

**Toward Critical Mass:  
The Second Annual Graduate Student Conference of  
The Toronto Group for the Study of International, Transnational, and Comparative Law**

University of Toronto Faculty of Law

9-11 January 2009

**ABSTRACTS**

Conference Organizers:

Amaya Alvez  
Mark Bennett  
Irina Ceric  
Michael Fakhri  
Derek McKee  
Umut Özsu  
Kim Stanton

**Friday, 9 January 2009**

**5:00 – Registration**

**5:35 – General Welcome (Flavelle House B)**

Graham Hudson (Graduate Law Students Association, Osgoode Hall Law School)

Derek McKee (Graduate Law Students Association, University of Toronto Faculty of Law)

**5:45 – Opening Plenary (Flavelle House B)**

Prof. Jean Cohen (Columbia University Department of Political Science) – “A Global State of Emergency or the Further Constitutionalisation of International Law: A Pluralist Approach”

Discussant: Prof. Patrick Macklem (University of Toronto Faculty of Law)

**6:45 – Reception (Flavelle House Common Room)**

**Saturday, 10 January 2009**

**8:45 – Light Breakfast**

**9:20 – Ancillary Welcome**

**9:30 – Early Morning Session**

*After Globalization and its Discontents (Flavelle House A)*

Chair: Michael Fakhri (University of Toronto Faculty of Law)

Discussant: Prof. Sara Slinn (Osgoode Hall Law School)

Cristian Dimitriu (University of Toronto Department of Philosophy) – “Free Trade and Exploitation”

Proposals are coercive when somebody is made worse off relative to a normative baseline. In this paper, I shall analyze Thomas Pogge’s suggestion that, insofar as the normative baseline of basic human rights is violated, trade agreements among developed and developing countries usually involve coercion. I will argue that his argument, as presented, is not compelling enough to make the case for coercion. I propose, instead, that we should understand trade agreements as cases of mutually advantageous exploitation. Trade agreements are exploitative when one of the parties

takes *unfair* advantage of the other. It is not obvious, however, what “unfair” or “fair” means in this context. So I develop a brief account of fairness and I apply it to trade transactions

Iain Frame (Harvard Law School) – “Rules of Prohibition and Rules of Permission in the International Law of Money”

With regard to the stream on international economic law I’d like to present a paper dealing with the international law of money. I want to sketch out how money has been administered, more or less consciously, at the international level from 1870 through to the present. Underlying the attempts to administer money over this period is a tension that I think is at the core of all monetary regimes: the tension between (i) the need for credit by actors within the economy in order to sustain accumulation, and (ii) the quality of the money supply, which if it is not conserved, will lead to inflation and a devaluation of the currency. Although in the first place the tension between (i) and (ii) is mediated at the state level, it is the interconnectedness between states that ultimately leads to monetary instability at the international level calling for, as a consequence, action from states through some kind of international framework. In this paper I wish to consider three international frameworks through which international money has been administered over the period 1870 to the present. The three periods can roughly be captured under three headings – the classical, the modern and the postmodern:

- \* 1870-1914 and 1925-1931 – the classical international gold standard;
- \* 1945-1971 – the modernist Bretton Woods institutions, especially the International Monetary Fund;
- \* 1971-the present – the postmodern notion of soft law, an example of which is the Basle Accords on banking.

The three frameworks capture a different sense of the regulatory role of law. The gold standard represents a self-adjusting economic process that legal interventions – i.e. regulation – would only disrupt with adverse consequences for state freedom. The IMF in its original post WWII guise is an example of regulatory law coming to the rescue to curb the excesses of the unregulated market. The emergence of soft law acknowledges the limits to top-down regulatory law administered by formal international institutions and calls for self-regulation instead. Law is presented in each framework in a negative manner: either, law gets in the way, and hence there is no need for it; or, law is necessary, but only to prohibit or restrain by responding to disruptive behaviour, through top-down regulation or decentralized self-regulation. When sketching out these three frameworks I shall hence keep in view the possibility that law plays more than a merely responsive role when mediating the tension between (i) the quantity of money and (ii) the quality of the currency; law might, in fact, be constitutive of the very problems that it then tries to resolve.

Alexandra Harrington (McGill University Faculty of Law) – “Law without Links: Re-Locating International Economic Law within the Sphere of Law and Society”

I believe that, at its heart, international economic law is an outgrowth of international law, society and associated norms. Whether on the domestic or international scale, economic law per se is not created organically and does not exist in a vacuum. Rather, it is the product of the social and legal structures of the system in which it operates. As such, international economic law may evolve with the overall legal and societal systems that give rise to it, necessarily taking in developments – such as increases in and changes to environmental law and regulation – without having to be “linked” to them through an extrinsic justification. Understanding the origin of international economic law and its relationship to other areas of law does not require “linkages” in the sense

that this term implies the need to forge a bond between two areas of law which are not otherwise connected. Instead, such an understanding informs a study of international economic law and the system that created and continues to frame it together. Once this understanding occurs, the need to expand institutions that are regarded as affecting international economic law becomes apparent. Thus, for example, domestic and international aid organizations, national, regional and international military and policing entities, human rights groups and institutions, and environmental conferences at all levels become part of the international economic law lexicon. This, in turn, eliminates the potential for blind-spots in international economic law discourse.

Irfan Sungkar (University of Malaya Faculty of Economy and Administration) – “Do Countries Expect Only Legal Foreign Workers? Abuses and Injustices for the Illegal Indonesians in Malaysia”

Differentials in the situation and progress of economic development, income level and employment prospects between two countries often led to immigration from one country to another, moreover when the two countries are close, such as in the case of Malaysia and Indonesia. As Malaysia has better employment opportunities with higher income for unskilled and semi-skilled jobs, Indonesians immigrants/ foreign workers hence fills the vacuum. As the labor market in Malaysia quite rigid, employing illegal workers has become a preferred choice by the employers, especially in the construction, plantation and informal sectors. It is widely estimated that there are about 1 million legal Indonesian workers in Malaysia; in addition to another 1 million illegal Indonesian workers respectively. While the legal workers protected by laws and regulations, this is not the case for the illegal workers. Indonesians illegal workers in Malaysia have no laws or regulations that protecting their human rights, economic security and well-being. Even they are not part of bilateral negotiations between the two countries. There is no access for health/ medical insurance, banking or financial services and other basic necessities for proper lives. Moreover, they are grossly exposed to abuse, extortions, cheating and “economic rents”. Their hope for better lives which brought them to Malaysia, very often ended in a very sad situation. This paper will focus on the factors which make them come to Malaysia and analysis of their lives, living condition, human rights, economic security and general well-being of Indonesians illegal immigrants in three major states in Peninsular Malaysia e.g. Selangor, Johor and Perak. The findings of this paper is important to expose the lives of the million illegal immigrants which now known as “the forgotten society”, marginalized in bilateral discussions by the government of Malaysia and government officials of their own country, Indonesia.

*Constitutionalism and the International (Flavelle House B)*

Chair: Claire Mumme (Osgoode Hall Law School)

Discussant: Prof. Jutta Brunnée (University of Toronto Faculty of Law)

Martin Hevia (Torcuato di Tella University School of Law) – “On the Side of Dignity in the Latin American Constitutional Landscape”

It is often claimed that the role of a liberal constitution is to protect those individuals whose lifestyle is not popular and may be oppressed by the majority, that is, to protect the dignity of individuals who do not share prevailing values. This is the traditional account of constitutional law in Latin America. In this view, as the call for papers for this stream explains, “the nature and content of fundamental human rights is, it seems, something that the ordinary political energy of the people cannot be trusted with” because it may become a threat to the dignity of unpopular

minorities; thus, “highly contested political decisions are placed in the hands of judges, who are seen as the guarantors of the constitutional order.” Curiously, against that traditional account of constitutionalism, “social movements, indigenous peoples, and other groups traditionally excluded from constitutional affairs” have recently invoked their “dignity” to argue in favour of a more active role of the citizenry in constitutional politics. In light of this constitutional landscape, my aim in this paper is twofold. First, I aim to analyze how four accounts of dignity have been traditionally understood by Latin American judges - “dignity as liberty or Kantian autonomy,” “liberty as equality or the right of persons to be respected as an equal member of the polity rather than denigrated, subordinated, or excluded,” “liberty as respect for the inherent worth of a life,” and “dignity as collective self-government.” My second aim is to discuss the relative weight of these accounts of dignity in recent constitutional amendments and proposals.

Caroline Hodes (York University School of Women’s Studies) – “Just Say the Magic Words: Making Intelligible Citizens at the US and Canadian Supreme Courts”

In her dissent in *Egan v. Canada*, Canadian Supreme Court Justice Claire L’Heureux-Dubé forewarned that an analysis that focuses on creating abstract categories and the generalizations that unavoidably emanate from them can ultimately end up bereft of a substantive component that considers the most important questions: what are the specific effects of the policy on the complainant and are they discriminatory in the sense that they result in the complainant being treated as less capable or worthy of recognition or value as a human being or member of Canadian society? Following Ian López, Michael Olivas and R.A. Lenhardt, this paper will consider *Hernández v. Texas*, *Brown v. Board of Education*, and *Perez v. Sharp* in light of the authors’ respective discussions of colourblindness and the possibilities for constructing an alternative jurisprudence at the US Supreme Court. I will compare these decisions to three pivotal Canadian cases, *Andrews v. Law Society of British Columbia*, *Law v. Canada* and most recently in *R. v. Kapp* in the interest of drawing similarities and outlining differences between judicial interpretations in each country. Charles Lawrence and Neil Gotanda provide a useful starting point for this paper. Lawrence’s piece provides an approach to effects based analyses that offer several points that can be used as a springboard to begin a comparative analysis. This paper will focus primarily on the ways in which constitutional doctrine creates exclusions through the erasure of complex identities. The erasure of complexity and the elimination of possibilities for self-identification have serious implications for the outcomes of discrimination claims. This paper will draw on Michel Foucault’s concept of the archive from *The Archeology of Knowledge* in order to critique the grounds of discrimination in the *Canadian Charter* and the intent requirement in equal protection clause cases in the United States. It will also draw on the work of Cheryl Harris, Kimberlé Crenshaw and Sumi Cho to assess the possibilities for redemptive strategies that may lead to an alternative jurisprudence. A jurisprudence that is not so much interested in the enlightenment narrative of progress but that is interested in generating more socially just outcomes for those who experience discrimination, exclusion and erasure.

Carl Lebeck (Stockholm University Faculty of Law) – “Delegation and National Constitutionalism in Europe”

Two parallel debates has attracted a lot of attention in constitutional law/theory in recent decade, one has been the issue on desirability of extensive constitutional judicial review, which has had both left/liberal (Waldron 1999, Tushnet 2001, in a British context, Tomkins 2005) and rightwing critics (for a very general account see Bork 2002, but for more limited criticisms focusing in particular on institutional competency, see Vermeule 2006, Vermeule 2007, Posner & Vermeule 2007). The other aspect has concerned the increasing role played by international law in general and international organisations in particular when it comes to governance. However, these two

lines of inquiry have usually been discussed separately, despite that issues of political constitutionalism and its focus on accountability and judicial control are central in relation to the legislative, executive and judicial roles of international organisations. International law (understood broadly to include general international law, laws of international organisations and so called “supranational law”) has a dramatically increasing role as a medium of governance in the recent decades. The increasing role of international organizations (WTO, NAFTA, EC/EU, UN) arguably constitutes a major shift in governance, from a model where nation states cooperated to one where nation states create operationally independent international organizations with limited accountability, and legislative and judicial powers that are directly applicable within national legal orders. The problem of such international organizations has been (and to a very great extent is) that they exercise much of their powers with little judicial control and limited political accountability. At the same time their powers are, as they are dependent on international treaties, usually more difficult to amend than national legislation. It is a shift which also has implications for national constitutionalism. Although the formal rank of norms that are based on international organizations may vary, effective international cooperation seems to presuppose that norms of international organizations usually take precedent over national law, That means that powers of international organizations often have entrenched and (at least for practical purposes) higher rank than legislative national norms. In a similar way, the only way for a national legislator to decide independently about the rules of an international organization, is to withdraw from it entirely. One may thus say that the increasing role of norms originating in international organizations create a challenge to the traditional constitutional hierarchy of norms. The role of international delegation in contemporary national constitutionalism also illustrates a problem of contemporary constitutionalism, namely that whereas traditionally non-elected judicial bodies have posed a central problem for accountability, as legislative decisions on international delegation are often functionally, if not formally entrenched, through which legislatures may “burn the bridges” for the successors, by adopting certain policies. The increasing role of international law as a medium of governance is not necessarily a threat to the governing capacities or even sovereignty of nation states, indeed it is often the contrary that is true. It is clear that internationalization/globalization upsets central aspects of national constitutionalism. (Here, I seek to give a broad overview of the decision-rules, and case law in national law in EU/EEA and Switzerland. (For related studies in other parts of the world, Franck & Thirgundvadam 2003) In this paper, I argue that national constitutional law has indeed become at least partially (and selectively) deconstitutionalized through globalization, strengthening the executive and to some extent increasing the discretion of judiciary, but limiting the role of directly elected legislatures and to a great extent creating uncertainty on constitutional hierarchies. The (very pragmatic) responses to that have been double, one has been to impose special procedural requirements when it comes to deciding on international delegations, secondly it has been that the issue of control of international organizations has largely been left to national judiciaries. The first response has concerned the decision-rules on international delegation, where it is possible to say that it may have sought to increase accountability and to ensure strong support of international delegation. It is a tendency which has increased over time, and which has led to that in many, but not all countries in Europe, there is a strong tendency towards differentiation between treaty-powers and powers of international delegation as well as between different kinds of international delegation, for which special procedural requirements have been imposed. However, at the same time, there is a striking absence of more detailed regulation on the rank of secondary and tertiary norms of international organizations, which means that the an important aspect of current deficits of political accountability seems to stem from constitutional underregulation, rather than too much of constitutionalization. One could thus say that the procedures of decision-making on international delegation have led to an informalisation of law-making and law-making authority, once international delegation has been decided about. The other has been a limited degree of judicial control of decisions of international organizations,

however in a considerably more limited way than traditional forms of constitutional judicial review. That form of judicial control, has, at least from a European perspective, been exercised with striking restraint in national courts, in a way which has sometimes threatened coherence of the constitutional order and integrity of democratic processes within national law. (Claes, 2005, Sweet-Stone, Slaughter & Weiler 1998, Haltern 1999) These processes has meant that the role of judiciary has increased in the sense that the judiciary becomes the only continuing check on exercise of supranational powers, but delimited it in the sense that appeals to effectiveness of international cooperation has led to more restrained judicial control of supranational forms of public powers. The effect seems to have been that constitutions become less of a restraint in the traditional sense, without increasing political accountability. From a positive perspective, my argument is that continuing international integration has led to weakening of constitutional regulation, and increasing role of the executives and judiciaries at the expense of directly accountable branches of government. In that regard, any idea of “taking the constitution away from the court”, if to increase political accountability (and ultimately political autonomy) will also have considerable implications for the scope and character of international integration, in the sense that political constitutionalism at the national level may require more, not less of judicial control of international integration.

Pedro Lomba (European University Institute Department of Law) – “International Constitutional Domains: In Search of a Social Approach to Global and International Constitutionalism”

The increasing openness of constitutional law to forms of international and global governance invites us to rethink the foundations of constitutionalism and to search for new constitutional approaches and frameworks. In his insightful book *Constitutional Domains: Democracy, Community, Management* (1995) the American constitutional scholar Robert Post explained how in many ways the project of constitutional law can only be understood considering the various forms of social order in which constitutional values find their actual embodiment. The expansion of relations of interdependence between constitutional states, produce a recognizable but still deficiently theorized transformation of the very social domains of constitutional law. This paper searches for a social approach to international and global constitutionalism in light of this transformation. The approach sketched is neither purely descriptive nor normative since the interaction between legal form and social form requires a constant exchange between the two perspectives. It also refuses the view of constitutionalism as a maximizing endeavour of a particular collective goal because social structures interact with each other under factual relations of tension and interdependence. The intellectual ambition of a social approach is simultaneously more modest and difficult. First, it intends to identify and to reconsider the “social spheres” of constitutional law in which particular modes of constitutional authority are experienced and tested. Second, it broadly addresses the impact of international law on those social spheres. Then, following these assumptions it tries to rethink the relationship between an international law assuming constitutional claims and domestic constitutional law as a relationship between purposive social institutions moving towards a plurality of ends over a framework in which constitutional claims are subject to processes of social balancing.

**11:00 – Coffee Break**

**11:30 – Late Morning Session**

*Law and Power in an Unequal World (Flavelle House A)*

Chair: Irina Ceric (Osgoode Hall Law School)

Discussant: Prof. Ruth Buchanan (Osgoode Hall Law School)

Maria Grahn-Farley (Harvard Law School / Albany Law School) – “Neutral Law and Eurocentric Law-Making”

This is a post-colonial analysis the abilities of the post-colonial states, as independent states to affect the process of international law-making. This is a case study of the drafting of the UN Convention on the Rights of the Child. I have focused on law-making itself, a phase that is often over-looked in international law and in post-colonial critiques. This article is an attempt to describe what happens when post-colonial states try to assert ownership over international law, and thereby, this article represents a challenge to European entitlement to international law as Eurocentric. Stated more specifically, I argue that post-colonial efforts affecting the Eurocentricity of European international law have been met by a strong united effort by Europeans to preserve international law as Eurocentric. In particular, the assertion of the need to establish the jurisdictional relationship between Islamic law and international law met with several European objections, as did the assertions of post-colonial states of their sovereign status through constitutional references, which is a dualist view of international law. By contrast, European countries did not object to reservations against provisions that constitute core values often defined as Western, such as civil and political rights, for example. Neither did the holding of non-sovereign territories by several of the state parties generate any objections. These instances of non-resistance on the part of European participants suggest that the resistance of the post-colonial states to international law as a Western or a European project is not at issue. In fact, the European sense of entitlement to international law as Eurocentric is not threatened by the post-colonial critique of international law as Western or Eurocentric. This form of dissent is not only accepted but much expected. However, I am suggesting that the West’s investment in international law *as Western* is revealed through the objections of European participants to alternatives to Western views of the nature of international law, particularly the limitations of international law. I have come to this conclusion by making an in-depth case study of the law-making process of the UN Convention on the Rights of the Child (CRC). The CRC is the most ratified international treaty in the world. Every country in the world is a party to this treaty except the USA and Somalia. There are more parties to the CRC than members in the United Nations. My article is the first in-depth study of the legislative process of the CRC in any US Law Review article or publication. My interest in the CRC comes from having been active in creating the field of international child rights. As a member of the National Board of Rädde Barnen (Save the Children - Sweden), the world’s largest child rights non-governmental-organization and the leading agency in the drafting of the CRC and in its adoption by the General Assembly in 1989.

Craig Martin (University of Pennsylvania Law School) – “Sheathing the Sword of War: Law and the Constraints on the Use of Armed Force”

There is a long history of influence between international law and constitutional law principles on limiting the use of armed force. Yet there are very few modern constitutions that incorporate the principles of *jus ad bellum*. Similarly, notwithstanding the spread of constitutional democracy, few constitutions provide for legislative involvement in the decision to use armed force, or any role for the courts whatsoever. This paper argues for a constitutional model that requires legislative approval of the decision to use force, and requires the executive and legislature to consider compliance with the prevailing principles of *jus ad bellum* in making their decision. Moreover, such explicit requirements would provide grounds for judicial review of the basis and process of the decision making, though not the substance of the decision itself. The separation of

powers and legislative control over the decision to go to war was not only deemed crucial by Kant and Madison, among others, for providing a check on the urge to use force, but legislative involvement is supported by aspects of modern organizational and political theory. It is an issue that is being considered in a number of countries. The arguments for a unitary executive that condemn legislative involvement on grounds of competency and effectiveness are flawed. The domestic implementation of measures to enhance compliance with international law is similarly supported by transnational theories of international law compliance and liberal theory of international law. Domestication would also enhance the legitimacy of the *jus ad bellum* regime, and it also satisfies criteria for validity in the context of democratic deficit arguments. Finally, subjecting the decision making process to judicial review helps to solve the Kantian dilemma of how to reduce the tendency for war with illiberal states without undermining the institutional strengths that have given rise to the democratic peace. In short, the model would likely decrease the incidence of illegitimate use of force. It is argued by some that the changing threat profile of the post-9/11 world will require a more unitary executive, and there is pressure to transform the *jus ad bellum* regime itself so as to permit preventative war and expansive notions of self-defence. On the contrary, as the *jus ad bellum* evolves, more *ex ante* analysis will be required to assess the legitimacy of the use of force. Post 9/11 arguments and policies have done violence to the rule of law, and such efforts ought to be resisted, as the rule of law is at the heart of reducing the incidence of illegitimate armed conflict.

Dinesha Samararatne (Harvard Law School) – “*Medellin* and *Singarasa* Compared: What’s Sauce for the Goose is not Sauce for the Gander”

The decision handed down in *Medellin v Texas* (2008) by the supreme court of the United States and the case of *Nallaratnam Singarasa v Attorney General* (2006) decided by the Sri Lankan supreme court have been highlighted and criticized for the refusal by the respective courts to give domestic effect to applicable international law. In the case of *Medellin*, the authority of the *Mexico v United States of America* (2008) judgment given by the International Court of Justice was in issue, while in the *Singarasa* case the authority of a communication by the Human Rights Committee and the legality of Sri Lanka’s accession to the First Optional Protocol to the International Covenant on Civil and Political Rights was in issue. The outcome in these two decisions and the events that followed these decisions provide insight into the extent of US imperialism vis a vis the international legal process today. The reaction of the international community to the *Singarasa* decision eventually resulted in intervention in Sri Lanka’s domestic affairs including coercing the Sri Lankan government to pass legislation to reverse the impact of the *Singarasa* decision. Even though the *Medellin* decision was criticized at the international level, there has been no attempt to interfere with the domestic affairs of the US in order to coerce the US to ensure that the procedural default rule in domestic criminal law does not preclude the courts from upholding the right of an accused foreign national to access consular services. This paper proposes to critically examine these two outcomes in order to illustrate that US imperialism is the critical factor which prevented the international legal process from requiring that the US complies with international law. On the other hand, Sri Lanka, as a developing nation could not resist the pressure from the international community and from international institutions and was compelled to take concrete measures to ensure compliance with international law. The US on the other hand has been able to continue to disregard a decision of the ICJ and a legally binding treaty provision by relying on its domestic law. Using these two cases studies, the paper will explore the impact of US legal imperialism on the credibility of a given public international law regime. The reality of US legal imperialism validates the critical approaches to international law. If international law is to disprove that “might is right” in relation to US imperialism, the role of law and international law scholars is to explore means whereby the international legal process and

international legal institutions are made more representative and more democratic so that US imperialism can be challenged.

Vijayashri Sripati (Osgoode Hall Law School) – “The Evolution of the UN’s Constitutional Assistance: A Historical and Analytical Perspective”

This presentation provides an analytical and historical perspective on the evolution of the United Nation’s constitutional assistance role in the post-Cold War era. It argues that the UN’s constitutional support has evolved into a “policy institution,” or established practice and that the need to interrogate the internationalization of constitution-making – essentially a domestic process – places the legitimacy of, and the explanations offered for, such support into question. Through examples drawn from recent case studies this presentation seeks to show how the UN’s constitutional support has influenced its structuring of the post-Cold War constitution-making processes and constitutional outcomes. In questioning why the UN has been empowered to provide constitutional assistance, the broader historical factors, ideological aspects, and colonial continuities are uncovered. These aspects are fundamentally significant in understanding internationalized constitution-making processes and the UN’s role therein.

*Transitional Justice: Justice on Whose Terms? (Flavelle House B)*

Chair: Kim Stanton (University of Toronto Faculty of Law)

Discussant: Prof. David Dyzenhaus (University of Toronto Faculty of Law)

Samantha Jones (McGill University Faculty of Law) – “Head in the Clouds: The International Criminal Court’s Approach to the Northern Uganda Conflict”

I submit my research paper, entitled, “Head in the Clouds: The International Criminal Court’s Approach to the Northern Ugandan Conflict and Finding the Appropriate Response”, for consideration in the stream “Transitional Justice: Justice on Whose Terms?” My research reviews the involvement of the ICC in the Northern Ugandan conflict and concludes that its response is too retributively-focused to genuinely promote peace, justice and long-lasting accountability. The ICC is an innovative development of transitional justice and has the potential to contribute to a global community that enforces international justice, particularly through its complementarity function (Article 17 of the Rome Statute). Based on a study of the Northern Ugandan conflict, I contend that a multifaceted approach is required to achieve accountability objectives such as securing long-lasting peace, justice and reconciliation. My research particularly addresses victims’ requirements, as transitional justice should be implemented in their favour and with their needs in mind. I also review the tripartite model of accountability established in response to the 1994 Rwandan genocide, which I argue provides a model of an appropriate response to the Northern Ugandan conflict. My analysis of the operational interaction of the ICTR, the national courts and the *gacaca* courts demonstrates that their complementary interaction encourages the development of a three-way symbiotic relationship and has been effective in promoting transitional justice and accountability objectives. In regards to my research on Northern Uganda, information elicited from interviews, demonstrate that there is a clear requirement for a culturally-specific and victim-centred approach, similar to that implemented by the Rwandan *gacaca* courts. The ICC should retain and encourage its role as a tribunal of last resort, intervening when States are unwilling or unable to carry out investigations or prosecutions, as outlined in Article 17 of the Rome Statute. National accountability strategies that not only ensure that comprehensive prosecution and justice is achieved, but that also promote peace, should be

promoted. Thus, I contend that a separate provision should be included in Article 17(1) to allow the court to declare a case inadmissible where it can be proven that a state has implemented justice mechanisms that promote the interests of victims. Currently Articles 17(1) and 53 remain too limited to promote accountability objectives and victims' needs. As the peace versus justice debate continues and the conflict in Northern Uganda continues, the ICC must tread carefully to ensure that it helps to develop a global community to secure international justice. It must ensure that it is not seen simply as securing its own legitimacy amongst the international community at the cost of promoting national proceedings and achieving peace.

Heidi Matthews (Harvard Law School) – “The Other Side of COIN: The Civilian/Combatant Distinction, Terrorism and the Structure of War Law”

This paper offers a critical evaluation of the role played by the civilian/combatant distinction, and the concomitant principles of civilian immunity and belligerent privilege, in structuring the way the law of war carves up the terrain of permissible violence. I argue that the contingency of the distinction prevents it from guiding categorization decisions in a morally relevant way. In response, I suggest an approach (the “culpability principle”) that borrows both from the subjectively-oriented pre-traditional posture as well as the objectively-oriented traditional approach. In focusing on both the action *and* intentions of combatants and civilians we would be better equipped to make the kind of fine-grained distinctions required for a morally relevant law of war. The second part of this paper explores how the indeterminacy of the civilian/combatant distinction bleeds into the law of terrorism. Since terrorism is commonly defined in its opposition to the distinction, it ultimately works to exclude consideration of pluralistic conceptions of political community. The third part examines the new United States' counterinsurgency doctrine (COIN) in an effort to recuperate the political aspect of terrorists' objectives within the law of war. In explicitly incorporating the civilian in the calculation of military strategy, COIN operationalizes the culpability principle in many respects. However, as I show in the fourth part, its structural elision of the political objectives of terrorists/insurgents ultimately prevents it from providing a truly transformative model. While the law of war can learn from COIN, it should expand on this approach by explicitly recognizing the legitimacy of terrorists' political objectives in order that it can begin to adjudicate these objectives on a substantive level, rather than excluding them *a priori*. My analysis will be useful for both international lawyers engaged in law reform projects, as well as those practicing international criminal law. It also provides a theoretical platform from which military lawyers and officers can begin to reconceptualize how they distinguish between civilians and combatants both with regard to targeting decisions, and the design of non-conventional warfare strategy.

Geneviève Renard Painter (McGill University Faculty of Law) – “Towards Feminist Critiques of Reparations”

From activist and academic quarters, feminist critiques of the post-conflict justice agenda have emerged. Much attention has been devoted to ensuring that sexual violence crimes are punished by national and international criminal justice systems, truth commissions are gender-sensitive, and disarmament and demobilization programmes address women's experiences. Until relatively recently, little feminist attention has been paid to the issue of reparations. This paper sets out to develop feminist critiques of reparations for massive human rights crimes in times of conflict. The paper offers a working framework for defining and analysing reparations. It argues that reparations programmes incorporate a vision of justice, including a conception of the self, the role of the law, and the remedies to injustice. These varying visions of justice influence the goals of reparations programmes and their design. By asking why reparations programmes are established, it is possible to establish a typology of the nature of reparations, as rights, symbols, or processes.

These varying conceptions of justice attract varying feminist critiques, but this is only possible if the goals of reparations programmes are uncovered. As decisions about reparations programmes are context-specific, a blueprint for “a feminist reparations programme” is impractical and ill-advised. The political, social, economic, and cultural context of reparations programmes must be analysed. Clearly, the causes of conflict must be understood. But less obvious is the need to map the structural inequalities which prevail both before and after the conflict, such as social stratification based on gender, race, ethnicity, and class. An analysis of context is crucial to framing the goals of reparations, the decision-making process, and the design and implementation decisions. Reparations programmes are developed through a political process in which decisions are made about the values and goals of reparations, the class of eligible beneficiaries, the delivery mechanisms, and other design choices. The decision-making process itself is an outcome of the transition and deserves careful analysis and feminist critique. Design and implementation decisions are the most visible features of reparations programmes; they have been the focus of most activist and academic critique. The paper synthesizes and supplements existing feminist critiques of these design and implementation decisions. Using a conceptual framework for analysing reparations, by looking at why, where, how, and in what ways reparations programmes are established, this paper demonstrates how feminist analysis and critique can elucidate the possibilities and limits of reparations for achieving justice for victims of human rights crimes.

Emily Rosser (York University School of Women’s Studies) – “Re-Reading ‘Participation’ Rhetoric: Women, Sexual Violence, and Neoliberalism in Truth Commissions”

Can transitional justice scholars produce practical solutions? How can peace and justice be achieved without some trade-offs? I would suggest that these questions in themselves entail important assumptions which are often critiqued but seldom re-worked in transitional justice frameworks. Answers to the question “transition to what?” often appear self-evident in the work of truth commissions. Further, the meanings of “peace” and “justice” are too often premised on violent frameworks that privilege the status quo, and what constitutes an acceptable “trade-off” is most often determined by the powerful, to the detriment of poor people, women, indigenous people and other overlapping groups that are often marginalised on local or national levels. Building on critical scholarship and my own research on women and sexual violence in truth commission reports (most notably the 1999 Guatemalan *Comisión para el Esclarecimiento Histórico*), I will take up three such assumptions here. First, that the broad participation of survivors and particularly of women means democratisation, either of a reconciliation process or of the production of knowledge about the conflict and its ongoing effects; second, that meaningful reconciliation can be achieved within the neoliberal model; and third, that there can be any substantive “justice” without shifts in gendered power structures. The separation of economics from politics is one pillar on which neoliberal and neocolonial regimes are built. Transnational feminist critiques indicate that the investment of rights discourse in this particular aspect of neoliberalism is one of the main challenges for social justice movements, especially in so-called “post-conflict societies.” A gradual shift in the focus of feminist activism from legal remedies for sexual violence to broad-based reparations signals an increasing understanding of the limits inherent in relying on the relatively inaccessible and individualising processes of law. It also supports the desire to put resources in the hands of those who would rebuild civil society from the bottom up. Yet many truth commissions continue to reproduce problematic assumptions about women, their bodies and their function in (or outside of) politics which have very material consequences. Working with several case studies about the role of women in truth commissions, I argue that revisiting notions of “expertise” and breaking down the false universalism on which human rights rest are necessary steps in creating transitional processes that focus less on producing superficial international “success stories,” and more on doing things that are sustainable and just on a local level.

## 1:00 – Lunch

## 2:00 – Early Afternoon Session

*Fragmentation and Pluralism (Flavelle House A)*

Chair: Derek McKee (University of Toronto Faculty of Law)

Discussant: Prof. Sean Rehaag (Osgoode Hall Law School)

Edouard Fromageau (University of Geneva Faculty of Law) – “Constitutionalist and Administrative Approaches in International Law: The Dialectic of Order and Disorder in a Changing Structure”

Generate an order from a disorder. Theories of International Law seem to pursue tirelessly this quest in front of changes in international society. Considering theory as a systematization of a receding reality must correspond the idea of the necessary adaptation of it, *au fur et à mesure* of the evolution of this changing structure. Fragmentation and globalization can be described as two of the most significant challenges for International Law since the mid-twentieth century. On the one hand, many international lawyers raise worries about the possible disorder caused by such changes. On the other hand, and partly in response, we can observe the emergence of theories trying to generate order, with a strong structuring dimension. The intensity of the debate on the fragmentation, as a threat to the unity of the International Legal Order, has significantly risen in recent years. As a countermove, some scholars suggest to analyze the International Order under a constitutionalist approach. The aim of such an analyzing method seems to “place limits on the activities of international organizations, (by) subjecting those organizations to standards of proper behaviour” (T. KOOPMANS, *Courts and Political Institutions: A Comparative View*, Cambridge University Press, 2003, p.245. Quoted by J. KLABBERS, “Constitutionalism Lite”, *International Organizations Law Review*, 2004, pp.32-33). In the same time, the impact of globalization on International Law has been increasingly emphasized. One of the consequences of this impact was the progressive transfer of power from States to global governance bodies. Nevertheless, these transfers, from a democratically legitimate space to a global level, have brought the situation at a place where “those who have legitimacy have a lack of competence, and those who have competence have a lack of legitimacy” (P. LAMY, *La démocratie-monde: pour une autre gouvernance globale*, Le seuil, Coll. La république des idées, 2004, p.61. Quoted by C. GHORRA-GOBIN (dir.), *Dictionnaire des mondialisations*, Armand Colin, 2006, p.186 (Our translation)). In recent times, the concept of global administrative law, shaped essentially by scholars from New York University, has emerged. This theory is focused on the analysis of mechanisms that promote or otherwise affect the accountability of “global administrative bodies”, in particular by ensuring they meet for example adequate standards of transparency or participation. Despite the undeniable theoretical contribution of the domestic analogy, it is the purpose of this work to state that neither the constitutionalist nor the administrative approach are the best way to properly characterize the changing structure of International Law. Several content of this paper will go through the concept of legal pluralism as a possible alternative way.

Brendan Naef (University of British Columbia Faculty of Law) – “To and Fro: The Fluctuating Power of the State as Described Through a Foucauldian Approach to International Law”

This article proposes a guarded approach to the fragmentation and pluralism debate in relation to international law by warning legal scholars not to dismiss the traditional *Westphalian* model too

hastily. This approach is not one of regression nor is it one of timidity; it essentially attempts to provide a more logical understanding of how a growing number of international institutions and international norms continue to depend on the more traditional aspects of the State. The article will argue that, with few exceptions, States have never ceased to jealously defend their sovereignty when it serves their purpose, which has led to a type of *selective pluralism*. Otherwise stated, if pluralism truly does exist in international law, it is due more to the acquiescence of States than to other factors such as advances in technology or economic globalisation. Consequently, there is a need to re-evaluate the impact of the proliferation of transnational norms and international institutions as States continue to hoard the essential for themselves, *i.e.* much of what scholars define as pluralism translates to little more than norms and institutions of relatively little significance or, simply, transnational static hush. The paper will argue that the decoupling of “State and Law” is a more sensitive and complicated issue than some scholars imagine and will also demonstrate how some of H.L.A. Hart’s views can be applied to the role of the State within International Public Law and the relationship between the two. The above view is meant to be descriptive, however, and does not purport to assign a positive or negative value to the perspective. It will be suggested that, in order to move forward, attention must be focused on areas over which States continue to assert strong claims of sovereignty. To provide context for the paper and to clearly demonstrate the above-mentioned points, the fields of immigration and international human rights law will be used as case studies. Finally, the article will argue that, although more imaginative models are enticing, State-centred approaches remain relevant, especially for areas such as enforcement.

Hamed Shafia (University of British Columbia Faculty of Law) – “Disintegration of International Law: The Emergence of International (Quasi-)Judicial Bodies and its Implications for the ICJ and International Law”

This paper is an attempt to deal with the proliferation of (specialized) international judicial and quasi-judicial bodies since the establishment of the International Court of Justice, and their impact on the possible, but not probable, supervisory role of the Court and on the development and disintegration international law. The discussion is developed through reviewing the evolution of judicial and quasi-judicial bodies of international competence before the establishment of the ICJ, giving a description of how that evolution has continued since the establishment of the ICJ, considering the trends to predict the emergence of further judicial and quasi-judicial bodies, and assessing the positive and negative implications of such emerging trends for the ICJ and international legal order.

Jennifer Shkabatur (Harvard Law School) – “International Standard Setting: The Quest for Institutional Design”

International commercial standards play a central role in the global economy. Harmonized international standards serve as important instruments of globalization and facilitate international trade and communication. Despite of the eminence of commercial standards in the global arena and their substantial effect on international trade, the question of the appropriate institutional design for international standard-setting bodies has mostly remained untouched in the literature. The suggested paper attempts to start filling the gap. The paper first addresses the need for international standards as an essential part of the disaggregated global realm, where there is a lack of collectively binding decisions, centralized competences and hierarchically ordered legal principles. In this regard, the paper discusses the tensions between harmonization and pluralism; between traditional domestic regulatory norms and novel international regulatory needs; and between the often competing principles of international and administrative laws. Following this theoretical background, the paper offers a broad overview of the current state of affairs of

international standard-setting institutions. First, it shows that while a variety of *de facto* standards are set by the market or a relevant industry such standard-setting cannot be conceived as justified, legitimate or satisfying for a variety of normative reasons. Second, the paper suggests a novel typology, based on a detailed survey of dozens of the existing international standard-setting organizations. As part of this typology, the paper analyzes and evaluates the membership, participation, deliberation and decision-making rules that are common in these organizations. The analysis breaks down into five regulatory models, each of which represents a unique pattern of international regulation that is made by inter-governmental or non-governmental international organizations: *rigid agency model*; *loose agency model*; *hybrid model*; *industry model*; and *open model*. Examining each regulatory model in its context, the paper evaluates its relative strengths and weaknesses: it examines the accountability and democracy mechanisms embedded in the different models; their normative priorities and values; and their overall legitimacy in the international arena. In the final part, the paper suggests considering an alternative model for international standard-setting. This model draws on the conception of “regulatory negotiations”, which suggests that both public and private actors would participate in the standard-setting organizations and negotiate standards throughout the decision-making stages. The paper discusses possible advantages and disadvantages of such a model and considers the implications of its borrowing from domestic to international law. It concludes that such collaboration may enhance the quality and credibility of the international standards, and expand the legitimacy and resources of the standard-setting organization itself.

*Constitutions and Citizens in the Global Context (Flavelle House B)*

Chair: Amaya Alvez (Osgoode Hall Law School)

Discussant: Prof. Jennifer Nedelsky (University of Toronto Faculty of Law and Department of Political Science)

Joel I. Colón-Rios (Osgoode Hall Law School) – “The End of the Constitutionalism-Democracy Debate”

I always thought there was something strange about the literature produced in the 1990s by North American constitutional theorists on the relationship between constitutionalism and democracy. The problem, it seemed, had two different roots: an excessive focus on the legitimacy of judicial review and an insistence in defending the constitutional status quo. On the one hand, the emphasis on judicial review usually ended up obscuring what should have been at the center of the debate: the way in which ordinary citizens could or not re-constitute the fundamental laws under which they lived. On the other, these approaches rarely involved recommendations for institutional changes (other than the occasional proposal for the abolition of judicial review) in the constitutional regimes they were operating. These “happy endings” were particularly surprising, since one would think there must be many ways of upsetting the “balance” between constitutionalism and democracy in favor of the latter. With these limited ends, it is no surprise that the constitutionalism-democracy debate appears to have stagnated. This paper will advance a different approach to the debate, one that emphasizes popular participation in constitutional change and that recommends institutional transformations that would contribute to the realization of democracy in contemporary constitutional systems. I begin by reviewing the works of Ronald Dworkin, Jeremy Waldron, and Bruce Ackerman. The take of these three authors on majority rule, judicial review, and constitutional amendments, exemplify very well the shortcomings of the literature on constitutionalism and democracy. The implications of Dworkin’s constitutional theory are fatal for any democratic project: the petrification of a constitutional regime that is

reputed to rest on the “right” abstract principles. Waldron's approach, although attributing to “the people” the right to have the constitution they want, ends up identifying people and legislature, thus neglecting any actual participation of citizens in constitutional change. Ackerman's constitutional politics, although insisting in keeping citizens and representatives separate, replaces the flesh and blood human beings that live under the constitutional regime with a mythical “People” (always with a capital P) whose acts are identified ex post facto. In contrast to these theories, I propose a conception of constitutionalism according to which the constitution should remain permanently open to important transformations. Under this “weak” constitutionalism, there is no such thing as a “good” or “finished” constitution, contrary to what Dworkin's analysis implies. Only such a conception of constitutionalism, I believe, is consistent with a serious commitment to the democratic ideal. However, this supposes that democracy is not exhausted in legislatures and daily governance, but that it extends to deliberating and deciding on the very content of the constitution. In this respect, and in contrast to Waldron, I will defend a distinction between two dimensions of the democratic ideal: democracy at the level of daily governance and democracy at the level of the fundamental laws. By their very nature (daily vs. episodic), each of these dimensions demand different levels of popular engagement. Finally, I consider the institutional implications of this approach to the constitutionalism-democracy dilemma. Unlike Ackerman, I suggest a series of mechanisms designed to allow for the actual participation of ordinary citizens in the constitution and re-constitution of government.

Constanza Pauchulo (York University Graduate Programme in Social and Political Thought) –  
“Beyond Citizenship’: Reconsidering Citizenship and its Relation to Global Justice”

National citizenship – as a legal category and a theoretical construct – has long been contested and sought after as a means through which to obtain particular rights and privileges. Indeed, Hannah Arendt (1968), while referring to the experiences of stateless persons, famously argued that, “the moment [that] human beings lacked their own government and had to fall back upon their minimum rights, no authority was left to protect them and no institution was willing to guarantee them” (370). The necessity of the nation-state to secure the rights of individuals and groups has, however, come into question. In fact, recent work surrounding the concept of citizenship has focused on what has been labelled as the “disaggregation” of citizenship rights from membership in a territorially bounded nation-state to the realm of universal human rights. These new understandings of citizenship have also been positioned as a possible tool for the achievement of global justice (Benhabib 2004, 2005; Cohen 1999; Soysal 1996; Ong 1996, 1999, 2006). Therefore, the aim of this paper is to consider the ongoing transformations in various understandings of citizenship and their implications for working towards global justice. I argue that, although these reconfigurations of citizenship are crucial for the creation of global equality and more robust representational institutions, citizenship is insufficient for engaging with the various levels of work necessary for achieving global justice. Specifically, I begin by examining the changing conceptions of citizenship from a strictly legal definition of membership within a state (with specific reference to Canada) to the more nuanced notions of what Yasemin Soysal terms (1996) “postnational citizenship” or Aihwa Ong (1996, 1999, 2006) identifies as “flexible citizenship”. In the second portion of this paper, I examine current arguments for changes in representative institutions at both the national and global level and their relation to the changing conceptions of citizenship. The final section, entitled “Beyond Citizenship”, grapples with the idea of imagining a different theoretical framework or construct that can work beyond the limits of citizenship. This section examines the notion of “cosmopolitan solidarity” as a possible starting point for this type of theorizing (Kurasawa 2007). The goal is not to develop a definitive response for the question of thinking “beyond citizenship” (a project that would be both impossible and undesirable) but to explore different authors that can assist in creating alternative frameworks within which to think about global justice.

Hicham Safieddine (University of Toronto Department of Near and Middle Eastern Studies) – “A Critique of New Constitutionalism: The Fallacy of Outcome as Process”

One of the prominent theories that grew out of the post-cold war discourse in relation to democratic reform is New Constitutionalism (NC). NC lays out a set of principles and mechanisms its proponent argue privilege the process of constitution making to the final document or outcome. As such, it allows for greater participation by communities and ordinary people in the making of their own laws. Its three main principles are: Local Ownership, Due Process, and Expert aided. NC proponents argue that due to its focus on process, it is a sustainable form of progressive societal change, particularly for those social groups that tend to be sidelined by elite-mechanisms of constitutional making. As such, NC can be a tool of democratic transition in conflict-ridden or ethnically divided countries. In fact, in the past three decades, the NC doctrine has inspired and influenced the constitution making processes in over a dozen countries across the globe, namely in the global south (Latin America, Africa, and more lately Afghanistan and Iraq). In this paper, I take a critical look at this doctrine through an investigation of the main theoretical works and over a dozen case studies where NC shaped the constitution making process of countries undergoing some conflict and deemed to exhibit deep ethnic or religious divisions. I ask whether NC is in effect a means of democratic transition out of conflict (privileging process) or rather a transition to democracy (privileging outcome), the latter being no more than a formal set of tools that reinforce a narrow understanding of democracy and in fact is aimed at guaranteeing a particular outcome, that of representative neo-liberal democracy. My findings will hopefully raise some major questions about liberal notions of justice, the limits of the law, and the primacy of political versus legal reform as well as the costs and benefit of international efforts at conflict resolution within the context of constitutional change.

Rayner Thwaites (University of Toronto Faculty of Law) – “Troubling Invocations of the Common Good: Finnis and ‘Nationally Differentiated Risk Acceptability’”

Arguing against *Belmarsh*, a contemporary judicial decision that held indefinite immigration detention to be incompatible with the United Kingdom Human Rights Act, John Finnis has presented an argument for “nationally differentiated risk acceptability”. By this he means that “risks to the public good which must be accepted when arising from the presence of a national [ie citizen] need not be accepted from the presence of an alien [ie non-citizen] and may be obviated by the alien’s exclusion or expulsion”. He further reasons that until such time as a non-citizen can be removed, he or she can be held in immigration detention. His account rests on the further proposition that the “right of abode” is exclusive to citizens. He argues that a threat to the exclusivity of this right is a threat to the “core constitutional distinction” that defines citizenship. The conferral on a non-citizen of an effective right to remain, arising from an absolute prohibition on deportation to torture, constitutes such a threat. In turn, the preservation of an exclusive conception of citizenship matters for him because it is held to be a precondition for a viable state that secures goods for those that belong to it: democratic, protective and redistributive. The interest of Finnis’ account for me is as a clear exposition of the assumptions that animate contemporary arguments for indefinite immigration detention. In my talk I examine the light his account sheds on contemporary immigration jurisprudence, particularly in the post September 11 context, and explore why the nature of his argument for the legal permissibility of indefinite immigration detention is misconceived. My argument follows the lines suggested by current writings critical of conceptions of citizenship as identity. Finnis presents his argument for the necessity of an exclusive conception of citizenship as a normative-theoretical argument. I think that this is highly misleading. In truth, his claim for the necessity of an exclusive conception of citizenship only makes sense as an empirical claim. And on that level, his evidence is lacking.

Furthermore, I think that the way his exclusive conception of citizenship grounds an argument for indefinite immigration detention evidences how such concepts function at a practical level in a way inimical to democratic inclusion and human rights.

**3:30 – Coffee Break**

**4:00 – Saturday Plenary (Flavelle House B)**

Prof. Andrew Arato (New School for Social Research Departments of Sociology and Political Science) – “Amendment and Legitimacy: From Carl Schmitt to the Turkish Constitutional Court and Beyond”

Discussant: Prof. Nehal Bhuta (University of Toronto Faculty of Law / New York University School of Law)

**6:30 – Dinner (Hart House)**

**Sunday, 11 January 2009**

**9:30 – Light Breakfast**

**10:00 – Early Morning Session**

*Law, Exclusion, Sovereignty (Flavelle House A)*

Chair: Umut Özsü (University of Toronto Faculty of Law)

Discussant: Prof. Karen Knop (University of Toronto Faculty of Law)

Graham Hudson (Osgoode Hall Law School) – “Canadian National Security, International Human Rights and the Role of Domestic Legal Institutions”

The Supreme Court of Canada seems to be taking the international human rights (IHR) of refugees seriously. In a number of recent *Charter* cases, such as *Charkaoui v. Canada* and *Khadr v. Canada*, the Supreme Court has relied upon often non-binding international law to justify providing greater procedural rights to detainees held within an immigration and refugee law context. In like fashion, a number of legislative committees and civil society groups have utilized IHR to increase the persuasive authority of reports which have often been highly critical of Canadian national security policy. The government has responded by amending security certificate and detention provisions within the *Immigration and Refugee Protection Act* in order to comply with the *Charter* and, by inference, IHR. As required by the Supreme Court, non-citizens named in security certificates now have the benefit of representation by security-cleared special advocates and a more formalized detention review process. As recommended by legislative committees, named persons have a limited right of appeal, enhanced access to protection as refugees, and the ability to contest the admissibility of evidence which has been

obtained through torture or similar abuses. It would be reasonable to regard the apparent effectiveness of these judgments and reports as evidence of what may be termed “transnational human rights advocacy”, whereby various institutions and actors facilitate the movement of human rights norms across national boundaries and, in so doing, collectively shaped public policy in the image of human dignity. I propose to critically test this optimistic claim and the theory upon which it rests. After re-examining the impact of international law most generally upon judicial reasoning in *Charkaoui*, I will argue that, despite appearances, there have been few changes to the operation of Canadian detention and deportation practices. I will also contend, however, that the significance of IHR may yet glimpsed if we refine some of our standard research methodologies and, with this, look to other loci of law-formation. If we are to make meaningful assessments of whether IHR matter in the context of Canadian national security policy, we must look beyond the internal operations of authoritative decision-making and resultant prescriptions, and towards the full spectrum of legal process, in which a range of official and unofficial participants, perspectives and expectations systematically shape legal practice.

Asha Kaushal (University of British Columbia Faculty of Law) – “Linking Blind Spots to Bias: The Distributive Legacy of Critical Legal Studies”

The future of critical legal studies is supposedly gloomy. This paper argues that CLS provides a window on legal analysis that other legal approaches cannot: a space *inside* the law to address and contest the distributive consequences that follow from virtually every judicial decision. The dominant legal discourses of liberalism, law and economics, and post-modernism permit lawyers and legal scholars to discuss legal issues without discussing distribution. The paper explores how the focus on rights, efficiency and narrative function to exclude distributive concerns.

Zoran Oklopcic (Carleton University Department of Law) – “Against Popular Sovereignty: In Praise of Meekness as a Political Virtue”

All territorial political communities are notoriously over-inclusive. They necessarily capture individuals who wish they were members of some other polity. One of the theoretical and rhetorical strategies of concealing that problem is to presuppose “the people” – the body of all citizens – as the source of ultimate political authority. Several theorists – Carl Schmitt, Hannah Arendt, and more recently Paul Kahn – have claimed that the idea of “the people” and its sovereignty has its roots in Christian theology. Only by recognizing that fact can we appreciate the salient features of modern polities that do not fit easily within a liberal model. Alongside the language of contract and obligation, we encounter the pervasive vocabulary of love and sacrifice that colours the political experience of belonging to a sovereign state. Christian roots of popular sovereignty explain intense political emotions, and the willingness to sacrifice (i.e. die for) for the state. However, such conceptions can only aggravate the political conflict in deeply divided societies. Who belongs to “the people”, and who can demand love and sacrifice from whom becomes a source of bitter conflict. “Christian” popular sovereignty humiliates radicals by demanding love and sacrifice for a project they did not choose. In addition, it gives them no reason why they should be satisfied with an arbitrarily delineated polity. Of course, the problems of over-inclusivity can never be “solved” and bitter resentments festering in deeply divided societies will linger. Having deeply divided societies in mind, my aim in this paper is to sketch a soothing alternative to Christianity-based popular sovereignty, by positing in its stead a Christianity-based secularized virtue of meekness. To put it differently, instead of positing a god-like “people” and trying to extract love and loyalty in the people’s name, we should openly theorize the type of a virtuous character that should reconcile himself with a political order not of his choosing. Building on the work of Norberto Bobbio, I argue that such a character is best described as “meek”. Meek people detest “perpetuate quarrels” and reject the “succession of

reciprocal grudges and reprisals expressed through the usual justification ‘you did that to me so I do this to you’”. They are not vindictive or resentful, nor do they brood over past offences. They have a deep detachment from “vanity or pride that urges an individual to stand out.”

Sujith Xavier (Osgoode Hall Law School) – “Prohibited Grounds: Categories of Protection or Categories of Exclusion?”

The drafters of the Genocide Convention viewed the Holocaust genocide victims only in terms of four enumerated groups (ethnic, national, racial and religious). The targeting and the intention to ‘destroy in whole or part’ of these four groups eventually became the intrinsic component of the *Genocide Convention* and the *mens rea* of genocide as it now stands in the *Rome Statute*. These categories of protection continue to dominate the conception of genocide, such that current jurisprudence from the two *sui generis ad hoc* tribunals and the International Court of Justice denies the possibility for the inclusion of other groups; even though they may have been the victims of genocide. Scholars have claimed that language shapes the law and limits its interpretation, no matter how contrary the resulting interpretation may be to the law’s fundamental objective (Martti Koskeniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Cambridge, Cambridge University, 2005) at xxii). Within this contextual paralysis, the central aim of this paper is to examine how to include new groups, particularly homosexuals, within article 6 of the *Rome Statute*. This will be done firstly, by showing that categories of protection enumerated within genocide can be *exclusionary*, particularly in terms of homosexuals, and secondly, by examining how international criminal law (notably the *Rome Statute*) can transcend this limitation through the international human rights compatibility requirements provided within the *Rome Statute* (1998, 37 ILM 999, art. 21). The argument presented here is not an attack on the significance of the *Genocide Convention*, but rather seeks to use the structure of the *Rome Statute* to demonstrate that there is an internal contradiction within the *Statute* and subsequently international criminal law. The *Statute* limits the possible victims of genocide in article 6 but concurrently requires, through article 21, a non-discriminatory interpretation when using the *Statute* (*Ibid.*). This contradiction will be highlighted by focusing on the exclusion of homosexuals, especially as it relates to the drafting and interpretation of genocide as falling within the ‘heteronormative’ project. It will outline the legal realities of the meaning and scope of the contested provision as part of the post-modern binary of self and other; those that are protected versus those that are deemed unstable and mobile groups. In so doing, this paper will show how the existing protected four groups are also characterized by instability and fluidity. For this reason the exclusion of homosexuals from the enumerated and protected groups runs counter to the *Rome Statute* itself as the *Statute* given the requirement that the international criminal court act compatibly with the established human rights norms and standards (*Rome Statute*, art. 21).

*Interpretation and Mobilization: Constitutions in the Court of Public Opinion (Flavelle House B)*

Chair: Mazen Masri (Osgoode Hall Law School)

Discussant: Prof. Lorne Sossin (University of Toronto Faculty of Law and Department of Political Science)

Peter Atupare (Queen’s University Faculty of Law) – “Legitimacy, Judicial Review, and Human Rights Enforcement in Ghana”

We are in a rights-conscious century. The postwar global Human Rights constituency is so strong that no state and no developed political entity can afford to eschew at least its language or its values. The world now abounds with countries that have sufficient constitutional Human Rights guarantees. Liberty, equality and respect for human dignity have thus gained prominence. States' primary concern currently is not about how to justify rights and other constitutional norms, but how to protect them. A demonstrably good reason for constitutional Human Rights guarantees warrants effective mechanisms to protect and enforce them. A reliable enforcement scheme may prevent the Human Rights provisions from lapsing into an empty political rhetoric. In effect, the people can reap the full benefits of the constitutional protection of Human Rights. This paper focuses on Judicial Review within the context of a written constitution as an institutional device by which Human Rights can be enforced and protected. In large part, the paper pays attention to the place of Individual Rights within the constitutional system of a State. In particular, it explores the exercise of the power of Judicial Review by the courts in Ghana as a mechanism in enforcing Human Rights under a written constitution. Judicial Review in this form is undertaken by determining the compatibility and validity of an Act of Parliament or Executive act in relation to the written Constitution. In Ghana like in the United States, statutes or executive actions are scrutinized for their conformity to Individual Rights as set out in the Constitution. This rights-oriented Judicial Review is part of general constitutional review, and the courts are required to strike down statutes or any executive instruments that violate Individual Rights. As a theoretical prelude to the entire work, I claim that the main juridical basis to legitimate Judicial Review lies in the courts duty to enforce a higher body of law grounded in rights. On the basis of this claim, the work argues that while the Judiciary did play a constructive role in the promotion, enforcement and sustenance of Fundamental Human Rights and Freedoms in the country, it has not adopted a consistent approach in giving all Human Rights equal weight. A generous reception has been given to Civil and Political Rights, while Social-Economic Rights have not been sympathetically considered. This has generated a gap in Ghana's Human Rights jurisprudence, and negated the values upheld by the postwar global Human Rights constituency - of which Ghana is a member. To avert the creation of Judicial determinism which will hold back the realisation of Socio-Economic Rights in Ghana, this work urges the Judiciary to inter alia accord equal respect to all Rights by adopting a purposive approach in deciding all rights claims.

Edin Hodžić and Nelcy López Cuéllar (McGill University Faculty of Law) – “Popular Constitutionalism within the Courts: The Case of Divided Societies”

Popular constitutionalism calls for taking the constitution from the courts and giving it to the people – and their multiple voices. Popular constitutionalism sees courts as institutions that represent a narrow range of interests and can only be expected to reflect those interests in their judgments and not to act as popular entities representing the plural voices of the people. Defenders of court-centered constitutionalism argue that courts introduce reason into the political debate and, hence, are better suited to act as guardians of the constitution. The basic assumptions of defenders of popular and court-centered constitutionalism do not apply to the constitutional courts of divided societies, i.e. societies in which ethno-cultural diversity translates into political fragmentation. We argue that it is possible to have popular constitutionalism within the courts in divided societies. First, divided societies are characterized by the rule by ethno-political elites and weak civil society. The opportunities for popular political involvement that popular constitutionalists have in mind are, hence, scarce in those societies. In these societies, courts are not an antonym of popular bodies and plural-voice institutions. On the contrary, courts are the democratic institutions that, given these societies' specific context, embody and support their vision of the democracy. Second, due to the political importance of the ethno-cultural principle, divided societies are characterized by the prevalence of descriptive representation over other forms of representation. According to Pitkin, whom we follow here, descriptive representation is

symbolic representation by resemblance or reflection, in the sense of *standing for others*. The composition of the constitutional courts in divided societies is such that they descriptively represent the people. By constitutional mandate, each justice belongs to, and thus *represents* (represents, or makes present again), one of the dominant communities, i.e. ethnic groups. More importantly, justices are perceived by these groups as their representatives. Lack of popular “democratic” legitimacy is, thus, compensated with another kind of popular legitimacy: the extensive “politics of presence”. We focus on the debates within constitutional courts in divided societies when these courts act as deadlock-breaking mechanisms. We argue that, in divided societies, courts are neither completely divorced from populism nor completely consumed within it. Finally, we argue for the need to develop an account of the role of constitutional courts in divided societies that takes us beyond the opposed camps of popular and court-centered constitutionalism.

Ilana Lifshitz (University of Texas at Austin Department of Political Science) – “Courts, the Public, and Progressive Constitutionalism”

Judicial decisions in liberal democracies require, at a minimum, tacit acceptance from the Legislative and Executive branches, the public and lower-level courts. Irrespective of the provisions of a given constitution, judges cannot, on their own, implement policy. Subsequently, for justices to go beyond aspirational pronouncements and effectuate progressive change, strategic adjudication is required. A recent development in world constitutionalism is the appeal to mass support both at the constitutional design stage and with regards to constitutional interpretation. The role of mass support does have a specific place in explaining the expansion of power in modern judiciaries, albeit a limited one. The court must work within the boundaries found acceptable by the political branches, or risk sanction. In such a scenario, I argue, public opinion and action matter little. Similarly, when the executive and legislature explicitly endorse a policy, the court can act safely with or without public support, because the public will first appeal to the other elected branches of government through the electoral system. Only in instances where the executive and legislature are split, or implicitly agree that change is warranted but feel taking action would be too politically risky, can the court exploit public support in order to enact change and vice versa. Put more simply, where courts push for change and other governmental bodies are in conflict or find the proposal incongruent with their duties, the role of public support and mobilization can act as a decisive factor. By determining how and when the public can affect change via the courts, certain holes in legal scholarship can begin to be filled. Namely, throughout the literature there is often an assumption of legitimacy conferred upon courts by the public, yet no discussion on how that legitimacy is created, maintained or challenged. Though the “counter-majoritarian difficulty” notes a tension between judicial decree and democratic checks, the role the public plays in shaping judicial behavior, and justice’s willingness to make positive legal change [positive in the sense of creating policy], remains under-theorized. Additionally, writings on judicial behavior often place too little value on the interaction courts play with the other branches of government and with the public. Even the literature which accounts for a dialogical process seems to accept or anticipate that the court’s decision is often the final word on a matter – whether the court’s position is adhered to or not. In addressing the role of the public, we create a clearer picture of this feedback loop and place the courts within the process rather than at the end of a continuum.

Adam Shinar (Harvard Law School) – “Progressive Constitutionalism, Progressive Constitutionalists, and the Accommodation of Social Change”

In his critique of the Canadian Charter, Michael Mandel argues that while Charter advocates touted its potential for positively affecting democracy, the rights guaranteed by the Charter are

sufficiently vague for reasonable people to disagree about the particular rights being protected. Corresponding claims made in the U.S. and elsewhere amount to an argument that those interested in rights protection and societal reform should not look to constitutions (and the judges who interpret them) for guidance. Similarly, critical scholars argue that legal texts are sufficiently indeterminate to justify almost any result, further entrenching the hegemony of the ruling elites. Similar arguments, though with a different political motivation, have been made by legal realists in the 1930s and German political theorist Carl Schmitt in the 1920s. These scholars sought to critique liberal dogma, assailing the notion of the rule of law and its ability to produce clear, determinate, and enforceable norms that can be logically deduced from text. This paper offers a response to both of these aforementioned arguments. It does so by conceding the point regarding legal indeterminacy, but seeks to harness indeterminate constitutional norms to the benefit of progressive causes. In doing so, I counter conventional thought that indeterminate constitutional concepts are detrimental to a proper functioning of the constitution, rights protection, and societal progress. Instead, I will argue that the advantage of constitutionalism lies precisely with its inherent inability to generate fixed rule-of-law-like directives. This argument has several implications. First, it accommodates varying and even opposing constitutional conceptions of the good. Second, it causes what I term a “disturbing effect”, which roughly means the ability of one conception of the good to “disturb” a rival conception, thus dislodging it. Third, the disturbing effect allows for ongoing democratic deliberation among non-judicial actors as to the proper meaning of the constitutional norm. Thus, the focus shifts from what may be labelled progressive constitutions to progressive constitutionalists, social movements and civil society writ large. These actors will very often precede the courts in the articulation and specification of a new constitutional norm. These theoretical arguments will unfold through a discussion of two case studies: the civil rights movement in the U.S. in the 20<sup>th</sup> century and U.S. education reform in the particular states. At the same time, it is important to state the limitations of such an argument. Mainly, it will not change the fact that constitutional law is constrained. It will inevitably continue to operate on a platform of legal reasoning for it to be effective, and even realistic. For obvious political reasons, constitutions will probably never be intrinsically progressive, because they are not likely to contain the particular commitments progressives hope for. Indeed, even constitutions that extend some protections to social and economic rights, for example, have done so in a very careful manner. The most that progressives can hope for then, in the arena of constitutional law, is for progressive discourse and ideology to channel through relatively familiar institutional arrangements. But here constitutions can play a positive role. This paper, then, offers a second order argument about how a constitution should function and be designed so as to foster deliberative discourse, by asserting that constitutions should remain sufficiently open for the continuance of that project. This might even be considered better than having an outright “progressive” constitution, because the temporal impact will have a tendency to alter our meaning of progressive. The aim of a constitution, then, should be to embrace a certain level of textual indeterminacy, which can serve progressive political goals, whatever they may be, as they too change over time.

### **11:30 – Coffee Break**

### **11:50 – Late Morning Session**

*Identity and Law’s Selective Memory (Flavelle House A)*

Chair: Alex Livingston (University of Toronto Department of Political Science)

Discussant: Prof. Nergis Canefe (York University Department of Political Science / Osgoode Hall Law School)

Alicia Breck (Carleton University Department of Law) – “Space, Identity, and Reconciliation: How Transitional Justice Can Result in Fractured Socio-Spatialities”

Space plays a vital role in managing the relationships between individuals in situations of post-conflict reconstruction. During post-conflict reconstruction, concepts of the Self, such as identity and memory, are reflected and maintained within the physical structure of cities as well as the social structure of communities. This results in multiple heterogeneous spaces of perception, memory, and identity that co-exist within a single location. In Rwanda, for example, the use of transitional justice to deal with these fractured socio-spatialities has resulted in juxtaposition between publicly expressed unity and privately suppressed identity. Have attempts at reconciliation created places where certain identities and memories are allowed and others are not? Understanding this intersection of spaces within the framework of transitional justice allows people to understand how components of conflict could be maintained under the surface of national reconciliation. My paper will look at how the physical space between individuals and the cognitive space between the Self, identity and memory, intersect in relation to the process of *Inkiko Gacaca*. Using Rwanda to illustrate my argument, I use theories of space, identity, and transitional justice to understand how people can project or suppress their perceptions of conflict into the spaces they inhabit.

Luis Campos (University of Toronto Faculty of Law) – “Archival Fantasy: 19<sup>th</sup> Century Explorer Journals as Evidence in Contemporary Aboriginal Rights Litigation”

This paper represents a chapter in a larger work about the law’s continued investment in the imperial archive to adjudicate contemporary aboriginal land claims. Parties (particularly respondents) in such proceedings regularly rely [and Canadian courts enthusiastically accommodate] the 19<sup>th</sup> century narratives of explorers and traders in British North America to determine past activities on disputed lands. My preoccupation relates to their purported reliability and perceived evidentiary value (as measured against aboriginal oral evidence) despite the landmark *Delgamuukw* decision, in which the Canadian Supreme Court sought a greater balance between competing modes of evidence. In this particular paper, I reach across disciplines, importing critical archive theory to interrogate the journals collectively. I explore the concept of archival rationalization in suggesting their appeal as artifacts and objects of judicial fetishization. Although my focus is on Canadian courts, appropriate reference will also be made to Australian jurisprudence.

Ireh Iyioha (University of British Columbia Faculty of Law) – “The Gender of Medicine: From Monolithism to Paternalism to the International Patent Regime – Making Horizontal Laws from Vertical Treaties”

Medical Pluralism, Medical Paternalism and Pharmaceutical Patents are three distinctive issues that are not often linked to the subject of gender as one integrated issue. Yet, there exists an intricate link between these three issues in medical jurisprudence and the gender debate. This research traces the subtle paths of two important medical histories in the lives of women: the history of paternalism in healthcare and a concurrent history of biomedical dominance in healthcare – an era in which alternative health systems were monitored and criminalized by the state health system. I employ the term, “Medical Monolithism” to capture this era of biomedical dominance in which the state attempted to suppress medical pluralism. These histories capture the difficulties encountered by healthcare consumers and practitioners, especially women, in their

attempt to access or provide alternative healthcare. Employing the evidence from these concurrent histories, this research attempts to establish linkages between healthcare pluralism, medical paternalism and the current international debate on the patentability or otherwise of indigenous medicinal knowledge. Recent scholarship on patents and indigenous knowledge are highlighting the role of women of the South in nurturing biodiversity and indigenous knowledge. The patents and indigenous medicinal knowledge debate centres on whether this knowledge fits within the patent system. This research interlinks the appropriative role of patents over indigenous medicinal knowledge largely generated by women of the South with a historical past/present in which biomedical science was/is employed as an instrument for exclusion of alternative healthcare paradigms largely practiced and consumed by women. While the discourse on healthcare pluralism has largely centered on regulation, a closer look at history reveals that the monolithic stance of biomedicine/science on what kind of medicine/pharmaceutical can be delivered or patented has had notable impact on women. Deploying history to this unique task, this work attempts to show that the linkage between monolithism in medicare (a systemic and conscious effort to exclude alternative health systems and values), medical paternalism and the international debate on patents/indigenous medicinal knowledge is a continuum that can be broken through legal reforms. Therefore, this paper suggests that women's innovative contribution to indigenous medical systems, coupled with the historic socio-cultural prejudice against women in male-dominated societies, compels a reading of history as a tool of substantive equality. By looking at laws through the eyes of history, we may begin to reconstruct the present international intellectual property regime into a more equitable system cognizant of women's interests.

Harlovleen Kaur (Osgoode Hall Law School) – “The Punjab Conflict: Justice Awaited for Twenty-Five Years”

There are some conflicts that horrify the world and compel international community to respond to them. However, there are some conflicts that remain buried in the shadow of national interests resulting in denial of justice to the affected people. One such example was the conflict in India during 1984 where Sikh men were forced to watch the rape of their own Sikh wives, daughters and mothers. On November 1, 1984, tens and thousands of Sikh men were brutally murdered, Sikh women raped and rendering Sikh population virtually homeless and displaced. More specifically, rape has been massively and systematically used as an instrument of ethnic cleansing demanding more serious interventions by the international community. This orgy of violence was a textbook example of the failure of the international community. The inaction taken by the national and international community reflects how international humanitarian law and international community failed to protect Sikh population. Notwithstanding domestic commitments to protect and promote international norms, India disavowed any responsibility whatsoever to even acknowledge, let alone address issues concerning Sikh population during Punjab conflict. While some may argue that we must forgive and forget, the disturbing lack of awareness toward relatively recent events in our shared planetary history urgently requires all of us to be active contributors to civil society and become more aware, responsive and influential to prevent the recurrence of such violence. The purpose of this paper is to establish that violence committed against Sikh population constitutes genocide and rapes committed against Sikh women are used as a means of ethnic cleansing and genocide. This paper seeks (a) to study the applicability of the definition of genocide established under the auspices of international law to Punjab Conflict; (b) to establish that it was not a riot, but a state-sponsored genocide; (c) examine the role played by politics, power and dominant interests; and (d) to make a case for transitional justice.

*Nationhood and the Meaning of Constitutional Rights (Flavelle House B)*

Chair: Ladan Mehranvar (University of Toronto Faculty of Law)

Discussant: Prof. Zoran Oklopčic (Carleton University Department of Law)

Diane Desierto (Yale Law School) – “Freedom and Constraint: Universalism in the Philippine Constitutional System and the Limits to Executive Particularist Power”

This research offers universalism – the philosophy of human rationality making human dignity values the primordial foundation for forming individual judgments and legitimating public community decisions – as the platform of progressive constitutionalism under the Philippines’ postcolonial and post-dictatorship 1987 Constitution. While the nomenclature of universalism is unspecified in the Constitution, many of its fundamental concepts are replete throughout the Constitution’s written text and corresponding jurisprudential practice. The distinct language and orientation of the 1987 Constitution strongly entrenches democratic participation, individual autonomy guarantees, and executive accountability in the public order – a decidedly “legal” vigilance fueled by the experience of centuries of colonialism and recent decades of martial law rule. Universalist theory thus progressively aligns the embedded topography of individual freedoms in the 1987 Constitution with the corpus of universalist international legal norms. An open-textured reading of the Constitution’s text (the longest to date with eighteen (18) Articles and three hundred and six (306) sections) which employs a comparativist approach in the application of the Incorporation Clause (as drawn from the German Weimar Constitution and the 1931 Spanish Constitution), shows that many universalist norms and conceptions have already been institutionalized in Philippine constitutionalism. Various manifestations of *embedded* universalism can be seen from: 1) constitutional textualization in the Bill of Rights (Article III) and Social Justice and Human Rights (Article XIII); 2) the Philippine Supreme Court’s history of jurisprudence interpreting such textualized norms alongside universalist conceptions; 3) the vastly expanded judicial review and rule-making powers of the Philippine Supreme Court in light of its historic constitutional role in the post-dictatorship restoration of democracy in the Philippines; and most importantly, 4) the Incorporation Clause where “general principles of international law form part of the law of the land”. I argue that in thus providing for various modes of entry of universalist international legal norms and conceptions that mandate primacy of individual human rights, the 1987 Constitution’s decidedly-universalist design, orientation, and philosophy collectively comprise deep transformative structures in the Philippines’ postcolonial and postdictatorship democracy. I operationalize the most immediate socio-political consequence of the universalist reading of the 1987 Constitution in the constitutional demand for greater accountability and responsibility in exercises of executive power (“*executive immunity*”, “*executive privilege*”, and “*executive authorization for the use of force*”) that deconstructs the traditionally “particularist” justifications of state sovereignty and executive prerogative. As discussed throughout the research, how Philippine judges recognize the infusion of universalism in the language and underlying philosophy of the constitutional system is most critical to the modalities of vindication of individual rights against arbitrary exercises of state power. To more critically and rigorously apprehend the vast *pluriversum* of norms and their interrelationships, the research presents an analytical template for the Judiciary’s recognition of international law in the Philippine constitutional system. This template (among possible others) could substantiate the 1987 Constitution’s implicit guarantee that “widening” the judicial lens does not have to create a precarious trade-off in the clarity, predictability, and stability of the Philippine Supreme Court’s exercise of its expanded power of judicial review, and especially, the Court’s constitutionally-designated role in normative “gatekeeping” of international law. Ultimately, progressive constitutionalism under the universalist 1987 Constitution attempts to capture and further the

discursive *realpolitik* of popular sovereignty within the space of continuing public dialogue between the Filipino people, their representatives, and the courts.

Miriam Polman (University of Victoria Department of Political Science) – “Proportionality Review and the Depoliticization of Religion: ‘Freedom of Religion’ as a Case-Study in the Possibility of Progressive Constitutionalism”

Increasing religious diversity has led to a politicization of the meaning of “religion,” bringing the status quo, private, apolitical conception into contestation. This occurs simultaneously with the adoption of a “freedom of religion” clause in the *Charter*. While historically Canadian jurisprudence on religion has enforced the status quo, privileging modern, Protestant conceptions of religion over minority conceptions, *Charter* jurisprudence seems to tell a different story – one of increasing and expansive recognition of alternative conceptions of “religion.” Thus Canada’s jurisprudence on religion is an apt case study for evaluating the possibility of progressive constitutionalism. Do interpretations of the “freedom of religion clause” that create room for Sikh, Jewish and Jehovah’s Witness’ religion represent a moment in Canadian history when dominant conceptions of religion have been successfully influenced by alternative conceptions, exemplifying one moment of progressive constitutionalism? A central feature in jurisprudence on religion has been proportionality review. It is also this feature which has been construed as the “ultimate rule of law” (Beatty), capable of progressive recognition of political difference. In this paper I analyse this method of deciding cases on religion, particularly s. 1 cases, and argue that this method re-depoliticizes religion. It acts to hide the court’s real judgments on religion from public observation and scrutiny, leaving the court’s judgments unexposed to the forms of influence and critique that could encourage it to be progressive. While rulings can appear progressive the method of proportionality review reifies a dominant mode of governing difference emblemized in “reasonable accommodation” and used in managing religion internationally. While demonstrating how proportionality review depoliticizes is the main focus of this paper, the case study of religion presents some interesting discussion points for the possibility of progressive constitutionalism. As an area dealing with cultural minorities, calls for progressive constitutionalism that look to “popular sentiment” seem inappropriate for determining progressive interpretation of “freedom of religion.” Completely deferring to religion however, also takes away access to *Charter* rights from the most vulnerable members of religious communities. Using literature on critical pluralism and cultural transformation, I will propose that the form of constitutionalism most in need of study for its possibility of being progressive in matters of religion returns to Robert Cover’s call to a particular form of “giving reason.”

Ana Paula Ackerman Sheps (Osgoode Hall Law School) – “The Paradox of Indigenous Constitutional Rights and the Sovereignty of Brazil: A Case Study over the Demarcation of the Raposa Serra do Sol Indigenous Reservation”

While indigenous rights in Brazil are constitutionally protected, they have never been subject to in-depth analysis. In fact, indigenous rights are hardly elucidated by the media and mostly ignored by the academia. As an example on how neglected the matter is, the majority of Brazilian Law Schools does not incorporate the subject as part of the curriculum to be studied or even mentioned in the program. Different from many other countries in Latin America, where indigenous communities are playing an increasingly important role in the society, in Brazil the topic remains virtually unexplored as it’s commonly perceived as contrasting the ideals of state sovereignty with the ones of human rights and constitutionalism. The current situation evolving around the demarcation of the indigenous lands of the *Raposa Serra do Sol in Roraima* (the northernmost state of Brazil), that comprises a population of 14 thousand native people in a demarcated area of 1.7 million of hectares, has, however, brought some publicity to the matter

and made it to the cover of several newspapers and magazines in the last months. The demarcation of this area alarms many sectors of the society who believe the division of land between natives and non-natives creates an environment of discrimination and hatred. Moreover the demarcation process of the Raposa Serra do Sol is understood as a serious threat over the sovereignty of the country. In this sense there is an increased concern from the army and certain political circles that without serious interventions from the Brazilian Forces, the country is vulnerable to the intervention of various armed drug trafficking and guerrilla groups operating in the area such as FARC. Furthermore, it is believed that foreign entities, NGOs and other international groups in the region may use their increased influence to control the indigenous communities and even usurp the effective control over the whole region. While the Brazilian Constitution recognizes indigenous rights to their lands, it singles out the importance on the maintenance of the sovereignty of the nation. This work critically analyzes the demarcation of the Raposa Serra do Sol and potential ramifications in regard to the rights of the indigenous people and the ideals of autonomy in the country, including concerns over Brazilian acceptance of the United Nation Declaration on the Rights of Indigenous People.

**1:20 – Concluding Strategic Session (Flavelle House B)**