

Voos, Sandra. *Die Schule von New Haven. Darstellung und Kritik einer amerikanischen Völkerrechtslehre.*

Berlin: Duncker & Humblot, 2000. Pp. 345. DM138, €69, sFr119.

For Continental jurists, the international legal scholarship of the New Haven School (NHS) has been a prime subject for over half a century of sometimes harsh criticism. However, these unfavourable critiques of the NHS's theory of international law have more often than not been unfair, or have completely missed the mark. The latest engagement with the NHS, the book under review, is no exception to this trend and must be appraised accordingly.

This is not to say that the book as a whole is a failure. Its strengths lie in a sober and comprehensive presentation of the NHS's terms and most important arguments; these are diligently elaborated. Most notably, the

author discusses these arguments from the NHS's perspective in light of findings to the contrary, i.e., findings reached by non-members and/or outspoken critics of the NHS. In what amounts to very subtle observations by the author, central and detailed aspects of NHS thought are identified and weighed up against their critics' arguments. For instance, McDougal's assertion that the freedom of the high seas cannot be considered as a fundamental legal principle which is to be respected – arguably as a rule – when overriding goals of the world community are at stake is juxtaposed with the opposing view that it is for the world community to decide whether to regard the freedom of the high seas as such as a principle of international law. That is, McDougal's argument favouring the interpretation of a principle in terms of policy is not contrasted with a dogmatic attitude which insists on the binding character of principles as a matter of form and/or sources. Rather, it is weighed against, and dismissed by the author of the book under review, on the ground of conflicting interpretations of what is desired by the world community whose interests international law is meant to protect.

It is not so much the descriptive parts of the volume but rather its evaluative sections that may be expected to draw the attention of potential readers. However, the author has not managed in this respect to avoid repeating mistakes that have hitherto prevented most Continental jurists from a fair engagement with NHS ideas. For instance, the author's discussion of the school's scepticism regarding the role of norms as it has been traditionally conceived on the European continent may in itself be seen as a failure in appraising the NHS, if not on its own terms, then at least in a fair and reflective manner. As the author correctly points out, it is a fundamental assumption of the NHS that issues of international law pose the problem for decision-makers of favouring one of at least two conflicting principles before they sanction a particular norm. Norms are not viewed as operating autonomously, nor are they conceived as being separable from general legal principles. Sharing the legal realist conviction

that principles directing judicial reasoning may conflict and that, where they do, decision-makers may be forced to make a choice,¹⁵ the NHS emphasizes that it is important to understand how decision-makers make that choice in the context of an international incident.¹⁶ For it is here, according to NHS thought, that policy considerations play themselves out.

It is maintained, for instance, that norms regulating conduct on the high seas inevitably fall within at least two complementary sets of sound community policies, with corresponding principles pointing in opposite directions: on the one hand, the principle of *pacta sunt servanda* which emphasizes the protection of classical freedoms concerning navigation or fishing on the high seas; and on the other hand, the principle of *clausula rebus sic stantibus* which structures the currently evolving regime of sovereign title over coastal waters delimited by the Continental shelf. For the NHS, the question of which principle is, and ought to be, given more directive force in a concrete situation cannot be answered by the resort to rules. Since it is assumed that there are usually extra-legal factors at play, what should be investigated with a view to their influence on the process of deliberation are the policy-relevant social and political interests of the actors in a situation of choice. As the NHS's argument goes, the policy content reflected in a choice between legal principles can be exclusive or inclusive, i.e. ranging between narrow self-interest and overall community interests. Ultimately, the decisive point to be considered in an evaluation of such

¹⁵ This argument goes back to B. N. Cardozo, *The Nature of the Judicial Process* (1921).

¹⁶ For an attempt to elaborate ways of analysing decisions contextually and with due regard to policy, see the collection of essays edited by W. M. Reisman and A. R. Willard, *International Incidents: The Law that Counts in World Politics* (1988), esp. the contributions by the editors themselves.

arguments lies in the assumption that there is always some policy consideration involved.¹⁷

It would not appear that the salience of this assumption has been given full credit by the author of this volume. This is doubly remarkable because in earlier sections of the book she rightly describes the jurisprudence as being composed of inextricably intertwined conceptual, methodical and normative elements and because she concedes due respect for the ensuing different identity of the NHS. The author's appraisal, however, is tainted with a purely formalist aesthetic, which exhibits the same dogmatic stance that has so far prevented the great majority of Continental commentators from a fair engagement.

In the author's view, there may indeed be conflicting principles but, contrary to what the NHS tends to perceive, only one of them proves to be relevant and valid in concrete cases. Arguably, the relationship between conflicting principles is not characterized by competition. As the author maintains, this relationship should rather be seen as one of 'rule and exception', the crucial aspect being that the applicability of principles is ultimately regulated by the system of law itself. That is, the legal system, and not the political fiat of actual decision-makers, determines the applicability of principles in concrete cases because it provides a category by which any given case

can be classified, and because it distinguishes between principles that apply in such cases as a rule and those that apply in such cases only exceptionally. The formalist argument of the author runs as follows: the applicability of legal principles depends on whether or not the conditions arguably stipulated by these very principles are met in fact; it is questionable that the conditions stipulated by two different principles are met simultaneously; cases in which two principles seem to apply are to be subsumed under preformulated categories; the classification of cases makes it clear that only one of two or more conflicting principles is usually applicable in a certain category of cases; principles that apply only exceptionally should be narrowly interpreted; resort should be to principles that apply as a rule. Given the purely formal truth that principles are only either generally or exceptionally applicable in certain cases, and that resort should be to the former, it is held that it follows logically from the legal system's internal operation that only the generally valid principle is applicable in concrete cases.

The author's argument begs the very question that lies at the root of the NHS's scepticism as it purports to counter the NHS's criticism of formalism by definition and tautological reasoning. Unfortunately, the same kind of problem can be observed in the author's attempt to criticize the NHS's insistence on a fusion of law with social scientific methodology premised on a self-conscious normative stance. Her critical remarks on the NHS's notion of decision are illustrative in this regard.

As Part A of the book under review aptly describes, the NHS favours the concept of decision over (formally conceived) norms because the former has the potential to allow for a more realistic account of international law. That is, the NHS's approach to the question of how international law is made and applied problematizes the extent to which perspectives of decision-makers attending particular choices as well as the sum of choices actually made culminate in specific decisions. Moreover, the two crucial elements of decision, i.e. perspectives and operations,

¹⁷ Cf. Reisman's detailed discussion of the Award of the Arbitral Tribunal in the First Stage of the Proceedings involving the Government of the State of Eritrea and the Government of the Republic of Yemen, *supra* note 2. As he points out at 678–679, the authoritative choice between two recognized legal principles regulating disputes about territorial sovereignty, i.e. succession to title as a *jus in re* or effective occupation as *de facto* possession, has not been facilitated by resort to existing rules. On the contrary, the operational provisions contained in Art. 16 of the Lausanne Convention have rather severed the apparent links of succession, the consequence being that issuance of an award had been based on 'a strong presumption in favor of a state's sovereignty over maritime formations in its territorial sea by virtue of propinquity alone'.

are investigated by members of the NHS with a view to whether and to what extent they embody normative guidelines that 'serve as summary indices to relevant crystallized community expectations'.¹⁸ In short, the NHS's focus upon decision is meant to illustrate the actual role of international legal norms in the psychological and sociological dimensions of the process of deliberation and decision-making.

This notion of decision, arguably affected by psychological and sociological factors, championed by the NHS and widely adopted throughout American foreign policy analysis at the time,¹⁹ has been the focal point in the NHS's attempt to integrate findings of different academic fields such as psychology, anthropology and sociology with a process theory of (international) law. As such, it is an important aspect of the ambitious endeavour on the part of McDougal and his associates to manufacture a multivariate conceptual scheme in which disciplinary boundaries are blurred for the sake of a contextual and, for this reason, more sophisticated understanding of law in operation. To be sure, it has been plausibly maintained that this multidisciplinary approach to political decision processes tends to promise more than it is able to deliver. Most notably, the heuristics of the NHS has been shown to rest on perhaps incommensurable epistemological assumptions as it is believed that norms affect decision-making behaviour through their becoming manifest in psychological factors on the one hand and sociological factors on the other. As has been argued, this fusion of psychological and sociological theorems in the attempt to develop an explanatory scheme of decision-making could be considered fruitful only if the underlying notions of social action, i.e. psychologism/subjectivism and materialism/objectivism,

were not mutually exclusive. But this has so far been held to be the case.²⁰ Without further explanation of how to dissolve this opposition, the NHS, it would seem, can be legitimately criticized for not having found a way to circumvent this problem. This does not mean, however, that the very attempt to conceive of law in a not purely formal manner is a mistake.

Taken as a whole, the author's criticisms amount to a multifaceted complaint that the NHS's jurisprudence does not conform to what are deemed valid and firmly established jurisprudential views. This complaint refutes the NHS's claim of greater intellectual sophistication by simply hypostatizing the merits of formal models and by depicting a narrow and contingent set of criteria as the only valid basis of scholarly appraisal. What renders this complaint important in this context is that it stands in obvious contradiction to what the author herself has professed to accomplish, since there is no sign of reflective caution. Albeit unfortunate, this is understandable given the unquestioned premises of the author's appraisal.

The views underlying the author's complaint are common among Continental jurists. Nevertheless, despite their being considered self-evident among mainstream jurists on the Continent, they have their

¹⁸ M. S. McDougal and F. P. Feliciano, *Law and Minimum World Order*, quoted by Voos at 54.

¹⁹ See, for example, R. Snyder, H.W. Bruck and B. Sapin, *Foreign Policy Decision-Making* (1962) and G. Modelski, *A Theory of Foreign Policy* (1962), which were influential textbooks of this genre during the 1960s.

²⁰ For the views of the main protagonists in this debate, see Mandelbaum, 'Societal Facts', in P. Gardiner, *Theories of History* (1959); Watkins, 'Historical Explanation in the Social Sciences', in *ibid*; and Agassi, 'Methodological Individualism', 11 *British Journal of Sociology* (1960). For the implications of this debate in American political science, see Gorman, 'On the Inadequacies of Non-Philosophical Political Science: A Critical Analysis of Decision-Making Theory', 14 *International Studies Quarterly* (1970) 395. On the consequences for the NHS in the context of international legal scholarship, see Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-House of Language', 26 *Harvard International Law Journal* (1985) 327, at 343; and M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989), esp. at 173–176.

origin in a set of questionable philosophical ideas: the branch of Neo-Kantian philosophy mainly developed by the Marburg School, which was dominant more than a hundred years ago, and which has, in one form or another, provided the intellectual subtext of much formal positivist legal scholarship until the present day. The most typical feature of this perspective is that analysts identify uncritically with the formal identity of their model(s) and are thus led to reify the object under investigation in a purely formalist aesthetic, i.e. international law as an autonomous body of rules. It is assumed, primarily for the sake of logical exegesis, that international law exists independently of external influences, the consequence being that the importance of societal and/or political factors and the context in which international law is, say, functionally embedded are ruled out *a priori*. Most Continental jurists do not find it necessary to consider the craft of law as being dependent on sociological and other kinds of social scientific knowledge. As (international) law can supposedly be studied in its own right, preferably through the investigation of treaties and/or generally accepted principles together with the doctrines in which they become manifest, knowledge about societal contexts and political and/or economic processes is not deemed necessary. Indeed, according to the author of the book under review, it is not even possible.

Considering that the contingent intellectual status of her scholarly commitments is barely problematized by the author of the book under review, the question is how she could make good on the claim and investigate the NHS's theses in a reflective fashion. This question is vital because the approach of the NHS must seem rather controversial in a legal culture in which scholars and practitioners are largely oblivious of the fact that they conform to peculiar disciplinary conventions centring on objectified norms, deductive and subsumable methodologies as well as dogmatic rationalist views regarding epistemology. This rather dubious intellectual self-understanding deprives the members of such a culture of the very basis upon which to critically engage

with the NHS's jurisprudence in a fair and convincing fashion because the latter's identity is premised on intellectual identifications whose salience is categorically denied by the former: interdisciplinary methodology and a pragmatic epistemology. The author's inability to escape the narrow confines of her perspective is thus her biggest problem. Additional shortcomings include the author's tendency to repeat old-fashioned claims and her reliance on rather dated sources. In addition, newer arguments from the NHS's perspective²¹ are not considered, nor are more recent criticisms of this school²² discussed. This, too, is to the detriment of a critical engagement that transcends the dogmatism of Continental legal scholarship for the purposes of a fair discussion.

Despite these obvious shortcomings, the book may be considered an accomplishment if, and to the extent to which, one is interested in a diligent enumeration and thorough exposition of the NHS's thought.

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²¹ Among them are, for example, M. S. McDougal and H. D. Lasswell, *Jurisprudence for a Free Society* (1991); Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in G. H. Fox and B. R. Roth (eds), *Democratic Governance and International Law* (2000) 239; Reisman, 'International Legal Responses to Terrorism', 22 *Houston Journal of International Law* (1999) 3; and Wiesner and Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity', 93 *AJIL* (1999) 316.

²² See, for example, F. V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), esp. at 194–200; P. Allott, *Eunomia: New Order for a New World* (1990); B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993), esp. at 73–145; Falk, 'Casting the Spell: The New Haven School of International Law', 104 *Yale Law Journal* (1995) 1991, at 2003.