia and University of London). With Greig's retirement as acting editor in 1999, Robert McCorquodale joined Charlesworth as editor (until 2000). Andrew Byrnes replaced McCorquodale, and he and Charlesworth led the AYBIL until 2006. In that year, Penelope Mathew joined the editorial team for two years, joined by Kim Rubenstein in 2007. Rubenstein was joined by Don Rothwell in 2009. Rothwell continues to serve as editor at the time of writing. Sarah Heathcote (2013-14) and Matthew Zagor (2014-17) were joined by Imogen Saunders in 2018, and Esme Shirlow in 2019. Rothwell, Saunders and Shirlow are the current editors.

³⁷ For, e.g., the initial advisory board members were: Phillip Alston (NYU), Christine Chinkin (LSE), Laurence Boisson de Chazournes (Geneva), Theodore Christakis (Grenoble), Helen Brady (ICC), Katrina Coper (Australian Embassy, Washington U.S.), Bill Campbell (Office of International Law/AGD Australia), James Crawford (ICJ), Hilary Charlesworth (Melbourne University), Karen Scott (Canterbury NZ), Simon Chesterman (NU Singapore), and Gerry Simpson (LSE).

³⁸ Simon Chesterman (NU Singapore).

global-facing publication, it remains a globe dominated by Western Europe, the former British Dominions, and the U.S.

The institutional attachment of the AYBIL to the ANU has had a number of consequences. First, the AYBIL has flourished alongside the gathering of international law scholars at the ANU Faculty of Law.³⁹ Second, basing the AYBIL in Canberra has allowed the editors ongoing personal contact with officers of AGD and DFAT responsible for preparing the sections on Australian practice. While Australians now take for granted their ability to communicate easily with colleagues in other places, physical access to government officials and resources was vital in times before email and the internet, and the ability to build personal contacts is eased by proximity. Finally, the connection of the AYBIL with ANU, and in particular with the Centre for International and Public Law (CIPL), facilitated a connection of the AYBIL with the modern incarnation of the Australian and New Zealand Society of International Law (ANZSIL), the key professional association for international law scholars in Australia and New Zealand founded in 1992 through CIPL.⁴⁰ Indeed, for a period in the late 1990s/early 2000s, Charlesworth was director of CIPL, editor of AYBIL and president of ANZSIL.

Contributing Authors

AYBIL has served as a platform for academic international lawyers, government lawyers (including military lawyers), and lawyers working for international organisations. Of those with university affiliations, the ANU and Sydney University have dominated, with Monash being a source

³⁹ CIPL at the ANU has been a lively locus for international legal research in Australia since its establishment in 1990, see ANU College of Law website, 'Centre for International and Public Law: Twentieth Anniversary', 2010. chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://law.anu.edu.au/sites/all/files/media/documents/events/cipl_booklet_anniversarybooklet_web.pdf

⁴⁰ See Australian and New Zealand Society of International Law, available at <https://anzsil.org.au/>.

of numerous articles in the early years. Those contributing from overseas have been concentrated in western Europe, particularly the U.K. There are the occasional contributions by authors at what would now be called ‘Global South’ institutions.⁴¹ While the characterization of these as ‘Global South’ authors is complicated by unfolding and incomplete decolonisation and persisting imperial structures in international law teaching and research, perhaps even more strikingly, only five articles have been contributed by scholars affiliated with Global South institutions since 1981.⁴²

While the list of authors is a roll call of notable Australian international lawyers, it is also interesting that a small handful, typically the editors themselves, have proven very regular contributors over a long period, illustrating the editorial efforts required to sustain a year book’s success.

Observations

This brief outline of the institutional affiliations of the AYBIL, and its editors and authors illustrates several characteristics. First, the AYBIL’s editors and board members have been predominantly white men. A significant proportion of its authors have also been based at institutions in the settler colonies or Global North. The orientation of the AYBIL’s editors and authors to other white and European nations mirrors Australia’s history as a dominion within the British Empire.

The complex legal framework of Australia’s dominion status is illustrated by its constitution, which granted the Australian federal government power over ‘external affairs’ rather

⁴¹ The contributors are Raj Krishna (Punjab, India contributing twice to *AYBIL* 1 (1965); JF Hookey (University of Papua New Guinea), contributing two articles in *AYBIL* 2 (1967). In 1980 a special issue (published without volume number) had wide geographic representation of authors, including individuals based in Bahrain, Bangladesh, the University of Malaya, Indonesia, San Remo, the Philippines, China, Japan, India, Thailand, and Singapore.

⁴² Judge Weeramantry (Sri Lanka 1996); Ilas Bantekas (Brunei, 2008); Amos Enabulele (2015 Benin), Elizabeth Exposto (CEO, Maritime boundary office Timor Leste, 2018); Chaya Bhardwaj (Jindal, 2022). While articles by authors at global north or epicentre institutions may be characterised as ‘global south scholars’ there are various definitions (birth, nationality, place of legal education, self-characterisation for eg). We have chosen to focus on global south institutional affiliation.

than ‘foreign’ or ‘international’ affairs.⁴³ This language was intended to capture the doctrine of ‘inter se’, that is, ensuring that Australia could transact independently with members of the British Empire (‘externally’), but not with independent states (‘internationally’).⁴⁴ Before World War II, Australia’s position between Empire and independence manifested in many Australians as ‘empire nationalism’ – attempting to balance loyalty to the Empire with pride in a growing Australian nationhood.⁴⁵

Empire nationalism was grounded in whiteness which underpinned the construction of Australia’s nationhood on the basis of racial exclusion. The Australian Constitution specifically included a power for the federal Parliament to make laws on the basis of race, to ensure that governments could act in ‘self-protection’ in dealing with the ‘race difficulty’.⁴⁶ So, for example, one of the first pieces of legislation passed by the new Australian Parliament was an Act to expel several thousand Pacific Island people who had been working in Queensland.⁴⁷ The key plank of Australia’s ‘race protection’ was a ‘White Australia Policy’. This policy was used to exclude non-European immigrants, racialised (southern and eastern) Europeans, and those whose politics or religion were deemed undesirable.⁴⁸ In the words of historians Henry Reynolds and Marilyn Lake,

⁴³ Australia, Commonwealth of Australia Constitution Act 1901, s 51(xxix). For further, see Stephen Donaghue, ‘International law’, in Cheryl Saunders and Adrienne Stone (eds.), *The Oxford Handbook of the Australian Constitution* (Oxford: Oxford University Press 2018) 237-260.

⁴⁴ See, e.g., J.D.B. Miller, ‘The Decline of Inter se’. *Contemporary International History* 24(4) (1969) 765-775.

⁴⁵ See, e.g., Neville Meaney, ‘Britishness and Australian identity: the problem of nationalism in Australian history and historiography’. *Australian Historical Studies* 32 (2001) 76.

⁴⁶ A.G. Deakin, Commonwealth Parliamentary Debates, House of Representatives (12 September 1901) 4804. Deakin was Australia’s second Prime Minister.

⁴⁷ Australia, *Immigration Restriction Act 1901* (Cth). See also Tracey Banivanua-Mar, *Violence and Colonial Dialogue: The Australian-Pacific Indentured Labor Trade* (University of Hawaii Press 2007).

⁴⁸ Nancy Viviani (ed.), *The Abolition of the White Australia Policy: The Immigration Reform Movement Revisited* (Griffith University: Centre for the Study of Australian-Asian Relations, no 65, 1992); Gwenda Tavan, *The Long, Slow Death of White Australia* (Melbourne: Scribe 2005); Kel Robertson, Jessie Hohmann and Iain Stewart, ‘Dictating to one of “Us”: the Migration of Mrs. Freer’. *Macquarie Law Journal* 5 (2005) 241-275.

‘[A]t the beginning of the twentieth century, Australians drew a colour line around their continent and declared whiteness to be at the very heart of their national identity’.⁴⁹

A commitment to empire, whiteness and an orientation to other white nations are, then, originating characteristics of modern Australia, and they cast a long shadow. This shadow, we argue, hovers over the AYBIL in two ways: through its institutional structures and personnel (which we discuss here), and through its contents (discussed in Pt VI). Institutionally, the AYBIL’s association with ANU has given it a noticeable angle and approach. It carries the stamp of a particular international law: one oriented to its utility to government and to policy makers and the international legal profession. As we discuss in Pt IV, there is criticism of government and international law within the pages of AYBIL volumes, but such critique tends to be framed within the mainstream boundaries of international law, rather than challenge the structural biases and foundational myths of that law. In this sense, the AYBIL reads as a publication of and for establishment international lawyers. It is notable that the main ‘other’ Australian journal of international law, published out of Melbourne University, trades in contrast on its reputation as innovative, theoretical and critical, a fact we note carries some irony, given that the Melbourne Law School is itself among the Nation’s most elite institutions.⁵⁰

In relation to its personnel, the composition of AYBIL editors and authors highlights very particularly the imperial orientation of international law in Australia. The identity of the editors and authors positions Australia less as part of the Asia Pacific region, and instead as aligned with the U.K., followed by Western Europe, with further links to the U.S. and Canada. The paucity of

⁴⁹ Henry Reynolds & Marilyn Lake, *Drawing the Global Colour Line: White Men’s Countries and the Question of Racial Equality* (Melbourne: Melbourne University Publishing 2008) Ch 6, 1.

⁵⁰ Melbourne Law school is Australia’s oldest, established in 1857. Sydney and Melbourne Law Schools are the established training grounds for Australia’s judiciary (20 High Court justices have been educated at Sydney Law school, and 14 at Melbourne Law school with a total of 12 educated elsewhere). Of Australia’s Prime Ministers with law degrees, 5 gained their LLB at Sydney, 3 Melbourne, and only one at another institution, though some went on to further law study in the U.K. or the U.S.

contributions by Global South authors across the AYBIL's history further indicates the resilience of Australia's positioning as apart from its geographic region, and as speaking from within – and to – the Global North. Thus, although Indonesia is only 200 kilometres, and New Guinea approximately 150 kilometres, from its coast, Australia is still presented as 'remote'.⁵¹ The centres of knowledge production with which Australia imagines itself in conversation remain the U.K., Europe, and the US.⁵² The AYBIL expresses the legal practice and scholarship of a country 'in' Asia but not 'of' it.

The AYBIL's editors have sometimes sought to rupture this orientation and to better explore Australia's place within the Asia Pacific. 1980, for example, saw a special issue dedicated to 'Asian Approaches to International Law', and there are other contributions across multiple volumes on regional issues that affect Australia, such as the South China Sea Award, the Whaling Case and approaches to human rights within ASEAN nations.⁵³ At the same time, contributions tend to establish the relevant comparators for Australian international law as the U.K., U.S. and Europe. For example, in 2009, the Inaugural Kirby Lecture in International Law, given by James Crawford (then Whewell Chair in International law at Cambridge) was published on the topic 'International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison,' while the Kirby Lecture in 2019 by Sir Kenneth Keith (former New Zealand judge at the ICJ) was on 'New Zealand, Australia and international human rights law 1919-2019.'⁵⁴

Our argument is not that the editors or authors of the AYBIL acted as agents of empire or along consciously race-based lines themselves. There are no doubt both structural and personal factors at play in selecting contributing authors and the institutions and networks they represent.

⁵¹ Crawford, 'Teaching and research', 195.

⁵² As Australian international law scholars with institutional connections to Canada, the U.K., and U.S, we are also entangled in this orientation to whiteness and the Global North.

⁵³ See, e.g., volumes published in 2017, 2014, 1980, respectively.

⁵⁴ James Crawford, 'Inaugural Kirby Lecture in International Law: international law in the House of Lords and the High Court of Australia 1966-2008 – A Comparison'. *AYBIL* 28 (2009) 1-26; K.L. Keith, 'Kirby Lecture in International Law 2019: New Zealand, Australia and international human rights law 1919-2019' *AYBIL* 37 (2019) 1-21.

And most Australian international law scholars, including the past and present personnel of the AYBIL, would position themselves as both anti-imperial and as critical of Australia's policies.⁵⁵ Nonetheless, editors draw on personal connections to invite authors and advisory board members. Where networks are not strong, representation from a diversity of authors is more difficult to attain, and this can become a cyclical problem, with strong Global North networks replicating a Global North focus. The very few scholars affiliated with Global South institutions who have contributed to the AYBIL in its history are telling in this regard; Australia's dominion and racially-grounded history are difficult to escape.

The AYBIL's institutional and personnel histories tell, then, a story of an Australia that has then been, and remains, a white, western nation, that draws only sporadically on individuals from its region, whether as authors or editors. The content of the AYBIL tells a slightly different story, but one that unfolds within the same context. This story is one of the tension between critique of the Australian state's stance revealed in AYBIL's pages, and the AYBIL's role as publication of record on Australian State Practice. We turn now to examine the contents of the AYBIL.

IV The Subject Matter and Contents of the Australian Year Book of International Law

In this part, we examine in more detail the subject matter covered in the AYBIL's articles and the 'International Practice' section. We draw out the range of topics, regimes, and regions covered, and zoom in on key contributions that, in particular, demonstrate how AYBIL operates as an artefact of Australia's international legal concerns. The contributions we consider are, first, writings specific to Australia's role as a mandatory or 'sub-imperial' power, and second a special issue on the Howard Government's approach to international law. We focus on these writings for

⁵⁵ Early examples include W.A. McKean, 'The South West Africa cases two views'. *AYBIL* 2 (1966) 135-148; Elizabeth M. Eggleston 'Prospects for UN protection of the human rights of indigenous minorities'. *AYBIL* 5 (1970-3) 68-74.

two reasons. First, they revolve around key figures in Australia's interactions with the international legal system whose influences span significant proportions of the AYBIL's history: Percy Spender, former politician and judge, then president, of the ICJ; and John Howard, former (and second-longest-serving) Australian prime minister. Second, each of Spender and Howard, in the ways we describe below, solidified Australia's international reputation as a settler colonial nation oriented to whiteness. In drawing out how the AYBIL has reflected the role of these men in Australia's relations with the international legal system, we make explicit the assumptions about Australia's sub-imperialism and western-nation-orientation that we argue lie unstated behind the AYBIL's pages. At the same time, we illustrate the tensions between the AYBIL as record of state practice, and the critique of that practice unfolding in it. In focusing on these characteristics as they emerge from the AYBIL, we join with others in highlighting the racialised policies that continue to underpin Australia's approaches to international law and contribute to the work that is being done to foreground these approaches and to support Australian international lawyers' attempts to reckon with our histories.⁵⁶

General Regime and Subject Coverage:

With respect to subject matter, the AYBIL has featured a wide range of topics on a great array of international law's subject matters, regimes, and disputes. Within these general topics, a key role has been to explore Australia's place in the international community, channeled through questions of trade, law of the sea, boundary disputes, human rights, and the flow of migrants and refugees.

⁵⁶ See for eg Anthony Anghie, 'Race, self-determination and Australian Empire'. *Melbourne Journal of International Law* 19 (2019) 423-462; Cait Storr, 'Critical minerals: Australia's role in negotiations over resource extraction in domains beyond national jurisdiction, 1958-91', in Madelaine Chiam and Alison Duxbury (eds.), *Australia in the International Legal System: From Empire to the Contemporary World* (Hart, forthcoming, 2024).

The first decade of the AYBIL saw the publication of articles on themes that continue to raise central questions in international law. Boundary disputes,⁵⁷ treaties for the protection of foreign investment,⁵⁸ the legality of the use of force,⁵⁹ trade,⁶⁰ conflict of laws,⁶¹ and the relationship between international and domestic (Australian) law⁶² were regular. More specific to the moment, though of enduring impact, were discussions of trust and mandate law, alongside issues raised in formal decolonization.⁶³ In the later 1970s human rights were a central concern.⁶⁴ The AYBIL's subject matter expanded rapidly with the specialised regimes of international law, tracking the development of humanitarian law,⁶⁵ nuclear non-proliferation,⁶⁶ the 'racial convention'⁶⁷ the

⁵⁷ See, e.g., A. Lamb, 'Treaties, maps and the Western Sector of the Sino-Indian boundary dispute'. *AYBIL* 1 (1965) 37-52; K.B. Berry 'Delimitation and the Anglo-French arbitration'. *AYBIL* 6 (1974-5) 139-152; Geoffrey Marston, 'International law and the Sabah dispute'. *AYBIL* 3 (1970) 103-152.

⁵⁸ Raj Krishna, 'Exchange Controls under West German Treaties for the Protection of Private Foreign Investment'. *AYBIL* 1 (1965) 71-83.

⁵⁹ William E. Holder, 'The Legality of the United States Participation in Vietnam: An Appraisal'. *AYBIL* 2 (1966) 67-83; H.L. Cryer, 'Legal Aspects of the "Joanna V" and "Manuela" Incidents, April 1966'. *AYBIL* 2 (1966) 85-98; David R. Gilmour, 'Art 2(7) of the United Nations Charter and the Practice of the Permanent Members of the Security Council'. *AYBIL* 3 (1970) 153-210.

⁶⁰ David R. Anderson, 'Some Juridical Aspects of Australian Trade Agreements'. *AYBIL* 1 (1965) 85-103; F. McCarty, 'The New Zealand-Australia Free Trade Agreement of 1965' *AYBIL* 2 (1966) 17-34; Bernard Marks, 'The Legal Environment of Australian-Japanese Trade' *AYBIL* 3 (1970) 36-102; R. Burnett, Australia's Bilateral Trade Treaties - Developments 1972-1975' *AYBIL* 6 (1974-5) 153-171.

⁶¹ P.F.P. Higgins, 'Some Aspects of Substance and procedure in the Conflict of Laws'. *AYBIL* 1 (1965) 53-70; Peter Nygh, 'Conflict of Laws within A Federation: Anderson v Eric Anderson (Radio and TV) Pty. Ltd.'. *AYBIL* 2 (1966) 35-46.

⁶² W.R. Edeson, 'Australian Bays'. *AYBIL* 4 (1971) 5-54; H.B. Connell, 'International Agreements and the Australian Treaty Power'. *AYBIL* 4 (1971) 83-101; Gareth Evans, 'Prospects and Problems for an Australian Bill of Rights'. *AYBIL* 5 (1975) 1-18; Nygh, 'Conflict of Laws'.

⁶³ J. Leyser, 'Title to Land in the Trust Territory of New Guinea'. *AYBIL* 1 (1965) 105-117; J.G. Starke, 'The Acquisition of Territorial Sovereignty by Newly Emerged States'. *AYBIL* 2 (1966) 9-15; Marston, 'the Sabah Dispute'.

⁶⁴ See for example Evans 'Prospects and Problems' and a number of other articles in Volume 5; 'D.F.J.J. De Stoop, 'New Guarantees for Human Rights in Armed Conflicts – a Major Result of the Geneva Conference 1974-77'. *AYBIL* 6 (1978) 52-76.

⁶⁵ De Stoop, 'New Guarantees for Human Rights'.

⁶⁶ D.W. Grieg, 'The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty'. *AYBIL* 6 (1974-5) 77-118.

⁶⁷ M.R. Burrowes, 'Implementing the UN Racial Convention – Some Procedural Aspects'. *AYBIL* 7 (1976-77) 236-278.

African Charter on Human and Peoples Rights,⁶⁸ and law of the sea.⁶⁹ At the same time, international issues impacting Australia through its close geographic neighbours were increasingly the subject of contributions. For example, in the 1960s maritime boundaries in the Timor Sea and the Torres Strait (off the North coast of Australia) were both the subject of articles,⁷⁰ as were 'South-East Asian Refugees - the Australian Experience'.⁷¹ By the 1980s, legacies of colonialism, even if not always expressed in that way, dominated the AYBIL's pages. Boundary disputes (once again),⁷² the legacies of mandates and protectorates,⁷³ and issues of self-determination⁷⁴ were frequently explored. Increasing space for theoretical and methodological innovation is reflected, for example in volume 12's special focus on feminist approaches to international law. By the 1990s, AYBIL was publishing a wide range of articles across international law's regimes, including with a theoretical and historical focus.⁷⁵

The AYBIL shares with its year book counterparts the pattern of publishing special issues on international law matters of particular interest to the relevant state, and of memorialising individuals of significance with special lectures and/or obituaries.⁷⁶ The AYBIL's first special issue was the 1970-3 volume, with a focus on human rights.⁷⁷ The first article in the issue, written by

⁶⁸ R.M. D'Sa 'The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action'. *AYBIL* 10 (1981-83) 101-130.

⁶⁹ Edeson 'Australian Bays'.

⁷⁰ See Lumb, 'The delimitation of maritime boundaries in the Timor'. *AYBIL* 7 (1976-77) 72 and Ryan and White, 'The Torres Strait Treaty', 87.

⁷¹ R.P. Schaffer, 'South-East Asian refugees – the Australian experience'. *AYBIL* 7 (1976-77) 200-235.

⁷² C. Cook, 'Filling the gap: delimiting the Australia-Indonesia maritime boundary'. *AYBIL* 10 (1981-1983) 131-175.

⁷³ P.G. Sack, 'Protectorates and twists: law, history and the annexation of German New Guinea'. *AYBIL* 10 (1981) 1-66.

⁷⁴ S.K.N. Blay 'Self-determination in Cyprus: the new dimension of an old conflict'. *AYBIL* 10 (1981-1983) 67-100.

⁷⁵ See, e.g., Vol 13 which included an article by G.C. Marks on 'Indigenous peoples in international law: the significance of Francisco de Vitoria and Bartolome de las Casas' 1; and McCormack, 'HV Evatt at San Francisco', 89.

⁷⁶ See, e.g., Fatsah Ouguergouz, 'African Yearbook of International Law: A quarter-century of contribution to the development and dissemination of international law'. *Netherlands Yearbook of International Law* 50 (2019) 61; Haskell, 'A case in the politics of form'.

⁷⁷ *AYBIL* 5 (1970-73).

Gareth Evans (then Lecturer in Law at the University of Melbourne and later a prominent minister of foreign affairs) was on 'Prospects and problems for an Australian bill of rights'.⁷⁸ The prospects were poor - Australia remains the only liberal democracy without a national bill of rights. A second special section on international refugee law was included in volume 8.⁷⁹ In 1980 an additional issue was published on the protection of human beings in armed conflict, reproducing the papers from an Asia/Pacific seminar on International Humanitarian law.⁸⁰ Returning to our argument about the orientation of the year book towards white and European audiences, it is notable that this issue represents the highwater mark for Global South publication in the year book. Other special issues include one with a dual focus of the role of consent, and a feminist analysis of areas of international law,⁸¹ and one drawn from a colloquium to celebrate the fiftieth anniversary of the ICJ.⁸² More recent 'agora' topics have focussed on regional issues in which Australia has a particular interest, including whaling in the Antarctic, the subject of an Australian claim against Japan before the ICJ; international law issues arising in the South China Sea and the Timor Sea, both of which are significant issues in Australian foreign policy; and the COVID-19 pandemic.⁸³

The AYBIL's named lectures, and volumes honouring notable individuals, have all commemorated prominent white male figures.⁸⁴ Crawford's significance as an Australian international law figure is signaled here, even as he spent the majority of his professional life in the

⁷⁸ Evans, 'Prospects'. Evans also delivered the 2010 Kirby Lecture 'Swimming to Cambodia: justice and ritual in human rights after conflict'. *AYBIL* 30 (2012) 1-12.

⁷⁹ *AYBIL* 8 (1978-80).

⁸⁰ *AYBIL* 9 (1980).

⁸¹ *AYBIL* 12 (1992).

⁸² *AYBIL* (1996).

⁸³ Whaling: volume 32 (2014); the South China Sea: volume 34 (2017); the Timor Sea: volume 35 (2018); and the covid pandemic: volume 39 (2021).

⁸⁴ The Kirby lecture honours Michael Kirby, former High Court judge; the Elihu Lauterpacht Lecture commemorates Sir Elihu's contributions to international law, including his time in Australia as Legal Adviser to the Australian Government 1975-7.

U.K.⁸⁵ The focus on Crawford mirrors the AYBIL's origins in a small group of international lawyers who served as a bridge between, and linked Australia with, Western Europe and particularly the U.K.⁸⁶

The Practice Sections

As we have already noted, the practice sections of the AYBIL are the central public repository for Australian practice in international law. A version of the practice sections has been published in every volume, with the exception of the 1980 special issue, which was already nearly 400 pages without one. Until the 1990s, the practice section included all forms of Australian practice in international law. Since 1992, and reflecting the expansion of international legal practice in the 1990s, the section has been split into multiple parts, distinguishing between Australia's participation in international dispute resolution processes, Australian cases, legislation and government practice on international law, and developments in private international law.

As public records of Australian practice in international law, the practice sections evidence the issues of interest to Australian governments and issues on which those governments have had to engage. The practice sections show a pattern of Australian actions in general, often perennial, issues of international law, including sovereignty, self-determination, jurisdiction, and territory, as well as specific areas of international law, such as the law of the sea, international economic law, and diplomatic and consular relations.⁸⁷ The table of contents for the section on Australian

⁸⁵ volume 40 contains a tribute to James Crawford. The Inaugural Kirby Lecture in International Law (2009) was given by Crawford, who was then Professor of International Law at Cambridge. In 2017, the Year Book began publishing another annual lecture, the Sir Elihu Lauterpacht International Law Lecture. The 2017 lecture was (again) given by Crawford (then Australia's judge at the ICJ).

⁸⁶ The networks of the 'invisible college' of international lawyers have been highlighted by Soares Pereira and Ridi 'Mapping the invisible college', where Crawford emerges as a major 'node' in the connected lives of international lawyers as read through obituaries published in the *British Yearbook of International Law*.

⁸⁷ Given the volume of material contained in the totality of the practice sections, we focussed on the government practice section, rather than the sections on cases and legislation.

government practice was largely stable from the 1980s to 2000s,⁸⁸ suggesting a consistency of both Australian engagements in international law and government perceptions of the significance of those engagements.

The format of the government practice section underwent a change after 2015, with the table of contents revised to frame legal issues under categories such as the ‘international rules-based order’ and ‘accountability’.⁸⁹ This move to describe in international relations language issues that were previously characterised as legal ones mirrors a shift by contemporary Australian politicians from the language of ‘law’ to the language of ‘rules and norms’ when discussing international events.⁹⁰ The transformation signals a bipartisan turn in Australian foreign policy to align explicitly with American views of international governance in the face of perceived threats from China.⁹¹ This rhetorical change signals (again) Australia’s ally-ship with Western settler colonies. The changes in the table of contents of the practice section illustrate how the AYBILt records shifts in Australian foreign policy and in formal state attitudes to the international legal system.

Within the broad topics of the practice sections, some themes emerge. Reports on questions of sovereignty and self-determination, for example, regularly included matters arising from Australia’s settler-colonial status. For example, the practice sections have included references to early cases of judicial approval of Australia’s (now overturned) *terra nullius* status and government consideration of the Draft Declaration on the Rights of Indigenous Peoples.⁹²

⁸⁸ See eg the Tables of Contents from *AYBIL* 8 (1978-1980) 320, and from *AYBIL* 20 (1999) 405, which followed essentially the same format of topics.

⁸⁹ See eg *AYBIL* 36 (2018) 379.

⁹⁰ See eg Penny Wong, Australian Minister for Foreign Affairs and Trade, ‘Speech to the ANU National Security College “Securing Our Future”’, 9 April 2024.

⁹¹ See eg Gregory V. Raymond, ‘Advocating the rules-based order in an era of multipolarity’. *Australian Journal of International Affairs* 73 (2019) 219-226; Rebecca Strating, ‘The rules-based order as rhetorical entrapment: Comparing maritime dispute resolution in the Indo-Pacific’. *Contemporary Security Policy* 44 (2023) 372-409.

⁹² See *AYBIL* 8 (1978-80), 256; *AYBIL* 20 (1999), 411.

Australia's relations with its former mandates (Papua New Guinea and Nauru) and its island neighbours (including East Timor) are also a consistent presence in the practice sections. These include, for example, consideration of appeals from Nauru to the High Court of Australia; discussion of events relating to the sovereignty and self-determination of East Timor and Irian Jaya; and maritime arrangements in the Timor Sea.⁹³ The shifts in Australia's relationships with its former mandates are also recorded in recent practice sections including, for example, the Regional Resettlement Arrangement between Australia and Papua Guinea, which concerns asylum-seeker processing and reception;⁹⁴ and the Australia and Timor-Leste Conciliation proceedings, which sought to resolve a dispute under the Law of the Sea Convention.⁹⁵ The accounts of these events present Australian government views of the relevant developments and, where relevant, Australia's preferred interpretations of the international legal issues involved.

Having given a general overview of the contents of the AYBIL, we turn next to observations on the Australia that emerges from its contents. Here, we focus on two specific themes: first, Australia's history and legacy as a mandatory and sub-imperial power, and second, the specific contribution of key individuals (Spender and Howard) to (re)inscribing Australia as a white, Global North state. In both, we reflect on the tensions between a year book's role as a record of state practice, and the scholarly and editorial critique of that practice within the year book's pages.

Observations Australia as Mandatory and Sub-Imperial Power

As the pages of AYBIL reveal, so much of Australia's contemporary activity in international law builds on its past as mandate power for New Guinea and Nauru.⁹⁶ Anthony Anghie has described Australia's mandate power as creating an 'Australian Empire', while Cait Storr and

⁹³ AYBIL 7 (1976-77), 25; AYBIL 20 (1999), 405; AYBIL 28 (2009), 315.

⁹⁴ AYBIL 34 (2017), 434.

⁹⁵ AYBIL 36 (2018), 528.

⁹⁶ See Aaron M. Margalith, *The International Mandates* (Baltimore: Johns Hopkins Press 1930).

Clinton Fernandes have used the term ‘sub-imperial’ to describe Australia’s position as both a subject of empire and a wielder of imperial power.⁹⁷ We adopt Storr and Fernandes’ terminology of ‘sub-imperial’ as this conceptualisation of Australia best fits our discussion in this chapter.

Australia’s position as a sub-imperial power is significant to its development as a member of the international community. Because Australia’s ‘international’ relations were managed formally by the empire until World War II, the management of ‘external territories’ in the Pacific was the place where politicians and lawyers within dominion Australia confronted international legal questions such as sovereignty, self-determination, equality between ‘races’, and opportunities for and limits on exploitation of natural resources. Indeed, Anghie argues that Australia’s imperial status ‘powerfully influenced the origins of Australian international law’ because many of the major figures in early Australian international law ‘had to deal directly with issues of colonial governance, race and self-determination’.⁹⁸ These are themes that consistently characterise articles in the *ABYIL* and are particularly evident in the collections of Australian state practice discussed above.

Two pieces in the first edition of *AYBIL* highlight connections between Australia and Empire. The first was authored by Percy Spender, ‘The office of the president of the International Court of Justice’.⁹⁹ Written during Spender’s time as president of the Court, the article provided a descriptive account of the role and procedure of the Court and its president and offered his view, for example, that the authority of the president ‘is naturally one which must be exercised firmly, but with considerable discretion’.¹⁰⁰ The article’s privileged place in opening the *AYBIL*’s first volume reflected the pride of Australian international lawyers in having a fellow national as the Court’s

⁹⁷ Anghie, ‘Race, Self-Determination and Australian Empire’; Cait Storr, *International Status in the Shadow of Empire: Nauru and the Histories of International Law* (Cambridge: Cambridge University Press 2020); Clinton Fernandes, *Subimperial Power: Australia in the International Arena* (Melbourne: Melbourne University Press 2022).

⁹⁸ Anghie, ‘Race, self-determination and Australian empire’, 3.

⁹⁹ Percy Spender, ‘The office of president of the International Court of Justice’. *AYBIL* 1 (1965) 9-22.

¹⁰⁰ *ibid*, 15.

president. This pride was also evident in Starke's preface, where he noted the significance of Spender being 'the first Australian elected a Judge of the Court, and ... a distinguished President.'¹⁰¹ The second contribution was from J. Leyser, on 'Title to land in the Trust Territory of New Guinea', which focussed on the right and duty of mandate Australia to 'attempt to bridge the gap' between what Leyser characterises as its 'Stone Age civilization and modern statehood'.¹⁰² Leyser's view was that the presence of Europeans was 'of decisive importance'¹⁰³ for modernisation and economic development in New Guinea, and by extension that Australia's exertion of influence as mandate over New Guinea would be of interest both to Australian and to wider international audiences.

Leyser's account of Australia's mandate power emphasised Australia's civilising mission in New Guinea. This expression of Australia's sub-imperialism takes on even more significance when it is situated in conjunction with Spender's piece because it was Spender who, as president of the ICJ, under Article 55(2) of the ICJ Statute, cast the deciding vote in the *South West Africa Cases* to deny Ethiopia and Liberia's challenge of South Africa's mandate over South West Africa, an ability the Court had declared to exist three years earlier.¹⁰⁴ The Court, and Spender's, decision to preference the interests of powerful white nations over developing states at the height of the decolonial era caused 'severe and deserved' fallout.¹⁰⁵ Spender's actions had long-lasting impact for Australia, particularly with developing countries, some of whom described Spender as

¹⁰¹ Starke, 'Preface', 3.

¹⁰² Leyser, 'Title to land in the Trust Territory of New Guinea', 106.

¹⁰³ Leyser, 'Title to land in the Trust Territory of New Guinea', 111.

¹⁰⁴ ICJ, *South-West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Judgment of 18 July 1966, ICJ Reports 1966, p.6.

¹⁰⁵ Crawford, "Dreamers of the Day", 536. See also Victor Kattan, "There was an elephant in the court room": Reflections on the role of the Judge Sir Percy Spencer (1897-1985) in the South West Africa Cases (1960-1966) after half a century'. *Leiden Journal of International Law* 31 (2018), 147-170, 147.

‘representative of a country where outmoded racism and colonialism prevailed’.¹⁰⁶ After Spender left the Court in 1967, no Australian was elected to it until James Crawford, in 2014.¹⁰⁷

The divisiveness of the Court’s decision appears to underpin a curious contribution to AYBIL’s volume 2. This article ‘The South West African Cases: Two Views’ presents two opposing views on the cases, but cites only one author, W.A. McKean of Brasenose, Oxford, who was critical of the decision. The author writing in support of the decision remained anonymous. The author’s anonymity prompts speculation as to the motives of the editors, and the identity of the writer. The anonymous author’s claims included that ‘Australian lawyers are ... unlikely to be moved by the chorus of criticism of the South West Africa Cases’¹⁰⁸ but no one appeared willing to put their reputation on the line by owning the statement. This is the only article in the AYBIL explicitly dedicated to a consideration of the case and the key role of an Australian jurist in it, and the only anonymous contribution.

Although hardly an example of state practice, Spender’s vote, in protecting South Africa’s mandate, served also to protect Australia’s ongoing interests in New Guinea and Nauru and, as Victor Kattan argues, enabled the Court to avoid judicial consideration of self-determination, an avoidance that was also a preference of the Australian government.¹⁰⁹ Spender’s legacy for Australian international legal practice is thus mixed, but he remains the opening authorial voice of the AYBIL. In combination with Leyser’s deeply colonial and racist analysis of New Guinea, the first edition of the AYBIL records the approach of many Australian elites to Australia’s exercises of sub-imperial power, one that burst into international consciousness through Spender’s actions in the South West Africa cases. While the second edition of the AYBIL included a critique of that decision,

¹⁰⁶ David Lowe, *Australian between Empires: The Life of Percy Spender* (Pickering and Chatto 2010), 170.

¹⁰⁷ Crawford, “Dreamers of the Day”, 537-8; Anghie, ‘Race, Self-Determination and Australian Empire’, 25.

¹⁰⁸ W.A. McKean, ‘The South West Africa Cases (1966): Two Views’. *AYBIL* 2 (1966) 135, 144.

¹⁰⁹ Kattan, ““An elephant in the court room””.

it also placed that critique next to the odd anonymous contribution that supported the decision..

From its earliest volumes, thus, the AYBIL has manifested the complex, sometimes contradictory role of year books as records of state practice, as forums for criticism of that state practice, as outlets for the celebration of individual Australians and their contributions to international law, and as sites to engender broader consideration of state actions by the communities represented by that state.

Observations – The Howard Government

Another special issue of AYBIL was dedicated to international law under prime minister John Howard, whose eleven-year tenure is the second longest in Australian history. Howard was a determined bilateralist. He explicitly prioritised relations with the ‘Anglosphere’, had an unwavering commitment to Australia’s alliance with the U.S., and a deep suspicion of multilateralism in all its forms.¹¹⁰ Howard’s premiership followed a period of government that had attempted to re-orient Australia’s international relations to Asia,¹¹¹ and the Howard government’s actions, particularly on human rights protections, caused consternation amongst many international lawyers.¹¹² At the same time, Australia’s High Court had taken a more robust stance to international law,¹¹³ bringing the Court into conflict with the executive and parliament. By the mid-2000s, the pages of AYBIL were home to debates raised by Australia’s participation in the

¹¹⁰ See, e.g., Jack Holland, ‘Howard’s war on terror: a conceivable, communicable and coercive foreign policy discourse’. *Australian Journal of Political Science* 45 (2010), 643. Australia’s alliance with the U.S. dates to the late 1940s, after the British surrender of Singapore to Japan in 1941, considered as a catastrophic abandonment by its dominion protector (see prime minister John Curtin ‘Address, 1 January 1942’). Australia’s turn to the U.S. has parallels to the policy of ‘looking northwards’ toward the U.S. discussed by Daniel Ricardo Quiroga Villamarin in the Colombian context in this volume.

¹¹¹ See, e.g., the report on Fisheries, *AYBIL* 14 (1992) 447-8; and the report on Defence and regional security, *AYBIL* 15 (1994) 703-705.

¹¹² See, e.g., Hilary Charlesworth et al, ‘Deep Anxieties: Australia and the International Legal Order’. *Sydney Law Review* 25 (2003) 423-465.

¹¹³ Charlesworth et al, ‘Deep anxieties’; Gavan Griffith and Carolyn Evans, ‘Teoh and visions of international law’. *AYBIL* 21 (2000) 75-94; Shane S. Monks, ‘In defence of the use of public international law by Australian courts’. *AYBIL* 22 (2002) 201-226.

invasion of Iraq in 2003,¹¹⁴ the ‘war on terror’¹¹⁵ and, what the editors described as the Howard government’s ‘biggest foreign policy test’¹¹⁶ the conflict in East Timor and East Timor’s eventual independence, including the implications for Australia.¹¹⁷

The impact of these events on international legal doctrine was recorded in the practice sections of the *AYBIL* and discussed in multiple articles. Indeed, volume 27, was dedicated to Australia and international law during the Howard years, indicating the Australian international law community considered this period of international law’s development in Australia unusually significant.¹¹⁸ The topics addressed in the special issue included the Howard government and the international human rights system, East Timor, terrorism, refugee protection, the environment and the use of force. Authors of the chapters on refugees, human rights and the use of force lamented Howard’s approaches to these issues, variously describing his government’s policies as ‘uniquely draconian’,¹¹⁹ ‘perplexing’ and ‘outmoded’,¹²⁰ and ‘idiosyncratic ... and contradictory’.¹²¹ These assessments arose from actions that included the government’s open hostility towards human rights treaty bodies (for example, rejecting the 2000 Concluding Observations of the Committee on

¹¹⁴ Andrew Garwood Gowers ‘Pre-emptive self-defence: a necessary development or the road to international anarchy?’. *AYBIL* 23 (2004) 51-72; Nicole Abadee and Donald R. Rothwell, ‘The Howard Doctrine: Australia and anticipatory self-defence against terrorist attacks’. *AYBIL* 26 (2007) 19-62.

¹¹⁵ Ben Saul, ‘Defending “Terrorism”: Justifications and Excuses for Terrorism in International Criminal Law’. *AYBIL* 25 (2006) 177-226.

¹¹⁶ Rothwell and Rubenstein ‘Introduction’, 5.

¹¹⁷ Christine Chinkin, ‘East Timor: A Failure of Decolonisation’. *AYBIL* 20 (1999) 35-54; Jonathan Morrow and Rachel White, ‘The United Nations in transitional East Timor: international standards and the reality of governance’. *AYBIL* 22 (2002) 1-46; Gillian Triggs, ‘The Timor Sea Treaty and the international unitisation for greater sunrise: practical solutions in the Timor Sea’. *AYBIL* 23 (2004) 161-176.

¹¹⁸ There was, for example, no volume dedicated to the Whitlam years (1972-1975), though the Whitlam government’s engagements with international law might be considered equally significant. See Kirby, ‘Whitlam as internationalist: a centenary reflection’. *Melbourne University Law Review* 39 (2016) 850-894.

¹¹⁹ Jane McAdam and Kate Purcell, ‘Refugee protection in the Howard Years: obstructing the right to seek asylum’. *AYBIL* 27 (2008) 87-114, 87.

¹²⁰ Sarah Joseph, ‘The Howard government’s record of engagement with the international human rights system’. *AYBIL* 27 (2008) 45-68, 47, 48.

¹²¹ Gerry Simpson, ‘Warriors, humanitarians, lawyers: the Howard government and the use of force’. *AYBIL* 27 (2008) 143-164, 163.

the Elimination of Racial Discrimination as ‘blatantly political and partisan’)¹²² and its refugee policies (which included offshore processing – notably, in Nauru – and mandatory detention for asylum-seekers arriving by boat).¹²³ Authors of other chapters, including on environmental protection and East Timor, had kinder assessments, while also highlighting how ‘sovereign rights’ and ‘an essentially Australian foreign policy’ respectively underpinned the Howard government policies.¹²⁴

The articles in this special issue underscored the defining characteristic of the Howard era: a focus on protecting Australia’s ‘sovereignty’. Howard’s idea of sovereignty constructed Australia as a territorial and metaphorical fortress, one over which he and his government exercised total control, allowing ‘in’ only those international laws – and peoples – they deemed acceptable. As Howard famously said in the aftermath of the attacks of 11 September 2001: ‘We will decide who comes to this country and the circumstances in which they come.’¹²⁵ Within this framing, the Howard government continued to foreground Australia’s whiteness, its commitment to its Anglosphere allies, and its rejection of the multilateralism (and non-whiteness) of human rights, refugee protections, and Indigenous rights. In recording the official practices that manifested Howard’s approach, and in providing an outlet for critiques of those practices by international law scholars, the *AYBIL* played an important role in both documenting the Howard government’s actions in the international sphere, and publishing multiple critiques of those actions.

Jan Klabbers has described the role of the year books generally as representing, and even speaking for, a community.¹²⁶ And it is consistent with this idea that the special issue on the

¹²² Joseph, ‘Human rights’, 54.

¹²³ McAdam and Purcell, ‘Refugee protection’, 87.

¹²⁴ See Gregory Rose, ‘Australian approaches to international environmental law during the Howard Years’. *AYBIL* 27 (2008) 115-142, 115; Stuart Kaye, ‘Australia and East Timor during the Howard Years: an international law perspective’. *AYBIL* 27 (2008) 69-86, 69.

¹²⁵ See McAdam and Purcell, ‘Refugee protection’.

¹²⁶ Klabbers, ‘On Yearbooks’, 46.

Howard years highlighted international legal matters important to Australia from multiple perspectives. The Howard special issue underscores how the tensions that are sometimes evident in the AYBIL between acting as a record of government practice and publishing scrutiny and critique of that practice reflect the differences within the Australian community about Australia's international legal actions. In sometimes speaking within its pages for an Australian community that is divided on international issues, the AYBIL has given representation to a multi-faceted Australia even as it continues to act as a publication oriented to government and policy makers, and within the history and ongoing legacy of its sub-imperial status.

VI Conclusions

In this chapter, we have sought to contribute to recent scholarship on the production of knowledge that takes place in the journals and year books of international law. Taking the AYBIL as an artefact of international law raises it out of the background, the assumed landscape against which international law unfolds, and examines it as an artefact that it also an archive.¹²⁷ In this, we attempt to put in practice a call for a closer examination of objects as a way to reveal international law's subjectivity.¹²⁸ The subjectivity that emerges from our examination of the AYBIL is one that actively construct's Australian statehood as following on from its history as a Dominion of the British Empire; one that is aligned with the Anglosphere, western Europe and the U.S. as the relevant comparators and companions for Australia, Australian international lawyers, and Australian international law scholars.

We also see a tension that emerges in the subjectivity involved in being both the author and the lead character of Australia's story as a sovereign state in international law. By both critiquing state practice, and by orienting itself to government and policy makers while acting as the

¹²⁷ See Hohmann and Joyce, 'Introduction', 1. Chiam et al 'History, anthropology and the archive'; 3.

¹²⁸ Hohmann and Joyce, 'Introduction', 3; Chiam et al, 'History, anthropology and the archive', 3.

publication of record for Australian practice, the AYBIL is a conflicted artefact. However, this conflict can be seen as a productive one, within the limits of the structures in which the AYBIL operates. We conclude that it is the context of Australia's dominion history, and the state's continuing orientation to the global north and ongoing commitment to whiteness that best represent the structures within which the AYBIL has developed since its founding in the 1960s at the ANU. Thus while the AYBIL's editors have changed over time – in fact we might characterise the editors as having represented three phases – a tight knit group of editors with strong 'traditional' links with empire from the 1960s to 1980s; a 'broadening out' under Charlesworth and Alston to an outward looking editorship during the late 1980s through to the Howard prime ministership and then a return to a more Australian-centric editorship (under Rothwell) – the extent and character of that change is circumscribed by broader structural factors. These range from the personal and institutional affiliations and networks of the editors, which are oriented to the global north and particularly to the U.K. as Australia's former colonial power, to the expertise of Australian international lawyers in both the academy and in government, forged in Australia's sub-imperial adventures as a mandate power in the region. It is also structured by the legacies of Australia's commitment to whiteness, its great power alliances – first to Britain and later to the U.S. – and the longevity of its positioning as a state that merely happens to be located in Asia, while speaking to and with Europe and the other Anglophone settler colonial states.

The AYBIL as artefact of Australian international legal life *also* tells stories that resist and contest that subjectivity.¹²⁹ Indeed, as we have discussed, the AYBIL has published legally and methodologically innovative scholarship, along with energetic critiques of Australian government practice. And while we argue that these critiques remained constrained by the long shadow of Australia's dominion past, they nevertheless perform ongoing and important functions of scrutiny

¹²⁹ On the resistant potential of objects see Hohmann and Joyce 'Introduction'; Hohmann, 'Lives of objects'.

and analysis of the government practice that is also published within the AYBIL. In these ways, exploring the structural and substantive aspects of the AYBIL has helped reveal unstated and unexamined assumptions that sustain – and also constrain – international law in Australia, and how it is discussed, published, and disseminated.