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UNIVERSAL JURISDICTION VS NATIONAL SOVEREIGNTY – THE CASES OF ARGENTINA AND CHILE[*]

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I. INTRODUCTION

One of the major problems in the implementation of International Law on Human Rights from its beginning has been the contradiction between the principle of national sovereignty and the idea of universality. This is also mirrored in the concept of "universal jurisdiction". As I write, this contradiction is clearer than ever before, because of a growing globalization process. This process is eroding both the monopoly of the state and the state system itself at the different levels, from the economic and political level through to the social, legal and at the cultural level (Santos 2007: 5-11; Bartolomei 2000).

The human rights regime over the last fifty years has been inspired by this idea of "universal rights", although enforcement has only been recognized by states, as the principal political actors. Many human rights experts believe that if human rights are to be fully implemented, today, political subjects other than states (international or non-governmental organization) must be granted a broader mandate (Archibugi, Held and Köhler, 1998:4; Bianchi, 1997; Bartolomei, 2000 and 1999).

According to some authors, the most important legacies for the new millennium are the accentuation of the processes of globalization, the end of the Cold War and the affirmation of democracy as the legitimate system of government. At the same time, the globalization of economic, social, cultural and legal life involves a diversity of subjects and fields, where interaction generates multiple effects. Coupled to these, new groups of actors grow more intensive each day, through the actions of companies,

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network activities and individuals, including social movements, governments and international organizations (Archibugi, Held and Köhler, 1998:1-2; Castells, 1999).

In spite of the process of globalization and it effects on the daily lives of people, political institutions are continually being constructed and, at the same time, work on a narrower geographic scale, that is to say, the territorial state. However, traditional forms of the national state are not secure anymore. The sovereignty and autonomy of states are now being challenged and limitations posed in a number of ways:

> "International law, international organizations, diplomacy, the interests of the big multinationals, the emergence of a transnational civil society, no less than the distribution of military strength across the planet, ensure that states can take fewer and fewer decisions without extensive consultation, collaboration and negotiation with other states and agencies" (Archibugi, Held and Köhler, 1998: 3).

As a number of scholars affirm, we are now living in a world where state borders are increasingly becoming obsolete. International borders are becoming so penetrable that they no longer fulfill their historical role as barriers to the movement of goods, ideas and people, and as markers of the extent and power of the state (Held 2004: 119-136). The decay in the strength and significance of international borders is linked to a redesigning of the nation- state as the pre-eminent political construction of modernity (Wilson and Donnan, 1998:1-25; Castells, 1999:243-307).

The increasing powerlessness of the nation-state, for instance, is aptly described by Castells in the era of globalization, "… the growing challenge to states´ sovereignty around the world seems to originate from the inability of the modern nation-state to navigate uncharted, stormy waters between the power of global networks and the challenge of singular identities" (Castells, 1999:243-44).

As a consequence of this, a number of questions need to be reconsidered. First, who for instance will uphold human rights in a world that has left behind a powerful national state? Second, in relation to economic, social and cultural rights, how does the weakening of state capacity affect the protection of rights in peripheral and semi-peripheral states? Third, how can social safeguards, which have been barely guaranteed by Latin American states, be redrawn and enlarged in the future? Finally, how can such questions be really answered when there has been a widening of the gap between the rich and the poor, between men and women, ethnic groups and religion?

With these questions in mind, now let us turn to the ideas behind globalization, democracy and human rights.

This paper analyses the growing challenge of universal jurisdiction in the process of implementing human rights in a global world, particularly in Latin America. I want to look at what consequences there are on the limits, for example, of national sovereignty, cosmopolitan democracy, the globalization of law and non-state actors through universal jurisdiction. I take into account both the concepts of Held and Santos concerning these and look at the similarities and the differences in their analysis.

I will also show how the cases of Chile and Argentina have become crucial in our understanding of the human rights movement for both universal jurisdiction and the struggle against impunity.

II. NATIONAL SOVEREIGNTY AND UNIVERSAL JURISDICTION

Historically, the national state had become a "territorial state" and power lay in the attachment to a particular place. As it stands today, the global society is now undermining the importance of the national state and is now acting across the boundaries of the national state, threatening its sovereignty, its tax raising and foreign policies and crossing its national security borders. The growth of international and trans-national organizations and collectivities, from the UN and its specialized agencies to international pressure groups and social movements, has altered the form and dynamics of both state and civil society. The state has become a fragmented policy-making arena, permeated by trans-national networks (governmental and non-governmental) as well as by domestic agencies and forces. The exclusive link between territory and political power has been broken. A body of regional and international law has developed which underpins an emerging system of global governance, both formal and informal (Beck, 2000:4; Bartolomei, 2000; Held and McGrew, 2002:11-13).

The sovereign state, at present and according to Held, lies at this intersection of an enormous display of international regimes and organizations, which is arranging whole areas of trans-national activity, from trade, to the oceans, to space and importantly human rights (UN, G7, IMF, WB, WTO, EU, APEC, ARF, NAFTA, MERCOSUR and many other groupings). The development in the amount of these new forms of political organization mirrors the quick expansion of trans-national links and networks, the growing interpenetration of foreign and domestic policy and the corresponding aspiration by most states for some form of international governance and regulation to deal with collective policy questions and conflicts. These expansions and changes are explained by Held in the following examples (Held, 1998:20-21),

- New forms of multilateral and multinational politics, as well as, collective decision-making.[1]
- The shift away from a purely state-centred international system to new models of geo-governance.
- Increased emphasis on gathered defence and cooperative security. The huge financial costs and technological needs have resulted in a "globalization of military technology" and a "trans-nationalization of defence production".
- The proliferation of weapons of mass destruction has made states insecure.

These developments have contributed to a change in the nature of the democratic political community. Held, for instance, explains that the point of convergence of effective political power is now no longer presumed to be simply about national governments. Effective power is increasingly shared and exchanged by different forces and actors at a national, regional and trans-national level. In addition, the project of a political community of fate is no longer situated within the limits of a single nation-state. And although the system of a national political community remains, as Held indicates, it is articulated and re-articulated with mixed economic, organizational, administrative, legal and cultural interrelations and structures. Furthermore, the function of states, in intensifying complex global and regional systems, increasingly influences the autonomy and the sovereignty of these systems. In recent times, new types of boundary problems have too emerged and the idea of a democratic order is no longer defended as suitable to a political community or nation-state. There is, today, as Held confirms, a more complex interconnected world (Ibid and Held, 2004).

In total, in a world of intensifying regional and global relations and with distinguished overlapping communities of fate, democracy needs roots in both the regional and global networks, as well as, in a national and a local political life. Without such an expansion, many of the most powerful regional and global forces will lose the democratic mechanisms of "accountability, legitimacy and considered public intervention". In this respect, Held proposes a new global ethic (*cosmopolitan principles or cosmopolitan ethical ideals*) which recognizes "a duty care" beyond borders, as well as within them, and a global new deal between the rich and the poorer states. This involves rethinking social democracy as a purely national project, recognizing that if it is to remain effective in a globalizing economy, it has to be embedded in a reformed and much stronger system of global governance, which seeks to combine human security with economic efficiency, and this means a global social democracy. A reconstituted social

democratic project requires the coordinated pursuit of national, regional and global programs to regulate the forces of economic globalization, which means that the global markets begin to serve the people of the world rather than visa-versa. Extending democracy beyond borders also depends on strengthening solidarities between those social forces, in different regions of the world that seek to content or resist the terms of contemporary economic globalizations (Held, 1998:24 and 2004:161-178; Held and McGrew, 2002:28-39).

Santos, from a more radical and bottom-up perspective, explains that this new global model or the neo-liberal hegemonic globalization is based on three institutional features: *new legal restrictions* on state regulation; *new international property rights* for foreign investors and intellectual creations; and *new subordination of state sovereignty* in economic areas, toward multilateral or supranational agencies. In this way, a selective version of the western local tradition is being imposed globally by the economic, social and political forces that lead the hegemonic globalization. Consequently, the weakening of the state is both internal, through limitations of state regulation, and external, through the hollowing-out of state sovereignty by trans-national agencies like the EU, NAFTA, the IMF and the World Bank (Santos, 2001 and 2007).

In my research, I am attempting to analyze the challenge of universal jurisdiction and the limits to the principle of national sovereignty, in two cases, Chile and Argentina, in Latin America. There has recently been an overwhelming interest in pursuing accountability for cases relating to genocide and other crimes against humanity, particularly torture and war crimes. This has taken place domestically, through prosecutions, truth commissions and even commissions of inquiry. There have also been international tribunals and the exercise of universal jurisdiction. More recently, public attention was turned to proceedings in Spain and the United Kingdom, in regard to the former dictator, General Pinochet of Chile (1998). A number of other cases have also started in European States (Spain, France, Belgium, United Kingdom, Netherlands, Germany, Denmark) and other countries (Human Rights Watch 2006: Universal Jurisdiction in Europe; Roht-Arriaza, 2005; Falk, 2002:63-68).

Despite the creation of *ad hoc* international criminal tribunals for the former Yugoslavia (1994) and Rwanda (1993), the Special Court for Sierra Leone and the International Criminal Court (ICC) (2002), huge gaps persist in the ability to bring to justice persons accused of the gravest international crimes: genocide, crimes against humanity, war crimes and torture. In combating impunity for grave human rights violations, there still remains a critical role for national courts and tribunals, through the exercise of

universal jurisdiction (Ibid and Held, 2004:122-125; Robertson, 2002:218-259).

The most striking feature in the Pinochet case was that a Spanish judge (Baltasar Garzón) had the authority to order his arrest for crimes committed in Chile, mostly against Chileans including Spanish citizens. This authority derives from the principle of universal jurisdiction, which is the principle that every state has an interest in bringing to justice the perpetrators of particular crimes of international concern, no matter where the crimes was committed, and regardless of the nationality of the perpetrators or their victims. This level of broad jurisdiction is justified on the grounds that there are certain crimes under International Law which affect the international community or mankind in general. These are clearly defined as genocide, terrorism, war crimes, apartheid, crimes against humanity, enforced disappearances, extrajudicial executions and torture. It is claimed that this level of jurisdiction gives a clear signal that certain crimes are so immoral they threaten the international community and are forcefully condemned by it. In other words, it is in the interest of justice the world over, that perpetrators are brought to justice (Roht-Arriaza, 2005:170-224; Robertson, 2002:393-426; Human Rights Watch 2006: Universal Jurisdiction in Europe).[2]

Although Pinochet was not extradited, the case was a starting point for subsequent universal jurisdiction cases in Spain. Since the Pinochet case, other cases have been resolved, including that against former Peruvian President Alberto Fujimori, and the Argentine military officer Adolfo Scilingo, who was convicted and sentenced by the Spanish National Court to 640 years of imprisonment for attempted genocide and other crimes committed during Argentina's dirty war in the 1970s. As I write, some cases are ongoing on events in Tibet, Rwanda, Guatemala as well as the case against Ricardo Miguel Cavallo, an Argentine military officer whose trial is scheduled to start in 2007 (Human Rights Watch 2006: Universal Jurisdiction in Europe, 86-87; Roht-Arriaza, 2005) [3].

Those cases have demonstrated how the relationship between international and national law, including the principle of national sovereignty has dramatically changed, in Latin America and in the international community as a whole. It has also marked the beginning of the end of impunity for the worst state crimes and, importantly, has helped to establish the principle that grave crimes against human rights are subject to universal jurisdiction, something that now can be prosecuted anywhere in the world.

III. GLOBALIZATION, COSMOPOLITAN DEMOCRACY AND HUMAN RIGHTS

The idea of globalization, according to Held and Santos, and which I have followed in my own analysis, is neither a "singular condition" nor a "linear process". It is best thought of as a multidimensional phenomenon involving diverse domains of activity and interaction, which, from the economic sphere, the political, technological, military, to the legal, cultural and environmental sphere, importantly, involves diverse patterns of relations and activity. That being said, the significance of globalization, at the same time, differs for *individuals*, *groups* and *countries*. At the core of this differential access is power. In this context, power is the ability to transform material circumstances whether it is the social, the political, the cultural or the economic. At the same time, it involves goals, which are based on the mobilization of resources and the generation of rule systems, as well as the control of the infrastructures and institutions (Held, 1998 and 2004:1-12; Santos, 1995 and 2007. See also Bartolomei, 2000).

Held explains the forms of power implicit in the process of globalization, "The particular form of power that is of concern to a theory of globalization is characterized by *hierarchy* and *unevenness*. Hierarchy connotes the asymmetrical access to global networks and infrastructures, while unevenness refers to the asymmetrical effects of such networks on the life chances and the well-being of peoples, classes, ethnic groupings and the sexes" (Held, 1998:14).

Santos, from a pluralist and bottom-up perspective, explains how this process of globalization and homogenization is contradictory, not linear and uneven. It combines new forms of globalization together with *new* or renewed *forms of localization*; international sources with local diversity, national and ethnic identity, which take into account, popular and community grounding. In the case of peripheral and semi-peripheral states, political autonomy and effective sovereignty weakens further, and the *capacity to resistance* and *negotiation,* in regard to the *hegemonic states*. This is particularly the case in the USA, Europe and Japan, including international institutions, like the World Bank, the International Monetary Fond, the European Union and NAFTA (Santos, 1995:252-258 and 2007; Bartolomei, 2000:142).

As Santos clarifies,

> "Today, the selective erosion of the nation-state due to the intensification of neoliberal globalization raises the question of whether both social relation and social emancipation are to be displaced to the global level. We have started to speak of global civil society, global governance, and global equity. The worldwide recognition of human rights politics is at the forefront of this process" (Santos, 2007:5).

According to Held, globalization involves at least two clear phenomena.

1. The issue that the number of links between "political, economic and social activity are becoming interregional or intercontinental in scope"
2. There is an "intensification of levels of interaction and interconnectedness within and between states and societies". There is for Held a "stretching of social relations in and through new dimensions of activity and the chronic intensification of patterns of interconnectedness mediated by such phenomena as modern communication networks and new information technology" (Held, 1998:13).

While Held holds to two distinct phenomena, Beck defines Globalization as "the processes through which sovereign national states are criss-crossed and undermined by transnational actors with varying prospects of power, orientation, identities and networks" (Beck, 2000:11). One essential feature, which distinguishes what Beck calls the "second modernity" or "globalization", is that the new globality cannot be reversed. This means that the various autonomous *logics of globalization* –-the logics of ecology, culture, economics, politics and civil society, exist side by side and cannot be reduced or broken up because of their own dynamics. The question arises; what is it that makes this globality irreversible? Beck specifically numbers eight reasons for this new globality.

1. Geographical expansion and greater density of international trade.
2. A revolution of information and communications technology.
3. Universal demands for human rights – the principle of democracy.
4. Global culture industries.
5. The emergence of a post-national, polycentric world politics in which trans-national actors (corporations, non-governmental organizations, United Nations) are growing in power and number alongside governments.
6. The problem of world poverty.
7. Global environmental destruction.
8. Trans-cultural conflicts (Beck, 2000:11).

In so many words, "globality" means that from now on anything happening on our planet is only a limited local event and all inventions, victories and catastrophes now affect the whole world. Today, to reorient and reorganize our lives and actions, there needs to be a change in the organizations and institutions, along a "local-global axis". *Politics has to be reinvented*. Solutions to the "first modernity" are now inapplicable and

increasingly contradictory for the "second modernity" (Ibid and Held, 2004:1-12).

Crawford and Marks talk about the process of globalization within the developments of International Law and Human Rights. According to them, International Law, which started as a *jus gentium* or *droit des gens*, later presumed the character of a distinctively "interstate law". Territorial sovereignty, equality of states, non-intervention in domestic affairs and state consent, were the central doctrines of this period. Each of these doctrines focused on interstate relations. Constitutional issues concerning relations between citizens and government were for the most part discarded and allocated to national law. However, things changed particularly after the First and the Second World War, especially in the development of a Human Rights Law (Crawford and Marks, 1998:72-73).

The extent to which Human Rights law has kept together the framework of the democratic political life and international decision-making, are issues worth thinking about. To what extent has International Law, for example, supported the *application of democratic ideas*, not only on the national, but also on the international level and with it its respective inter-relation?

According to Held, democracy must be rethought in order to address this expanding framework of political activity. His proposition of a cosmopolitan democracy has as its objective the introduction of democratic standards wherever power resides. This includes the deepening of democracy within nation-states. Even so, it does involve the expansion of democracy in the arena of both global and trans-national decision-making. Today, people are influenced not only by decisions taken by their elected representatives, but also by the governments of other countries, by international and regional organizations and by private economic actors. A reconstituted social democratic project therefore requires the coordinated pursuit of national, regional and global programs to regulate the forces of economic globalization - to ensure that global markets begin to serve the world's peoples rather than vice versa (Held, 1995 and 2004).

In this respect, International Law, with its increasing normative scope and growing institutionalization, illustrates the growing phenomenon of globalization. Nevertheless, it has left the implications of globalization unaddressed, within democratic theory and practice. Democracy has remained for international law an idea about the "government of nation-states", with little application for other sites of political authority and participation of people. However, vastly increased participation in recent years of non-governmental organizations at the international level is evidence of the pressures and the possibilities for democracy in the global

decision-making. Many international legal scholars subsequently share the view of Held that democratic ideas are as pertinent to international and other forms of decision-making as they are to national decision-making (Crawford and Marks, 1998:82-83; Held, 2004).

Held proposes a reform of international law and a reform of the international political processes, which includes recommendations calling for the expansion of the International Court of Justice (ICJ) and the International Criminal Court (ICC). Furthermore, he proposes that resolutions by the United Nations General Assembly carry more weight than at present, particularly in regards to international law and the establishment of a new representative Security Council (Held, 1995:Ch.12 and 2004:163-166).

The possibility of a cosmopolitan democracy, according to Held, arises from the fact that the nation-states are, at present, captured in multiple interconnected relations. Even so, there are tendencies at work giving seeds to new forms of public life and new ways of discussing regional and global issues. These tendencies point towards the creation of *new ways of holding trans-national power systems* to account, while opening up the possibility of a cosmopolitan democracy. The UN, the European Union, new social movements for women rights, indigenous rights, environmental and human rights as well as new regional and global trans-national actors are all example of groups contesting the process of globalization (Held, 1998:24-25. See also Bartolomei, 2000:140-143). In the words of Held,

> "A cosmopolitan democracy would not call for a diminution *per se* of state power and capacity across the globe. Rather, it would seek to entrench and develop democratic institutions at regional and global levels as a necessary complement to those at the level of the nation-state. This conception of democracy is based on the recognition of the continuing significance of nation-states, while arguing for a layer of governance to constitute a limitation on national sovereignty" (Held, 1998:24):

But these new political institutions would prevail over states in clearly determined spheres of activity. In addition, the phenomenon of cosmopolitan democracy proposes for the development of these new political institutions, which would exist along side the system of states. These operations would have clear trans-national and international consequences and demand regional or global initiatives in the claim of effectiveness, while depending on such initiatives for democratic legitimacy. It would not merely be the formal construction of new democratic mechanisms and procedures, but also the creation, in principle,

of a "broad access" of civic participation at local, national and regional levels (Held, 1998:24 and 2004:161-178).

Nevertheless, Richard Falk understands the difficulty of articulating, concretely, how cosmopolitan democracy might be expanded to geopolitical and market arenas, but he attaches great importance to the role of trans-national networks of grassroots organizations, as part of a global civil society. According to him, the development of human rights norms under UN auspices created an instrument available for "social forces in civil society" as well as for "governments" and "official elites". The emergence of human rights organizations, independent from the state and funded by citizens and members, created a new constituency that was, above all, focused on the implementation of human rights norms (Falk, 1998:312-315, Falk, 2000:215-219).

He further explains this contradiction between the principle of sovereignty and the project of cosmopolitan democracy as follows,

> "It is this process of subverting unconditional sovereignty that points world order in the direction of cosmopolitan democracy. Such an outcome is far from inevitable, as contradictory market forces and the dynamics of statist backlash politics point in the direction of an oppressive type of globalization, but it is the normative implication of a human rights culture. Cosmopolitan democracy, as such, is not a utopian project superimposed by way of the political imagination, but is clearly rooted in the evolving norms and patterns of practice in the life-world of political behaviour" (Falk, 1998:316).

Writing on the rise of trans-national social forces, which has been formed by active individuals in relation to environment, human rights, feminism, indigenous peoples, and the economic agenda of the South, he says,

> "It is illuminating to contrast these trans-national social forces as creating an alternative globalisation, 'globalisation from below' to offset the cooptation of governments by the market-oriented forces associated with 'globalisation above'" (Falk, 2000:215).

From a more radical perspective, Santos talks about the necessity to distinguish between on the one side hegemonic neo-liberal globalization or globalization from above and, on the other, counter-hegemonic globalization or globalization from below. Neo-liberal globalization stands as the dominant legal and political paradigm on the world system. At the same time, it has developed conditions for the counter-hegemonic globalization, which have counter-hegemonic forces, organizations and movements located in different parts of the world. They help to project common interests across and beyond the diverse differences that separate them, in the name of distinct but connected emancipating social projects

and the struggle against social exclusion (Santos, 1995:262-268 and 2007:5-11).

> "This resistance is organized through local/global linkages among social organizations and movements representing those classes and social groups victimized by hegemonic globalization and united in concrete struggles against exclusion, subordinate inclusion, the destruction of livelihoods and ecological destruction, political oppression, cultural suppression, etc" (Santos, 2007:9).

In my analyses of the movement for universal jurisdiction in the case of Argentina and Chile, I will make use of the concept on cosmopolitan democracy by Held, which I consider as a social-democratic alternative to the Washington Consensus. This means extending social democracy beyond borders. I will also use Santos' idea of counter-hegemonic globalization as a radical, pluralist and bottom-up project of trans-nationalization of law from below. I will look at the differences and similarities, in my analysis of universal jurisdiction as a movement against impunity in Latin America.

IV. Transnationalization of the Legal Field, Counter Hegemonic Globalization and Universal Jurisdiction

The *intensification of trans-national interactions* in the last three decades and its impact on the *legal field* can be considered as a new development. I refer to this phenomenon as the globalization of the legal field or the trans-nationalization of the legal field. This process, according to Santos, has been promoted by practicing lawyers, state-bureaucrats and international institutions, trans-national companies (TNC) as well as by popular movements and NGOs, at the end of the 20th century. This is a very *complex*, *diverse* and *ambiguous phenomenon* which combines *uniformity with local differentiation*, top-down imposition with bottom-up creation, boundary-maintaining orientation with boundary-transcending orientations (Santos, 1995:250-274 and 2007; Bartolomei, 2000:144-145).

This process questions the state monopoly of the production of law "because the national legal field is increasingly interpenetrated by transnational legal forms, which unfold in complex relations with both the state legal order and the local legal order" (Santos, 1995:250). National legal fields are transformed by trans-national legal movements, while at the same time, "legal forms that can be national or local in origin reproduce themselves transnationally by mechanisms other than those typical of interstate relations" (Ibid).

Here, it is important to distinguish between hegemonic and counter-hegemonic forms of legal globalization. This involves a radical rethinking of law, reinventing it to fit the normative claims of subaltern social groups

and their movements and organizations struggling for alternatives to neo-liberal globalization (Santos, 2007:6-11).

In this respect, Santos refers to the concept of *Jus Humanitatis* or Global Commons as a form of *trans-national legality* which has pushed the idea of globalization further, because it takes the planet itself as the object of its regulation. He explains:

> "… jus humanitatis is potentially the privileged field of the struggles between capitalist forms of globalization (globalized localism and localized globalisms) and forms of globalization pointing towards the emergent paradigm (cosmopolitanism and common heritage of humankind)…" (Santos, 1995:365).

He explains later that,

> "…jus humanitatis expresses the aspiration to a form of governance of natural or cultural resources which, given their extreme importance for the sustainability and quality of life on earth, must be considered as globally owned and managed in the interest of humankind as a whole, both present and future" (Santos, 1995:365).

Jus Humanitatis collides with two important principles of the existing dominant paradigm: property, the base of the capitalist system and sovereignty, the base of the interstate system. In the doctrine of the common heritage of humankind adopted by International Law, Santos observes contours of *jus humanitatis*.[4] This doctrine presents many elements for the development of an emergent paradigm, which can "bring about the bankruptcy of the dominant paradigm, and hence of international law itself as it is conceived today" (Ibid).

The concept of the common heritage of humankind questions the field of traditional International Law and deals with international relations among nation-states, which are supposed to be the main beneficiaries of the regulation that is agreed upon. These relations are based on "reciprocity", which grants distinct advantages to another state or states, in return for "equivalent advantages". The common heritage of humankind differs from traditional International Law in two respects: there is no question of reciprocity and the interests to be safeguarded are the interests of humankind as a whole, rather than the interest of states. Its object and subject of regulation transcend states. Humankind comes out as the subject of International law, empowered to its own heritage and the autonomous prerogative to protect the spaces and resources included in the "global commons" (Santos, 1995:366).

Santos compares the concepts of common heritage of humankind and cosmopolitanism as two emancipating projects that reject the hegemonic forms of law globalization, and are possible examples of Jus Humanitatis. These two concepts are explained as forms of juridical globalization and

transcend the limits of capitalist (hegemonic) globalization and the hegemonic globalization of law. They are considered as examples of legal counter hegemonic globalization.

In this respect, Santos analyses the similarities and differences between both concepts:

> "…while cosmopolitanism signifies the struggle of oppressed social groups for a decent life under the new conditions of globalization of social practices promoted by the capitalist world system, the common heritage of humankind signifies the idea that such a struggle will be fully successful only in terms of a new pattern of development and sociability that will necessarily include a new social contract with the earth, nature and the future generations" (Santos, 1995:365).

For Santos, the new *jus humanitatis* breaks with the basic premises both of nation-state law and traditional international law, in many different ways. First, it creates a new spatiality and beyond the local, national and international, it creates global legal spatiality. Second, *jus humanitatis* is trans-temporal, as it is grounded on the idea of intergenerational responsibility. Third, it represents the re-emergence of the principle of community in a new model. Both, the language of the *market* and the language of the *state* are in the antipodes of *jus humanitatis* (Ibid:372-373).

There are some similarities and differences between the idea of *jus humanitatis* as outlined by Santos and the concept of a *cosmopolitan democratic law* by Held as two projects of utopian and limitations to a state-centred world, presenting elements for the development of an *emergent paradigm*. According to Held, a cosmopolitan democratic law is a "democratic public law". This law, commonly known as international law, is conceived as a domain of law that is different in kind from the law of states and the law made between states. Cosmopolitan law transcends those particular claims of nations and states and extends to all in the "Universal community". It must comprise of the mutual acknowledgement of, and respect for, the equal and legitimate rights of others to pursue their own projects and life-plans (Held, 1996:228).

He describes the concept of cosmopolitan model of democracy and cosmopolitan democratic law in this way:

> "In the first instance, the cosmopolitan model of democracy would seek the entrenchment of cosmopolitan democratic law in order to provide shape and limits to political decision-making…enshrined within the constitutions of parliament. Democratic law, thus, creates the constitutive basis of modes of interaction and dispute settlement..." (Ibid:272).

He explains how the developments of a cosmopolitan model seek the creation of an effective trans-national legislative and executive, at regional

and global levels, bound by and operating within the terms of the basic democratic law.

> "Thus, the framework for utopia is cosmopolitan democratic law – enhanced through its enactment in the agencies and organizations of economic life; through democratic deliberation and co-ordination of public investment priorities" (Ibid:266).

The idea of cosmopolitan democracy has been rejected by some authors, because it presumes the universal validity of Western liberal democracy, therefore, discounting the legitimacy of alternative or non-Western democratic cultures. However, while it draws considerable inspiration from modern theories of liberal democracy, it is also influenced by critical theory, theories of participatory democracy and civic republicanism. It is distinguished from liberal-internationalism by its radical agenda and skepticism towards state-centric and procedural notions of democracy. While accepting the important role of progressive trans-national social forces, it nevertheless differentiates itself from radical pluralist democracy (McGrew, 2002:220-222). Santos, on the other hand, talks on democratizing societies beyond the liberal democratic canon, a bottom-up and anti-capitalist trans-national legal project (Santos, 2005).

I am trying to look here at this concept of *Jus Humanitatis* and the idea of cosmopolitan democratic law, and relate it to the legal principle of universal jurisdiction, while connecting it with the idea of national sovereignty and the interstate system, in the case studies of Argentina and Chile.

In this respect, we observe how power and duty under International Law have gradually developed (e.g. the exercising of universal jurisdiction). Traditionally, jurisdiction over a crime depends on a link, usually territorial, between the prosecuting state and the crime itself (principle of territorial jurisdiction). International Law has progressively recognized that national courts can exercise other forms of extraterritorial jurisdiction. This comprises of jurisdiction over crimes committed outside the territory by the state's own nationals (active personality jurisdiction), together with crimes committed against the essential security interests of the state (protective principle jurisdiction). This form of jurisdiction is contested by some states, particularly over crimes committed against a state's own nationals (passive personality jurisdiction) (Robertson, 2002; Amnesty International: Universal Jurisdiction, May 1999:4; Human Rights Watch 2001: The Pinochet Case- A Wake-up Call to Tyrants and Victims Alike, 2001-07-11; Slepoy, 2001).

Piracy was the classic "universal" crime and was later joined by the slave trade. These crimes occurred across borders or on the open seas, so

International Law began to recognize that the courts of a state could exercise jurisdiction on behalf of the entire international community and over certain grave crimes under International Law that were matters of international concern. Since such crimes threatened the entire international framework of law, it was possible that any state, where persons were suspected of such crimes, could bring the offenders to justice.

However, Piracy occurs in a place, the high seas, which requires universal jurisdiction, as the alternative to there being no jurisdiction at all. The crime against humanity normally occurs in a country where there is jurisdiction, albeit one which (because of the power of the state-backed perpetrator) will not be exercised, and the issue arises years, perhaps decades, later, when the perpetrator is found (or brought) within the jurisdiction of a nation with the exceptional resolve to bring a prosecution. This power to bring alleged perpetrators to justice is described by the phrase "universal jurisdiction": states have the power, individually or collectively, to conduct a trial even if they have no link with the place where the crime was committed, or with its perpetrator or its victims (Robertson, 2002:253-259).

As a consequence, International Law and conventional legal obligations now permit, and, in some cases, require states to exercise jurisdiction over persons suspected of certain grave crimes under International Law, no matter where those crimes occurred. As we can see, these crimes could have taken place in the territory of another state, or posed no direct threat to the state's own particular security interest (principle of universal jurisdiction). (Amnesty International: Universal Jurisdiction, May 1999).

After World War II, the list of crimes giving rise to universal jurisdiction developed further. Many atrocities were committed within national borders, from genocide, torture, apartheid, crimes against humanity, enforced disappearances, war crimes to extrajudicial executions. Attempts at the time by a Spanish magistrate to gain custody of the former Chilean dictator Augusto Pinochet (1998), in London, drew significant international attention and while the principle of universal jurisdiction is part of Customary International Law, it appears in a variety of international crimes. This principle continues to be applied in connection with customary international proscriptions and with a variety of international legal instruments, domestic legislation, and alternative bases for jurisdiction, in order to initiate legal proceedings for crimes committed. This has been the case of Chad, Rwanda, Bosnia-Herzegovina, Kosovo, Argentina, Chile, Guatemala and Suriname (Roht-Arriaza, 2005; Derechos-human rights: The Criminal Procedures against Chilean and Argentinean Repressors in

Spain: 11 Nov 1998; Human Rights Watch: Universal Jurisdiction in Europe, June 2006)[5].

In some respects, the principle of universal jurisdiction has also Humankind as the subject of International law and so subsequently it collides with the principle of national sovereignty. The implementation of this principle, in practice, questions the traditional international relations among nation-states, in some way and points out in the direction of the Jus Humanitatis or Global Commons, as a new form of trans-national legality and the globalization of the legal field.

V. The Role of Non State Actors in the Implementation and Development of Human Rights Law[6]

Some authors have questioned the orthodoxy of the law-making monopoly of the nation-states, by looking at the experience and development of international human rights law and doctrine. They analyze this development in terms of a self-reproductive legal discourse on a global scale, which is further enhanced by an *intellectual community* that is closely bound to the social processes and social movements which support the basic principles in that discourse (Bianchi, 1997:179-204; Bartolomei, 1997:162-70 and Bartolomei, 2000:144-145).

It is important to note the role that non-state actors play. This is particularly in relation to human rights organizations, professional organizations, public opinion and the mass-media, the community of legal scholars, and the interaction of courts on different levels. The case of Pinochet, the military in Argentina and the struggle in general against impunity are good examples, in Latin America (see Bartolomei, 1997; Bermúdez and Gasparini, 1999).

It is no longer traditional international law mechanisms, that is the appropriate method of law-making and law enforcement in an emerging global society, but their interaction with trans-national social process, and the mediation of non-state actors (Teubner, 1997:xiii-xvii and Bartolomei, 2000:145).

Susan Burgerman explains how, in the field of human rights, there are intersecting levels of advocacy, which form today a trans-national human rights network. This consists of “diverse, often overlapping entities, which can include international and regional organizations, international nongovernmental organizations, domestic nongovernmental organizations, private agencies and foundations, church groups both domestic and international, and agents of state governments. Individuals and agencies, have in essence ‘shared values, a common discourse, and dense exchanges of information and services’ ” (Burgerman, 1998:907-908 and Bartolomei,

2000:145). As we can see, trans-national activism leads to international co-operation by enforcing human rights principles[7].

An analysis of the activities of trans-national advocates is necessary to explain the co-operation with the international human rights regime. In this respect, the research agenda on trans-national issue networks is designed to capture the increasingly complex webs of non-state actors who participate in the politics of others without resorting to the power base of either their own governments or that of the target state (Burgerman, 1998:908-909 and Bartolomei, 2000:145)[8]. In this respect, Castells writes on the emergence of a Network society where, a "new world" is taking shape at the end of the millennium, and originates in a historical coincidence of "three independent processes", in and around the late 1960s and mid-1970s (Castells, 1998:355-380).

1. The information technology revolution;
2. The economic crisis of both capitalism and statism, and their subsequent restructuring;
3. And the blossoming of cultural social movements, such as a) Libertarianism b) Human Rights c) Feminism and d) Environmentalism.

The "interaction between these processes" and the reactions brought into being a new predominant social structure integrated by the network society; a new economy, the informational/global economy; and a new culture.

In this respect, Santos refers to the counter- hegemonic globalization as a networking and connecting of diverse emancipating projects, characterized by divergent frameworks across the world system. This means the claims of subaltern social groups and their movements and organizations, struggle for alternatives to the hegemonic forms of globalization. These projects involve a radical unthinking of law, reinventing it to fit the normative claims of "subaltern cosmopolitanism". They question the concept of law as "autonomous national state law" and the state as having the "monopoly of legal creation and distribution". The confrontational political social struggles are part of this "counter-hegemonic globalization". Though local or national in scope, these political and social struggles are networked in different ways, with parallel struggles elsewhere. They battle against social exclusion and for human dignity and diversity (Santos, 1995 and 2007).

Landmark universal jurisdiction cases, like Pinochet and Cavallo in Spain and requests for their extradition from the United Kingdom and Mexico, as in the case of Scilingo, were initiated through the complaints

lodged by private parties – usually victims, relatives and nongovernmental organizations (NGOs). Victims and their relatives, and NGOs, were frequently the principal sources of evidence or of witnesses that could establish responsibility for the alleged crime (see Human Rights Watch 2006: Universal Jurisdiction in Europe, 7- 10; Bartolomei, 2000; Verbitsky, 1995; Slepoy, 2001).

Discussing the cases of Pinochet and the Argentine military officers in Spain, Naomi Roht-Arriaza writes in her conclusions: "In the end, it was ordinary people, acting mostly on their own time and their own dime, who made the *Pinochet* cases a landmark in international law and a symbol for both dictators and *génocidaires* and for their survivors. It will be ordinary people, organized into various and ever-changing groups, who will hold states to their promises to respect and ensure basic human rights. And it is ordinary people who, again and again and again, until it's not necessary any more, will demand justice, of the national and international and transnational kind" (Roht-Arriaza, 2005:224).

I will now turn to the struggle of trans-national, national and local human rights movements in the implementation of the principle of universal jurisdiction and I will present both the Chilean, and Argentinean cases as examples for analysis.

VI. The Globalization of Law in Latin America

The emerging system of international justice has been strengthened at the level of the UN, in recent years, particularly with the adoption of the 'Rome Statute of the International Criminal Court', in 1998, and the founding of the "International Criminal Court" (ICC) in July 2002, against war crimes, crimes against humanity and genocide. In addition, the Security Council created an ad hoc 'International Criminal Tribunal for Rwanda' (ICTR) in 1993, which allowed for the indictment of the then Prime Minister of Rwanda, Jean Kambanda and an ad hoc 'International Criminal Tribunal for Former Yugoslavia' (ICTFY), in 1994, with the indictment of Slobodan Milosevic (Held, 2004:122-125; Robertson, 2002; Falk, 2002).

Over the past decade, several European states have also began to honour their obligations and prosecute those people found accused of crimes against humanity, within their own boundaries and prosecute other serious violations of human rights, on the basis of universal jurisdiction. Two very good examples of this have been the arrest, in London, of General Augusto Pinochet, former dictator in Chile (1998), and the claims for extradition of an Argentinean torturer, Ricardo Miguel Cavallo, in Mexico (2000). Using domestic laws of universal jurisdiction in the

domestic courts, Switzerland, Belgium, Germany, Spain, France, among others, have prosecuted individuals, far from the countries of origin, where the actual crimes were committed (Roht-Arriaza, 2005; Robertson, 2002; Human Rights Watch 2004: Beyond the Hague, by Dicker and Keppler).

Prosecuting people, who have committed human right crimes on the basis of universal jurisdiction, regardless of a territorial or nationality nexus, requires a solid commitment of political will. Unfortunately, this process is usually subject to corruptive political interference and the risk that cases implicating foreign government officials could be inconvenient or embarrassing to the country where the court is located. Some states, for instance, lack the appropriate domestic legislation to allow for them to pursue cases, while others are reluctant to invoke universal jurisdiction, even for the most egregious human rights crimes. It is clear that further steps are needed to reinforce this trend toward accountability and opposition to impunity worldwide (Slepoy, 2001; Falk, 2002; Human Rights Watch 2006: Universal Jurisdiction in Europe, 1-4). Here, I will briefly present the Chilean and Argentinean cases and the movement for universal jurisdiction.

Fourteen Principles on Universal Jurisdiction

Amnesty International has observed 14 distinct principles in the effective exercise of Universal Jurisdiction, which was presented in a document by in May 1999 and titled 'Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction'. Below are some of the major points in the document[9].

1. Crimes of universal jurisdiction: *States should ensure that their national courts can exercise universal and other forms of extraterritorial jurisdiction over grave human rights violations, abuses and violations of international humanitarian law* (Amnesty International- Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction, May 1999:6-7). States should ensure that their national courts exercise universal jurisdiction on behalf of the international community over "grave crimes" under international law, when a person suspected of such crimes is found in their territories or jurisdiction. Among the human rights violations and abuses over which national courts may exercise universal jurisdiction, under International Law, are "genocide", "crimes against humanity", "war crimes" (whether committed in international or in non-international armed conflict), other "deliberate and arbitrary killings" and "hostage-taking". These cover crimes committed by state or by non-state actors, such as

members of armed political groups, as well as "extrajudicial executions", "disappearances" and "torture"[10].

2. No immunity for persons in official capacity: *National legislatures should ensure that their national courts can exercise jurisdiction over anyone suspected or accused of grave crimes under international law, whatever the official capacity of the suspect or accused at the time of the alleged crime or any time thereafter* (Ibid:7-8).
3. No immunity for past crimes: *National legislatures should ensure that their courts can exercise jurisdiction over grave crimes under international law, no matter when they took place* (Ibid:8).
4. No statutes of limitation: *National legislatures should ensure that there is no time limit on the liability to prosecution of a person responsible for grave crimes under international law* (Ibid:8) .
5. Superior orders, duress and necessity should not be permissible defences: *National legislatures should ensure that persons on trial in national courts, for the commission of grave crimes under international law, are only allowed to assert defences that are consistent with international law. Superior orders, duress and necessity should not be permissible defences* (Ibid:9).
6. National laws and decisions designed to shield persons from prosecution cannot bind courts in other countries. *National legislatures should ensure that national courts are allowed to exercise jurisdiction over grave crimes under international law in cases where the suspects or accused were shielded from justice in any other national jurisdiction* (Ibid:11-12).
7. No political interference. *Decisions to start or stop an investigation or prosecution of grave crimes under international law should be made only by the prosecutor, subject to appropriate judicial scrutiny, which does not impair the prosecutor's independence, based solely on legal considerations, without any outside interference* (Ibid:12).
8. Grave crimes under international law must be investigated and prosecuted without waiting for complaints of victims or others with a sufficient interest. *National legislatures should ensure that national law requires national authorities, exercising universal jurisdiction, to investigate grave crimes under international law* (Ibid:12).
9. Internationally recognized guarantees for fair trails. *National legislatures should guarantee that criminal procedure codes assure persons suspected or accused of grave crimes under*

international law, all rights necessary to guarantee that their trails will be fair and prompt, in strict accordance with International Law and Standards for fair trials(Ibid:12-13).

10. Public trials in the presence of international monitors. *To guarantee that justice is not only done but also seen to be done, intergovernmental and non-governmental organizations should be allowed, by the competent national authorities, to attend and monitor the trials of individuals charged by grave crimes under International Law observed* (Ibid:13-14).
11. The interests of victims, witnesses and their families must be taken into account. *National courts must protect victims, witnesses and their families. Investigation of crimes must acquire the special interests of vulnerable victims and witnesses, including women and children* (Ibid:14).
12. No death penalty or other cruel, inhuman or degrading punishment. *National legislatures should guarantee that grave crimes under International Law are not penalised by the death penalty or any other cruel, inhuman or degrading punishment* (Ibid:14-15).
13. International co-operation in investigation and prosecution. *States must amply collaborate with investigations and prosecutions by the competent authorities of other states, when they exercise universal jurisdiction over grave crimes under International Law* (Ibid:15).
14. Effective training of judges, prosecutors, investigators and defence lawyers. *National legislatures should guarantee that judges, prosecutors and investigators undergo effective training in Human Rights Law, International Humanitarian Law and International Criminal Law* (Ibid:15-16).

Now, I want to turn to the two examples of Universal Jurisdiction examined in this paper, and that is, the case of General Pinochet in Chile and the military junta in Argentina.

The Case of Pinochet (1973-1990)

On April 1996, the *'Unión Progresista de Fiscales'* (Union of Progressive Prosecutors), a group of Spanish prosecutors, brought a complaint against General Augusto Pinochet, and others, in a penal chamber of the Spanish *'Audiencia Nacional'* in Madrid, for crimes against humanity, terrorism and genocide, between 1973 and 1990. This complaint laid the groundwork for factual and legal claims which would be used in subsequent actions against him.[11] The complaint was based on actions that

occurred between the coup, which brought him and his junta to power, on 11th September 1973, through to the return of democratic rule, in March 1990. The complaint alleged that the regime of Pinochet had kidnapped, detained, tortured, killed and had people "disappear", individuals who were supportive of the deposed regime. It also protected its members through the 1978 self-amnesty legislation, including the institution of the 'Senator-For Life' status for Pinochet (Roht-Arriaza, 2005:25-31; Robertson, 2002: 393-426; Garretón, 2003:99-177).[12].

The complaint alleged that Spain had jurisdiction, through a combination of domestic and International Law, to address crimes of genocide, torture and terrorism. Under the Spanish Law on Judicial Power, Spanish courts are competent to hear cases addressing these crimes though they occur outside Spanish territory and whether they committed by a Spaniard or a foreigner (Ley del Poder Judicial, Art 23.4). Thus, under domestic law, it was argued that Spain could address these crimes even if no Spanish citizen had been killed in Chile, although (as the complaint and subsequent judicial orders emphasized) there were in fact *Spanish victims* (Roht-Arriaza, 2005 and Robertson, 2002).

Domestic legislation was not the only ground linked to the exercise of jurisdiction, by Spain. The complaint also turned to International Law as a basis for pursing crimes, through universal jurisdiction, as well as, other grounds for jurisdiction. Crimes committed under Pinochet were also said to constitute crimes of genocide, under the 1948 UN Genocide Convention, which included torture. It was recognized that under the UN Convention against Torture (1984) defenses such as obedience to superior orders or official status were rejected. Under the UN International Covenant on Civil and Political Rights (1966), there was also no immunity for persons acting in an official capacity (see further information in Lekha Sriram, 2001; Derechos-human rights: The Criminal Procedures against Chilean and Argentinean Repressors in Spain: Nov 11, 1998; Roht-Arriaz, 2005).

On 17th October 1998, Pinochet was arrested in London, where he had gone for medical treatment. He was apprehended by the British authorities on the basis of a provisional Spanish arrest warrant issued the day before, which had been the request of a Spanish court. This warrant alleged that he had been responsible for the murder of a number of Spanish citizens, in Chile, when he was President of that country. On 22nd October 1998, he was served with a second Spanish provisional arrest warrant, alleging that he was also responsible for systematic acts in Chile and other countries, of murder, torture, 'disappearances', illegal detentions and forcible transfers. Importantly, what was at issue, here, was the simple basic question: does a former head of state enjoy diplomatic immunity from

prosecution or can he/she be called to the bar to answer for crimes committed by his regime? To put it more direct: is there impunity for former Heads of *State?* (Torsein and Wiseberg: Impunity for Pinochet, January 1999:1; Brotóns, 1999; Bermúdez and Gasparini, 1999; Urbano, 2000:515-552).

The Spanish case is only one of a number of cases, which have been established against former General Pinochet, in the national courts. The Swiss government, for instance, has sent an extradition request to the United Kingdom, in the case of a person with Chilean and Swiss citizenship, who was kidnapped, by members of the Directorate of National Intelligence (DINA), in Buenos Aires, in Argentina and transferred to Chile and subsequently "disappeared". The French government has also filed an extradition request in the cases of French nationals who "disappeared" or were killed, in Chile. Other criminal proceedings have also begun, or are planned, in national courts in Belgium, Italy, Luxembourg, Norway, Sweden and the USA (Roht-Arriaza, 2005; Amnesty UK: the Case of General Pinochet-12th April 1999; Universal Jurisdiction in Europe: Criminal Prosecutions in Europe since 1990 for war crimes, crimes against humanity, torture and genocide, 1999).

On March 2nd, 2000, Pinochet was repatriated back to Chile from England, and his extradition to Spain interrupted on medical grounds. The medical report delivered by the British Home Office stated that Pinochet was mentally unfit to stand trial and that he was suffering from diabetes and depression, that he wears a pacemaker, has difficulty walking, has suffered two or three minor strokes and now suffers from memory loss. Spain, Switzerland, Belgium and France all issued statements indicating they would not appeal against the decision (Garretón, 2003:164-166; Walker: Pinochet Found Unfit to Stand Trial, March 2000:1).

This meant that while Pinochet will not be prosecuted by foreign jurisdiction for crimes committed in Chile when he was a dictator, his arrest, detention and subsequent legal fight has set a precedent in International Law and Human Rights. The case of Pinochet questions the basic tenets of "state sovereignty" by defending the customary notion of "universal jurisdiction", even against former Heads of State (Ibid, Bermúdez and Gasparini, 1999:13-14; Amnesty International: Pinochet case: step by step toward justice, 6 June 2000).

The simple fact that Pinochet was arrested outside his own country was an important step forward for International Human Rights Law, and one that will never be erased. In addition, the fact that his claim to immunity was dropped twice by the House of Lords meant that Pinochet was not regarded to be immune from prosecution, even though he was the

Head of State at the time the crimes were committed[13]. Although the British government ultimately ensured that Pinochet returned to Chile, instead of sending him to Spain, his arrest helped spur efforts, in Chile, to prosecute him for the atrocities that were committed, while he was in power. As of October 2006, courts had convicted 109 other agents of his regime for crimes, including disappearances, extra-judicial executions and torture. Thirty-five former generals of the Army, Air Force and police have been convicted or are facing trial (Human Rights Watch 2006: Chile: Pinochet's Legacy May End up Aiding Victims, 10-12-06; Garretón, 2003).

Pinochet died in Santiago de Chile, on December 10th, 2006, but his arrest in London had jump-started the use of national courts in trying foreign leaders for abuses committed in their own countries. "The arrest in London was the beginning of the end for Pinochet and the start of an effort to bring the world's most powerful abusers to justice" said José M. Vivanco, Americas Director at Human Rights Watch. "Pinochet spent his last years fending off an ever-tightening web of prosecutions in Chile and died a profoundly discredited figure in the land he once ruled" (Human Rights Watch 2006: Chile: Pinochet's Legacy May End up Aiding Victims, 10-12-06).

The Military Junta in Argentina (1976-1983)

In March 1996, one month before the complaint brought against Pinochet, relatives of Spanish citizens killed during the Argentine Dirty War, in Argentina, brought charges in the Spanish courts against some forty high-ranking officers, which alleged that acts of genocide, terrorism, and more generally, the death and disappearance of thousands of people had taken place. Similarly, over a hundred Italian families of victims of the Dirty War have brought claims before the Italian courts. Additional cases have also been presented in Germany and France (Roht-Arriaza, 2005:5-25; Bartolomei, 1994)[14] .

As with the charges against Pinochet later on, the complaint alleged that leaders of the junta, through violence, had subverted the constitutional order in a coup, in 1976, and did not reinstate democratic rule until 1983. They did this by carrying out a systematic campaign of repression through kidnapping, disappearances, torture, and murder, as well as, the illegal adoption of children. The complaint alleged that some thirty thousand persons remain unaccounted for and that among those who disappeared were at least 35 Spanish citizens[15] .

The complaints and subsequent judicial holdings used a mixture of domestic and international customary and conventional law to assert

jurisdiction, similar to the Pinochet case presented before in this article. Spain claimed competence to judge the crimes, based upon universal jurisdiction, but also referred to the Spanish citizenship of those who had disappeared (passive personality jurisdiction). The complaint indicated that the alleged acts could constitute crimes of genocide and terrorism under domestic law[16].

As has been discussed in the Pinochet case, the Spanish "Law on Judicial Power" (Art. 23.4), recognizes universal jurisdiction over crimes of genocide and terrorism. With respect to certain crimes, this law asserted Spanish competence, in pursuit of crimes committed by Spanish nationals and foreigners abroad. The complaint also alleged that genocide, under the UN Genocide Convention (1948), is a crime subject to universal prosecution and as such can be pursued by Spain, wherever the crime took place, or the nationality of the perpetrators or victims (Equipo Nizkor: *'Denuncia de la Asociación Progresista de Fiscales de España con la que se inicia el juicio por los desaparecidos españoles en Argentina de fecha 28 Marzo 1996,* citing the *'Ley Orgánica del Poder Judicial', Arts. 23.4 (a) and (b*)).

The complaint further alleged that pursuing the perpetrators was an exercise of Spanish "sovereignty", as some of those who had disappeared were Spanish citizens; the procedural limitations and pardons granted in Argentina (Amnesty laws- Full Stop Law 1986 and Due Obedience 1987) can have no effect on Spanish competence, since in the exercise of sovereign competence no law of a foreign land can act as a limitation; and the Spanish Constitution prohibits general amnesties (Art 23.4). The defense of due obedience to orders is generally recognized in Spanish law, but not where orders are clearly illegal. Finally, the UN Convention against Torture (1984:Art. 3) states that superior orders are not a justification for torture (For further information see Lekha Sriram, 2001 and Roht-Arriaza, 2005)[17] .

On the 24th August, in 2000, Mexican authorities arrested Ricardo Miguel Cavallo, who was accused of having been a torturer in the navy Mechanics School in Buenos Aires, from 1976 to 1983, in the Argentine military government. He was allegedly implicated in hundreds of cases of kidnappings, disappearances and tortures. An order for his arrest, and then a formal extradition request, later came from the Spanish judge, Baltasar Garzón, who had previously sought the extradition of Augusto Pinochet, in September 2000. The Mexican government subsequently approved the extradition of Cavallo to Spain (Iriart, 2001:4-17; Roht-Arriaza, 2005:140-149)[18].

The Cavallo case could have the potential of extending the "Pinochet precedent" to a country, like Mexico that was once considered a haven of impunity. In addition, by targeting a lower-ranking official, the arrest spoke to police officers and soldiers around the world, telling them that if they committed torture today, they could be apprehended tomorrow, and not only in Europe (Roht-Arriaza, 2005; Human Rights Watch: World Report 2001:4).

In April 2005, Spain's National Court sentenced former Argentinean naval office Adolfo Scilingo to 640 years imprisonment, for crimes against humanity. The ruling marked the first time a national court had convicted an individual for war crimes committed in another country. Human rights groups hailed the verdict as a vindication for the principle of universal jurisdiction (Human Rights Watch 2006: Universal Jurisdiction in Europe, 86-87; Roht-Arriaza, 2005:139; Verbitsky, 1995).

In August 2003, the Argentine Congress struck down the so-called impunity laws (Full Stop Law 1986 and Due Obedience 1987), which had blocked the prosecution of crimes committed under the last military dictatorship, and such paved the way to the removal of impunity. The Supreme Court annulled these laws in June 2005, stating that they were unconstitutional. These laws, which had blocked the prosecution of crimes committed under the country's last military government, were ratified by President Alfonsín. After years of impunity, the prosecution of those responsible, for these crimes is at last taking a giant step forward (Roht-Arriaza, 2005:113-117; Human Rights Watch 2007: Argentina: Events of 2006)

Since the Supreme Court annulled the amnesty laws, the first trial, was held in La Plata, on June 20th, 2006, against a former police commissioner on charges of illegal arrest, torture and forced disappearances during Argentina's "dirty war". This trial marked the end of 20 years of impunity under amnesty laws in Argentina (Human Rights Watch 2007: Argentina: Events of 2006).

VII. CONCLUDING REMARKS

In concluding certain questions need to be addressed in relation to the concept of universal jurisdiction and the movement against impunity in Latina America. This also includes Santos' theory in legal pluralism and *jus humanitatis,* as well as, Held's view of cosmopolitan democratic law.

The recognition of a legal plurality of legal orders indicates how the nation-state is being challenged as a privileged and unified unit of political initiative, in recent times. At the same time, it has been decentralized by the emergence of both a powerful infra-state political process and a powerful

supra-state process. This has meant that the legal field, as a constellation of different legalities, operates at the local, the national and in trans-national time-space (Santos, 1995:110-122 and 2007:9-11).

According to Santos, we can observe how, at present, the trans-nationalization of the legal field is contributing to the "diasporization of national legal fields", which also occurs simultaneously with the "ecumenization of the international legal field". This gives birth to the development of multiple forms of legal trans-nationalization. The following process involves profound changes, both at the prerogative of state sovereignty and the prerogative of state monopoly, over the production and the distribution of law. This process of trans-nationalization is diverse, complex and contradictory. At the same time, globalization and the erosion of national sovereignty, are taking place with a greater intensity in the legal fields. _Santos concludes by saying " the international legal Diaspora still allows for transnational coalitions informed by cosmopolitanism and the common heritage of humankind, particularly those adopting a paradigmatic reading of current times, to transform it into an emancipatory legal ecumene" (Santos, 1995:377).

If we look at the case of Pinochet, some authors have pointed out to the relation between globalization and legal cosmopolitanism in the following way:

> "The Chilean debate on Pinochet's prolonged stay in London demonstrated how the relationship between democratization and national sovereignty has changed in Latin American political cultures…. The 'Pinochet precedent' is also likely to encourage human rights activists and other concerned actors to press criminal charges against exiled or traveling human rights violators, both in Latin America or elsewhere" (Teivainen, 2000:75-75).

The Pinochet litigation, on the basis of universal jurisdiction in England and Spain, prompted an opening of the domestic courts in Chile to victims, who had been denied access to remedies, and broke the spell of his impunity in Chile. There was a profoundly important 'spill-over' effect: national courts, for instance, began to take on litigation of previously barred cases. A synergy developed between efforts to bring justice at the international level and access to national courts, where the crimes had occurred. In August 2003, the trials of military officers responsible for gross violations of human rights, during Argentina's dirty war, were reopened, in Buenos Aires. A Spanish judge prompted this development when he issued warrants for the extradition of forty-five former military officers and a civilian accused of torture and "disappearances", in Argentina, so that they could stand trial in Spain. Argentina's Supreme Court, in 2005, crossed out immunity laws, for former officials, and dozens

now face investigation and trial for crimes during Argentina's 1976-1983 dictatorship. The 'spill-over' effects have been particularly marked in countries that have undergone a thorough transition from authoritarian rule to democracy, such as in the case of Chile and Argentina. Courts in Austria, Germany, Denmark and Switzerland, for example, have now applied laws, based on universal jurisdiction, to individuals accused of crimes arising out of the former Yugoslavia and Rwanda in Africa (Roht-Arriaza, 2005; CELS: Derechos Humanos en Argentina: Informe 2004).

The seeds of universal jurisdiction in international criminal cases gave rise to the fact that some crimes were so heinous that it was a duty of every nation to prosecute these crimes, if the opportunity arose. The very name "crimes against humanity" is clear to all nations, and it means a corresponding obligation to take action. Although the concept is old (read the Nuremberg trials of World War II), it came to the fore after the widespread collapse of dictatorships, during the 1980s, especially in Latin America and the movement against impunity. The cry was for "an end to impunity", and the hope was that universal jurisdiction would help to bring torturers and murderers to justice. However, national experiences until now have shown that the fair and effective exercise of universal jurisdiction is achievable where there is the right combination of appropriate laws, adequate resources, institutional commitments, and political will (Human Rights Watch 2006: Universal Jurisdiction in Europe, 1-36; Robertson, 2002; Falk, 2002).

Democracy, according to Held, must be rethought in order to address the expanding framework of political activity at the local, national and trans-national level. Cosmopolitan democracy has, as its objective, the infusion of democratic standards wherever power resides. This is a matter of deepening democracy within nation-states. It also involves the extension of democracy to the areas of global and trans-national decision-making. Democratic ideas are as pertinent to international and other decision-making agencies, as they are to national decision-making. The improved participation of non-governmental organizations at the international level is one indication of the pressures and possibilities for democracy in a global decision-making (Held, 1998 and 2004).

In this respect, the proliferation of networks of NGOs, linking the local with international levels today, is one of the most striking developments of human rights regime, since 1948. This involves all three functions of standard setting, monitoring and implementation. What we have here is a developed trans-national civil society, with strong links both at the trans-national level, while mediating between global and local actors. Its component elements are the NGOs, the network of human rights

lawyers, citizen's assemblies and a national and international media, all operating independently of governments. The movement in favor of a universal jurisdiction in Latin America is a good example how effective this network can be (Bartolomei, 2000 and Sikkink, 2005).

Borders between states have become ever more penetrable. Trans-national, national and local networks of human rights activists work today across borders, within political systems, irrespective of their nationality. The establishment of a global regime, seeking to regulate behavior on this issue, has helped to internationalize the category of human rights but many governments do still refer to their sovereign authority in order to avoid and stop criticism, although no longer easily accepted as legitimate, neither by a global civil society nor by an increasing number of governments (Burgerman, 1998 and Bartolomei, 2000).

Human Rights violations in Latin America, in the 1960s through to the 1980s, created activists who went outside a closed domestic political system to find allies and pressure points abroad. In Argentina organizations like CELS, SERPAJ, the Mothers and Grandmothers of the Plaza de Mayo sprung up during and after the dictatorship years to document and denounce human rights violations. In Chile, the Comité Pro-Paz and its successor, the Vicaría de la Solidaridad, played key roles in amassing the information on human rights violations that would undergird later investigations. International institutions like the UN and the Inter-American Human Rights Commission took up complaints of violations, leading to political, economic, and moral pressure from powerful states, particularly in Europe and North America as well as creating more domestic political space, which encouraged more human rights, related organizing at home. A series of such inside-outside-inside "boomerangs", with increasing concessions by governments and increasing pressure from activists inside and out, creates a spiral of increasing trans-nationalization and institutionalization of human rights norms (Bartolomei, 1994 and 2000; Roht-Arriaza, 2005:208-224).

In the case studies (Argentina and Chile), the role played by groups of nongovernmental organizations both in the "target" country and outside, lawyers, family members of the disappeared, journalists and academics on different continents that began to take shape around pushing for trials, had many of the attributes of a trans-national advocacy network. Many of the activists in this process were exiles or former expatriates who had come home. They had formed solidarity groups, helping to pass on information about the old country to the new country, as well as asking for international pressure on the dictators, bringing speakers, mobilizing politicians, and

raising funds for opposition groups and humanitarian aid (Roht-Arriaza, 2005:212-218).

The trans-national concept of criminal jurisdiction, as in the case of universal jurisdiction, for all its failings, is more and more compensating for some of the weaknesses of domestic criminal jurisdiction. It is going to act in some cases where local social and political forces prevent domestic prosecutions. In Chile, universal jurisdiction has served one of its principal purposes, and that is to make it clear to nations that they alone should take responsibility for crimes on their soil. In Argentina, the prosecution of those responsible for crimes committed under the last military dictatorship, is today taking a giant step forward. Is Universal jurisdiction, therefore, a globalization of law project beyond the liberal democratic canon, a counter-hegemonic globalization, or it is a cosmopolitan law project reforming the liberal democratic canon, extending social democracy beyond borders, to contest or resist the terms of contemporary economic globalization, or both?

In the final analysis, we can refer to a question that has been posed by Santos and that is: can law be emancipating? He has, for instance, proposed, as a method of analysis, a "hermeneutics of emergence", which interprets the different initiatives, movements or organizations that resist neo-liberal hegemonic globalization and social exclusion. This means looking at the potential that lies implicit or hidden in the actual counter-hegemonic actions (Santos, 2001 and 2007). In this respect, the struggle of trans-national, national and local human rights movements in Latin America is a good example.

As this author writes: "The question of the role of law in bringing about social emancipation is today a counter-hegemonic question ….. and beyond the many differences that separate them and to converge in counter-hegemonic struggles brought about in the name of separate but coalesced emancipatory social projects" (Santos, 2001:17-18).

Held's theory on cosmopolitan democracy and cosmopolitan law helps us to understand a top-down perspective, the institutionalization process of new social movements for universal jurisdiction and the creation of new democratic spaces at the global, regional and state level. Santos explains, how the struggle from below, from the oppressed and the excluded social groups, develops new emancipating projects and a pluralistic, communitarian approach of law with new alternatives to neo-liberal globalization. This for him involves a radical unthinking of law to fit the normative claims of "subaltern cosmopolitanism".

Counter-hegemonic globalization, therefore, as a diverse plural project, questions the monolithic theoretical approach and herein is its

distinct weakness and distinct strength. The cases of Chile and Argentine are crucial for our understanding of the human rights movement for universal jurisdiction and the struggle against impunity.

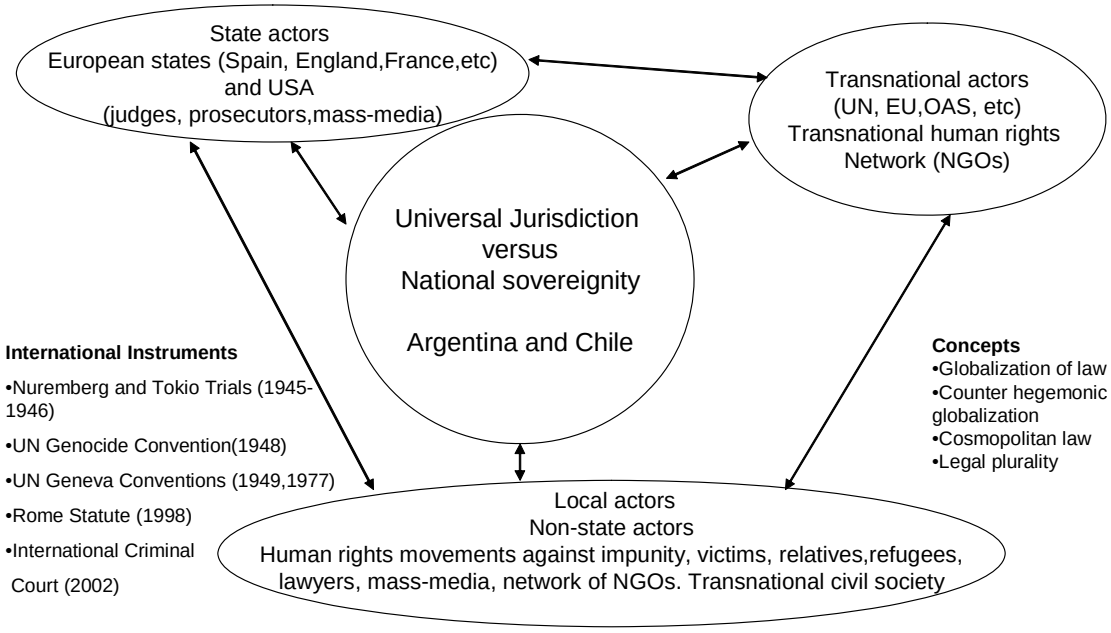

Figure 1. Universal jurisdiction and the transnationalization of the legal field

Notes

[1] According to Held, in 1909, there were 37 International Government Organizations (IGOs) and 176 International Non-Government Organizations (INGOs). In 1989, these had increased to approximately 300 IGOs and 4,624 INGOs. In the middle of nineteenth century, there were two or three conferences or congresses per year sponsored by IGOs, but today the number has risen to nearly 4,000, annually. Against this background, the range and diversity of the participants at the Earth Summit in Rio de Janeiro, in 1992, or the Conference on Women, in Beijing, in 1995, may not seem quite as remarkable as the occasions initially suggested (Held, 1998:20).

[2] See also here Human Rights Watch: The Pinochet Case- A Wake-up Call to Tyrants and Victims Alike, 2001-07-11; Slepoy, 2001:18-27.

[3] The concept of universal jurisdiction and its relation with the Chilean and Argentinean cases are further developed in chapter 6 of this article.

[4] The concept of "common heritage of humankind" has been applied to the ocean floor, and other "common areas" such as the "moon", "outer space" and "Antarctica". The idea behind this concept is that these natural entities belong to humankind in its entirety and that all people are, therefore, entitled to have a say and a share in the management and

allocation of their resources. Five elements are usually associated with the concept of the common heritage of humankind: 1. non-appropriation; 2. management by all peoples; 3. international sharing of the benefits obtained from the exploitation of natural resources; 4. peaceful use, including freedom of scientific research for the benefit of all peoples; 5. conservation for future generations (Santos, 1995:366).

[5] To determine which crimes give rise to universal jurisdiction under International Law, we must look at international treaties --for example the UN Convention against Torture (1984) or the UN Geneva Conventions for war crimes ((1949)— and the general custom of states ("Customary International Law") under which genocide and crimes against humanity are considered crimes of universal jurisdiction. In each case, however, the key to determining whether a prosecution can actually be brought to court, based on universal jurisdiction, will be the law of that particular state where the case is dealt (the "prosecuting state"). (Human Rights Watch: The Pinochet Case, 2001-07-11: 3 and Human Rights Watch: Universal Jurisdiction in Europe, June 2006).

[6] Part of this title has been presented in my article, "Human Rights in a Global World- The New Role Played by Transnational, National and Local Actors", Institute of Latin American Studies, Stockholm 2000.

[7] Envisioned as an interconnected single entity, the issue network operates at both the international and domestic levels. Internationally based actors exert external pressure, for instance, via media campaigns, UN resolutions, or by mobilizing diplomatic pressure. They also become internalized in domestic politics, on a short-term basis as in the case of election observers, human rights monitors, or police and military advisors. They also become long-term participants in the local system, as members of forensic teams, legal aid staff, or consultants to local NGOs (Burgerman, 1998:909; Bartolomei, 2000:145).

[8] For example, human rights network activists of European origin may be found lobbying the US Congress and advocating aid to an African nation, while the London-based Amnesty International letter writing campaign will mobilize individuals from several nationalities to address protests to the Syrian or Chinese governments, and so on (Burgerman, 1998: 908).

[9] For the whole document, see http://web.amnesty.org/library/index/engIOR530011999

[10] In defining "grave crimes" under International Law as extraterritorial crimes under their National Criminal Law, national legislatures should ensure that the crimes are defined in ways consistent with International Law and Standards. This includes, for instance, International Instruments such as the "Hague Convention (IV) Respecting the Laws and Customs of War on Land" and the annexed "Hague Regulations Respecting the Laws and Customs of War on Land" (1907); the "Nuremberg and Tokyo Trials" (1945 and 1946); "Allied Control Council Law No. 10" (1945); the "UN Convention on the Prevention and Punishment of the Crime of Genocide" (1948), the four "Geneva Conventions for the protection of Victims of War" (1949) and the two "Additional Protocols" (1977); the "UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment" (1984); the "UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions" (1989); the "UN Declaration on the Protection of All Persons from Enforced Disappearance" (1992), the "Draft Code of Crimes against the Peace and Security of Mankind" (1996) and the "Rome Statute of the International Criminal Court" (1998). In defining these crimes, national legislatures should also take into account the Statutes and Jurisprudence of the former Yugoslavia (1993) and Rwanda Tribunals (1994) (See Amnesty International- Universal Jurisdiction: 14 Principles on the Effective Exercise of Universal Jurisdiction, May 1999:7).

[11] See Equipo Nizkor: 'Juicio a Pinochet en España', 1996. Later, complaints were brought by a group of relatives of Chileans, who had disappeared, and were admitted as an elaboration of the initial compliant. The later private criminal action was filed by the President Salvador Allende Foundation and was joined by "Izquierda Unida" (Left Union Party) and thousands of Chilean citizens (July 1996). See Equipo Nizkor: "Auto por el que se admite la ampliación de querella presentada por la Izquierda Unida contra Augusto Pinochet y las querellas contra éste y otros presentados por la Agrupación de Detenidos y Desaparecidos de Chile" (October 16th, 1998).

[12] The domestic amnesty for acts between September 11th, 1973 and March 10th, 1978 was established by Decreto-Ley No. 2191 of 1978 while Art. 58 of the Chilean Constitution established the "Senator-for-Life" status (see Derechos-human rights: The Criminal Procedures against Chilean and Argentinean Repressors in Spain- A Short Summary: Nov 11, 1998).

[13] The first rejection was based on the fact that former Heads of State enjoy immunity for acts committed as part of their functions as Heads of State. International crimes, such as torture, were not considered the 'functions' of a Head of State. A decision made in the British House of Lords, which is the highest court in the United Kingdom, on November 25th, 1998. The second rejection of immunity was based on the fact that once Britain and Chile had ratified the 'UN Convention against Torture' (1984), Pinochet could no longer claim immunity. These countries therefore had a responsibility to prosecute him for his crimes against humanity (Walker: Pinochet Found Unfit to Stand Trial, March 2000: 1).

[14] See also here Bermúdez and Gasparini 1999; Bartolomei 2000; Urbano 2000: 483-514; Servicio Paz y Justicia Argentina (SERPAJ): "Juicio por desaparecidos italianos en Argentina" and "Comunicado de los Organismos de Derechos Humanos Argentinos Desaparecidos: Juicio en Italia Sigue" - 12 February 1997.

[15] See Equipo Nizkor: "Denuncia de la Asociación Progresista de fiscales de España con la que se inicia el juicio por los desaparecidos españoles en Argentina de fecha 28 Marzo 1996": 28 March 1996.

[16] See Ibid: "Denuncia de la Asociación Progresista de fiscales de España con la que se inicia el juicio por los desaparecidos españoles en Argentina de fecha 28 Marzo 1996", citing Arts. 137 bis of the Penal Code (genocide), and 174 bis of the Penal Code (terrorism).

[17] See also here Equipo Nizkor: (Argentinean case) "Juicio por los desaparecidos españoles en Argentina: Providencia del Magistrado Juez D. Baltasar Garzón" (23 January 1997); "Procedimiento: diligencias previas 108/96L.Terrorismo y genocidio", (26 February 1997); "Orden de prisión provisional incondicional de Leopoldo Fortunato Galtierei por delitos de asesinato, desaparición forzada y genocidio", (25 March 1997); "Auto de Procesamiento y detención del Almte Luis Eduardo Massera y nueve más", (10 October 1997); "Desaparecidos españoles en Argentina", (16 October 1998); "Auto por el que se imputa a la cadena del mando del Tercer Cuerpo del ejército argentino (Tucumán)".

[18] See also Equipo Nizkor: *"Escrito de la Acusación Popular pidiendo la prisión provisional incondicional del Marino Angel Cavallo con fines de extradición"; "Auto del Juzgado Central número cinco ordenando la prisión preventiva a efectos extradicionales de Miguel Angel Cavallo"; "Escrito de la Acusación Popular solicitando la extradición de Miguel Angel Cavallo e impuntándolo de 227 casos de detenciones ilegales, torturas sistemáticas, desapariciones forzosas y asesinatos*".

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Human Rights Watch (HRW) on "Pinochet Principle":

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International Centre for Human Rights and Democratic Development (ICHRDD) on the history of impunity:

http://www.ichrdd.ca/111/english/commdoc publications/ impunity/impunity.html

International Criminal Court (ICC):

http://www.un.org/icc/

http://www.iccnow.org (the NGO coalition for an International Criminal Court, discussion on impunity, genocide crimes and other crimes against humanity).

http://www.iccnow.org (NGO Coalition for an International Court (CICC)

http:// www.ichrdd.ca; and http:// www.icclrlaw.ubc.ca (Rights and Democracy and The International Centre for Criminal Law Reform and Criminal Justice Policy: International Criminal Court- Manual for the Ratification and Implementation of the Rome Statute)

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