

Tel Aviv University Law School
Tel Aviv University Law Faculty Papers

Year 2008

Paper 83

The Conception of International Law as a
Legal System

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Abstract

Perhaps the most distinctive aspect of the German approach to public law in general and to public international law in particular is the systemic vision: the effort to envision the various legal norms as arranged within a hierarchy, composing together a coherent, logical order. This essay highlights what I believe to be the contribution of this systemic vision to international law and politics. This approach has contributed significantly to the emergent conception of international law as a legal system. The system of norms constitutes a map that guides lawyers in their search for applicable norms, and empowers judges to fill lacunas, interpret treaties, manage the interface between different treaties, and in general develop and further solidify the system. Probably the most significant political outcome of the vision of international law as a legal system is the empowerment of courts to develop international law beyond the intention of governments, and the equalizing effect of a coherent and consistent interpretation and application of the law. The essay also mentions a few contemporary challenges to this vision, in particular the fragmentation of the law and the turn to informal arrangements.

The Conception of International Law as a Legal System

By Eyal Benvenisti

A. Introduction

Perhaps the most distinctive aspect of the German approach to public law in general and to public international law in particular is the systemic vision: the effort to envision the various legal norms as arranged within a hierarchy, composing together a coherent, logical order. This systemic approach has contributed significantly to the emergent conception of international law as a legal system. Lacking a global legislator, the systemic vision has provided a potent tool for the development of international law. The system of norms constitutes a map that guides lawyers in their search for applicable norms, and empowers judges to fill lacunae, interpret treaties, resolve conflicts between norms, and in general develop and further solidify the system. This essay highlights what I believe to be the contribution of this systemic vision to international law. The essay also suggests a few contemporary challenges to this vision.

B. The Systemic Vision of International Law

The systematic vision of law characterizes German legal scholarship in general, and is probably the key to understanding its significant and lasting influence on decision makers in Germany.¹ This systematic approach – “the emphatically academic and *scientific spirit* of legal scholarship with its struggle for

¹ *Stefan Vogenauer*, *An Empire of Light? Learning and Lawmaking in Germany Today*, *Oxford Journal of Legal Studies* 26 (2006) 627, 656–657. For the differences between the systematic German approach to constitutional law and the more contractual American approach to constitutional law, as well as the implications of these different approaches, see *Georg Nolte* (ed.), *European and US Constitutionalism* (2005).

rationality, systematic coherence, logical consistency, building on first principles, obsession with taxonomy, abstractness, precision and clarity of concepts that characterizes German legal culture”² – has been particularly helpful in constructing a global world view of law that delimits national sovereignty and governs inter-state relations. “[T]he traditional approach of English law with its virtual absence of clear divisions of the law and a ‘tradition of working disorder’ where lawyers categorized and compartmentalized only at a relatively low level of abstraction”³ could not compete in this endeavor. The systemic vision organizes the diverse types of communications between states – actions, agreements, declarations, even silence – as legal obligations arranged within a certain hierarchy and internal coherence. That today most contemporary students, scholars and practitioners envision international law as a legal system is arguably the outcome of German public law scholarship.⁴

The systemic vision of international law, developed during the nineteenth century by German (or German-speaking) scholars such as *Georg Friedrich von Martens*, *August Wilhelm Heffter* and *Johann Caspar Bluntschli*,⁵ contributed to

² *Vogenauer* (note 1), 657.

³ *Ibid.*, the ‘tradition of working disorder’ is quoted from *Tony Weir*, *The Common Law System*, *International Encyclopedia of Comparative Law*, vol. II, chap. II (1974), paras. 82–84.

⁴ *Martii Koskenniemi* highlights the role of *G. F. von Martens* in developing the concept of international law as a legal system: “Martens did for international law much what Moser had done for German public law, compiling over the course of the years the basic legal sources that other lawyers could use to pursue their interpretative and systematic studies on a practical basis and thus contribute to the sense among the bureaucratic class in Germany of the presence of an understanding of treaties as forming or at least manifesting the operation of something like a legal system.” *Martii Koskenniemi*, *Georg Friedrich von Martens (1756–1821) and the Origins of Modern International Law*, in: *Christian Calliess/Georg Nolte/Peter-Tobias Stoll* (eds.), *Von der Diplomatie zum kodifizierten Völkerrecht* (2006), 13, 18–19.

⁵ The contributions of the German scholars to the construction of a systemic vision of international law were recognized at the time. *Schulze*, in his notice nécrologique on Heffter suggests that “certaines faces de la théorie du droit international ne peuvent être développées que par la science allemande,” *Hermann Johann Friedrich Schulze*, *August Wilhelm Heffter (1796–1880)*, *Annuaire de l’institut de droit international* 5 (1882) 25, 35; *Friedrich von Martens*, *Völkerrecht, Das Internationale Recht der Civilisirten Nationen*, vol. I (1883), begins the Foreword by paying tribute to the German literature on international law that is “reich an ausgezeichneten systematischen Arbeiten,” and at 168–174 emphasizes the works of these three scholars for their synthesis of philosophical principles with the positive elements of international law, a synthesis that provided a basis for understanding and criticizing state practice. See also *Betsy Röben*, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (2003).

the evolving legal order, because it provided room for both continuity and change: continuity of the basic principles of a legal system, with its rules of recognition, coupled with the appreciation of the role of judges in developing the law through interpretation, and change through the ample opportunities state actors have to adjust specific norms by their practice. The accommodation, by this vision, of both continuity and change pays its respects both to the notion of state sovereignty and to the fundamental goals of the community of states, as they evolve over the years.

The vision of international law as a legal system is not the only possible vision. A recent trend in international law scholarship, particularly in the United States, challenges this view, offering a vision of international law as nothing more than a mix of solitary treaties hovering over the abyss of international anarchy in no particular hierarchy. Even the Vienna Convention on the Law of Treaties,⁶ according to this view, is a document designed to clarify treaty obligations, rather than an instrument identifying key rules of recognition of the legal system.⁷ Under this vision, state sovereignty reigns supreme, and the international obligations of states – which are not necessarily *legal* obligations – fluctuate with the ebb and flow of world events.

Fortunately for the proponents of the vision of international law as a legal system, the German approach has been influential also beyond Germany. It was introduced to the Anglo-American world through the writings of German and German-speaking *émigrés* such as *Francis Lieber*, *Lassa Oppenheim*, *Sir Hersch Lauterpacht*, *Georg Schwarzenberger*, *Hans Kelsen*, and many others. In the works of all of these scholars, there is a pronounced endeavor to create a coherent system of laws, one that resolves potentially contradictory outcomes and allows lawyers and courts to bridge across the archipelago of treaties and disparate state practice to fill legal voids. The recent International Law Commission report on fragmentation, with its suggestion that no international undertaking is beyond the reach of the Vienna Convention on the Law of Treaties, and the increasing resort by international tribunals and domestic courts to the

⁶ Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331 (VCLT).

⁷ The main proponents of this approach belong to the younger generation of American scholars, such as Goldsmith and Posner. See, e.g., *Jack Goldsmith/Eric Posner, A Theory of International Law* (2004) (international law as reflecting short-term interests of states and their bilateral obligations).

concepts of *erga omnes* and *jus cogens* obligations are evidence of the durability of this approach.⁸

C. The Systemic Vision as a Delegation of Authority

The vision of international law as a legal system creates a space within which decision makers can reach conclusions about specific outcomes using the rhetoric of law, rather than the rhetoric of what is just or efficient. Judges, bureaucrats, politicians and private claimants engage in deliberations about *legal* principles and the legitimate conclusions these principles stipulate. They use the traditional lawyers' tools of interpretation, deduction and inference to justify specific rules they articulate. This legal discourse empowers primarily judges, whose province is not to promote the good and the efficient, but rather to proclaim what is legal. Their authorization to assert what the law is requires them to use the lawyers' tools to reach specific conclusions. The vision of international law as a legal system rather than a mix of discrete treaties allows them to interpret, deduct, draw inferences and resolve conflicts not only by resorting to the specific treaties at hand but also by relying on the basic principles of the system and its underlying norms.

As a result of this implicit authorization, perhaps the most significant political outcome of the vision of international law as a legal system is the empowerment of courts to develop international law beyond the intention of governments. The systemic or constitutional conception of international law supplies relatively independent bureaucracies and judiciaries with doctrines that enable them to expand their authority while maintaining coherence and consistency through broad interpretation of treaties and the development of customary international law. Whereas governments tend to prefer rules on treaty interpretation that look back to the historical intention of the negotiators, thereby maximizing governments'

⁸ See UN International Law Commission, Study Group on the Fragmentation of International Law, Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), 176 (finalized by *Martti Koskenniemi*): "States cannot contract out from the *pacta sunt servanda* principle – unless the speciality of the regime is thought to lie in that it creates no obligations at all (and even then it would seem hard to see where the binding force of such an agreement would lie)."

influence on the outcomes of the interpretation process,⁹ international tribunals have developed alternative interpretative approaches, such as “evolutionary interpretation,”¹⁰ which are inspired by systemic goals such as coherence and efficiency.¹¹ Recourse to the doctrines of customary international law, *jus cogens*, and *erga omnes* obligations, allow judges considerable discretion to make new law while couching it in existing practices or fundamental norms. Indeed, international tribunals exercise considerable discretion in both “identifying” state practice and in determining whether following that practice reveals a state’s acknowledgment of its binding quality, making it a customary international law norm.¹² Moreover, international tribunals have promoted what *Lauterpacht* referred to as “the principle of effectiveness” in treaty interpretation to ensure that the treaties effectively achieve their goals, even reading into the texts additional obligations if necessary.¹³ If a treaty establishes institutions, the courts will bol

⁹ See, Art. 31(1) VCLT with emphasis on “the ordinary meaning to be given to the terms of the treaty in their context” and Art. 32 VCLT with reference to the preparatory work of the treaty and the circumstances of its conclusion.

¹⁰ For this type of interpretation, see ICJ, *The Gabčikovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, ICJ Reports 1997, 7. On the WTO Appellate Body’s preference for contemporary concerns over the historic intergovernmental agreements, see *Richard H. Steinberg*, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, *AJIL* 98 (2004), 247 (suggesting, for example, that, in its *Shrimp/Turtle* decision, the Appellate Body invoked “contemporary concerns of the community of nations about the protection and conservation of the environment” in its interpretation of the particular treaty by referring to “the secondary rank attributed to this criterion by the Vienna Convention, the lack of reliable records, and the ambiguities resulting from the presence of contradictory statements of the negotiating parties,” despite the availability of records of the negotiations).

¹¹ For coherence as a concern in interpretation, see the growing use of Art. 31(3)(c) VCLT, for example in: *Iron Rhine (“IJZEREN RIJN”) Railway* (Belgium v. Netherlands), Award of 24 May 2005, available at <http://www.pca-cpa.org/upload/files/BE-NL%20Award%20240505.pdf>.

¹² As *Lauterpacht* noted already in 1958, “In few matters do judicial discretion and freedom of judicial appreciation manifest themselves more conspicuously than in determining the existence of customary international law.” *Sir Hersch Lauterpacht*, *The Development of International Law by the International Court* (1958), 368. Courts rarely engage in systematic review of state practice, and instead rely on proxies such as adopted treaties or decisions of other international institutions as reflections of state practice. As *Meron* has observed, “Notably absent from many of these cases [in which international tribunals invoke customary international law] is a detailed discussion of the evidence that has traditionally supported the establishment of the relevant rules as law.” *Theodor Meron*, *Revival of Customary Humanitarian Law*, *AJIL* 99 (2005), 817, 819.

¹³ *Lauterpacht* (note 12), 227–228 (“The activity of the International Court has shown that alongside the fundamental principle of interpretation, that is to say, that ef-

ster those institutions, strengthening their authority internally and externally. At the internal level of that institution, the court will reinforce an institution's authority and impact *vis-à-vis* state parties beyond what the negotiators intended. At the external level, the court will recognize the institution's status as a "subject" of international law that must be treated and recognized as such by non-member states.¹⁴

D. Achievements and Challenges for the Systemic Vision of International Law

Obviously, the concept of international law as a coherent whole has had its marked effect in shaping outcomes in the international arena. A systemic vision that constructs and maintains an international rule of law promises all states – weak and strong alike – equal formal status to take part in the lawmaking process, and, even more importantly, equal protection via an impartial decision maker that resorts to a coherent and consistent interpretation and application of the law. By creating general principles, normative hierarchy, and by privileging consistency and precedent, judges provide weaker states with claims that they can employ in a variety of adjudicative bodies. The impact of unequal economic or military power between states is more apparent during treaty negotiations than when courts are called upon to interpret and enforce the treaty. This system of norms increases the likelihood that a victory that they achieve in a particular venue will have broad ranging implications.¹⁵ Hence the empowerment of the judiciary mitigates at least somewhat the disproportionate power relations between states. Evidence provides that developing countries seek judicial assistance in protecting their rights and promoting their interests more often than do

fect is to be given to the intention of the parties, beneficent use can be made of another hardly less important principle, namely that the treaty must remain effective rather than ineffective.”). According to *Lauterpacht*, the “principle of effectiveness of obligations, conceived as a vehicle of interpretation, is an instrument of considerable potency. It may be as comprehensive as all the rules of interpretation taken together,” *ibid.*, 282.

¹⁴ The jurisprudence of the European Court of Justice is a case in point. See *Joseph H. H. Weiler, A Quiet Revolution – The European Court of Justice and Its Interlocutors*, *Comparative Political Studies* 26 (1994), 510.

¹⁵ See *Eyal Benvenisti/George W. Downs, The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, *Stanford Law Review* 60 (2007), 595.

strong states¹⁶ and that the concept of international law as a legal system operated by judges benefits the weaker states. Because a dominant view holds that the systemic vision of international law also includes the basic human rights obligations as permeating the entire corpus of the law, adjudicative bodies view themselves authorized also to protect the individual rights and interests overlooked by governments.

But the systemic vision of the law does not eliminate discord. There can be competing perceptions of what constitutes the legal system. One well-known debate relates to the possible existence of so-called “self-contained regimes,” such as the European Union and the World Trade Organization, as discrete systems immune to the general normative order. Another famous – and some would say arid – debate concerns the relationships between the international legal system and the national system in countries that follow the dualist approach. In these debates – debates that often conceal competing policy considerations – disagreements can lead to tensions. This has been demonstrated, for example, by the sometimes tense relations between the European Court of Justice (ECJ) and the *Bundesverfassungsgericht* (BVerfG). Both courts viewed the same legal system from different angles, and also viewed themselves as the authoritative interpreters of that system. Their viewpoints clashed. *Juliane Kokott* notes that the BVerfG’s approach was not devoid of political undertones. The BVerfG’s vision of the European legal system was a way to promote national interests in the European political sphere. In a review of German courts’ compliance with EU law, *Kokott* notes:

Post-War Germany still has identity problems. For example, it is much more difficult for German politicians to articulate national interests than for French politicians. In comparison, it is easier for Germany to make its voice heard as the advocate or guarantor of legal principles. [...] Germany tries to influence the shape of European integration through the judiciary in the name of the fundamental rights of the individual and of democracy.¹⁷

But the more fundamental challenges to the German systemic approach to international law lie in some of the unique ways in which international law has developed since the end of the Cold War. I will refer to what I see as the three most pertinent challenges.

¹⁶ *Ibid.*

¹⁷ *Juliane Kokott*, Report on Germany, in: *Anne-Marie Slaughter/Alec Stone Sweet/J. H. H. Weiler* (eds.), *The European Court and National Courts – Doctrine and Jurisprudence*, (1998), 77, 126 .

I. Toward Pragmatism in the Global Counter-terrorism Effort?

The strict prohibition on the use of force suited well both East and West Germany during the Cold War. They were not expected to strike first, not even to respond to an attack unilaterally. Since 1945 (West) German scholars were perhaps the clearest supporters of a strict interpretation of Article 51 United Nations Charter,¹⁸ ardently opposing the doctrines promoted by the more active participants in the Cold War – the Soviets who supported wars of national liberation, and the Americans who promoted the expansion of the concept of self-defense to include anticipatory self-defense. This opposition to any deviations from the strict prohibition has kept alive the logic of the rule against the use of force, and no doubt contributed to its persistence.

The end of the Cold War finds a united Germany that is threatened, as many other affluent Western states are, by global terrorism. The growing sense of threat, particularly since 11 September 2001, creates tensions between the strict prohibition on the use of force and the need to counter the undeterred terrorists. The long-standing commitment to a strict prohibition on the use of force is challenged by those who argue that reaction in self-defense may be too little, too late of a response to an armed attack – possibly using weapons of mass destruction – by terrorists, alone or in cooperation with rogue regimes who also cannot be deterred.

The wide-ranging legislative authority asserted by the UN Security Council acting under Chapter VII poses another challenge to the systemic vision: does the Security Council have the authority to react to the abstract threat of global terrorism rather than respond to specific threats and attacks? Are there any legal restraints, including human rights and procedural guarantees of due process that the Security Council is bound by in its various actions?

The systematic response imposes significant constraints on any pragmatic solution. Under such circumstances it is tempting to look the other way and leave the “dirty work” to others, particularly to the United States, which has shown less commitment to the strictures of the law – certainly to the law as most German lawyers perceive it to be. These tensions have come to the forefront in light of the counter-terrorism measures authorized by the US – including practices such as “extraordinary renditions” and “secret prisons,” – measures which many European governments, committed to the rule of law and to human rights,

¹⁸ Charter of the United Nations, 26 June 1945, UNCIO 15, 335.

found difficult to accept as legally valid. Germany remains critical of the doctrine of preemptive self defense.¹⁹

But Germany, as other European states, will, at a certain point, have to relate to legal arguments that seek to justify modifications or derogations from basic international legal norms. How will the German approach to international law as a legal system adapt to pressures, coming particularly from the United States, to tolerate a concept that is yet to be clearly articulated as “a state of exception?”²⁰ Obviously, the concept of exception to the rule of law has been embedded in many constitutions, and is reflected also in the doctrine of “state of necessity” in international law. But any attempt to develop this doctrine further is bound to undermine the promise of a hierarchical, principled, normative order. As reflected also in the judgment of the BVerfG of May 2007,²¹ the tendency of German scholars and courts has so far been to interpret this exception strictly.

One question that arises in this context, and in view of contemporary threats, is whether the German approach to international law will or should become more pragmatic, more open to claims of derogations or exceptions for security reasons, especially as Germany assumes a proactive role in global politics. If one takes seriously public speeches of heads of states as indications of future trends, one cannot escape noticing the way Chancellor *Angela Merkel* referred to her government’s commitment to international law. Meeting with the US Secretary of State in late 2005 to discuss the CIA practice of “extraordinary renditions,” Dr. *Merkel* asserted that Germany was committed to abide by its law and by its international obligations (*internationalen Verpflichtungen*). She refrained from mentioning the term *Völkerrecht*:

[W]ir brauchen Dienste, um den Bedrohungen auch wirklich gerecht zu werden. Ich denke, dass das Wesentliche heißt, dass wir jeweils die Regeln einhalten müssen, d.h. für Deutschland die Gesetze und die *internationalen Verpflichtungen*, denen wir uns

¹⁹ W. Michael Reisman/Andrea Armstrong, The Past and Future of the Claim of Preemptive Self-Defense, *AJIL* 100 (2006), 525, 547 footnote 107 (citing an interview with Chancellor *Schröder* from 29 January 2003, in which he “explicitly stated his disagreement with the US claims to the right to pre-emption”). At the same time other European governments, including France and the UK, seem according to *Reisman* and *Armstrong*, to approve this doctrine with respect to terrorist action (*ibid.*, 541–544 concerning the UK and *ibid.* 544–545 for France).

²⁰ On the the post 9/11 war on terror as a “state of exception” see *Giorgio Agamben*, *State of Exception* (2005).

²¹ BVerfG, Judgement of 8 May 2007, reprinted in: *NJW* 60 (2007), 2610.

verpflichtet haben. [...] Ich meinerseits habe deutlich gemacht, dass ich als deutsche Bundeskanzlerin unserem Recht und unseren *internationalen Verpflichtungen* genüge tun muss, dass wir auf sie zurückgreifen und dass wir sie einhalten.²² (my emphasis)

That the US Secretary of State *Condoleezza Rice* was using the same formula (“[we] live up to our commitments under *our laws* and to our *international obligations*.”²³ (my emphasis)) was not surprising, given the general dismissive view of the system of international law of her administration. But the fact that the German Chancellor was consciously avoiding the term “*Völkerrecht*” may not be devoid of significance, especially in light of the traditional German vision of international law as a legal system.

II. The Fragmentation of International Law

The growing phenomenon of “fragmentation” of international law, namely the proliferation of different legal regimes and institutions governing inter-state relations, is a source of anxiety for those who appreciate the benefits of a comprehensive, systematic vision of international law, a system that offers at least modest assurances for the protection of the interests of weaker states and of individuals. Some respond to the phenomenon of fragmentation with criticism.²⁴ Others elaborate the idea of the constitutionalization of international law as a response that could impose some sense of order and even reassert hierarchy.²⁵ The

²² US-Außenministerin Condoleezza Rice trifft Bundeskanzlerin Angela Merkel – Protokoll der Pressekonferenz (6 Dezember 2005) provided by AG Friedensforschung an der Universität Kassel, available at: <http://www.uni-kassel.de/fb5/frieden/themen/Aussenpolitik/merkel-rice.html>. The interpreted version is available at: <http://www.state.gov/secretary/rm/2005/57672.htm> reads as follows: “[w]e need intelligence services in order to be able to face up to the threats to our society in this century of ours. It’s very important that whilst we adhere to the rules and the international obligations, to laws that govern us and the international obligations to which we’ve committed ourselves, [...]. In the meeting we had, I myself made it quite clear that I, as the Chancellor of the Federal Republic of Germany, work under and adhere to German laws and to the international commitments my country has entered into.”

²³ See *Vince Crawley*, US Following Rule of Law, Rice Tells German Chancellor (6 December 2005), available at: <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2005&m=December&x=20051206154844mvyelwarc0.7002941>.

²⁴ *Gerhard Hafner*, Pros and Cons Ensuing from Fragmentation of International Law, *Mich. J. Int’l L.* 25 (2004), 849.

²⁵ *Armin von Bogdandy*, Constitutionalism in International Law: Comment on a Proposal from Germany, *Harv. Int’l L.J.* 47 (2006), 223, 235 (suggesting that according to

challenge, however, comes from those states, particularly the stronger ones, for whom fragmentation is a strategic choice.²⁶ Given the efforts of powerful states to promote fragmentation and resist judicial attempts to level the global playing-field, it is becoming less certain that the systemic vision of international law will remain for long a true reflection of political, economic, and social realities.

III. The Turn to Informal or Privatized Forms of International Coordination

Increasingly since the end of the Cold War, governments that initiate coordination efforts across national boundaries consciously avoid making claims about international law. This constitutes yet another step, beyond fragmentation, which leads governments away from the systemic vision of international law. Governments engaged in such coordination efforts do not resort to treaties. Instead they explore alternatives to formal international law, relying on informal intergovernmental coordinated actions that do not involve the setting up of international organizations that are subjects of international law. Such intergovernmental action can simply be based on those governments' authority under their respective domestic laws to pursue domestic policies, or on relegating authority to private actors. Such coordinated practices do not betray *opinio juris*; in fact, the participating governments emphasize the opposite, namely their self-interest and lack of legal commitment. They consciously try to disengage from traditional international law.

The hesitation to resort to the formal tools of international law is shared by the German government. In 2000 the federal German ministries were ordered to avoid international obligations as much as they could. The directive, addressing all ministries, stipulated that negotiators should explore alternatives to formal international undertakings before they commit to such:

Vor der Ausarbeitung und dem Abschluss völkerrechtlicher Übereinkünfte (Staatsverträge, Übereinkommen, Regierungsabkommen, Ressortabkommen, Noten- und Briefwechsel) hat das federführende Bundesministerium stets zu prüfen, ob eine völkervertragliche Regelung unabweisbar ist oder ob der verfolgte Zweck auch mit

the hierarchical understanding of the international community, states have legitimacy only to the extent that they respect and implement the fundamental obligations of international law).

²⁶ *Benvenuti/Downs* (note 15).

anderen Mitteln erreicht werden kann, insbesondere auch mit Absprachen unterhalb der Schwelle einer völkerrechtlichen Übereinkunft.²⁷

The proliferation of informal means of creating inter-state commitments, as well as the growing reliance on coordination among private actors, challenge the vision of international law as a coherent legal system. The assumption that states cannot contract out of international law, an assumption most recently articulated by the International Law Commission,²⁸ seems increasingly in tension with political, social, and economic realities.

The turn to informal or privatized international law could reduce the opportunities for adjudicators to rely on the systematic approach as a means to reduce the disparities between strong and weak states, and between governments and individuals. The new informal venues are likely to offer fewer adjudicative opportunities. Conscious of the proclivity of strong states to explore the more informal means of coordination, judges in existing international institutions, who seek to maintain the vitality and relevance of their institutions, could become more responsive to the interests of the stronger states in order to keep them from deserting. As the “exit” from formal international law into the informal and private spheres becomes the norm rather than the exception, so would the opportunities of judges to interject with their equalizing power diminish. The systemic vision of international law may have to confine itself to describing a shrinking scope of norms.

E. Conclusion

One of the most important contributions of German scholarship to international law has been its conception as a system of law. When the Cold War ended, this vision was most likely at its zenith. Since then, and in particular since 11 September 2001, it is increasingly being questioned and challenged. The German government itself has been part of the proliferation of informalism. Will the German approach to international law concede to pressures and become more pragmatic rather than principled, accepting derogations from otherwise applicable norms in emergency situations? Is it possible to interpret Chancellor *Mer-*

²⁷ Gemeinsame Geschäftsordnung der Bundesministerien of 30 August 2000, GMBI. 525, § 72, also available at: <http://www.bmi.bund.de/Internet/Content/Common/Anlagen/Broschueren/2007/GGO,templateId=raw,property=publicationFile.pdf/GGO.pdf>.

²⁸ See *supra*, note 8.

kel's emphasis on *international obligations* rather than *international law* as signaling a departure from the traditional systemic approach and a move toward a more pragmatic, American vision of international law? As Germany becomes a key global actor, its commitment to international law as a *legal system* may increasingly be viewed also as a liability rather than the asset it always was for West Germany after 1945. Fortunately, for the adherents of the systemic vision around the globe, the systemic vision is no longer German: it is universal.

