

**Mapping Emergent Terrains, Contesting Rigidified Traditions:
The First Annual Graduate Student Conference of
The Toronto Group for the Study of International, Transnational, and Comparative Law**

University of Toronto Faculty of Law

11-13 January 2008

ABSTRACTS

Conference Organizers: Michael Fakhri and Umut Özsü
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Friday, 11 January 2008

4:15 – Registration

5:00 – General Welcome (Bennett Lecture Hall)

Michael Fakhri and Umut Özsu (University of Toronto Faculty of Law)

5:10 – Preliminary Remarks (Bennett Lecture Hall)

Kim Stanton (Graduate Law Students Association, University of Toronto Faculty of Law)

5:20 – Opening Address (Bennett Lecture Hall)

Dean Mayo Moran (University of Toronto Faculty of Law)

5:30 – Opening Plenary (Bennett Lecture Hall)

Prof. Ed Morgan (University of Toronto Faculty of Law) – “Fear and Loathing in *Jus Cogens*”

The purpose of this essay is to take a Hunter S. Thompson-like journey to the rules of *jus cogens* – the normative heart of international law. Doctrinally, the essay asks about the remedies available in the domestic courts to individuals victimized by breaches of the peremptory norms of the international system. The starting assumption is that the study of *jus cogens* can help circumvent the banality of the discipline – a place that is, like Thompson’s description of hell, a “viciously overcrowded version of Phoenix,... where almost everybody seems vaguely happy” – and ascend the law’s heights in search of norms that have profound meaning. Despite the attractiveness of seeking to remedy breaches of the most fundamental global rules, the trek may be a frustrating one. Arguments and counter-arguments tend to swirl around the legal terrain leading to *jus cogens* so intensely that the courts have for the most part determined that they are unable to fashion a workable remedy. As Thompson’s alter ego in *Fear and Loathing in Las Vegas* tells his lawyer and traveling companion, “We can’t stop here. This is bat country.”

6:30 – Graduate Law Students Association Reception (Faculty Common Room)

Saturday, 12 January 2008

8:30 – Light Breakfast

9:00 – Early Morning Session

Latin America’s “Turns” (Flavelle House A)

Chair: Prof. Shin Imai (Osgoode Hall Law School, York University)

Amaya Alvez and Joel Colon-Ríos (Osgoode Hall Law School, York University) – “The Latin American Path to Constitutional Politics”

The fall of most authoritarian regimes and the coming of the so-called third wave of democratization have resulted in intense episodes of constitution making and constitutional reform in Latin America. That new constitutions have been adopted should come as no surprise: the history of Latin American constitutionalism is the history of frequent and even violent changes (M. Schor, 2006). What makes these recent experiences different is that, unlike in the past (where constitutions were commonly “given” to populations by elites), there has been an increase in popular participation. Social movements, indigenous peoples, and other groups traditionally excluded from constitutional affairs, are playing varying roles in the constitution-making enterprise. Whether apparent or real, this increase in popular participation has been reflected in the amendment rules of new Latin American constitutions. Constitutional reform is no longer the exclusive domain of the traditional representative institutions, and the role of citizens is no longer that of passive spectators or limited to a simple “yes” or “no” vote in a referendum. These new constitutions include, among others, mechanisms that allow ordinary citizens to initiate a process of constitutional reform through the recollection of signatures, draft the content of the new provisions to be inserted into the constitution, and require the state to call a popular referendum to validate the proposed changes. Although these mechanisms are new and have seldom been used (in some cases the ordinary legislation required for their operation is yet to be adopted), they raise several questions that deserve serious consideration. First, can these mechanisms of constitutional reform “from below” improve the quality of democracy in the countries that have adopted them, which are characterized by deep social inequalities and ideological divisions? Or, on the contrary, are they simply new instruments at the disposal of political elites? (D. Altman, 2005) Second, what should be the role of judges in the context of constitutional reforms initiated and validated directly by “the people”? Should Latin American constitutional courts be limited to protecting the transparency of the process, or should judges regulate the “constitutionality” of proposed constitutional amendments? Is the content of these proposals limited by higher principles? Third, can these mechanisms of direct democracy provide a path in which the tension between popular sovereignty and constitutional supremacy is finally solved in favor of the former? In this paper, we will explore these questions taking as the factual basis of our analysis the most important Latin American episodes of constitutional politics (B. Ackerman, 1991) of the last decades.

Nelson Dordelly-Rosales (University of Ottawa Faculty of Law) – “Venezuelan Constitutional Democracy: Are there Lessons to be Learned from Canadian Constitutional Democracy?”

The theory and practice of constitutional democracy has become an important problem in the last few years in Venezuela. Although constitutional democracy has been accepted as a matter of historical fact, currently there is a substantial debate among scholars. Among the questions that have emerged from this debate are: how to protect fundamental rights? What can be learned of the Canadian constitutional democracy? What are concrete changes that should be made to the Venezuelan Constitution? In this paper I will examine a set of problems with the current constitutional democracy’s principles in Venezuela. In response to these problems, I will suggest how a central tenet of an “integrative rights-based” approach of constitutional interpretation, is a strategy for protecting and preserving the principle of guaranteed rights. This mode calls for a pluralistic, multifaceted and unified vision of all of the best components among rival legal theories – a holistic view, committing to the values of tolerance, cooperation, and compromise. Focusing on the constitutional sphere, I believe that the notion of “strategic constitution” as a

long term plan of action for freedom and development (based on legal accountability that should be embedded in the constitution) directs toward solutions. Overall, in response to the above questions, I will discuss my vision for Venezuela, what the goals should be, and I will provide some remedial recommendations in light of the Canadian experience.

Paul Martin (University of Toronto Faculty of Law) – “Venezuela’s Bolivarian Revolution and Democracy in the Organization of American States”

In the early 1990s, Thomas Franck, Gregory Fox, and others dramatically renewed the debate about the place of democracy in international law. According to Franck, a new norm is emerging in customary international law that guarantees each person in the world the “right to democratic governance.” In response to “consequentialist” objections that the adoption of a standard of democratic legitimacy “would lead to endless intervention in the affairs of other States [because] ... [t]he standards of democratic government are varied and open to facile controversy,” Franck insists that any such right be enforced solely by multilateral institutions. These institutions would, according to Franck, progressively enhance the norm’s legitimacy as they developed greater “textual” and “process determinacy” in its elaboration, monitoring and enforcement. In other words, “good norms and good process” would address these admittedly legitimate concerns about “vigilante” enforcement or abuse. But multilateralism in and of itself does not address the other main set of concerns raised about the democratic entitlement, which might be labelled the “ideology critique.” Susan Marks, Martti Koskenniemi and others have argued persuasively that no amount of “good norms and good process” can rescue the democratic entitlement project from its flaws, since they are inherent to the argument and are arguably exacerbated by their transition from the realm of political rhetoric to international law. Marks argues that the limitations of the democratic entitlement thesis are not practical but ideological, in the sense that they are embedded in the discursive moves that its proponents make to legitimate and naturalize their vision of low-intensity liberal democracy. The consequence, according to Koskenniemi, is that the democratic entitlement will be “always suspect as a neocolonialist strategy ... too easily used against revolutionary politics that aim at the roots of the existing distributionary system.” While I agree with these critics that a powerful liberal ideology is at work in the theorization of the democratic entitlement norm, I do not believe that their largely pessimistic conclusions necessarily follow. For the forums in which this norm is actually articulated and applied, *i.e.*, the decision-making bodies of international organizations, are complex sites of political contestation, with plural, often contradictory normative and discursive traditions. These alternative norms also exert their own ideological force, and may serve (or be employed) to deny the hegemonic power that Marks and Koskenniemi argue renders the democratic entitlement oppressive. I illustrate this argument through an analysis of the democracy-protecting mechanisms of the Organization of American States (OAS). The OAS has been particularly active in attempting to develop “good norms and good process” to enforce the democratic norm. “Representative democracy” has been a concern of the OAS since its inception, and has become increasingly central to the organization’s mission and institutional identity since the 1990s, culminating in the unanimous adoption of the Inter-American Democratic Charter on September 11, 2001. In this paper, I examine these OAS mechanisms and their application in the case of Venezuela. I argue that the OAS’s reaction to developments in Venezuela since the election of Hugo Chávez in 1998 in fact provides grounds for considerable optimism about the ability of international organizations to enforce the democratic norm in a manner that responds not only to the consequentialist concerns about vigilantism but also the ideology critique. While it is certainly true that a powerful liberal ideology is at work in the democratic entitlement argument, by transferring the arena where these arguments take place to international organizations and, in particular, to their political organs, proponents of alternative or even radical politics can take advantage of other dynamics that exert ideological force on the workings and outcomes of these bodies. In particular, the OAS’s history

as a site for the management of the tension between a desire for US commitment to hemispheric affairs and resistance to US attempts at regional hegemony means that it is particularly receptive to counter-hegemonic arguments, and thus provides a space for the articulation and legitimization of plural approaches to fulfilling the still-contested ideal of democracy. I argue that opposition to the democratic entitlement is therefore misplaced, and that efforts to establish it as a principle of international law should be supported even by critical scholars, although continued scepticism is both warranted and, indeed, desirable.

The International Law / International Relations Interface (Flavelle House B)

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

Eugene C. Lim (University of Toronto Faculty of Law) – “A Long ‘TRIP’ Home: Intellectual Property Rights, International Law and the Constructivist Challenge”

The entry into force of the World Trade Organization’s *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS”) in 1995 has, in the past decade, provided international lawyers and compliance scholars with the opportunity to renew their debate over the role of enforcement in the conduct of orderly international relations between states. While earlier intellectual property conventions have often been criticized for lacking “teeth”, the TRIPS Agreement’s arsenal of dispute resolution mechanisms has, quite ironically, also come under attack for its failure to generate effective compliance by member states. The continuing debate over the issue of “enforcement” in the regulation of intellectual property rights under the WTO-TRIPS institutional framework has, in turn, inspired new channels of inquiry into the “binding” quality of legal norms, and what this means for the juridical status of international “law”. Are international intellectual property rules now truly “binding” because they are “enforceable” under the WTO’s dispute settlement mechanism? Or is this positivistic conception of “bindingness” merely part of a larger picture of how intellectual property norms shape the interests and identities of actors in the international legal order? In this presentation, I attempt to sketch the emerging intersections between compliance theory, international law, and intellectual property regulation. By drawing upon insights gleaned from constructivist international relations scholarship, I highlight the dangers of approaching the question of compliance with the TRIPS Agreement from an exclusively positivistic perspective. While formal treaty obligations and enforcement mechanisms may constitute one aspect of what makes norms “binding”, it is just as important to be sensitive to the processes and pathways through which international norms are, in the words of Harold Koh, “brought home” to individuals in domestic society. I propose that this “internal” dimension of “bindingness”, based on the power of norms to generate voluntary obedience by domestic actors through processes of interaction and persuasion, appears to have been overlooked by the pronounced rationalistic leanings of TRIPS regime design principles. Attempts by the international community to promote deeper and more meaningful adherence to multilateral standards of intellectual property protection accordingly need to be sensitive to the capacity of TRIPS norms to mould the interests and identities of actors at an endogenous, internalized level, through means other than coercion or enforcement.

Joonui Park (Boston University Department of Political Science) – “State Compliance through Legislation within International Institutions: Perspectives from Northeast Asia – China, South Korea, and Japan”

After the breakdown of the Cold War, states have gradually been linked together by the framework of international institutions. Whether international institutions matter have stirred debates in the past decade, and some scholars have primarily focused on the behavior of states in pursuit of achieving national interest, while many others have retained their skepticism on the tools for binding measures within international treaties and agreements. However, during the past decade, scholars of international relations have gradually taken notice of the diplomatic initiatives taken by states and have begun to assess the behavior of states within international organizations. Throughout this paper, I seek to address the growing importance of international initiatives, participation and status of states within institutions, with an emphasis on the recent developments in China, South Korea, and Japan. I hypothesize that without state interest, it is difficult for a state to show commitment or compliance toward particular positions to represent compliance. (More hypotheses may be generated as the research unfolds; however, currently my research sticks to a single one.) For the first case within three Northeast countries, I trace back to China's state behavior before its joining of the WTO and compare it to its current behavior now driven for the quest for resources and energy, and note on the progress it has made in the international agreements within the field of economic development. On the contrary, I also note the lagging issues of human rights and civil liberties in China and its unreadiness to assume international standards just yet (China has ratified the United Nations International Covenant on Economic, Social, and Cultural Rights and signed, but not yet ratified, the United Nations International Covenant on Civil and Political Rights. In December 2005, despite rejecting the findings of the United Nations Human Rights rapporteur on torture, China "expressed willingness to work with him and the United nations on future visits.") For the second case of Japan, I note on its significant financial contributions to projects within international organizations (the United Nations, specifically). However, I also point out its gradual but slow development and ratification of international agreements, particularly on human rights. International participation of Japan within the United Nations up until present had been primarily focused on financial aid, which had caused criticisms from other UN member states on Japan for not having actually "shed blood" with military personnel. Now with Japan's aim for a seat in the UN Security Council, international commitments may have to be taken into action in a more substantive way than ever before. Here, I examine whether these initiatives of Japan are directly linked to the accomplishment of the state by means of not solely in financial contributions, but also in the augmentation of compliance towards international binding treaties and agendas. Last but not least, I examine the state behavior of South Korea within the international legal framework. As of 2001, South Korea has ratified 13 of the 25 international human rights covenants, and all of the seven most important covenants. However, it was not until April 1990 that South Korea ratified the most important human rights treaties including the ICCPR, the ICESCR, and the first optional protocol about a year before formally joining the UN. Moreover, South Korea has not ratified ILO 5 of the 8 fundamental ILO conventions identified as core standards of labor production to this day. It appears that legislation has been for the most part, regarded as a device at the disposal of the state to enable it to control society, rather than a mechanism to regulate state power in the past decades. Also, there are problems relating these treaties to Korean domestic law. However, with the current UN Secretary General Ban Ki-moon in charge, and with the US-Korea FTA coming of age, state interest tends to grow on global standards and these begin to show more initiatives on the domestic political arena.

Prabhakar Singh (National Law Institute University, Bhopal) – "The Political Narratives of International Law and International Relations: In the Defense of Universal Constitutionalism"

Constitutionalism of international law has traveled from anonymity of recognition to ubiquity of academic discourse. Authors have developed "constitutional vocabularies" to address the development of impressive legal edifice at the WTO, the EU and the UN to accommodate the

integrational nuances of globalisation. Its all-engulfing dynamics, particularly the WTO constitutionalism, has become a subject of anxiety among international lawyers. Constitutionalism, as a discourse, arose, as some argue, to pre-empt world trade politics but has failed. I have discussed the constitutional narratives of Miguel Maduro, and Martti Koskenniemi who defend EU constitutionalism and universal constitutionalism respectively. Today, a discourse over a non-existent “international legislative architecture” and merits of constitutionalism is called for because of its alleged self-defeating nature. The answer does not lie in international law exclusively. This question needs a synergised answer of international law and international relations and Kantian offerings about law, put together. My article defends the preoccupation of lawyers with constitutionalism as a pre-requisite to guarantee of rights, security and prosperity of mankind in an irreversibly globalising world.

10:30 – Second Plenary (Bennett Lecture Hall)

Prof. Frédéric Mégret (McGill University Faculty of Law) – “Competing Narratives of International Law: Internationalist Sensitivity and the Idea of Resistance”

International law is uniquely dependent on a number of narratives about its evolution, which often focus on some of its more heroic successes, the idea of progress, and the law of nations as a “gentle civilizer”. Many scholars have sought to unmask the brutality which often lies behind these narratives. I want to suggest that the narrative is also very self-serving in that it systematically obfuscates the contribution of forces other than the state in achieving change in the international system. At most “non-state actors” are seen as increasingly contributing to norm creation, but almost never to norm enforcement. Drawing on but also going beyond Balakrishnan Rajagopal’s idea of an *International Law from Below*, I want to suggest that the history of international law more generally can be retold as one of both mass collective action and individual resistance. I argue that it is high time that these narratives were re-energized if one is to get a chance at changing the international system. Against the myth of a centralized “world government”, I suggest a vision of an increasingly decentred or multicentered international law based on the “spirit of resistance” as the ultimate arbiter of international normative ambition.

11:00 – Coffee Break

11:10 – Late Morning Session

Canadian Constitutionalism (Bennett Lecture Hall)

Chair: Prof. David Dyzenhaus (University of Toronto Faculty of Law and Department of Philosophy)

Faisal Bhabha (Bakerlaw) – “Between Exclusion and Assimilation: Experimentalizing Multiculturalism”

In this paper, I set out to delineate the descriptive, interpretive, and normative scopes of section 27 of the Charter -- the multiculturalism provision. I am influenced by the approaches to constitutional innovation expounded by theories of democratic experimentalism. The experimentalist project seeks to explore institutional alternatives within the liberal-democratic constitutional structure with a view to broader, equality-enhancing transformations. First, I survey

the historical context and textual frontiers of the Charter's multicultural provision. In particular, I examine section 27 in relation to the minority language protections and federalism dimension of the Charter, offering a novel view on the scope and limits of the different rights afforded to different types of cultural communities. Next, I outline my normative approach, whereby I postulate that section 27 creates two distinct types of interests that could give rise to claims, one individual and one group-based, which I describe as accommodation and autonomy, respectively. Finally, I apply the normative theory to two case studies, exploring the possibilities created by section 27 to address the demands of culture in ways that go beyond conventional doctrinal and normative understandings. I suggest that an experimentalist interpretation of multiculturalism under section 27 would create a space that encourages trying-on different approaches and institutional arrangements in an effort to determine best practices for handling difficult, fact-centric questions. Instead of limiting possibilities by adopting restrictive calculations that extinguish culture claims and risk radicalizing groups, I argue that the normative force of section 27 includes an imperative to create the institutional conditions within which practices can be tried and tested, with the expectation that benchmarks will emerge through practice, not through inflexible rule-making.

Willmai Rivera-Perez (University of California at Los Angeles School of Law) – “Dolphin Delivery: The Constitutional Values Standard and its Implication for Quebec Private Law”

It is now acknowledged that in Canada the individual rights guaranteed by the *Charter of Rights and Freedoms* do not regulate the relations between private persons unless there is a governmental action on which a private person has relied. The *Dolphin Delivery* ([1986] 2 S.C.R. 573) decision interpreted the concept of governmental action and thus, limited the reach of the Charter to executive and legislative activity only. Following this reasoning, then, the judicial enforcement of common law rules is not deemed to be a governmental action. The result is that, although the Charter applies to common law rules, its direct application is limited to cases where the common law serves as the basis of governmental action which infringes a guaranteed right or freedom. In private litigation where no act of government is relied to support the action, the application of the common law rules have only to be consistent with constitutional values. The *Dolphin* decision created a dichotomy that has special consequences to the province of Quebec where the regulation of private relations is governed by a civilian legal culture. The two different standards of judicial review are used here to show how the legal analysis and the legal results, changes when applied to the law of defamation of Quebec. The dissimilarity in the results exemplifies the necessity to take into account the differences between the legal cultures that cohabit in Canada, in order to design a better mechanism that gives space for the recognition and appreciation of diversity. The *Dolphin Delivery* decision exemplifies a conception of Canada as a unitary, non diverse, legal culture. The Court created a rule by which Quebec's private law can be scrutinized under a higher standard without even mentioning it. However, the historical circumstances of Canada, in particular its federal system, could allow for the retention of different legal norms regulating the same type of conduct in the private sphere, specially when those norms come from to two different legal systems in which the validity of the balances of rights respond to their entrenchment as cultural and national fronts.

Alexander Schwartz (Queen's University of Belfast School of Law) – “*Charkaoui* and the Rule of Unwritten Law”

Charkaoui v. Canada (Citizenship and Immigration) is the Supreme Court of Canada's most important decision to address the tension between constitutional rights and the interests of national security since the terrorist attacks of September 11th, 2001 and the subsequent War on Terror. The case is interesting, not only for its legal consequences in Canada, but because it

addresses some of the more general problems that liberal democracies currently face in balancing the interests of national security with their constitutional commitments and the rule of law. Indeed, counter-terrorism law and policy has become a globalized phenomenon, with varying legislative and institutional solutions being exported and vetted across national jurisdictions. Thus, an evaluation of the way the tension between national security and constitutional rights and the rule of law is treated in *Charkaoui* may help to illuminate a general theory of counter-terrorism law that can guide legal developments in other jurisdictions. In this paper I will assess the Court's treatment of the notion of unwritten constitutional principles in *Charkaoui*. Specifically, I will defend McLachlin C.J.'s finding in *Charkaoui* that there is no unwritten constitutional right to an appeal. As I will argue, the meaning and implication of unwritten constitutional principles must be elicited either from the text of the constitution or the fabric of the legal order itself if these principles are to have legitimate normative force. The Chief Justice's decision in this respect rightly reflects an understanding of the rule of law that draws on values immanent within the Canadian legal tradition. Nevertheless, as I will also argue, because the decision fails to adequately articulate the theory of constitutionalism upon which it is based, it risks lending support to a view of constitutionalism that would overly restrict the impact of fundamental rule of law principles. Indeed, I hope to show that on even a rather disciplined and conservative account of the unwritten constitutional principles at stake, these principles support a substantive conception of the rule of law that can make a real difference to how we understand and resolve the tension between constitutional commitments and national security.

Sara Smyth (Osgoode Hall Law School, York University / Rochester Institute of Technology) –
“Online Child Pornography: An International Crisis from a Canadian Perspective”

Canadian child pornography law has proliferated in recent years along with the number of child sex abuse images circulating on the Internet. In order to address this problem, Parliament must look beyond the idea that broader and more punitive child pornography laws will result in better child protection. Legislators should instead focus on effective systemic enforcement of Internet content by securing the cooperation of service providers at home and abroad. This is important because the online transmission of child sex abuse images cuts across international boundaries. The Council of Europe's *Convention on Cybercrime*, which Canada signed but did not ratify, provides the ideal framework for the implementation of new regulatory measures to achieve this goal. It enables countries to work together to combat computer crime by pursuing a common criminal policy based on international cooperation and the harmonization of domestic legislation. It requires signatory states to update their technological capabilities for combating digital crime by implementing sophisticated evidence gathering techniques to lawfully intercept online communications, share resources, and obtain information about those who use the Internet for criminal purposes. I recommend that Parliament implement these measures domestically and cooperate with other nations to combat the proliferation of child pornography on the Internet.

12:30 – Lunch

1:00 – Early Afternoon Session

Liberalism and its Limits (Flavelle House A)

Chair: Prof. David Dyzenhaus (University of Toronto Faculty of Law and Department of Philosophy)

José Luis Fernández (State University of New York at Stony Brook Department of Philosophy) – “Scalia’s Textualist Jurisprudence: Exegesis or Eisegesis?”

In *A Matter of Interpretation*, Antonin Scalia says, “[T]he Great Divide with regard to constitutional interpretation is not that between Framers’ intent and objective meaning, but rather that between original meaning (whether derived from Framers’ intent or not) and current meaning.” The divide between those who view the Constitution as developing to meet the needs of a growing nation and those who view it as a static legal document was widened in a speech Scalia gave in February 2006 where he described adherents of “The Living Constitution” as “idiots.” His slur springs from an avowed fidelity to textualism, and his rationale for embracing this methodology is to help inoculate legal statutes from subjective judicial interpretations. In this paper, I argue that Scalia underestimates his own subjective dispositions and, hence, he risks *eisegetic* interpretations of the Constitution. We can see hints for the possibility of Scalia’s *eisegesis* in his textualist jurisprudence. That is, since the Constitution does not stipulate using any sole interpretive method, his fidelity to textualism is an *eo ipso* expression of his own subjective preference. Moreover, I show how Scalia’s interpretive technique is disruptive, i.e., it effectively disrupts the dialectic between the “original meaning” of a statute and how it may currently apply. Indeed, as Stephen Breyer has commented, textualists risk “divorcing law from life.” Scalia also seeks to enshrine a positivistic or *value-free* method to reading legal statutes. Science is a value-free area of inquiry, as it’s focused on empirical facts. Similarly, Scalia views the Constitution as an object in itself, and, hence, he thinks that it can facilitate a science of interpretation. However, since the Constitution is a wholly contingent artifact, I expose his textualist methodology as *pseudo-science*; one that reveals a sterile rationalism apathetic to “what the original draftsmen intended.” Scalia’s remark about the Constitution’s inflexibility can be attributed to how he muddles the distinction between its material *form* (which, though trivial, can be studied empirically) and its guiding principle or *spirit* (which is not given to empiricity). Hence, Scalia writes off an important difference between the “Constitution as document” (the literal text), and the “Constitution as lawgiver” (the body of ideas that inform the supreme law of the land). Mindful of this distinction, Earl Warren once observed: “It is the spirit and not the form of the law which keeps justice alive.” Moreover, Scalia says that he’s “first of all a textualist, and secondly an originalist.” Originalism gives weight to what the Constitution was understood to mean by “reasonable persons” living at the time of its ratification. However, if we look to the original framing of the Constitution, we note a semantics influenced by the “blood and soil” milieu of a slave-owning South. Wouldn’t it be interesting to know what Southern slaves in 1787 might have thought of “originalism,” since at the time of its ratification by “reasonable persons,” the Constitution allowed concessions not only for their enslavement, but also for the importation of more slaves? Despite Scalia’s *ad hominem* abusive, the Constitution is neither a philosopher’s stone, independently capable of transmuting subtle legal issues into fixed readings and resolutions, nor is it disposed to the procrustean reduction of law so espoused by fervid textualists/originalists. Rather, the Constitution’s 200-plus years of existence are a testament to its receptiveness to correct and suitable adaptability. Of course, if you subscribe to this line of reasoning, you risk having Scalia call you an “idiot” and therefore equate your I.Q. with your shoe size. Nevertheless, there is a cost attendant with seeing the Constitution as being in the perpetual grip of *post-mortem rigor*; namely, that this practice is indicative of the simplistic intelligence Scalia so intolerantly charges.

Mónica García-Salmones (University of Helsinki Faculty of Law / Erik Castrén Institute of International Law and Human Rights) – “The International Rule of Law of Thomas Hobbes: An Approach”

In this paper I want to introduce the argument that the international rule of law system is the upshot, if developed, of a particular project, that of the enlightened European Hobbesian theory of the state. We have inherited from Hobbes a number of powerful and essential concepts undoubtedly capable of building and sustaining a legal and political structure. In this regard, my aim is to examine the points of contact between Hobbes' conception of legality and our legal order. Perhaps the common experience of a subtle level of discomfort at living in a Hobbesian conceptual world of political and legal doctrines might make such enquiries more appealing. To support the claim of the linkage between Hobbes and our own legal order, I shall revisit the concepts of human nature, natural law and the assembly in the rule of law as Hobbes defines them. Rightly, he understood that those notions provide the necessary grounding for any further attempt to build a political or legal system. The result of his theories is striking in its ability "not to dispute the laws of any government in particular, that is, not to point out which are the laws of any country, but to declare what the laws of all countries are" (*De Cive*, end of introduction). In Hobbes' doctrine human beings need a *political salvation* and a *political saviour*. It is the argument of this paper that the saviour proposed by Hobbes is the rule of law. In a Hobbesian conceptual world everything works as it should work thanks to law. Moreover, Hobbes explains the world through law as *repressor*, in a manner perhaps analogous to the way in which Freud was later to explain the world through the single focus of the repression of the unconscious. After Kelsen, the idea that the rule of law may expand its boundaries so as to become international is nothing new. I argue that Hobbes' rule of law contains an internationalism within it. This internationalism makes itself apparent (via international analogy) by the sacrifice of the private sphere of the states when entering the public sphere of the rule of law. In conclusion the paper affirms the necessity of a genealogical inquiry of the international rule of law with an emphasis on the theories of Thomas Hobbes.

Meital Pinto (University of Toronto Faculty of Law) – "On Offence to Religious Feelings"

The Danish cartoon affair has polarized the public and academic discourse into two rival camps. One camp raises arguments mainly from freedom of expression, whereas the rival camp raises claims from offence to religious feelings. Similar concerns about religious feelings have risen with regard to the gay pride parade in the city of Jerusalem. Representatives of the three major religions have argued that having such a parade in the holy city of Jerusalem offends their religious feelings as well their right to religious freedom. I argue that although in some cases claims from religious freedom overlap with claims from offence to religious feelings, in other cases they do not. I show that the right to religious freedom is reducible to two other rights: the rights to freedom of conscience and the right to culture. Understood as the right to culture, the right to religious freedom protects a collective participatory interest in the survival of a religious community and its practices against external threats. It therefore may allow coercion in some cases. I argue that in cases such as the Jerusalem gay pride parade, claims from religious feelings may be seen as claims from religious freedom, understood as the right to culture. In contrast, the Danish cartoon affair cannot be understood in terms of the right to culture. Alternatively, I theoretically establish the independent status of claims from offence to feelings. Such claims appeal to the interest of every individual in having a secured cultural identity. In addition, I show that in Israeli law, claims from offence to feelings enjoy an independent status. From this I develop an account of the independent status of claims from religious feelings that allows us to discuss them within a unified theoretical framework of already established legal claims such as claims from freedom of expression.

Socialisme ou Barbarie (Flavelle House B)

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

Irina Ceric (Osgoode Hall Law School, York University) – “Rule of Law Imperialism and Post-Socialist Transition”

Recent legal imperialism scholarship has tended to converge on violations of public international law by the US and its allies in Iraq, Afghanistan and other sites of the “War on Terror”. In contrast, this paper will attempt to theorize the reproduction of the rule of law in domestic legal orders as an imperialist project. Weaving together literature on transition, the neo-liberal state and legal imperialism, this study proceeds from a recognition that the “rule of law”, however ill-defined, is central to the dominant post-socialist transition paradigm, just as transnational rule of law practitioners play key roles in the trajectory of Eastern European states undergoing such transitions toward liberal democracy and market capitalism. In broad terms, a theory of “rule of law imperialism” in the specific context of post-socialist transition elaborates on “the legal indicators of the ‘induced reproduction’ of imperialism in our time” as reflected in the transformation and development of rule of law norms, particularly those related to property and contract law and court reform, in states establishing the mechanisms of market economies. By exploring the function of law in constitutionalizing neo-liberalism through a focus on international intervention in the evolution of the legal and constitutional regulation of socio-economic relations, I aim to address two potential dimensions of an imperialist rule of law: the discursive and the disciplinary. For the purpose of this conference, my presentation will be limited to the latter dimension with a focus on how the rule of law can be seen to wield a crucial disciplinary force through the construction and maintenance of particular modes, political and economic, of transition. As this study is on-going, this conference paper will utilize a case-study of Serbia and offer a preliminary analysis of this process, through which a distinct form of governance is facilitated by rule of law exports and other law and development initiatives that may be termed imperial.

Golnoosh Hakimdavar (University of Turin / Cornell Law School) – “Democracy, Implementation, and Power Struggles”

Societies have historically been the victims of the actions of their leaders. Leaders’ interests—whether viewed as political interests, financial interests, or personal motives—seem to betray uncertainty but also a certain ambivalence towards the interests of the masses (Marx, Adorno). This paper employs political philosophy and post-modern political economics theories to explore dueling “interest” conflicts, particularly with a focus on interest of legal elites. This paper will explore the emergence of conflict not merely as an extension of legal struggles, but more broadly as conflicts of interests between two political agendas. Thus, the paper presents a return to traditional theories of law/politics as dual agents of social change, rather than merely examining abstract positive legal rights. Lastly, this paper shall offer a methodology for categorizing common leader political interests in four groups: resource conflicts; geographic setting; risk or threat and opportunities. Furthermore political follower perspective will be categorized to: degree of political involvement, internal strength and financial freedom. The scope of these concepts shall be explained.

Boris Mamlyuk (University of Turin / Cornell Law School) – “Reflections on Post-Soviet Law: The Theory of Lack Reexamined”

In a 2004 article, anthropologist Laura Nader formulated a novel theory called the “Theory of Lack”. The theory hypothesizes that certain people, nations, and regions internalize the West’s

view that they are undeveloped, less-developed, or developing. As a result, although they may have well-functioning institutional or legal processes, these people/nations/regions come to believe that their processes are deficient, and need to be “modernized” or “developed” to some uncertain Western level. This theory allows us to conceptualize legal transplants as partly influenced by a collective consciousness of lack, in addition to the traditional explanations for transplants: economic, political, or imperial imposition. As a result, we can imagine a complex model of legal transplants (Sacco, Mattei) which go far beyond the traditional lending/borrowing or imposition/submission models. This paper will reexamine the theory of lack through the lens of the post-Soviet experience, drawing both on post-Soviet legal literature as well as on recent conversations and personal experiences with post-Soviet jurists.

Zoran Oklopčič (University of Toronto Faculty of Law) – “New ‘Self-Determination’ After the End of the Cold War: From the Self-Determination of Peoples to Principles of Polity Creation?”

This paper challenges the concept of self-determination through the elaboration of eight theses. It argues that self-determination is inoperative in new instances of polity-formation after the end of the Cold War (1). Then, it claims that, logically speaking, the principle may be redundant (2), and that it distorts the conceptual architecture of polity-formation (3), while at the same time possessing motivational, aspirational and inflammatory potential (4 and 5). Furthermore, the distorting lens of self-determination hides possible normative principles that might be invoked in the process of polity-formation (6), and its abandonment would shed light on the crucial role played by outside actors in polity-formation (7). Finally, the shaky edifice of self-determination impels us to reconsider its conceptual foundations, which, in turn, present themselves as ambiguous and contradictory (8).

Umut Özsü (University of Toronto Faculty of Law) – “Imposition and Appropriation: The Power of Legal ‘Norm-Internalization’”

Constructivism is often presented as an apolitical, context-sensitive alternative to the expressly or implicitly rationalistic theories to which neo-realist and neo-liberal scholars of international relations and international law have traditionally had recourse. Nevertheless, it is open to much the same charges of conceptual parochialism and methodological myopia that its advocates level against its disciplinary rivals. Indeed, for all the suppleness and elasticity of their models, constructivist international legal theorists (e.g. Koh, Brunnée and Toope, Goodman and Jinks) are conspicuously reluctant to acknowledge their reliance upon socio-historically contingent accounts of “norm-internalization”. Not only do such accounts mask the often considerable disparities in power between those endowed with the authority to articulate and advance international legal norms and those burdened with the responsibility of accepting and absorbing them, but their effectively, if not always avowedly, top-down, uni-directional explanations of the processes through which such norms come to be incorporated into domestic institutions precludes engagement with the mechanisms that facilitate their appropriation, manipulation, and deployment by local forces. At root, there are two basic difficulties here. First, even the thinnest operationalization of the constructivist approach to legal “norm-internalization” can be shown to have its origins in and content defined by particular sets of politico-economic structures from which no universalistic imperatives may be derived, at least not without risking accusations of orientalism or overextension. Constructivists are therefore likely to be suspected of engaging in cynical apologetics so long as they refuse to recognize that the phenomena of “internalization” with which they are concerned involve the inculcation or, even more crudely, the imposition of non-indigenous normative structures. Second, despite their frequent reliance upon quasi-Habermasian models of communicative contestation and cross-pollination, models in which competing perspectives are regarded as jostling for progressively greater chunks of discursive

market share, international legal theorists with constructivist sympathies are generally hesitant to broach the question as to how international legal norms are used and abused by domestic agents. In fact, while constructivist theory developed into a distinct research paradigm in international relations and international law only after it had succeeded in establishing itself in social theory, its exponents in international law have largely jettisoned the kind of micro-analytical examination of the “everyday” with which the latter has long been associated. In a sense, then, the general *problématique* may be said to arise from the fact that constructivist international legal theory discourages its advocates from posing what are perhaps the most important questions of all: *who* is responsible for the promulgation of *which* legal norms, and *what* exactly is the role being played by these norms on the domestic plane? These are not merely tangential concerns best left to political scientists and social anthropologists; rather, they strike at the very heart of legal normativity itself.

International Law from the Commanding Heights (Bennett Lecture Hall)

Chair: Prof. Darryl Robinson (University of Toronto Faculty of Law)

Shivam Chowdry and Ankit Kejriwal (NALSAR University of Law, Hyderabad) – “Critical Analysis of Judgment of ICJ on Palestine-Israel Wall”

A million dollar question was raised at the inception of the Iraq War in 2003 – “Is the UN redundant?” While there were mixed responses to this question, it will remain unsettled until the UN is the sole remaining international political body that has the status of pronouncing upon the legitimacy of issues such as Afghanistan or Iraq. The process of delegitimation that started with the failure of the UN at several points in the past decade has now seeped into its judicial organ – the International Court of Justice. Despite having heard the matter at length and decided it, the International Court of Justice has not been able to implement its decision that the construction of a wall in Israel – Palestine is illegal. The didactic judgment delivered by the ICJ has contributed much to the growth of international law, while the impunity with which Israel and its allies have denounced the decision has reduced international law to only self-motivated politics. The goal of this paper is to critically analyze the judgment delivered by the ICJ in the case concerning the construction of a wall in Israel – Palestine and juxtapose it with the emerging international socio-legal order in the Middle East. The General Assembly Resolution favoring implementation of the advisory opinion yielded no results due to its non-obligatory nature, leading to the UN’s failure to make its members accountable for violations committed by them. The ICJ’s and General Assembly’s call to not recognize the wall was seen to be of no effect due to the continuous political, financial, and logistical support given to Israel by some Western nations and their strong support for the building of the wall. The two UN Resolutions of 2006 and 2007 bear testimony to the acceptance of failure by the UN in safeguarding international humanitarian law. Prevailing circumstances raise issues of immediate attention, i.e., whether the current state of affairs is leading to the creation of a condition of anarchy in which laws, treaties and conventions impose obligations on their signatories only on paper? Does the support of other nations give license to states to violate their obligations towards other countries? Does it lead to us coming to terms with the new status of international law as only politics with the “law” thrown in or around? The aim of this paper is to argue that international law is walled by world politics, particularly in the light of the contemptuous disregard of the decision given to the International Court of Justice by Israel and its allies. Institutions like the ICJ and UN need to be more suitably equipped to establish basic principles of respect for the sovereignty and territory of states, making factors like size, race, political strength, etc. of no consequence lest the desideratum of global comity will always be a dream.

Dror Harel (George Washington University Law School) – “Looking Beyond the Obvious: Judges’ Underlying Reasons in Denying *Jus Cogens* Civil Actions”

Many legal avenues that have been used to try and put an end to the impossible situation that victims of grave violations of human rights find themselves in when attempting to hold the state authorities responsible and accountable for their actions. However, all these attempts were to no avail. In this article I argue that the reason these tactics have not worked is because they only address the aboveground “legal” problems, whereas, when sitting in judgment, courts are not concerned solely by those aspects. By exposing the alternative apprehensions judges face, I will be able not only to draw attention to them and change the discourse of the discussion, but also to voice a new outlook on the topic that may, in turn, provide the starting point for a solution to the clash between immunity and human rights. I look at what I view as the main underlining motives that bring most adjudicators to refuse tilting the scales in favor of *Jus cogens*. The first cluster of reasons can be defined as the “floodgates argument”. It centers on the judges reluctance to open domestic courts to an unknown amount of claims that have no territorial nexus to their jurisdiction. The second set of reasons focuses on the political aspect of these claims. While, in the interest of clarity, I group various reasons, that are uncovered in the judgments into two subdivisions; it is important to remark that they are interconnected and rotate around the “fear of the unknown”. Although not mentioned in the judges’ writing, when reading most cases, the reluctance to tackle them is apparent. I argue that this disinclination is created by the fact that the issue at hand is a new and unripe one, causing judges to progress with caution for fear of the unidentified ramifications.

Cathleen Powell (University of Toronto Faculty of Law) – “Critique of the United Nations Security Council: New Tools from Domestic Public Law”

Since the end of the Cold War, the Security Council has begun to use its Chapter VII powers in a manner unlikely to have been anticipated by the framers of the Charter. It has intervened in states that did not seem to present a threat to international peace and security, set up international criminal tribunals, promoted regime change and determined national borders. Its counter-terrorism programme may have been the most pervasive and enduring in its effect. This programme may generally be divided into two main areas. On the one hand, an administrative or quasi-judicial programme identifies specific persons and takes measures against them. This main feature in this programme is the controversial “listing” mechanism, whereby certain persons and organisations are designated as linked to Al-Qaeda and the Taliban, and States are then obliged to take a range of measures against the “listed” persons. On the other hand, a wider programme sets up general norms which states are obliged to implement domestically and in their relations with one another. Under this programme, States are under a Chapter VII obligation not to provide any kind of support to terrorist groups and to prevent terrorist acts through early warning systems and mutual assistance in investigation and prosecution. They also have to establish and prosecute a range of terrorist offences within their domestic criminal justice systems. Some of the Security Council’s measures against terrorism have been criticised by states and scholars, in particular its “listing” mechanism. These critiques, particularly those based on global administrative law, have introduced the notion that the Security Council’s actions can be assessed against principles gleaned from domestic public law. However, the ambit of these critiques is limited. They tend to focus on the content of a Security Council decision, or the process by which the decision was made, but they do not interrogate the authority by which the Council acts in the first place. The growing consensus that the power of the Security Council is subject to legal constraints has not yet produced a clear picture of the source of these constraints. In my paper, I propose to sketch the main types of measures which the Security Council has taken, both in its anti-terrorism programme and more widely, concentrating on the measures by which it has created, or helped to

create, generally binding norms. I will then discuss whether the tools which are currently used in the critique of Security Council action are adequate. I aim to highlight the limitations of the “administrative law”-based approach to the Security Council and suggest that other principles of domestic public law – in particular, constitutional law – are needed for a meaningful critique of the Security Council’s actions.

Vincent-Joël Proulx (McGill University Faculty of Law) – “Rethinking International Law after 9/11: Advancing State Responsibility through United Nations Institutional Mechanisms, with Special Reference to the Security Council”

Much has been written since 9/11 on the attack carried out by the United States on Afghanistan. Many authors have questioned the legality of such retaliation while others have condoned it or, at least, found it justified under principles of self-defence. Regardless of one’s stance on the legality and legitimacy of the strike against Afghanistan, it is clear that we are witnessing a significant shift in international law. Current efforts to thwart terrorist activity fundamentally challenge important tenets of the global legal order. However, it is not yet clear if this paradigm shift amounts to a loosening of the application of self-defence standards, or whether it can be explained by the emergence of a new rule of state responsibility. Canadian and American scholars have engaged in an enriching horizontal dialogue and propelled to the forefront of academic inquiry the need to further study the relationship between use of force standards and transnational terrorism. Despite this progress, few advances have been made in extending this discourse to the politically sensitive sphere of state responsibility. From the perspective of counterterrorism obligations, the relationship between use of force and state responsibility remains rather nebulous. More importantly, the actual role of the United Nations Security Council in this setting remains unclear, while the merging of state responsibility and use of force repertoire ultimately shifts the focus of inquiry from full control to relative control, to the duty to maintain due diligence and, ultimately, to the presumption of absolute responsibility of states hosting terrorists on their territories. Building on my doctoral research, this project seeks to better define the Security Council’s role in applying state responsibility rules with regard to international terrorism. The connection between Security Council practice and the creation, interpretation and application of rules of state responsibility remains largely underexplored, especially in the field of counterterrorism. This deficiency must be remedied as such research could advance the intellectual discourse and lead to the formulation of potential deterrence models. Indeed, starting from the premise that state responsibility can play an important role in the suppression and prevention of terrorism, the question of enforcement remains elusive. It is no secret that responsibility flowing from an internationally wrongful act is typically actuated, and ultimately implemented, through inter-state mechanisms. Aside from self-help remedies and unilateral counter-measures, the question of whether state responsibility for failing to prevent terrorist attacks could be implemented through existing United Nations mechanisms warrants serious consideration.

Nidhi Singh and Preshit Surshe (NALSAR University of Law, Hyderabad) – “UN General Assembly Resolutions and Space Law”

Space law is an area of the law that encompasses national and international law governing activities in outer space. International lawyers have been unable to agree on a uniform definition of the term “outer space,” although most lawyers agree that outer space generally begins at the lowest altitude above sea level at which objects can orbit the Earth. The inception of the field of space law began with the launching in October of 1957 of the world’s first satellite, the Union of Soviet Socialist Republic’s *Sputnik*. In 1959, by resolution 1472 (XIV), the United Nations General Assembly established as a permanent body the Committee on the Peaceful Uses of Outer

Space (COPUOS), which today has 64 member states. COUPOS launched the five major international law instruments -- the Outer Space Treaty, Rescue Agreement, Liability Convention, Registration Convention, and the ill-fated Moon Treaty -- that govern space activities. There is a great controversy in regards to the legal significance of the resolutions and declarations of the General Assembly of the United Nations. Some jurists are of the view that they are only of political significance and have no legal importance. On the other hand, some jurists hold the view that under certain special circumstances they may have legal implications and some of them may even have binding effect. As observed by Judge Jessup the resolutions of the General Assembly are not of true legislative character. If a number of similar resolutions are passed on particular subject, thereby forming the contemporary international standard, the court has to take them into consideration while adjudicating. Besides, those resolutions, which are of law-making character, serve as an important link in the development of new principles of international law. These decisions are in the form of recommendations and resolutions and some of them are never implemented; yet they are helpful in the agreement between states and contribute in preparing the necessary environment for the development of the rules of international law. This paper looks into the role of U.N General Assembly resolutions in the context of space law. The paper tries to explore the possibilities of these resolutions being accepted as sources of Universal International Law and its development into International Space Law. An attempt will be made to analyse the assistance of such resolution in the process of treaty making and agreements between states on various subjects.

2:30 – Coffee Break

2:35 – Mid-Afternoon Session

War and its Laws (Flavelle House A)

Chair: Prof. Frédéric Mégret (McGill University Faculty of Law)

Ruba Ali Al-Hassani (Osgoode Hall Law School, York University) – “Legalizing the Occupation of Iraq? The Iraqi High Tribunal”

The trial included eight accused, the rotation of at least six judges, and three very different courtrooms; that of Rizgar Muhammad Amin, courteous but disastrously unpopular; that of the brisk and brusque Ra’uf Abd al-Rahman and, finally, that of the domineering Ali al-Kahaji (Sissons and Bassin, 272). Created as the consequence of a war of aggression against Iraq in 2003, the Iraqi High Tribunal (IHT – formerly called the Iraqi Special Tribunal) is the focus of this paper. By the time Saddam Hussein was purportedly captured on 13 December 2003, it was decided that he would be tried in a domestic court in Iraq with no international support, as opposed to being tried in an international court in The Hague. While there were other options to planning a tribunal in which to try Saddam Hussein and his aides, such an international court, an internationalized tribunal, and a domestic court with significant international involvement, the US administration preferred to establish a domestic Iraqi tribunal with no international interference, heavily influenced by the American agenda in Iraq and politics. The trials had been announced a few days prior to the war by the Bush administration, and the point of the announcement, I argue here, was not to commit the United States (US) to trying Saddam, as they were trying to kill him at that point, but to justify an illegal war taking place and an ensuing occupation (Mandel, 9). The then-US Ambassador for war crimes announced before the fall of Baghdad that the US intended to institute an “Iraqi-led” prosecutorial process (Sissons and Bassin, 274). But although the Iraqi

Special Tribunal (IST) of December 2003 was an American creation with Iraqi players, there was also strong and genuine Iraqi appetite for accountability of the crimes of the former regime. For primarily that reason, Iraqis cheered on the Dujail Trial. In this paper, I examine the discourse regarding the creation of the IST and its procedures. One side of the debate argues that the IST is a product of a war of aggression, a disastrous attempt by the Bush administration to legalize the occupation, while the other argues that the IST is a product of Iraqi appetite for justice; irrelevant of the war of aggression. Since I am an Iraqi myself, I feel the need to express both sides of the debate, though they may seemingly contradict one another.

Dan Kuwali (Lund University Faculty of Law) – “Grey War Zone? – The Question of Privatization of Warfare and Civilianization of the Military”

This essay seeks to map out the loopholes left by international law relating to mercenaries and the leeway for private military companies (PMCs) to escape accountability, with a view to “tighten the screws” to end impunity. PMCs challenge Max Weber’s theory of “monopoly of violence” as an exclusive domain of States, yet they seem to be condoned in the modern comity of nations where outsourcing is a liberal *cause du jour*. PMCs have blurred the principle of “distinction” in warfare since they can be “force multipliers” although PMC’s employees are not civilians *in strictu sensu* and not combatants properly so-called. This begs the question as to whether – and if so how – they can face justice for violations of human rights and IHL. It is often assumed that it is business interests – rather than law – that govern the use and conduct of PMCs, rendering them to fall through the cracks of both national and international law. The issue is under which circumstances can PMCs be said to “take direct part in the hostilities”. The limits of international law are evident in this area but PMCs do not operate in a legal vacuum and the market-based tools are not merely self-serving industry propaganda. Given that PMCs are either requested or accepted by the State, States are internationally responsible where PMCs engage in governmental functions – through attribution or lack of due diligence. If business goes to war, then there is a need to expand the conceptual frontiers of regulatory norms to accommodate market forces. Thus, a pragmatic response must focus on developing a governance regime that strikes a balance between legitimate business interests and public interest, as well as between voluntary and imposed regulation to oversee the activities of PMCs and punish the “corporate warriors” for abuse. If PMCs wish to develop – and be perceived to retain – the same degree of public trust and legitimate use of public violence that citizenry bestowed on the State, then they must accept the same degree of public accountability State institutions have. There is sense in the cynical adage that war is far too important to be left to the generals, today, the same holds true for the CEOs.

Yvenson St-Fleur (Université du Québec à Montréal) – “Aerial Bombardments in Contemporary Warfare: The Historical Development of Standards Controlling the Use of Excessive Force”

I propose to speak in an interdisciplinary manner which combines different approaches such as law, history, policy, and economics of the use of force in contemporary warfare. US President Theodore Roosevelt called the 1907 Hague Peace Conference for an armed limitation as a goal. State parties which attended the Conference indeed succeeded in adopting a number of declarations and conventions respecting the laws of war, which they later ratified. The ratification of the prohibition of aerial bombardment has proven ineffective. But more heed was given to conventions respecting the protection of civilian populations. The 1923 Convention allowed bombardment only against military objectives, that is to say, objects the destruction or injury of which would constitute a distinct military advantage to the belligerent. Firstly, these rules were never put into effect. The underlying logic or language of the conduct of warfare had survived in others forms. The complexity of the matter and lengthy process left us with a large corpus of legal

documents establishing normative statements by States which in due time were ratified, incorporated and enforced. Three moments stand out as particularly important. The prohibition of aerial bombardment (1907-1945), the legitimacy of the use of force in the United Nations Charter (1945-1990) and the construction of norms legalizing an excessive use of force as a means of warfare in modern conflicts (1990-2007). Some deep changes are underway concerning the military and the waging of war. For instance, *Operation Desert Storm* represented, at the same time, both the last great traditional war and the first future war. It was a classic war of the past with its grand climax of massed movements of armor and soldiers over a vast strategic chessboard and logistical support. This conflict provides a glimpse of what armed conflict will look like for the foreseeable future. A war which was won by the air campaign. The 1995 *Operation Delibareate Force* (Bosnia), 1999 *Operation Allied Force* (Kosovo), *Operations in Afghanistan* (2001) and *Operations in Iraq* (2003) and the *Israeli-Lebanon* air campaigns were the natural extensions of the lessons learned from *Operation Desert Storm*. It comes to the conclusion that air power could be the dominant maneuver force, and in the case of the Kosovo campaign, the only maneuver force. I will adopt a theoretical stance that permits me to use a historical approach to see if there is a continuity or rupture in either the discourse or the logic of the use of force in aerial bombardment after the *1907 Hague Convention*.

Disaggregation and De-Territorialization (Flavelle House B)

Chair: Prof. Audrey Macklin (University of Toronto Faculty of Law)

Joyce Chia (University of London, University College London Faculty of Laws) – “Re-Mapping Migration Review: Problems and Prospects”

The legal framework of migration review in Australia and the UK – the review of migration and refugee decisions and policy – is a framework which comprises international, regional and domestic law, and which lies at the intersection of several different legal regimes, namely refugee law, migration law, constitutional and administrative law, citizenship and nationality law, EU law, and international law. Migration review is therefore an exemplar of the increasing complexity of our legal world, both in terms of the de-centring of the State and the multiplication of competing and irreconcilable normative frameworks. Further, another important aspect of migration review is the trend towards the de-legalisation of regulation, through uses of mechanisms such as visas, carrier sanctions and interception on the high seas. This paper examines this peculiar legal formation, and its implications. It examines the different histories, norms, institutions, and functions of the different legal regimes. It examines the ever-changing shape of law in this field, and the paradox that migration law is commonly conceived of both as “hyper-law” (in its continuous amendment and exponential growth) and as “lawless” (in the trend towards de-legalisation). Most importantly, it analyses the interactions between, and the gaps between, these different legal regimes, and the problems that arise as a result of this haphazard legal configuration. I argue that the traditional search of legal scholars for doctrinal coherence is a misguided one. Nevertheless, this does not render insignificant the values that such coherence would protect. If this kind of plural, de-centred, constellation of law is, as I argue, the future of law, we must explore the normative consequences of this incoherence. How relevant, and persuasive, are the normative foundations of these different legal regimes today? In what ways do such legal formations challenge traditional notions of legitimacy? Is increasing plurality and de-centring of State law a good or bad thing? What problems does this peculiar constellation pose to the aims, the values, and the functions of law?

Philipp Socha (University of Toronto Faculty of Law) – “Cultural Property”

The concept of *cultural property* literally implies the tensions this term tries to explain. It is the tension between culture and its economic value. Cultural goods are here understood in the broadest sense including, for example, languages, arts and music, traditional healing methods or even sounds. However, modern technology made it possible to transfer these goods and, thus, created new economic interests. Cultural goods attain a rising status in global markets. Effective commercial use, but also their protection against exploitation and destruction, is a challenge today. In the judicial context, the immateriality of cultural goods suggests a parallel with intellectual property law, which is highly developed as a right of the individual. However, in the context of cultural goods, the question has to be raised, if groups or entities as a collective may hold rights and obligations. And if group rights are recognized as a legal instrument, how do you determine the right holder for a specific cultural good, especially where different cultures are in contact? Particularly interesting is the protection of culture on the international level. The interrelations of Human Rights, Environmental Law, and specific provisions concerning cultural diversity developed an increasing amount of treaties and agreements for the protection of culture. But, how do these systems of protection work especially for groups? Which concepts and mechanisms could lead to an all-embracing global protection system? And what specific rights and duties have been, should and will be established on the international, and thus, on the national and local level.

Rayner Thwaites (University of Toronto Faculty of Law) – “The Constitutional Impact of ‘Securitization’: Immigration Detention in Australia”

Post September 11, 2001, there has been a shift in government rationales for immigration detention. This has been most evident in cases on the legality of indefinite detention. My thesis looks at the jurisprudence on indefinite immigration detention in Australia, Canada and the United Kingdom. Today I focus on Australia, as it is here that the shift is most explicit. I will outline the shift in rationale and sketch what I think lies behind it. I compare two positions. The first is what the “vulnerability paradigm”. On this approach, aliens are entitled to the protection of the law, but are vulnerable to removal. This vulnerability justifies the use of immigration detention to facilitate removal. On this approach, the purpose of removal limits the authority to detain. Where the linkage between detention and removal becomes tenuous, then the authority to detain is impugned. The second position is the “control paradigm”. On this view the absence of a right to remain is translated into the absence of a right to liberty. The justification for detention moves from facilitating removal, to segregation from the community. The difference between these positions is brought to the surface by the cases on indefinite detention. In these cases the government is unable to remove an alien who is held to have no right to remain. This is either because of practical difficulties securing the consent of the receiving states involved, or because of objections to the treatment the detainee is likely to encounter in the receiving state. According to vulnerability paradigm, the rationale for detention no longer obtains, and so authority to detain is suspended. The rationale for detention under the control paradigm, segregation from the community, is unaffected. In a decision in 2004, a majority of the High Court, the highest appellate court in Australia, upheld the constitutionality of indefinite immigration detention in the decision of *Al-Kateb*. The majority reasoning is a clear exemplar of the control paradigm. I argue that the majority’s legal sanction of indefinite detention constitutes a qualitative shift from the vulnerability paradigm that previously obtained to the control paradigm. The majority reasoning was shaped by the view that courts can only rely on determinate legal rules that issue from the legislature. I argue that this results in a weak understanding of democracy and legality that promotes neither.

Globalization and Development (Bennett Lecture Hall)

Chair: Prof. Kerry Rittich (University of Toronto Faculty of Law)

Lisa Kelly (Harvard Law School) – “Percy Corbett: ‘A Citizen of the World’?”

In positing the 1648 Westphalian conceptual moment as law outside of politics, public international lawyers reinforced a Eurocentric worldview while simultaneously masking their own power. The mythical struggle of law against sovereignty – the rational civilizer against the irrational primitive of politics, religion, and empire – created a narrative in which international law was an inevitable sign of progress. To wrestle any law from politics became an achievement in itself and displaced the need for a critical analysis of substantive biases or flawed outcomes. This shared historical map forecloses consideration of important sites of political contestation by perpetuating a myth of continuity that treats “history” as a static context rather than a product of intellectual decipherment. In “retrieving” the past through the lens of the present, “the past – or, more accurately, pastness” becomes “a position,” both relative to and constitutive of the discipline’s contemporary preoccupations. This paper looks to complicate this narrative through an intellectual history of one international law scholar – Percy Elwood Corbett (1892-1983). Corbett, described by Ronald St.J. Macdonald as one of the finest international lawyers Canada has ever produced, was a former Dean of the Faculty of Law, McGill University. Born in Prince Edward Island in 1892, Corbett fought in World War One before studying Roman law at Oxford as a Rhodes Scholar and working as an assistant legal advisor in the International Labour Office. From 1924-1944 Corbett taught at McGill before leaving to teach at Yale University, and later Princeton and Lehigh Universities. He also held Visiting Professorships at the London School of Economics and the University of Delhi. In contrast to dominant legal biographies that often become yet “another opportunity to celebrate uncritically the achievements of law and lawyers...”, this project seeks to understand Corbett on his own terms, identifying the problems with which he was concerned and the contextual influences that shaped his thinking. In particular, I will consider how Corbett’s lived experiences – his military service, his early work with international institutions, and his experience of Empire as an Anglo-Canadian Protestant – shaped his proto-legal realist view of law and his enduring desire for universal law and institutions. Corbett understood the world through the lens of incremental global unification; thus, rather than seeing colonialism, war, and de-colonization as fundamental ruptures, he often advocated in favor of harnessing nationalist and militaristic energies through law and institution-building. This quest for “universal peace” through a “world law” that would transcend statist interests underscored Corbett’s view of himself as a “citizen of the world.” This paper ultimately looks to question what it means “for the Percy Corbetts of the world to speak as ‘internationals’ in a world of difference” – in a world where context matters. In doing so, I hope to illuminate some of the nuances of Corbett’s own work while considering its impact on international legal projects more generally.

Derek McKee (University of Toronto Faculty of Law) – “Legislating Foreign Aid: The ODA Accountability Bill”

Bill C-293 is a current attempt to legislate a poverty-reduction purpose for Canada’s official development assistance and to require certain forms of consultation and reporting. Such legislation has been proposed and debated several times over the past 20 years. Proponents of Bill C-293 argue for the need to focus aid spending on poverty reduction and to prevent the use of aid for commercial or political purposes. The bill is also inspired by recent British legislation. The discourse surrounding the bill has mainly used the language of domestic public law, such as accountability and transparency. But the bill’s key provisions are also directed toward multilateral

institutions – the OECD and the World Bank – that influence aid policies around the world. Bill C-293 can therefore be understood as an attempt to re-politicize these ostensibly functional, technical institutions. It helps to illustrate the potential role of state institutions in democratizing global governance. At the same time, it reveals how state legal systems may have only a limited capacity for responding to global structural injustices.

Julie Paquin (McGill University Faculty of Law) – “‘Best Practices’ and Contract Enforcement in Developing Countries: A Senegalese Reality Check”

Following the idea that “institutions matter”, one of the latest priorities identified by the World Bank with respect to developing countries is the creation of “investment climates” favoring the development of markets. Developing countries are advised to adopt business regulation based on the “best practices” found in richer countries. For this purpose, important resources are devoted to the identification of the most efficient legal models. Current debates revolve more around the respective merits of diverse transferable legal “models” than about the need for transfers itself. This approach assumes that the import of “better” models will have an impact on the economic activity of the receiving country. Despite acknowledgements that the transfer of legal models from one country to another often leads to poor results, the question of the “fit” required between transplanted laws and local environments is either ignored or treated as a matter best dealt with by local legal professionals. In the whole process, the point of view of the reforms’ end-users, i.e. the firms operating in developing countries, is conspicuously missing. The research project that I propose to present is based on the idea that legal reforms should be assessed by listening to the persons whose problems the reform is said to address. In 2006, I conducted in-depth interviews with 30 small- and medium-sized enterprises operating in the Dakar area (Senegal), with a view to assessing their needs with respect to one of the top priorities identified by the World Bank, i.e. the enforcement of their contracts. The data gathered shows that non compliance with contractual terms is frequent, but firms exhibit a very high degree of flexibility in the enforcement of their contracts. The “quality” of the legal system plays a very minor role in the choice of an enforcement strategy. In contrast, the general business environment, which is characterized by the presence of important financial constraints and a high level of uncertainty and interdependence between firms, stands out as an important determinant of disputing preferences. The important environmental constraints that firms face suggest they are unlikely to give up the benefits of contractual flexibility any time soon. Overall, data suggest that the current development agenda, which sees law reform as key to solving Dakar firms’ “enforcement problems” misses the point. By creating an additional pressure to comply, further reform may even create new problems for SMEs, without solving the most pressing issues they face.

Evita Rackow (College of Law, London) – “Tracing the Glocalization of a Legal Battle: IMF Conditionality and Economic, Social, and Cultural Rights in Current Poverty Reduction Strategies in Nicaragua”

Sixty years after the adoption of the Universal Declaration of Human Rights, economic and social rights have come to the forefront of international human rights discourse and advocacy. While Mary Robinson pronounces poverty reduction as the greatest human rights challenge of the 21st Century, Amnesty International takes poverty as the topic of its new global campaign 2008-2015. At the same time, development policy has become mainstreamed around poverty reduction strategies (PRS), incorporating the “social” into its policy paradigm and thus raising the hopes of human rights advocates. But we might be cautious in our optimism. There has not been slight recognition within the “international community” that ESC rights are actually rights at all. The PRS have become a show-case for the marginalisation, redefinition and transformation of ESC

rights. The IMF, in particular, perceives ESC rights as “political”, and relegates ESC rights to the political sphere for enforcement. In contrast, conditionality has become an increasingly sophisticated legal instrument in the hands of the IMF. This internationalised struggle surrounding ESC rights and IMF conditionality has been transplanted to the realities of the Third World. The study is based on socio-legal field-work undertaken in 07/-08/2006 in Nicaragua. The localised battles involved in the implementation of IMF conditionality and ESC rights have actually shaped national policy choices and transformed the concepts underlying ESC rights. ESC rights are stripped of any legal context and left to weak policy enforcement in Nicaragua. Tracing these struggles in development and human rights professions allows us to not only understand the role of law in international inequality and how certain rights are marginalized, but how we may move forward. In short, human rights advancements can only be made when confronting and fighting the real political issues behind the marginalisation and transformation of ESC rights.

4:00 – Late Afternoon Session

Law’s Gender (Flavelle House A)

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

Simone Cusack (University of Toronto Faculty of Law) – “Addressing Gender Stereotyping under the Convention on the Elimination of all Forms of Discrimination against Women: The Case of Ciudad Juárez”

This paper argues that combating gender stereotyping is inseparable from the larger project of ensuring women’s substantive equality under the *Convention on the Elimination of All Forms of Discrimination against Women*. This paper argues that in order to achieve this goal, we must develop a methodology capable of effectively identifying and challenging gender stereotyping. This paper aims to develop such a methodology. In order to demonstrate how adherence to a robust methodology might help to combat gender stereotyping, this paper then applies the proposed methodology to the inquiry into abduction, rape, and murder of women in Ciudad Juárez, Mexico – the first inquiry completed under the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*. This paper then considers the reasons why the *Optional Protocol* inquiry procedure provides a promising legal tool for applying the proposed methodology to combat gender stereotyping.

Harlovleen Kaur (Osgoode Hall Law School, York University) – “Gender Specific Implementation of International Humanitarian Law”

My research paper seeks to draw attention to the multi-faceted ways in which women experience recent armed conflicts. Women and girls predominantly experience armed conflict as members of the civilian population, and in fact are often targeted for acts of violence. International humanitarian law seeks to protect people who are not or are no longer taking active part in the hostilities. This very important branch of public law endeavours to apply universal principles to all situations uniformly. Local context is usually ignored in favour of global principles. Women are amongst the most vulnerable in society and often suffer devastating miseries in such conflicts. Shortcomings that are exposed during war times result not just from deficiencies in the rules but from the fact that these rules are often not observed in practice. At the level of international law, there are ample provisions aimed at protecting women, but it is clear now that the biggest challenge lies in ensuring respect for and implementation of these existing rules. The protection

to which women are entitled must become a reality. My research paper will explore to what extent have international legal conventions been successful in dealing with the problems women face on the ground in armed conflicts? My research paper will examine and analyze the various provisions relating to the protection of women during armed conflicts and the effectiveness of these provisions. As rightly pointed out by Krill, the international community will not succeed in remedying this situation merely by adopting new rules. In this paper, I attempt to explore the extent to which these instruments have been adopted and applied nationally. This will require a deeper exploration of the issues involved in applying international law at the domestic level. Therefore, my research will explore what measures are available for applying various norms, ethics and principles of International Humanitarian Law and how their implementation can be made more effective. In this context, I will ask what role the International Committee of the Red Cross has played in the development, application and consolidation of International Humanitarian Law Principles involving women. Finally an attempt will be made to investigate what measures can be developed to apply, strengthen the policies and rules relating to International Humanitarian Law.

Reem W. M. Mohamed (American University of Cairo Department of Law) – “Rape Law in Egypt: Defining ‘State Responsibility’ in National, Regional, and International Law”

Rape law in Egypt had a major development in 1999, when the criminal code was amended to annul a loophole that existed for many years allowing rapists to escape punishment by marrying the victim. Many other laws concerning the wellbeing of women were reformed to reflect a more “liberal” agenda. Those national changes came about, to a very large extent, by certain obligations upon the government through international law. Since gender issues are extremely controversial between the east and the west, rape law is chosen to be the reference in this paper because it reflects the pressure that could possibly be imposed upon a government to apply certain legal concepts. This paper attempts to define state responsibility in applying international and regional law to develop and enforce national laws concerning women. On the legal part; Egypt is subject to two regional legal systems; the African and the Arab systems as well as many instruments of international law. On the political part, Egypt has good political relations with the West and a relatively “liberal” legal and political agenda in the area. This paper provides three main issues; *first*, an analysis of the role of international politics in the formation and development of national law; *second*, a critical analysis of the functionality of international law to bring about national change; *third*, a discussion of the result of those legal changes that were the product of international emphasis pressure.

Oishik Sircar (University of Toronto Faculty of Law) – “Disciplining the ‘Radical Evil’ of ‘Postcoloniality’: Women’s Rights and the Crises of International Human Rights Interventions”

The growth of the women’s international human rights movement and its emergence as a field of research and advocacy has led to a valuable but increasingly self-contained discourse, often cut off from developments in postcolonial conditionalities (“Postcoloniality”), on the one hand, and conceptions of the different legal contexts in which international human rights operate, on the other. Such a trajectory of “development” in human rights standards for women have no doubt had an enormous impact on women’s lives worldwide, but simultaneously it is also culpable of creating the “woman-as-victim” subject, “geographically captive” in the “barbaric” cultures of the “third world”. This paper will map the developments that led to the integration of gender into the international human rights law discourse and examine how the language of “violence” and “respectable victimhood” (from Vienna 1993 to Beijing 1995) has been privileged leading to the dislocation of “discrimination” as envisaged by CEDAW, as the primary index for measuring

women's human rights violations. What has been the consequence of this dislocation? With specific reference to the historic proceedings at the Vienna Tribunal, the paper will attempt to identify the hypervisibility of "sexual violence" caused due to cultural/traditional sanctions in the "third world", constructed by the international women's right movement to invisibilize the "resistance potential" of women from the Global South. Post the formal integration of gender and sexuality in the international human rights discourse, these constituencies are increasingly being treated as subjects for human rights norm-setting. However, as the paper will argue, this "achievement" has been resulting in regressive consequences for women's human rights in the "third world". To establish this contention, the paper will closely study the concept of "worse the better" (Bhabha 2002) in international asylum jurisprudence, where the establishment of conditions of "radical evil" (Arendt 1966) are imperative to the guarantee of "saving" the fleeing, "disempowered" and "vulnerable" Eastern woman from the clutches of barbaric postcolonial states. In the main, the paper will deal with the emerging debates and crises that the international human rights regime faces with regard to the postcolonial accusations of it being a "civilizing-the-native" project and its creation of the third-world "woman-as-victim" subject, to establish how such an approach essentializes both gender and culture that adversely impacts on laws and government policies on women's rights in the Indian context, especially in the realms of trafficking, sex work and migration. In conclusion, the paper will suggest means through which a "lens of marginalization" can be employed to bring the peripheral subjectivity of the "woman-as-victim" to the centre – a move that will have the potential of busting the rhetoric of "respectable victimhood" – to claim, through the apparatuses of the state, the rights to politico-cultural autonomy and "plural" citizenship.

Human Rights and International Law: Variegated Experiences and Expectations (Flavelle House B)

Chair: Prof. Obiora Chinedu Okafor (Osgoode Hall Law School, York University)

Peter Atudiwe Atupare (Queen's University Faculty of Law) – "The Pillars and Kernel of Independence of National Human Rights Institutions: A Comparative Analysis of Canada, Ghana, and South Africa Human Rights Commissions"

The existence of regional and international human rights institutions to deal with unfortunate and despicable occurrences in human society obviously cannot in themselves suffice for the human rights struggles. This realization has in turn exposed the crucial necessity for the development at the national level of various kinds of resources for the promotion and protection of human rights. Undeniably, one of the resources which could be deployed is a national institution for the promotion and protection of human rights. Canada, Ghana and South Africa have partly indicated their commitment to this noble task by establishing national human rights commissions. But it must be said that the desire for these institutions does not end with their mere creation. In fact, they must be independent and impartial. This is imperative not only to gain the required legitimacy for effective and efficient functioning but also to encourage potential rights claimants to come forward and to prevent the human rights legislation lapsing into mere political rhetoric. The principal purpose of this paper is to do a comparative examination of the independence of these institutions, the focal point being Canada, Ghana and South Africa's Human Rights Commissions. Simply put, to what extent are these institutions independent? A compelling reason for the choice of the three commissions is the peculiar circumstances of the countries involved and the demonstrated commonality of interest to promote and protect human rights. Indeed, Canada as an established democracy, Ghana an emerging democracy in Sub-Sahara Africa from a

long period of military dictatorship, and South Africa in a new phase of political governance after several decades of institutionalized racism against the majority, are bound by the common need to foster the culture of rights. This paper finds that despite the different jurisdictional settings of these three commissions, all enjoy formal independence. They have also proven to be useful alternatives to the courts for rights enforcement, and good mechanisms for fostering the culture of liberty and equality. Given the important role of commissions in building a culture of rights, an independent commission is crucial for human rights and democracy. They become protectors of constitutional entitlements - rights, and true institutional bulwarks of the citizenry against serious invasions of fundamental rights and freedoms.

Jennifer Dalton (Osgoode Hall Law School, York University) – “Indigenous Self-Determination: The Significance of International Law in Canada”

The right of Indigenous self-determination causes apprehension among critics who fear that expanded conceptions of self-determination inevitably lead to political instability and potential secession. Yet, Indigenous self-determination and the territorial integrity of nation-states are not necessarily mutually-exclusive. While *external* self-determination usually leads to secession, *internal* forms of self-determination are largely feasible within nation-states, especially when exemplified as cultural, linguistic, and social expressions, flanked by territorial and governance arrangements. This paper argues that internal self-determination, as embodied under international law, is a workable objective of Indigenous Peoples in Canada. An assessment of who constitutes “peoples” under international law is undertaken, alongside in-depth evaluations of the extent to which Indigenous self-determination under international law might be replicated in Canada. Legal-theoretical examinations of whether Indigenous communities constitute “peoples,” rather than minorities, are also included. Ultimately, the paper asserts that Indigenous self-determination is the right of Indigenous Peoples to choose how they live their shared lives and structure their communities based on their own norms, laws, and cultures. It is argued that in Canada, Indigenous communities do indeed constitute “peoples” with a right of self-determination as defined by international law. In this way, Canada must recognise and respect the application of international legal norms on self-determination to Indigenous communities across the country.

Graham Hudson (Osgoode Hall Law School, York University) – “Neither Here nor There: The (Non-)Impact of International Law on Judicial Decision-Making in Canada and South Africa”

In this paper, the author explores the question of whether formalizing the Canadian law of reception would lead to an increase in the domestic influence of international law. He begins by briefly recounting Canada’s decidedly informal law of reception and, through a review of academic commentary, suggests a relationship between informality and international law’s historically weak influence on judicial reasoning. Tying this commentary to seemingly sociological perspectives on globalization, judges’ international legal personality and the changing forms and functions of law, he forwards the hypothesis that judges’ *subjective* recognition of the authority of international law can be engendered, modified and/or regulated through the *procedural* use of more familiar domestic legal authority. This hypothesis is then tested through a comparative analysis of the impact which international law has had in South Africa, where an historically informal law of reception akin to Canada’s has been replaced with clear and robust constitutional rules obligating the judiciary to consider and use international law. The author observes that there are no perceptible differences in the two jurisdictions; in neither country does international law exert a significant, regular or predictable impact on judicial reasoning. He concludes, modestly, that there is no available evidence to support the belief that Canadian judicial practice would change if the Canadian law of reception were formalized. He

further concludes, less modestly, that this has significant implications for underlying legal theory and, in particular, that theories concerning how the domestic impact of international law can be augmented, though seemingly sociological, are decidedly positivist in orientation. Given that judges' subjective attitudes towards international law are not perceptibly linked to domestic legal procedures, international, comparative and transnational legal theorists must, either, find evidence to demonstrate this link, or, recognize that their theoretical allegiances are divided between two, inconsistent traditions; legal positivism and the sociology of law.

Kim Stanton (University of Toronto Faculty of Law) – “Public Inquiry or Truth Commission: What’s in a Name?”

How a country deals with the abuses of its past is determined by many political, cultural and historical contextual factors, but increasingly, the choice of mechanisms includes a truth commission. This paper inquires whether the truth commission mechanism is a useful response to historical injustice in established democracies, and whether the distinction between truth commissions and public inquiries in recent transitional justice scholarship is a necessary one. The last half century has seen the rise of human rights commissions, international criminal tribunals and human rights mechanisms, and civil society movements to increase accountability for human rights abuses and combat impunity of perpetrators. In the last two decades, the truth commission has become a regular feature for countries grappling with human rights abuses in their pasts. In this paper, I consider the place of the truth commission within the legal order as a response to injustice by reviewing its history, progress and utilization in various contexts. I review scholarly definitions of truth commissions and public inquiries in order to consider whether truth commissions are properly viewed as a unique mechanism and also to explore the use of the truth commission mechanism in established democracies. This discussion will be conducted with a brief look through the lens of the Canadian context, illustrated by a short discussion of three Canadian commissions that relate to Aboriginal peoples (the Mackenzie Valley Pipeline Inquiry, the Royal Commission on Aboriginal Peoples, and the upcoming Truth and Reconciliation Commission on Indian Residential Schools).

International Trade Law (Bennett Lecture Hall)

Chair: Prof. Brian Langille (University of Toronto Faculty of Law)

Mark Bennett (University of Toronto Faculty of Law) – “A Practical Approach to Critical Legal Studies of International Trade Law”

International trade law is a ripe area for critical legal analysis. I will discuss the recent history and present practice of such analysis. In addition, I will offer my prescription for the future for such work, by describing the “practical critical” approach to analysing public international trade law that utilises insights from social theory that allow us to understand how actors (i) use their power to change or maintain the structures, in this case the legal structure and (ii) use systems of meaning to maintain relations of domination, again in this case through law. I argue that critical legal scholars should embrace relatively uncontroversial and orthodox aspects of social theory, discourse theory, and international relations, rather than engaging in relatively controversial philosophical analysis.

Muhammad Masum Billah (University of Ottawa Faculty of Law) – “Incentive Effect of Liability Rules in the Presence of Liability Insurance in Maritime Law Context: An Economic Analysis”

Liability rules are often desirable because they create incentive to take care especially when the cost of care is less than the expected loss. Bearing the risk of liability by the risk-averse individuals is not desirable because the fear of liability may prevent such individuals from engaging in socially desirable activities or may lead to excessive precaution. Liability insurance solves this problem of risk aversion. It is thus clear that both to impose liability and to facilitate liability insurance are desirable on their separate analysis. Now the question is whether it is desirable for a liable person to bear liability and at the same to have insurance against such liability. At first blush, having liability insurance seems to go against the very purpose of liability rules under the economic analysis i.e., creation of incentives, because the source of incentive in liability rules is the fear of bearing the financial burden of liability. When that burden is shifted to the insurer, the liable party has no longer any fear of liability, and any direct incentive effect from liability rules on an insured liable party is lost. Courts can no longer inflict fear of liability in the mind of a tortfeasor to induce him or her to take precautions. Can the insurer induce the insured to take care by creating similar fear of financial burden through premium increase based on risk classification, or through limited coverage either by deductibles or by a maximum limit? Does the fear of liability differ from fear of increased premium? If so, which fear can produce better incentives in the mind of the assured to take care? These are the questions the paper will attempt to answer and they will be answered mainly in the setting of maritime liability laws.

Michael Fakhri (University of Toronto Faculty of Law) – “Avoiding Legitimization as an Analytical Lens: Reconstructing the WTO Debate Away from Preconceived Notions of Institutional Legitimacy Towards Notions of Development”

A strong concern for the WTO's legitimacy prominently features in contemporary legal scholarship surrounding the WTO. The vast majority addressing legitimacy make reference to the protests held on the streets of Seattle in December 1999 during the WTO negotiations as the moment that exemplified the questioning of the WTO's legitimacy. The question is often framed as: how can we make the WTO more legitimate? The Ministerial conference that failed to commence in Seattle, restarted in 2001 in Doha. This round of negotiations was dubbed the “Development Round” by Member State negotiators and policy-makers. This paper seeks to explore the relationship between these two events: the perceived legitimacy crisis of the WTO and the emergence of development onto the global trade agenda. By arguing that the WTO should enhance its legitimacy, scholars often have a presumption of what the WTO is or should be. Much like the multitude of protestors, scholars arguing to legitimize the WTO do not agree what the WTO currently is in purpose and structure nor do they agree upon what the WTO should be. Moreover, scholars and policy-makers have not come to a contemporary consensus of what is development. I examine the contemporary debate regarding the WTO's legitimacy. My purpose is to, first, outline the current intellectual foundation of debates regarding the WTO to provide the context of further developments in international trade law. I capture the contemporary debate in order that we may understand the ideational milieu that is the foundation for future change. My examination is also intended as an intervention to shift the focus of the debate away from questions of how to legitimize the WTO towards questions of what global system does we want for trade and development. Generally, my claim is that the debates about the legitimacy of the WTO are in fact debates regarding competing global frameworks for development. Rather than starting with a theoretical notion of what the WTO should be or an assumption of what the WTO is as commonly done, I clarify the legitimacy debate in order to have a clearer way of arguing what do we want the WTO to be. I will examine four topics concerning the WTO's legitimacy: constitutionalization, the role of the dispute settlement system, transparency and participation, and trade linkage. I will explicate notions of the role of the state, market, law, international institutions and different political actors embedded within the various arguments. By unpacking, critiquing, and sharpening the terms of the legitimacy debate surrounding the WTO I hope to start

the way to reconstrue debates about the WTO towards conceiving trade as a concept of development. I suggest that to argue for a particular notion of trade or a particular conception of the WTO is to be arguing for a particular framework of development with a distinct sense of different institutional roles and hierarchies.

Mohammad Nsour (McGill University Faculty of Law) – “Regional Trade Agreements in the Era of Globalization: A Legal Analysis”

Regional Trade Agreements (RTAs) are agreements whereby members grant preferential treatment to one another in regard to trade barriers. When a member in the World Trade Organization (WTO) enters into an RTA through which it grants more favourable conditions to specific trade partners, this member departs from the guiding principles of non-discrimination in international trade law. Those principles are generally defined in Article I of the *General Agreement on Tariffs and Trade* (GATT), Article II of the *General Agreement on Trade in Services* (GATS), and elsewhere. However, WTO Members are still permitted to form RTAs under specific conditions which vary depending on the level of integration sought, mainly according to Article XXIV of the GATT and Article V of the GATS. The number of RTAs has grown dramatically over the last decade. Since 1995, more than 300 agreements have been notified to the WTO. The coverage of RTAs tends to expand and cover issues beyond the scope of the WTO such as investment, competition policy, government procurement, e-commerce, labor and environmental standards. This proliferation of RTAs, had never been expected, and is considered by many legal and economic scholars as parallel competing trade regime that could undermine the multilateral trade order. In 1996, the WTO created the Committee on Regional Trade Agreements (CRTA) to oversee all RTAs and to consider the implications of such agreements on the multilateral trading system. So far, the CRTA has achieved limited success. For many legal and technical reasons, the CRTA has been unable to carry out effectively its duties of examining the consistency of RTAs with the rules, and overseeing their implementation. Thus WTO Members agreed in July 2006 on a new mechanism on transparency that draws specific guidelines for reporting RTAs to the CRTA, and outlines clear timetables for that purpose. The effectiveness of this new transparency mechanism has not been tested yet. The paper I plan to present in the conference, and eventually publish, attempts to analyze the legal and factual status quo of RTAs. Simply put, the purpose of my paper is three-fold: first, to review certain developments in the proliferation of RTAs around the world; second, to offer a comparative legal analysis of major concerns that RTAs pose; third, to highlight the need to recognize and critically examine the link between the various factors that contribute in the proliferation of RTAs.

Robert Russo (University of British Columbia Faculty of Law) – “Cultural Imperialism or Decent Work? The Enforcement of International Labour Standards through Free Trade”

International labour standards were developed through the International Labour Organization (ILO) following World War I. These standards were almost exclusively created by representatives from Europe and North America. After decolonization in the 1950s and 1960s, the standards increasingly became applied towards developing countries. With the spread of globalization and proliferation of free trade agreements in the 1990s, and the failure of the WTO to incorporate labour and environment provisions, came incorporation of labour (and environmental) provisions into free trade negotiations. The intercultural aspects of this are profound as these provisions are targeted largely at developing countries. Many of these countries have different cultural approaches to work and labour, which often clash with the standards set by Europe and N. America. There is also the argument that Western countries are using these labour provisions as a form of cultural imperialism, i.e. to impose a Western style of labour culture on

developing countries. Esteva and Prakesh contend that “Imposing universal definitions of torture or evil upon different cultures is tantamount to the abuse of power, legitimized today under the umbrella of human rights.” The paper takes the theoretical approach that enforcing int’l labour standards, as they are now developed, is based on international cosmopolitanism, a framework of moral viewpoints that offers purpose of action to a community. The nebulous core shared by all cosmopolitan views is the idea that all human beings, regardless of their political affiliation, do (or at least can) belong to a single community, and that this community should be cultivated. The philosophical interest in cosmopolitanism lies in its challenge to commonly recognized attachments to fellow-citizens, the local state, parochially shared cultures, and the like. The paper also analyzes recent ILO initiatives, through a program known as the “Decent Work Agenda” to open the door to a genuine dialogue on the relevance and practicality of imposing labour standards originating from the West onto the developing world. The historical absence of such dialogue between cultures within the framework of the ILO and international labour standards reveals a form of cultural imperialism. Cultural imperialism within the ILO framework has historically meant defining and imposing an ostensibly universal conception of human rights without a true dialogue between cultures. The decent work concept requires the initiation of a cultural dialogue and the exploration of traditional cultures’ interpretations of the “good life” and work’s value within those cultures, in order to further a “culture of dialogue” that the ILO acknowledges has been historically “unevenly spread.”

5:30 – Coffee Break

5:40 – Keynote Address (Bennett Lecture Hall)

Prof. Anne Orford (University of Melbourne Law School) – “The Responsibility to Protect and the Politicization of International Law”

This paper will explore the implications of the shift from the language of humanitarian intervention which dominated international law and international relations in the 1990s, to the language of the “responsibility to protect” which has gradually colonised the legal and political debate since its development by the International Commission on Intervention and State Sovereignty (ICISS) in 2001. The paper traces the movement by states and within the United Nations towards the adoption of the concept of an international responsibility to protect populations at risk. The paper argues that this responsibility to protect creates a new normative environment in which to understand the obligations of the international community. In addition, it expands the temporal focus of “intervention”, by including three elements within the notion of a responsibility to protect – a responsibility to prevent, a responsibility to react and a responsibility to rebuild. Yet by describing the justification for this expanded role of the international community in terms of the logic of “protection”, this new doctrine stands in a complicated relationship to a long tradition of absolutist or authoritarian state theorising, in which the relation between state and subject was figured in terms of protection and obedience. This paper will argue that the overall effect is radically to politicize the international law relating to human rights and development, use of force and post-conflict administration.

7:00 – Dinner (L’Espresso Bar Mercurio – 321 Bloor Street West)

Sunday, 13 January 2008

9:00 – Light Breakfast

9:30 – Early Morning Session

Human Rights: Under-Inclusion, Over-Extension (Bennett Lecture Hall)

Chair: Prof. Anne Orford (University of Melbourne Law School)

Carlos Iván Fuentes (McGill University Faculty of Law and Centre for Human Rights and Legal Pluralism) and Sujith Xavier (University of Toronto Faculty of Law) – “The Living Instrument Doctrine as a Trans-Regional Discourse: Overcoming the Fragmented Regional Human Rights Regime”

Prior to the proliferation of international courts and quasi-judicial bodies, there was only one-way to interpret international law: Literal interpretation. Much of international law has changed since then, and its accelerated growth has produced many transformations in the way we think about treaty law. While theoretically we still believe that international courts, particularly human rights courts, do not create international law nor impose the adoption of national law; we have however accepted the creation of interpretative criteria by these courts. Both the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) have developed a set of criteria to help them read their respective instruments in innovative ways to deal with changing societal norms. On the one hand, the ECtHR has come up with the evolutive criterion (better known as the “living instrument” doctrine). On the other hand the IACtHR has adopted the living instrument doctrine criterion and expanded its scope by using the arguments of “cultural specificity” and “complex violation”. Some judges of the IACtHR have noted *obiter dictum* that the “*pro homine*” principle, which undoubtedly resembles the “living instrument” doctrine allows for the expansion of treaty law for the protection of the human persons. As the number of cases in both Courts increase, what used to be an unorthodox tool for the protection of humanity, has become the norm. The interpretative criteria created by the regional human rights courts are seen as irrefutable justifications for the expansion of treaty provisions to protect fundamental and inalienable rights. Under these circumstances we are no longer concerned about what human rights instruments stipulate, but what the judge *reads* them to be. Although neither of us considers the interpretative endeavors of the Courts to be demised, we do believe that the phenomenon must be studied. For this reason we wish to trace the development of the living instrument doctrine in the jurisprudence of both Courts. We hope to show that this criterion is a means to unifying the fragmentation of the regional regimes.

Noura Karazivan (Université de Montréal Faculty of Law) – “Extraterritorial Application of Human Rights: Between Formalism and Anti-Formalism”

In the last few months, the highest tribunals of Canada, the United Kingdom, and the United States were confronted with what one could easily call “hard cases”, that is, defining the extraterritorial scope of each jurisdiction’s human rights instrument. The purpose of the present article is to analyze and compare the approaches taken by these courts, and criticize the purely territorial approach adopted by the Supreme Court of Canada in the recent case in *R. v. Hape*. In the first part of this article, I shall expose the state of the law regarding the extraterritoriality of constitutionally protected human rights in Canada and the United States, as well as the extraterritoriality of the United Kingdom’s Human Rights Act. Does the *Human Rights Act* extend to British soldiers when they conduct operations in Iraq and violate the human rights of Iraqis? Does the American Constitution and Bill of Rights extend its shield to Guantanamo Bay

detainees, and allow them to raise the habeas corpus suspension clause before American courts? Does the *Canadian Charter of Rights and Freedoms* apply to Canadian officers conducting investigations abroad and violating constitutionally protected human rights? The comparison shows that contrary to the House of Lords and to the US Supreme Court, the Supreme Court of Canada has rejected any and all extraterritorial application of the *Charter*. The approach taken by the Supreme Court of Canada strikes no balance between territorial sovereignty and the protection of human rights. The second part of this article attempts to map the theories of extraterritoriality underlying each approach. I shall use part of Gerald L. Neuman's taxonomy of theories of extraterritoriality and place these theories on a spectrum going from formalism, at one end, to anti-formalism, at the other end. Through the deconstruction of the extraterritorial argument, we can better argue for a balanced approach to the extraterritoriality of the *Canadian Charter of rights and freedoms*, i.e., an approach that would reflect the progressive abandonment of the pure territoriality doctrine and the increasing role of international law in the interpretation of domestic law.

Chilenye Nwapi (University of Calgary Faculty of Law) – “Extra-Territorial Jurisdiction over Transnational Corporations for Corporate Human Rights Abuses: Need for More Creative Thinking”

For sometime now, scholars and activists alike have been searching for a potent legal mechanism for regulating the activities of transnational corporations (TNCs). This quest is being driven by a concern that TNCs have grown too powerful and are whittling down the authority of national governments as a result of economic globalization. This means that TNCs have spread their tentacles far and wide across the globe, operating in both democratic and non-democratic regions and often in war-torn regions where governance structures have broken down, and partnering with both benign and oppressive regimes. Thus they are seen by many as exploiting the absence of rule of law created by corrupt, oppressive and inefficient governments in the countries they operate to overlook their corporate commitments to their host communities and instead engage in egregious human rights violations with utter impunity. Orthodox methods of regulation having proved ineffective, the quest is therefore for a legal mechanism that is proportionate to the power and influence of TNCs and potent enough to constrain them to respect human rights. One mechanism that seems to be gathering momentum is the creation of extra-territorial jurisdiction by states over TNCs. This might be done via an international treaty. Regardless of where the harm occurred, the proponents (or some of them) suggest, states should exercise extra-territorial jurisdiction. This holds the prospect of creating no safe haven for TNCs. In this paper, I seek to present the legal and political problems such a mechanism would face during implementation. Drawing from the US Alien Tort Claims Act, I seek to show that extra-territorial jurisdiction is inescapably political. Unless the “politics of jurisdiction” is factored in, extra-territorial jurisdiction will end up on the bleeding edge rather than the cutting edge.

Text and Context (Flavelle House A)

Chair: Prof. Thomas Skouteris (Leiden University Faculty of Law)

Luis Campos (University of Toronto Faculty of Law) – “Mapping the Archive: Canadian Frontier Narratives in Contemporary Aboriginal Territorial/Title Disputes”

This paper represents initial work connected to a larger doctoral project. The project analyzes the role of discovery/encounter narratives (mainly the journals, letters, and graphic writings of early nineteenth century frontiersmen in Canada) as evidence in contemporary Canadian aboriginal

territorial/title disputes. The Canadian Supreme Court's *Delgamuukw* decision [and its treatment—shortcomings—of “historical” versus “oral tradition” evidence] is the main focus; however, significant attention is also placed on recent Canadian jurisprudence attempting to deploy *Delgamuukw*'s evidentiary aspirations. The work is principally organized around the theory of the archive, as a space for competing claims to knowledge. First, it borrows from Derrida and Foucault's treatment of the archive, as well as drawing from an emerging body of scholarship on the theory of the archive. Not only do courts view discovery/encounter texts as constituting an archive of “scientific truth,” but the court itself also acts as an archival forum that patrols, regulates, and suppresses the law of what may be said in relation to these disputes. Second, the project looks to literary criticism relating to travel writing for its insight about the construction and perspectives of discovery/encounter narratives. This body of scholarship helps interrogate this “unimpeachable” archive, revealing its epistemological limits.

Mark Toufayan (Osgoode Hall Law School, York University / University of Ottawa Faculty of Law) – “When British Justice (in African Colonies) Points Two Ways: On Dualism, Formalism, Mimicry and the Vocabulary of Progress in International Law”

Taslim Elias' pioneering work on Africa's contribution to the development of international law was foreshadowed by the markedly more modest reception of his groundbreaking scholarship on the impact of English colonial law on the growth of African (and particularly Nigerian) customary law beyond African – and European Africanist – and particularly within internationalist circles. Elias's work illustrates well what postcolonial cultural literary scholar Homi Bhabha calls the “doubly-inscribed play of mimicry and cultural difference” in the intersectionality negotiated between universal and subaltern laws in the constitution of plural normative orders within the statal domain through the mediating function of institutions – here the interplay between colonial and native (or customary) courts. As such, his intellectual portrait is illuminating not only for contemporary debates on the interface between the reception of international and transnational legal norms in domestic political structures, monism and dualism, and universalism and cultural relativism, but at its root serves to excise the uses of, and doctrines, strategies, imageries and ideas elaborated about the “native” and “law” when “either the pressure of culture contact or the necessities of trade made it no longer possible to ignore what goes on among the ‘natives’.” Thus, ever since the bulk of Nigeria was administered by the Royal Niger Company Chartered Ltd. and the system of courts established under its auspices, British judges who had to administer “native laws and customs” came to regard many of them as “barbarous” and mollified only by force of civilization to convert them into enforceable principles of law. Yet, while Elias decried the contempt or ignorance (or both) exhibited by colonial masters towards these customs and laws and vilified judicially crafted “repugnancy” and “public policy” doctrines as instruments of colonial policy to prevent British justice in the colonies from looking both ways by ensuring that British, and not the colonial, standards were the criteria for abrogation or change, he nonetheless saw English law as a unifying force towards the emergence of a Nigerian common law and unified legal system. Drawing on legal pluralist, postcolonial and law and development literature and critical geography, this paper argues that Elias' paradoxical and perplexing stance and, in the main, his challenge against the asserted oppositional dualism of English metropolitan (read universal) and indigenous (culturally specific) laws, notwithstanding a number of admitted non-negligible differences of content and method between the two, can only be understood in terms of his own professional trajectory of ascription to narratives of “ordered freedom and rational progress” as a function of developmentalist and “catching up” strategies pursued by Third World nations long before struggles were waged within the UN over the New International Economic Order. The paper connects this insight to what Duncan Kennedy dubs the first “moment” of the law and development movement (1858-1960) characterized by a pervasive emphasis on legal formalism, individual autonomy, protection of private property rights and free

transactions, and liberal ideas of the market under the guise of social justice considerations for the development and advancement of “welfare” of natives in the colonies. This insight, and the question of how indigenous and colonial peoples became further absorbed into unitary legal administrations at the height of colonialism and decolonization, is best exemplified by the perennial debate in postcolonial Nigeria over the question of land tenure and agrarian reforms, the suitability of communitarian vs. individualistic ownership of land and property rights for modern economic development projects and the role of law in social and economic regulation. Such a progressive movement towards legal uniformity and its, yet, ambivalent and agonistic relationship to local (or indigenous) culture and theories of state unity, modernization, dependency and economic prosperity through the “rule” of law has animated and – despite recent disciplinary shifts towards increasingly incorporating the “social” – perpetuates international law’s own programmatic trajectory of progress and effectiveness vis-à-vis the Third World. This is achieved through the distinct governance strategy of neo-liberal economic reforms packaged and sold as uniformity, certainty and coherence into the law.

Questions of Health: Problematizing the Pathological (Flavelle House B)

Chair: Prof. Joanna Erdman (University of Toronto Faculty of Law)

Rupal Agrawal and Anubha Singh (Hidayatullah National Law University, Raipur) – “Striking the Balance: Towards Harmonization”

The protection of intellectual property rights, and more particularly the patent rights claimed by the pharmaceutical industry, surfaced as an issue of international contention between developed and developing countries following the World Trade Organization (WTO) Ministerial Meeting in Uruguay in 1994. At the heart of the disagreement is the growing global awareness pertaining to the epidemic levels of HIV, AIDS, and other treatable, if not yet curable, diseases plaguing the developing world. The November 2001 Ministerial Meeting in Qatar met in the shadow of the failure of the Seattle WTO meeting, where no agreement as to the next round of trade liberalization talks was reached in part because of disagreements between the developing and developed States. Also looming over the Qatar meetings was the new geopolitical reality born after the September 11th terrorist attacks on the United States and the bio-terrorism that followed. On November 14, 2001, a resolution from Qatar emerged, directly addressing the issue of pharmaceutical intellectual property rights protection during a time of growing popular concern for both well-established and emerging public health threats. The Qatar resolution gives States tremendous latitude in addressing domestic health threats by legitimating the practice of developing States of invoking the WTO’s Agreement on Trade Related Intellectual Property Rights (TRIPS) in times of public health crises for the purpose of obtaining needed pharmaceutical products. The resolution’s inclusion of a provision for the granting of compulsory licenses to produce generic drugs, of a provision granting members the right to determine what constitutes a national emergency, and a provision to delay implementation of intellectual property protection laws in the “least-developed” countries (LDC’s) is seemingly a victory for the developing world and its sick. Nevertheless, the question still remains whether the resolution’s expansion of a State’s right to invoke a “national emergency” at times of “urgency” relating to public health may ultimately serve as a chilling disincentive for the research and development of new drugs in the developed countries, which in the long term has the potential of indiscriminately disadvantaging all the peoples of the world. This paper will examine the balance that the WTO’s TRIPS Agreement attempts to strike between the long-term need for pharmaceutical research and development and the short-term need for access to affordable medicines particularly in the developing world.

Sabrina Fortin (Université de Montréal Faculty of Law) – “Genomic Databases as a Global Public Good”

The human species shares more than ever a common destiny, conscious of its global environment, awake on its interdependence. Human biology is related to environment and is still to understand. Health research is deploying incredible efforts and money to push ahead the discovery. Since the completion of the human genome mapping, there is a new endeavor: associate genetic data to personal data to give them physiological meaning and link data from different population of the world to generate statistical power and bring to humanity valid and comparative results on susceptibility to health and disease. What is called “genomics population research” is spreading across research centers of the world and it comes with multiplication of “population databases”. Based on personal data from different sources (medical records, socio-demographic databases, administrative registries and environmental data), these databases are a valuable resource. While the resource allows technical capability at an international level, the ethical and legal frameworks prove to be inconsistent. The fear and ignorance surrounding genetic research as potentially eugenic; the legal regimes of occidental countries based on privacy rights and personal autonomy; the confidentiality rules, derived from privacy rights; the variations among institutions, regions, countries; the privatization of databases for mercantile interests; the lack of long term view and harmonization in the organization of the databases around the world are so many limits to slow slowing down the realization of a networking. I proposed to think of the organized network of human genomic databases as a “global public good”. My hypothesis is that “global public good” rationale could be a successful international strategy to transcend complexity of international law in the context of genomic research, because it is founded on interests. The scientific community work hard to facilitate sharing and publicness of genomic data. The Bermuda Principles, the Fort Lauderdale Agreement, the Statement of the Human Genome Organisation are initiatives related to sharing of “research data” and reflect the involvement of scientists in the debate. But sharing of personal information from all the sources mentioned earlier, needs more than scientific involvement. It needs public policy, it needs States power, it needs international organization oversight. It is in the interest of all States to participate in the construction of the genomic resource for scientific purpose, and sooner than later international law pathway is going to appear as the only road to attain the promise global public good of genomics.

Idowu Ohioze (University of Alberta Faculty of Law) – “Health or Wealth: Contemporary Issues in the Access to Medicines Conundrum”

One of the basic human rights of man is the “enjoyment of the highest attainable standard of physical and mental health.” Majority of sovereign nations have subscribed to this by their ratification of the *International Covenant on Economic, Social and Cultural Rights* (CESCR). By Article 2 of the document, a state which has ratified it: Undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particular the adoption of legislative measures. The obligation to protect and promote this right, which is recognised under Article 12 of the CESCR, comprises *inter alia* “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” and “the creation of conditions which would assure to all medical service and medical attention in the event of sickness.” More than four decades after the ratification and accession of the CESCR, States Parties to the Covenant maintain repeatedly that access to medication is a fundamental element of achieving that human right. The reverberation of this truism notwithstanding, the World Health Organisation (WHO) estimates that one-third of the world’s population still lack regular access to

even pharmaceutical products listed on its Model List of Essential Medicines. Such a frightening account of the failure of the States Parties to the CESCR to achieve this all important right has called for a scrutiny of the role of intellectual property rights in pricing medicines out of the reach of the world's majority. Incidentally, the advent of the World Trade Organisation's (WTO) globalised rules for patent protections on pharmaceutical and other products coincided with the explosive growth in the prevalence of diseases like HIV/AIDS, tuberculosis and Malaria which the States Parties to the CESCR are legally obligated to prevent and/or eradicate by measures within their capacities. Undeniably, the medicines and medical devices necessary for the prevention, treatment and/or eradication of the world's most devastating diseases are all known to and owned by some of the wealthiest nations and commercial entities in the world. But the lure of profit maximization far outweighs, sadly, the more compelling need to protect the world's infirm from the snares of epidemics and the throes of avoidable deaths. This has prompted a debate on health or wealth: access to medicines or intellectual property rights protection? This paper contributes to this on-going global discourse from a different standpoint: only genuine efforts, devoid of economic underpinnings, to tackle the colossal neglect of the world's unwell will guarantee the happiness of the healthy. In it I critically dissected Canada's Access to Medicines Regime (CAMR) using its legal framework, the *Jean Chrétien Pledge to Africa Act*, R.S.C. 2004, c.23. This Act is the most contemporary response to the access inquiry. Hence the objective is to ascertain the practical flaws which characterize this landmark effort of Canada and which have affected its functionality in the face of recurring and daunting access to medicines challenges. This legal writing equally proffers alternative routes to be taken in easing the intellectual property- access to drugs simmering tensions.

11:00 – Closing Plenary: What is to be Done? (Bennett Lecture Hall)

Prof. Thomas Skouteris (Leiden University Faculty of Law)