To Reform the World or to Close the System? International Law and World-making

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Recently, scholarship on international law has grappled with the complex role played by international law in bringing about our current international system. Two recent books, *The Closure of the International System* by Lora Anne Viola and *To Reform the World* by Guy Fiti Sinclair illuminate the processes through which our current international system came into being. Sinclair cleverly tells the story of how International Organisations (IOs) came to expand their powers beyond their legal mandate, arguing that international law and particular constitutionalist interpretations made IO expansion *thinkable* in a process intertwined with the making of the modern Western state. Viola on the other hand reverts the conventional *expansion* thesis and takes us through the history of how the international system has become increasingly closed. The puzzle for her is the coexistence of equality and inequality, and her constitutive and causal claim is that categories create boundaries that have distributional consequences. Juxtaposing these two accounts reveals the challenge of telling a coherent story of the role of international law in the development of our current international system: How does *expansion* coexist with *closure?* This tension, which both books grapple with, reveals something important about international law. It is characterised by contradictions and tensions, a reformist promise yet a tool for domination, a means of closing off clubs and creating boundaries, yet an equalising force. How do we make sense of this?

I argue that both Sinclair and Viola provide important insights into the complex nature of international law and its worldmaking effects. However, Viola's desire to engage with the English School's expansion thesis ends up missing important episodes of agency and resistance in an otherwise deterministic story of closure. Sinclair on the other hand allows space for contingency. By showing the agency of particular figures and their interpretations of international law and the UN Charter, he shows that things could be different. The space one attributes to agency and resistance in histories of international law matters, since 'intellectual history itself is a kind of worldmaking' (Sinclair 2019). Ultimately both books leave us wondering where to go from here. Sinclair's Foucauldian genealogy stays clear of any normative conclusions about what to make of the reformist promise of international law, and the key to the door of Viola's closed system seems long lost. In the end, Koskenniemi's question remains: Does international law offer 'for a cynical world, a vocabulary for imagining better futures?'(Koskenniemi 2012:3).

The natural corollary of asking *how we got here* is *whether things could have been different?* By making *closure* the leitmotif in her story of the international, Viola complicates contemporary accounts of an increasingly democratising international order. Her critique of recent literature on hierarchies is particularly sharp, arguing that even this critical work assumes a trajectory towards more inclusivity and openness (Viola 2020:58) In this sense her work is an important conceptual contribution in turning the expansion thesis on its head. However, drawing on Pitts' critique of Watson, I argue that Viola makes certain choices to 'render global interactions analytically tractable' that 'make it hard to see some of the major phenomena of modern world history' (Pitts 2018:14). In engaging so explicitly with the English School, she ends up inadvertently adopting some of the pitfalls of Bull and Watson. While her account up until the 20th century is compelling, it is at the discussion of self-determination, that the heuristic of *closure* itself closes off certain important perspectives and moments of resistance. Indeed, the 'battle for international law' (Bernstoff and Dann 2019) is in tension with the coherent account of the closure thesis. Part of this is her honest admission of providing a 'bird's eye view of politics' across time and space (Viola 2020:34).

This then leads Viola to offer a less than satisfactory theorisation of what international law is. For Viola international law demarcates clubs and defines standards of membership. This function of law is well described by Pahuja, who conceptualises the demarcation, not as a means of *closure*, but as a *cut* (2011:25). For Pahuja, the universal aspiration of law means that this cut seems to erase itself (2011:7), but there is amongst these cuts, a 'critical instability' (2011:25), that leads to 'law as cut' being 'a site of potential contestation' (2011:32).

This contestation is not seen in Viola's account which is particularly evident in her discussion of self-determination as another means of closure. Similar to Spanu's conceptualisation of the disciplining effect of self-determination (2020), we are presented with a rather bleak account of self-determination. Rejecting the emancipatory promise of self-determination, we are told that the doctrine 'further homogenises the international system and delegitimises alternative organisational forms' (2020:166). Here it becomes apparent that the *closure thesis* does not engage with the moments of resistance and promise of reform during this period. Getachew's analysis of anti-colonial interpretations of self-determination beyond the nation-state offers a glimpse into the promise of this period (2019). While the battle for international law (Bernstoff and Dann 2019) may have overwhelmingly been disappointing, there were real victories for the Third World after decolonisation such as the extension of laws of war to national liberation struggles (Mantilla 2020), or even decolonisation itself. The macro-perspective that tells us that the 'nation-state is a narrowing of political community' (Viola 2020:183) comes across as rather detached from specific agents and ignores the moments of resistance, which allows us to see that things could have been different. Here a lot of the work is done by the *closure* metaphor. When a door starts closing, we know where it will end up. The work does unfortunately not engage with the moments where the door was being pushed ajar. This illustrates how the leitmotif of the investigation can close off certain perspectives. For Pitts, the central theme is *domination*, which 'enables us to see how the emancipatory and dominating sides of international law are intertwined' (2018:10). I argue that the heuristic of closure makes Viola's investigation blind to exactly these emancipatory effects of international law.

An important contribution of Sinclair's work, on the contrary, is to show the contingency of the process of IO expansion. He shows how a 'distinctive legal hermeneutic' made IO expansion *possible* (Sinclair 2017: 226) by analysing how the specific convictions and legal interpretations of a broad set of characters such as the founder of the ILO, Albert Thomas, and UNSG Dag Hammerskjöld, and World Bank lawyer, Shihata. This Foucauldian deconstruction and genealogy leaves us wondering; what would our world have looked like had different actors been leading these organisations, or had they had different convictions? Hammerskjöld's expectations of international civil servants bordering on 'political celibacy' are particularly convincingly analysed as 'government of the self' (Sinclair 2017:189). Granted, these are indeed all 'great white men' (Alter 2019:186). However, conceptualising IO as a process 'of reform and resistance' allows for an investigation of 'the influence of movements 'from below'' (Sinclair 2017:284, 16). The Congolese objections to the 'mission creep' of the peace-keeping mission are an example of how Sinclair shows that IO expansion was resisted (2017:183). In contrast to Viola's rather macro and bird's-eye treatment of the construction of categories, Sinclair takes us into the room where it happens, as when he describes how the Information Committee 'became a site of ongoing struggle' over how non-self-governing territories were defined and whether Chapter XI reporting obligations applied (2017:127). It would however have strengthened Sinclair's account to focus even more on these struggles and resistances 'from below' (2017:16).

The focus on the protagonists in these IOs provides the foundation for a theoretically enriching conceptualisation of international law. At the beginning of the book, Sinclair presents three ideal-types or 'modalities' of international law that can coexist in various combinations (2017:9). It can be 1) coercive and repressive 2) taming and repressive or 3) responsive and adaptive (Sinclair 2017:9) Viola too conceives of international law as having different modalities and effects, being both equalising and stratifying (2020:161). Yet Sinclair's theorisation of international law offers a less deterministic conception of international law. This deterministic aspect of Viola's argument partly comes from the ambitious desire to say something *constitutive* about the international system. By staying close to the characters in his book, Sinclair's socio-legal method instead allows us to see why the promise of reform of international law allowed for constitutionalist interpretations beyond the scope of the letter of the law. Dag Hammerskjöld's 'sociological and spiritual' interpretation of the Charter (Sinclair 2017:161-162), reveals the unique appeal of international law. It is the promise of reform for Sinclair that is central to the power of international law. In this sense, Sinclair allows us to understand Koskenniemi's teleological understanding of international law and its 'universalising pull' (2011:24), but without embracing it himself, shows how this understanding has been central to structuring our

current international system through both dominant IOs and the very states that make up the system.

Exactly this ease by which Sinclair straddles the disciplinary boundary between international law and IR opens up the possibility for an interesting interdisciplinary conversation on the constitutive and productive nature of law. Legal scholars have long argued about the nature of statehood and recognition. Is recognition declaratory, as in simply describing what already exists, or is it constitutive, bringing the state into being through the act of recognition? The consensus among legal scholars is that recognition is purely declaratory and that states exist independently of recognition. Sinclair's argument about the state-making effects of the reformist promise of international law should awaken the lawyer's mind to the productive power of international law (Barnett and Duvall 2005). International law has shaped and formed the modern state through peacekeeping, ILO operations, and World Bank programmes, all enabled by constitutionalist discourses. Just as the protagonists of Sinclair's study are driven by interpretations beyond the letter of the law, Sinclair shows that international lawyers must conceptualise law as a 'discourse and practice' (2017:8) with worldmaking effects.

However, Sinclair could have benefitted from engaging with recent IR scholarship on practice. Adler and Pouliot conceptualise practices as being able to be performed more or less competently (2011). Taking seriously the 'practice' part of his definition of international law, Sinclair could have examined what made specific interpretations compelling and acceptable. Sinclair presents a thorough description of Hammerskjöld's and other protagonists' beliefs, but was there something about the culture of their specific organisations that meant that these individuals were successful in disseminating their constitutionalist ideas? In other words, what made these characters competent to do so? Such an analytic perspective also involves looking at who was silenced in these processes or deemed 'incompetent'.

Sinclair and Viola's stories of how we got to where we are today, then prompt the question*where do we go from here?* Sinclair is comfortable providing a genealogy of IO expansion, but less so in offering his take on the normative desirability of this process. However, I argue that this is part of the strength of Sinclair's work, in that it exposes the ideas that made the constitutionalist developments of IO's possible, without taking a normative stance. The contingent nature of the account then leaves us with the tools to assess how and whether it should have been different.

Viola is different on this account. At the end of the book, the preceding analysis has convincingly shown that categorical differentiation has distributional consequences (Viola 2020:44). In the conclusion, she then relates this insight to the realisation that we should 'become more conscious of what inequalities we are willing to accept ' (Viola 2020: 230-231). There is some confusion as to who constitutes 'we' here. The 'insiders' or the 'outsiders'? This confusion points to the lack of politicisation of international law and the absence of resistance in her book. If categorial differentiation, or in Pahuja's terms, the '*cut'* of international law (2011:26), necessarily has distributional consequences, then this has to be a question of politics and contestation. The idea that there is a 'we' to make these decisions exactly contributes to the naturalisation and erasure of the *cut* of international law.

This relates to some confusion about where the 'closing' of the international system began and what came before. Viola argues that 'prior to the creation of the category, there is no equal way to determine who ought to be included and excluded because there is no equal way of determining who is to participate in making this original decision' (2020:78). If the inequalities today and the categories of the international system depend on some original decision, is there a way to push the powerful actors back behind a Rawlsian veil of ignorance? Apparently not. Viola has shown the pervasiveness of categories and boundaries but has left us with preciously few tools to do anything about this.

What is lacking in Viola's account is the space for agency, that sovereign equality allows for states in the Global South, which is due to a limited exploration of the possibilities of international law. She offers a sophisticated typology of different strategies deployed by insiders to preserve club member privileges, consisting of assimilative multilateralism, hierarchical multilateralism, and exclusive multilateralism (Viola 2020:165). However, the typology might be turned on its head and present different ways in which international law and multilateralism worked in the favour of Global South states. Viola might plausibly counter by arguing that all of these attempts were situated within

the narrowly conceived content of the nation-state, but Getachew's concept of 'worldmaking' broadens this (2019). Thinking of the New International Economic Order as fundamentally rethinking the state and the world economy, allows us to identify a moment where the Third World resisted the 'club privileges' of the West. Viola does therefore not engage sufficiently with the Janus-faced nature of international law. It offers limitations and possibilities. It is both constraining and enabling (Hurd 2017). So while there may be an enduring logic to the international system in terms of categorical differentiation creating distributional consequences, the reality of the system's historical development is much more complex and contingent. To imagine how non-state actors might gain international legal standing and become part of the closed system, this duality of international law must be taken into account. Ultimately Sinclair's socio-legal method captures is better able to capture this complexity.

Granted, Viola does not deny the 'empirical reality' of states from the Global South having more rights than under colonialism or IOs having expanded their membership (2020:27). Yet importantly for Viola, this is not a sign of progress but rather 'indicators of how narrowly international rights are conceived to begin with' (2020:27). This comes down to ambiguity about who exactly the system is being closed for. Her analysis primarily centres around non-state actors, and in this sense, it is perhaps unfair for her to reject other hierarchy scholars' hesitant optimism about the inclusion of non-Western states. Her claim against scholars such as Zarakol is that despite identifying the stigmatising effects of an insider-outsider dynamic, Zarakol nonetheless sees a 'trend toward increasing inclusivity and pluralism' (2010:82). However, in the effort to reject a teleology towards greater liberalism, Viola ends up attributing too little importance to this 'empirical reality' of decolonisation and the agency of states from the Global South. On this point, she differs from Naylor, also working on social closure and international society, who cautions that 'we should not oversteer as we address the literature's earlier, problematic accounts' (2019:11). Naylor who similarly identifies the closure of international society to non-state actors, nonetheless, examines how such actors engage and try to influence global governance at summits. For Naylor, there is therefore the possibility of agency at these specific events. This partly comes from a more fluid understanding of closure that is used to 'capture less rigidly defined social orderings … in a more fluid international domain, not just in the formation and maintenance of distinct groups' (Naylor 2021:12). In contrast, Viola's more categorical approach to closure seems to close off the possibility of imagining and identifying resistance to the closure of the international system. A more fluid conception of closure would illuminate her analysis and allow her to investigate moments of resistance to the closure. The presence of non-state actors at the G7 and G20 summits (Naylor 2021) or how indigenous people transcend sovereign requirements for participation in international law (Shadian 2010) represent examples of how the door to the international society is sometimes pried open.

The question is then ultimately, where do we go from here? In Sinclair's case, future research could ask whether the general thesis holds up if we included more cases such as other IOs in the analysis. Would we discover more resistance if we examined how the ideas of the leading protagonists were received lower down in the bureaucratic hierarchies? The constitutionalist drive is very much embedded in Eurocentric ideas, and as Sinclair puts it in his conclusion: 'international law's reforming promise is deeply connected to its civilising mission' (2017:296). Therefore, expanding the analysis of IO expansion to include non-Western regional IOs, such as the African Union or ASEAN, might illuminate different factors leading to or preventing constitutionalist growth and expansion. Maybe in these cases, the same driving processes based upon a post-colonial state modelled on the Western liberal state are present as well. In that case, Viola's analysis about closure of other possibilities than the nation state would be strengthened, in showing that there are few alternatives to the role of the liberal Western state in the 'imaginary underlying international organisations' law' (Sinclair 2017:294). After comparing both Sinclair and Viola's work it becomes clear that international law has world-making effects. It has created exclusionary categories and spread the model of the Western liberal state. However, it is a testament to the unique nature of international law, a tool for subordination as well as emancipation, that neither Sinclair nor Viola offer a different way of thinking about alternatives. It seems that the reformist promise that has driven Sinclair's IO expansion ultimately still offers, 'for a cynical world', that both Sinclair and Viola have awakened us to, ' a vocabulary for imagining better futures' (Koskenniemi 2012:3).

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