International & Comparative Law Perspectives: Fall 2012

Int'l & Comp. Law Program
George Washington University

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Since arriving at GW Law in 2005, Professor Donald C. Clarke, an expert in Chinese law, has transformed the school’s focus on East Asia. Building upon the foundation that the renowned Chinese legal scholar Professor R. Randle Edwards had established at GW Law from 2002 to 2005, Don has made the Law School a hub of conferences, workshops, and other events relating to China. In addition, students and faculty have benefited from GW Law’s East Asian Law Society (EALS), which was started by Don. EALS, a forum for dialogue on a wide range of legal issues relating to the region, enables students to learn about job opportunities and sponsors Chinese and Japanese language discussion groups. The energy Don has brought to GW is representative of what he has done outside of the Law School through establishing and managing Chinalaw, the leading Internet listserv on Chinese law; writing the Chinese Law Prof Blog at http://lawprofessors.typepad.com/china_law_prof_blog/; and co-editing the Asian Law eJournal on the Social Science Research Network.
Jean-Marie Henckaerts is a leading authority on international humanitarian law (IHL), also known as the law of armed conflict or law of war. Since 1996, he has worked as legal advisor at the International Committee of the Red Cross (ICRC) in Geneva, where he co-authored the important ICRC study on Customary International Humanitarian Law. His writings and research have been at the forefront of and helped define the relationship between IHL and human rights law.

As a GW Law doctoral student from 1991 to 1994, Jean-Marie had access to some of the most well-known scholars in international law. He had the opportunity to work with two legendary professors, Louis B. Sohn, who was Jean-Marie’s SJD supervisor, and Thomas Buergenthal, who would later become a judge on the International Court of Justice. Jean-Marie took human rights courses under Judge Buergenthal and also a law of war course under W. Hays Parks, former U.S. Department of Defense senior associate deputy general counsel.

Jean-Marie’s SJD dissertation was on mass expulsions, a topic that Professor Sohn had proposed. His extensive training and focus, which occurred when war was raging in the former Yugoslavia, gave Jean-Marie a mastery of the relevant legal principles. That, in turn, caused him to reject the conventional approach that drew a clear line between IHL and human rights law.

Like many foreign students who have studied in the United States, Jean-Marie’s decision to come to this country was partially based on the influence of a U.S. professor who was teaching at the student’s home institution. In Jean-Marie’s case, that professor was the late Gabriel Wilner from the University of Georgia Law School, who served as a guest director of the summer “Brussels Seminar on the Law and Institutions of the European Union.” After graduating from the University of Brussels in 1989, Jean-Marie applied for LLM programs abroad with the hope that a foreign master’s degree would give him an advantage in the job market. He was also ready to leave Belgium and experience a different culture, country, and language. He opted for the United States and Georgia based on his ties to Professor Wilner and has “never regretted it.”

Indeed, upon arriving in Athens in 1989 Jean-Marie soon met Professor Louis Sohn, who held the Dean Rusk Chair in International Law at Georgia. He took two of Professor Sohn’s courses, international law and UN law. He also studied international business transactions under Professor Thomas Schoenbaum, who is now on the GW Law faculty. Jean-Marie wrote his thesis on private international law under Gabriel Wilner’s direction. He thrived at Georgia and particularly enjoyed the teaching and examination style of a U.S. law school.

After graduating from Georgia, Jean-Marie spent one year at the Atlanta law firm of Troutman Sanders. During this time, Louis Sohn had moved from Georgia to GW Law. Sohn encouraged him to apply to GW’s SJD program, which he eagerly did. Jean-Marie arrived at GW Law in the fall of 1991 to work with Sohn, yet quickly started studying human rights law under Thomas Buergenthal and later, as a research assistant, worked on Buergenthal’s second edition of *Human Rights in a Nutshell* and on his Hague Academy lecture on self-executing treaties. At the same time, he worked on his SJD thesis under Professor Sohn’s guidance. For Jean-Marie, working with Sohn and Buergenthal was stimulating and life-altering. He was moved by their compelling life stories of surviving World War II and took away the valuable lesson that “law can be made to work and serve the rights of the oppressed, of victims.” He saw even more clearly how “lawyers worldwide are contributing to the enforcement of rights, be it via domestic law, such as family law, administrative law, property law, or international law, through human rights, IHL, or refugee law.” He felt for the first time a purpose in his legal studies and a sense of professional direction that steered him to a career in human rights law.

One of Louis Sohn’s most lasting contributions to Jean-Marie’s SJD studies was aiding him in selecting a dissertation topic.
Our History

GW Law has been offering a course in international law since the late 19th century. Two luminaries, GW University President James Clarke Welling and GW Law Professor James Brown Scott, one of the founders of the American Society of International Law, were some of our earlier teachers of the subject. In 1898, the University established the School of Comparative Jurisprudence and Diplomacy. Housed outside of the law faculty, this school would eventually become the Elliott School of International Affairs. An interesting aspect of the program is that U.S. President William McKinley and his cabinet attended its dedication. The first class studied comparative constitutions under Justice John Harlan and international law under Justice David Brewer. Justice Harlan and Justice Brewer also taught in the law faculty. John W. Foster, the former Secretary of State under President Benjamin Harrison, taught in the comparative jurisprudence program. Foster’s grandson, John Foster Dulles, would later attend GW Law.

See Profile on page 4
HONORS AND RECOGNITION

PROFESSOR CHERIF M. BASSIOUNI (SJD ’73)
of DePaul University College of Law was awarded GW’s Distinguished Alumni Scholar Award. Bassiouni is the author of 32 books and some 240 articles and editor of a further 47 works on a wide range of legal issues, including international criminal law, comparative criminal law and international human rights law. Several of his publications have been cited by international courts, the U.S. Supreme Court and a number of state supreme, U.S. appellate and federal district courts. Bassiouni serves as Distinguished Research Professor of Law Emeritus, DePaul University and President Emeritus of the law school’s International Human Rights Law Institute. He is also President of the International Institute of Higher Studies in Criminal Sciences in Syracuse, Italy, and honorary President of the International Association of Penal Law in Paris, France. Outside of academia, Bassiouni has served the United Nations in a number of capacities, and was nominated for the Nobel Peace Prize in 1999 for his work in the field of international criminal justice and for his contribution to the creation of the International Criminal Court.

Professor Bassiouni (c) upon receiving the award

PROFESSOR THOMAS BUERGENTHAL
received the Medal of Honor and Diploma of Recognition from the Legislative Assembly of El Salvador for his contributions to the UN Truth Commission for El Salvador. He also received the Louis B. Sohn Human Rights Award from the United Nations Association (National Capital Area).

PROFESSOR LAURA A. DICKINSON
was awarded the 2011 IIT Chicago–Kent College of Law/Roy C. Palmer Civil Liberties Prize for her book Outsourcing War & Peace: Preserving Public Values in a World of Privatized Foreign Affairs (Yale University Press, 2011).

PROFESSOR SEAN D. MURPHY,
the Patricia Roberts Harris Research Professor of Law, was elected by the United Nations General Assembly to serve on the UN International Law Commission. He was also named to the 2012 Irish Legal 100, a directory of attorneys of Irish descent honored for their accomplishments.

PROFESSOR DINAH L. SHELTON,
Manatt/Ahn Professor of International Law, was awarded an honorary doctorate degree from the University of Stockholm.
On March 1, 2012, GW Law hosted a workshop with U.S. Supreme Court Justices Samuel Alito, Stephen Breyer, Anthony Kennedy, and Sonia Sotomayor, along with members of the European Court of Human Rights including President Sir Nicolas Bratza, Vice President Françoise Tulkens, former President Jean-Paul Costa, Judges Lech Garlicki and Nina Vajić, Registrar Erik Fribergh, and Deputy Registrar Michael O’Boyle. Legal scholars and policymakers rounded out the discussion. The workshop was held in cooperation with the U.S. Department of State, Office of the Legal Adviser.

“On behalf of President Obama and Secretary Clinton, I am honored to welcome you to this historic event,” said Legal Adviser Harold Hongju Koh in his opening remarks. “We hope this conference will be the first of many such dialogues between these two extraordinarily important judicial institutions.”

U.S. Secretary of State Hillary Rodham Clinton greeted participants via video message. “Today’s conference provides an important opportunity for justices and scholars to address issues that affect these two courts and judicial systems the world over,” she said. “The United States and Europe share deeply-rooted, common convictions about the importance of advancing democracy, the rule of law, and fundamental rights. Courts around the world increasingly look to the decisions of these two courts, making your engagement all the more crucial.”

While the majority of the day’s discussions were closed-door in order to promote a free exchange of ideas, the first panel was open to the public. The two-hour discussion, featuring U.S. Supreme Court Justice Breyer and Judge Garlicki of the European Court of Human Rights, along with Harold Koh, Derek Walton of the UK Foreign and Commonwealth Office, Professor J. Christopher McCrudden of Queen’s University, Belfast, and GW Law Professor David Fontana, focused on the similarities and differences between the two courts and how those differences affect the way the courts interpret issues.
GW LAW FACULTY FILE AMICUS BRIEFS IN CASE BEFORE THE SUPREME COURT

Professor Ralph Steinhardt submitted an amicus curiae brief in *Kiobel v. Royal Dutch Petroleum*, which was re-argued before the U.S. Supreme Court on Monday, October 1. His brief was in support of petitioners, and he filed it as counsel on behalf of several international law scholars. (Visiting Research Professor of Law Thomas Schoenbaum also filed a brief in support of the petitioner on his own behalf.) Professor Steinhardt also assisted Paul Hoffman, counsel for petitioners, in preparing for the oral argument and was at counsel’s table during the argument. On October 2, Professor Steinhardt led a post-argument discussion at the Law School that featured Mr. Hoffman and GW Law Professor Bradford Clark, who, along with Professor Anthony J. Bellia, Jr., of Notre Dame, filed a brief in support of the respondent. Their brief is based on their 2011 article, “The Alien Tort Statute and the Law of Nations.” The case, which was filed under the Alien Tort Statute, involves claims of Nigerians who allege that the corporation and other defendants engaged in human rights abuses. At issue is whether corporations can be held liable under the Statute and whether U.S. courts have the authority under the Statute to recognize a cause of action for violations of the law of nations occurring outside of the United States.

INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVES

International and Comparative Law Perspectives is published by the International and Comparative Law Program at the George Washington University Law School.

Questions or comments should be addressed to:
Susan Karamanian, Associate Dean for International and Comparative Legal Studies
skaramanian@law.gwu.edu
202.994.1210

The George Washington University Law School
International and Comparative Law Program
2000 H Street, NW
Washington, DC 20052

www.law.gwu.edu
WE WELCOME VISITING ASSOCIATE PROFESSOR OF LAW JAY ALEXANDER HILTON BUTLER

A graduate of Yale Law School, Oxford University, and Harvard College, Professor Butler was a law clerk to International Court of Justice President H.E. Hisashi Owada before joining GW Law this fall. Jay will teach a seminar on the UN Security Council in the fall and International Organizations in the spring.

RICHARD AND DIANE CUMMINS LEGAL HISTORY RESEARCH GRANT

GW Law is pleased to invite applications for this $10,000 grant to support short-term historical research using the Jacob Burns Law Library’s Special Collections, which comprise nearly 35,000 volumes of important legal works from the 15th through 19th centuries and is noted for its continental historical legal holdings, especially its French collection. Special Collections also is distinguished by its holdings in Roman and canon law, church-state relations, international law, and its many incunabula. The 2012 Cummins grant recipient was Professor Michel Morin of the University of Montreal, who conducted his research using the Collections’ pre-19th century French law books.

GLOBAL INTERNET FREEDOM AND HUMAN RIGHTS DISTINGUISHED SPEAKER SERIES

Thanks to the generous support of the Microsoft Corporation, GW Law launched this year a speaker series on topics addressing global Internet free speech and human rights. The inaugural speakers were Dunja Mijatovi, representative on freedom of the media, Organization for Security and Co-Operation in Europe (OSCE); Dr. Ian Brown, senior research fellow, Oxford Internet Institute; Frank LaRue, UN special rapporteur on the promotion and protection of the right to freedom of opinion and expression; Rebecca MacKinnon, co-founder, Global Voices Online; and Bernard L. Schwartz, senior fellow, New American Foundation.
IN PRINT

PAUL SCHIFF BERMAN

NAOMI R. CAHN

STEVE CHARNOVITZ

DONALD C. CLARKE

FRANCESCA BIGNAMI

BRADFORD R. CLARK

LAURA A. DICKINSON
Outsourcing War & Peace: Protecting Public Values in an Era of Privatized Foreign Affairs (Yale University Press, 2011)

KAREN B. BROWN (ED.)
General Reports of the XVIIIth Congress of the International Academy of Comparative Law (Springer, 2012) (with David Snyder)

DANIEL C. CLARKE
“Re-Imagining the International Human Rights Clinic” (with Nicolás Espejo Yaksic), 26 Maryland Journal of International Law 80 (2011); “Diferencias entre las clínicas de servicios jurídicos gratuitos y las clínicas de interés público y derechos humanos [Differences between legal services clinics and public interest/human rights clinics in Latin America],” in Clínicas de derechos humanos: Una alternativa para la educación jurídica y la sociedad, Supreme Court of Mexico (2011)

STEVE CHARNOVITZ

DAVID FONTANA
SUSAN L. KARAMANIAN

SEAN D. MURPHY

WILLIAM E. KOVACIC

STEVEN L. SCHOONER

MICHAEL J. MATHESON
International Civil Tribunals and Armed Conflict (Martinus Nijhoff, 2012)

THOMAS J. SCHOENBAUM

STEVEN L. SCHOOENER

JOHN A. SPANOGLIO

DINAH L. SHELTON

EDWARD T. SWAINE
Given Don’s mastery of the Chinese language and his nuanced understanding of Chinese society, one might assume that his focus on China began at an early age. In fact, Don’s interest in the country began after he arrived as an undergraduate at Princeton. According to Don, Princeton was one of the best Chinese language teaching programs in the country, with an outstanding East Asian Studies program and an exceptional library. He had studied languages in high school, but in college he wanted the challenge of learning a language with a complex writing system. He was drawn to Chinese and chose it over Arabic because he liked what he perceived as the difficulty of Chinese characters, and he hoped that by pursuing this path a rich written culture would open up to him.

On his first trip to China in 1977, even before he was a law student, Don made a connection to Chinese law. A native of Canada, he visited the Canadian Embassy library in Beijing and found there a book on China’s criminal process written by Professor Jerome Cohen, then at Harvard Law School and one of the founders of Chinese law studies in the United States. Don would later meet Professor Cohen, who encouraged him to attend law school and pursue his interest in Chinese law. Don did just that and studied under Cohen at Harvard Law. Before attending Harvard, Don studied Chinese politics at the acclaimed School of Oriental and African Studies (SOAS) at the University of London. In his second year at Harvard, he was hired as a lecturer in Chinese and Japanese law at SOAS. He then alternated between SOAS and Harvard to finish his law degree and later joined the faculty of the University of Washington School of Law.

In August 1989, Don made his first visit to China as a law professor. Arriving shortly after the Tiananmen Square massacre, he noticed that foreigners were eerily absent from the streets—they had left China and had not yet returned. People were cautious about what they said. Communications were of such concern to the state that it even tried to keep track of faxes. Today, according to Don, people can say virtually anything they like in private; the key is not to publish it or express it with others in an organized manner. The Internet, with its enormous potential as a means of communication, has made the Chinese much better informed, says Don, as the state had previously exercised almost complete control over information. Yet people believe that they are better informed than they actually are, as “the state is still remarkably successful in suppressing news it doesn’t like, and few Chinese have the time, ability, and inclination to master the technicalities of overcoming Internet censorship.”

With the rise of the Chinese economy, the financial condition of most Chinese has improved substantially. Both government and citizens have become more sophisticated in dealing with foreigners, and now life is much more what Don describes as “normal.” Don has watched the change first-hand as he spends nearly every summer and winter break in China, and he makes at least one or two additional trips to the country each year. Foreigners are no longer the oddity they once were, and they are no longer automatically suspected of being spies. Don feels free to interact with Chinese friends in a casual way that would be unremarkable were it not for the fact that he could never have behaved the same way in the 1980s.

The principal focus of Don’s scholarship is Chinese business law. That the state in China is both a regulator and a participant in business poses certain challenges. It creates political obstacles to regulation of business by law, with the main obstacle being an incentive system in which “local officials are answerable to their superiors, not to an electorate.” According to Don, officials respond directly not to popular pressures nor to legal mandates, but to the incentive system imposed by their superiors. As Don describes, if the law and local pollution victims both say, “Don’t pollute,” and political superiors say, “Give me GDP growth,” GDP growth will occur even if it means pollution. Local officials will simply override efforts by environmental authorities to enforce pollution standards. Similarly, any system of regulation that relies on citizen input—“private attorney-general” incentives, for example—is unlikely to find favor with the authorities in China, who again, for political reasons, would prefer that governance be left to the government.

Yet regulation of listed companies has been accomplished fairly successfully in many areas (though Don doesn’t always agree with the substantive purpose of the regulation). This is because the target of regulation is narrow—there are only about 1,500 listed companies—and the goals of regulation are limited.

Don’s current scholarship still focuses on corporate governance. He has recently
These students will remain in the United States, while others will return. Don is not too concerned about the number of Chinese students who stay behind—there are plenty of incentives for students to return to China, and a good number of them do. According to Don, “we teach our students about the positive role that lawyers can play in public life, and we should hope our Chinese students absorb this lesson.” Don doesn’t think we can generally expect Chinese students to have different professional or life goals from U.S. students, but at the same time he is not optimistic that these students’ experience at GW Law will have an immediate impact on human rights in China. “China is, after all, a very big country with powerful domestic forces operating to make it the way it is, but that is no reason not to [teach what we do to our students].”

Don is part of a community of about a dozen Chinese law experts in the United States, and that community is getting bigger all the time. The community has focused on explaining how things actually operate in China as opposed to building theoretical constructs that attempt to explain new developments. This practical approach is quite appropriate, given the difficulties scholars generally face when conducting research in China, as well as the special challenges inherent in researching the legal system—much of which is considered a state secret—or just learning about what is happening in the country. One can expect that Don’s work, along with that of his colleagues, will become increasingly influential, given the growing importance of China to the world economy.

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**PROFESSOR CLARKE HAS MADE THE LAW SCHOOL A HUB OF EVENTS RELATING TO CHINA.**

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### ON THE AGENDA

**September 4, noon**: International and Comparative Law Colloquium: Professor Chiara Giorgetti, University of Richmond Law School, speaks on “The Selection of Judges and Arbitrators in International Dispute Resolution.”

**September 10, 4 pm**: Martina Vandenberg, Open Society Fellow, speaks on “Ending Impunity: Justice for Trafficking Victims.”

**September 24-25**: Workshop on “Weapons under International Human Rights Law” (by invitation).

**October 1, noon**: International and Comparative Law Colloquium: Michael Mattler, majority chief counsel, U.S. Senate Foreign Relations Committee, speaks on “The United States and the UN Convention on the Law of the Sea.”

**October 11-12**: GW Law hosts the U.S. State Department Advisory Committee on Private International Law.


**November 1, afternoon**: GW Law, Shearman & Sterling, LLP, and the International Chamber of Commerce host a symposium titled “Courts and International Commercial Arbitration: Is the United States Becoming an Outlier?”

**November 15, 9 am to 1 pm**: Roundtable on U.S.–Japan Trade Issues (by invitation).

**November 29-December 1**: GW Law hosts the ASIL’s International Economic Law Interest Group Biennial Meeting on “Re-Conceptualizing International Economic Law: Bridging the Public/Private Divide.”

**December 4, 8 am to 6 pm**: GW Law, the International Bar Association, and the American Bar Association host a symposium titled “The International Fight Against Corruption: What’s Working, What’s Not Working, and What Will Work?”

**December 10**: GW Law hosts a reception as part of the World Bank’s Law, Justice, and Development Forum.
human rights had its inception here. We introduce our new colleague Professor Jay Alexander Hilton Butler, as well as some of our new initiatives, including the acclaimed lecture series on global Internet freedom and human rights, and the Richard and Diane Cummins Legal History Research Grant. We also provide a report on a historic event hosted by GW Law that brought together members of the U.S. Supreme Court and the European Court of Human Rights. These items plus more are in this fall 2012 edition of our newsletter. We hope you enjoy learning about our work and activities in international law and comparative law.

Democratic Republic of the Congo, or Sri Lanka and, of course, in the Occupied Territories.” The situation changed after the first Gulf War (1991), the conflict over Kosovo (1999), Afghanistan (2001), and Iraq (2003). IHL and related topics have become daily news. As Jean-Marie has said:

“IHL has never been as relevant as it is today. The matter covers attacks on civilians, the use of human shields, pillage of cultural property, the rules applicable to occupation, private military companies, direct participation in hostilities, the rights of detainees, fair trials, military commissions, war crimes, universal jurisdiction, etc. All of this news—the good and the bad—have come to underline the importance of IHL and the need for armies and political leaders to know and to respect IHL. The calls for enforcement and accountability are also becoming clearer and clearer.”

The establishment of ad hoc criminal tribunals for Yugoslavia, Rwanda, Sierra Leone, and the International Criminal Court have buttressed IHL’s relevance as the tribunals have created an expectation that persons responsible for genocide, crimes against humanity, or war crimes should be held accountable in a coherent and objective way, no matter who or where the perpetrators are. For Jean-Marie, the measure of his work is its effect on the battlefield and war rooms, and in legal proceedings in establishing accountability. The huge challenge going forward, according to him, is to ensure that the effect is not short-lived, but rather lasting and far-reaching.

Not many legal scholars or practitioners can say that they helped shape a discipline in a profound way, but in Jean-Marie’s case, it is true. The GW Law faculty is immensely proud of Jean-Marie and his contributions to identifying the customary rules of war that continue to have profound implications for humankind.