In an ideal world crimes against humanity would always be punished. In our real world in which reason and law coexist with unreasonableness and chaos, while we may wish that all crimes against humanity be punished, to do so in every case is virtually impossible and sometimes inconvenient.

So, when one faces reality one can only conclude that it would be good and reasonable—“natural” would be the term preferred by the classics—for all crimes against humanity to be tried and punished. If, however, the positive law of a country—say, Argentina—poses limits to the possibility of investigation, and/or trial, and/or punishment of such crimes; and those limits are neither unconstitutional nor substantially unjust, what turns out to be good and reasonable is to respect the limits—and hence, eventually leave some crimes against humanity unpunished. This, I think, is the most interesting problem that one finds after some intellectual delving in Simón, a 2005 Argentine Supreme Court case that received much press attention worldwide.

In 2003 Argentina ratified the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which had been adopted by the UN General Assembly in 1968. Article 1 states that no statutory limitation will apply to crimes against humanity, irrespective of the date of their commission. Arguably this means prima facie that Argentina can and must prosecute crimes against humanity, even if according to domestic statutes of limitations such crimes could no longer be subject to prosecution and even if those crimes took place before the Convention was ratified. By reasonable implication it also means that Argentina is not authorised to declare amnesties regarding those crimes and, if it did so before 2003, those amnesties are invalid. Based on the said Convention and on other norms and considerations, the Argentine Supreme Court held both propositions to be true as a matter of Argentine constitutional law.

I shall argue that the constitutional propositions expressed by those two statements are certainly true and valid—they are good law—for Argentina, but only from 2003. As from that date, statutes of limitations no longer apply to crimes against

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1 The full name of the case is Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, case S. 1767. XXXVIII (14 June 2005).
2 Following Argentine constitutional practice, the Convention had previously been approved by Congress through Law 24.584, promulgated on 29 November 1995.
3 The Convention entered into force on 11 November 1970 and it was ratified by Argentina on 26 August 2003.
4 In Arancibia Clavel, Enrique Lautaro s/ homicidio calificado y asociación ilícita y otros, case A.533.XXXVIII (24 August 2004), the Supreme Court had held that statutes of limitations do not apply to crimes against humanity; in Simón, it held that two amnesty laws were unconstitutional insofar as they applied to crimes against humanity. This case note will deal with the latter case but the two decisions and the problems they pose are closely related. Both cases are available in Spanish in the web-page of the Argentine Supreme Court: www.csjn.gov.ar.
humanity tried before Argentine courts and Argentine governments are prevented from declaring amnesties with regard to those crimes. Nevertheless—and this is the key—the retroactive application of the Convention provided by its first article, which would bar \textit{inter alia} any amnesty laws, including those passed prior to 2003, violates the Argentine Constitution and is therefore unlawful. Furthermore, I will try to show that several other norms of international law invoked by the Supreme Court do not affect this conclusion. For this reason, and notwithstanding the admirable aim of upholding human rights in Argentina, the Argentine Supreme Court has taken a wrong turn.

II

In 1985 the leaders of the Military Junta who had ruled the country from 1976 to 1983 were held responsible and subsequently convicted—in most cases being given life sentences—for a multitude of heinous crimes committed during the infamous Argentine “Dirty War”. This decision, which was ultimately confirmed by the Supreme Court,\(^5\) shocked the military and this persuaded President Alfonsín, who had been democratically elected in 1983, to seek measures to pacify the country and reduce the unrest that lingered in the lower military ranks. This is, in a nutshell, the background to two statutes passed by Congress in 1986 and 1987 at Alfonsín’s request: the so-called “Full Stop Law”\(^6\) and the so-called “Due Obedience Law”.\(^7\) The complexities of these statutes are of little import for the purposes of this note; the relevant matter is that the Supreme Court noted, in a case deciding that the latter law was constitutionally valid, that the law was, notwithstanding its name or format, in effect an “amnesty law”.\(^8\)

It is clear enough that Mr. Simón, a lower rank official accused of several dirty crimes, was covered by and benefited from the amnesty laws. This is why he was not tried and convicted, until recently. In the 2005 case \textit{Simón}, the Supreme Court, affirming the lower courts’ rulings and overruling its own previous decision, declared both statutes to be unlawful and unconstitutional, thereby confirming the legal possibility of bringing Mr. Simón before the courts.\(^9\)

The Supreme Court used several arguments to justify its new point of view. Most important among them is probably the one that relies on the \textit{Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity}. In my view, the clearest pursuit of this line of argument was that of Judge Carmen Argibay in her concurring opinion, to which I now turn.\(^10\)

First, I should say that although Mr. Simón disputed that his alleged crimes were, as a matter of law, “crimes against humanity”, for the sake of the argument I will

\(^5\) Supreme Court, \textit{Causa originariamente instruida por el Consejo Supremo de las Fuerzas Armadas}, 309:5, at 1689 (30 December 1986).
\(^6\) Ley de Punto Final, Law 23.492, passed on 29 December 1986.
\(^7\) Ley de Obediencia Debida, Law 23.521, passed on 9 June 1987.
\(^8\) Supreme Court, \textit{Campos}, 310:1162, 1301-1303 (22 June 1987). Judge Bacqué filed a lone dissent (\textit{ibid.}, at 1311).
\(^9\) As I write this note Mr. Simón’s trial comes to an end: he was convicted of the illegal detention and torture of two persons and sentenced to 25 years of imprisonment. See \url{http://www.lanacion.com.ar/EdicionImpresa/politica/nota.asp?nota_id=829171} (last visited on 5 August 2006).
\(^10\) It is noteworthy that, immediately before her appointment to the Supreme Court in February 2005, Judge Argibay worked for three years as an \textit{ad litem} judge for the Appeals Chamber of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
assume throughout that the would-be crimes do fall within that category. On the other hand, one aspect of the Simón case that is undisputed is that Mr. Simón’s alleged crimes took place in 1978, long before the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was ratified by Argentina (in 2003). Nevertheless, as already noted, the Convention states that no statutory limitation—and, by a reasonable implication endorsed in the Simón case, no amnesty—will apply to crimes against humanity, irrespective of the date of their commission. The Convention, however, establishes a seemingly flexible mechanism for the implementation of its main rule. Article 4 reads as follows:

“The States Parties to the present Convention undertake to adopt, in accordance with their respective constitutional processes, any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in articles 1 and 2 of this Convention and that, where they exist, such limitations shall be abolished.”

The particular “limitations” on the prosecution and punishment of the crimes in which we are now interested are the already mentioned amnesty laws of 1986 and 1987 which (if valid) applied to and benefited Mr. Simón. Hence, the second part of article 4 of the Convention is applicable: Argentina, as a State Party, must abolish the limitations that impede the retroactive application of the Convention, although it is only required to do so “in accordance with [its] constitutional processes”.

Under the Argentine Constitution—article 18—everyone has a right not to be subject to the retroactive application of a criminal law. This right includes, according to a constant line of Supreme Court case law, what we call in Spanish the principle of “ley penal más benigna” (literally, “more benign criminal law”), meaning the exclusion of any “criminal law” that ex post facto worsens the condition of convicts. The Court further clarified that for the purposes of the application of the principle of “ley penal más benigna”, rooted in article 18 of the Constitution, “criminal law” covers not only laws describing the crime and setting down the conditions of guilt but also “all the complex system of norms that regulate the extinction of the State’s punitive pretension”. This clearly includes, as the Court noted, laws regarding statutes of limitations. The latter implication and, more generally, the “ley penal más benigna” principle, are part of settled Argentine constitutional law—or at any rate they were so until the Court decided Arancibia Clavel and Simón.

11 Mr. Simón was accused of the illegal detention and torture of two members of a political opposition group.
12 This is an exception to the general principle of non-retroactivity embodied in article 28 of the Vienna Convention on the Law of Treaties.
13 Article 18 of the Argentine Constitution reads as follows in its relevant part: “No inhabitant of the Nation may be punished without prior trial based on a law in force prior to the offense, or tried by special commissions, or removed from the jurisdiction of the judges designated by the law in force prior to the offense”. As I will note below in the text, Article 15, section 1, of the International Covenant on Civil and Political Rights makes explicit what is implicit in article 18 of the Argentine Constitution: “…Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”.
15 Supreme Court, Mirás, 287:76, at 78 (18 October 1973).
16 Ibid.
17 That the statement in the text is true as a matter of Argentine constitutional law is thoroughly explained by Héctor Sabelli in his critical commentary of Arancibia Clavel. ‘No habrá más penas ni olvido. O de
Thus, if someone has benefited from a domestic rule of statutes of limitations he or she has a constitutional right to benefit from that law, meaning that the person cannot be prejudiced retrospectively by a new rule holding, e.g., that statutory limitations do not apply to his or her alleged crimes because they are “crimes against humanity”. By reasonable implication, this applies also to amnesty laws, which laws also have an immediate effect on the State’s punitive pretension, extinguishing the penalty altogether. So Mr. Simón, whose alleged crimes were undisputably covered by the mid-1980’s amnesty laws, has a constitutional right under article 18 not to be tried for the relevant crimes in virtue of an ex post facto rule such as the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.

We therefore face a problem, the clash between a right protected by the Argentine Constitution and a State duty under an International Treaty (ignoring for the sake of argument the apparent primacy given to state constitutional law by the Convention’s caveat that state parties must adopt the Convention “in accordance with their constitutional processes”).

The Argentine Constitution explicitly solves clashes of this sort when it sets the typical pyramid of norms. The Constitution itself is on top of that pyramid —it is the “Supreme Law of the Land”— and treaties and ordinary legislation are subordinated to it. Nevertheless, a 1994 constitutional amendment introduced a certain amount of complexity into the relationship between the Constitution and some treaties. The new section 22 of article 75 establishes that treaties in general stand above ordinary legislation but below the Constitution but, further and by way of exception to this rule, some treaties are afforded “constitutional standing”. These exceptional treaties comprise nine conventions on international human rights and the UN Universal Declaration of Human Rights. Further, the same constitutional provision provides for the possibility that other treaties on human rights not enumerated in the provision might in the future acquire constitutional standing, by a particularly stringent vote in Congress. Notably, for our purposes, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity was afforded constitutional hierarchy by Congress through law 25.778 in 2003, the same year in which the Convention was ratified by Argentina.

Hence, the correct question—that Judge Argibay should have faced in Simón but regrettably did not do so—is that of a clash between a treaty obligation with constitutional standing (the duty to prosecute crimes against humanity without limitation) and a constitutional right (the right against the retroactive application of a criminal law that would affect ex post facto the operation of an amnesty law). Again, the Constitution has a specific provision intended to solve conflicts like this one. Article 75, section 22, provides that the treaties with constitutional standing “do not repeal any

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18 See Argentine Constitution, Article 27 (“The Federal Government is bound to strengthen its relations of peace and commerce with foreign powers by means of treaties that are in conformity with the principles of public law laid down by this Constitution.”) and Article 31 (“This Constitution, the laws of the Nation that as a result thereof may be enacted by the Congress, and treaties with foreign powers, are the supreme law of the Nation, and the authorities of every Province are bound to conform to it, notwithstanding any provision to the contrary which the Provincial laws or constitutions may contain ...”).

19 See Simón, concurring opinion of Judge Argibay. The essential question posed in the text —and its solution— is also omitted in Christine Bakker’s commentary of Simón and this renders flawed her conclusion, favourable to the Court’s decision. ‘A Full Stop to Amnesty in Argentina. The Simón case’, Journal of International Criminal Justice, 3 (2005), 1106-1120, at 1118-1120.
article in the First Part of this Constitution, and must be understood as complementary of the rights and guarantees recognised therein”.20 Since the right against the retroactive application of a criminal law, including the principle of “ley penal más benigna”, is provided for in article 18, which is in the First Part of the Constitution, the state duty that flows from the Convention must yield to it. For this reason, Judge Argibay’s conclusion—that the amnesty laws are unconstitutional because they violate the duty posed by the Convention—cannot stand. Rather, the application of the Convention by the Argentine government is limited in cases like Mr. Simón’s by the Constitution itself, insofar as it gives priority to his right to benefit from the amnesty laws over the State duty to prosecute, emerging from a rule that provides for its retroactive application.

Interestingly, the right that article 18 of the Argentine Constitution affords Mr. Simón is also recognised, in a much more explicit fashion, by one of the treaties that enjoy constitutional standing according to article 75, section 22: the International Covenant on Civil and Political Rights.21 Article 15, section 1, of that Covenant reads:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby”.22

It seems clear that this express recognition of the principle of the lighter penalty (“ley penal más benigna”) in a treaty with constitutional standing helps interpret article 18 of the Argentine constitution in ways that reinforce the conclusion reached in the preceding paragraphs.

Apart from relying on the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Judge Argibay offers another argument. She notes that article 7 of the Inter-American Convention on the Forced Disappearance of Persons states that “Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations”. This is relevant since this Convention has been ratified by Argentina,23 and enjoys constitutional standing in the terms already explained.24 Nevertheless, two caveats are in order. First, article 7 has a second paragraph providing: “However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party”. As I have explained, such norm exists in article 18 of the Argentine Constitution. Secondly, although, like the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, the Inter-American Convention was ratified after Mr. Simón’s alleged crimes took place and after the amnesty laws that benefited him were passed, unlike the former convention, the Inter-American Convention does not provide for retroactive application.

20 Article 75, section 22, Argentine Constitution.
21 The International Covenant on Civil and Political Rights was ratified by Argentina on 8 August 1986.
22 International Covenant on Civil and Political Rights, Article 15, section 1. In part III of this note I will analyse the possible relevance of section 2 of this article.
24 The Inter-American Convention was afforded constitutional standing by law 24.820, promulgated on 29 May 1997.
(and therefore the general principle that treaties do not apply ex post facto must apply). For these reasons, the Inter-American Convention is not directly relevant to the decision in Simón, and nor, for the same reasons, is the Rome Statute of the International Criminal Court, article 29 of which provides that “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.

III

This leaves us with the other possible line of argument that, according to the opinion of some members of the Supreme Court in Simón, would support the conclusion that crimes against humanity may not be subject to amnesties. In short, the argument posits that when the amnesty laws were passed there were already international rules and principles binding Argentina which barred amnesties for crimes against humanity. Unlike the argument examined above, this argument does not fall foul of the Argentine constitutional principle forbidding the retroactive application of a less benign criminal law, since it focuses on the legality of the amnesty law at the time it was passed. As I will endeavour to demonstrate, however, this argument is not valid and this provides further reasons to consider the Supreme Court’s decision unfortunate.

Let us start with international rules taken into account by the Supreme Court. The International Covenant on Civil and Political Rights was already in force in Argentina when the amnesty laws were adopted. After establishing the principle that bans an ex post facto “heavier penalty”, article 15 of the Covenant, states the following in its section 2:

“Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations”.

Assuming, for the sake of the argument, that Mr. Simón’s acts, being crimes against humanity, were at the time when they were committed “criminal according to the general principles of international law recognised by the community of nations”, it follows, according to the Court, that the right recognised in section one of article 15 would not apply and, therefore, that the “lighter penalty”—or, rather, the absence of penalty—implied by the Argentine amnesty laws would violate the Convention.

Nevertheless, as Judge Fayt pointed out in his dissent, when Argentina ratified the International Covenant on Civil and Political Rights it entered a reservation in the following terms:

“The Argentine Government states that the application of the second part of article 15 of the International Covenant on Civil and Political Rights shall be subject to the principle laid down in article 18 of the Argentine National Constitution”.

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25 See footnote 12 above.
27 The Covenant was ratified by Argentina on 8 August 1986 and the amnesty laws were passed on 29 December 1986 (“punto final”) and 9 June 1987 (“obediencia debida”).
28 See above text to footnote 22.
29 Dissenting opinion of Judge Fayt, at §43.
This entails that in Argentina the principle stated by section two of article 15 does not apply to crimes—such as Mr. Simón’s—that took place before the Covenant entered into force because this possibility is barred by the right against the retroactive application of a criminal law, recognised in article 18 of the Argentine Constitution. Further, as already noted, the Covenant was ratified by Argentina on 8 August 1986 and the amnesty laws were passed on 29 December 1986 (“punto final”) and 9 June 1987 (“obediencia debida”). There being such a short period of time between the ratification of the Covenant and the first of the amnesty laws, one can reasonably presume — although I have found no evidence confirming it— that the Argentine government had the forthcoming amnesty in mind when it introduced this crucial reservation at the time of ratifying the Covenant.

The Argentine Supreme Court also relies on another significant international treaty that was already in force in Argentina when the amnesty laws were adopted: The American Convention on Human Rights “Pact of San Jose, Costa Rica”.

Although nothing in the text of this treaty prevents the application of amnesty laws to crimes against humanity, in the Peruvian case known as “Barrios Altos” the Inter-American Court of Human Rights interpreted several articles of the Pact in that sense. It is difficult to justify the interpretation adopted by the Inter-American Court in this case. Further, the Peruvian case was decided in 2001, long after the Argentine amnesty laws were passed; hence, to invoke this case in Simón as an authoritative interpretation of the American Convention as the Argentine Supreme Court does in Simón entails, once more, the violation of article 18 of the Argentine constitution, and this is unlawful as explained above in the preceding section. At any rate, it should be noted that the application of the Peruvian precedent to the Argentine situation has been seriously disputed, on grounds that underline the several factual differences between the two cases.

The third and last argument that should be analysed in this section is based on international custom and ius cogens. According to some members of the Argentine

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31 Approved by Congress through Law 23.054, promulgated on 27 March 1984; ratified by the Executive on 5 September 1984.

32 The Inter-American Court cites the following articles reproduced here in their relevant parts: Article 1.1 (“The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”), Article 2 (“Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms”), Article 8 (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature ...”), and Article 25 (“Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties ...”).

33 IACHR, case Barrios Altos (14 March 2001), available online at: http://www.corteidh.or.cr/seriecpdf_ing/serie_75_ing.pdf (last visited on 3 August 2006). See especially §43.

34 Case Simón, Judge Petracchi at §21, Judge Boggiano at §§ 22 and 23, Judge Maqueda at §§ 73 and 74, Judge Zaffaroni at §26, Judge Highton de Nolasco at §§ 14 and 25, Judge Lorenzetti at §21, and Judge Argibay at §14.

35 See above text to footnote 20.

36 Judge Fayt, dissenting, at § 81-85.
Supreme Court, when the amnesty laws were passed there was a customary rule of *ius cogens* in force that banned amnesties for crimes against humanity. The judges who make this argument assume that this custom exists. Nevertheless, custom and *ius cogens* cannot be presumed; in order to apply a customary rule it must be shown that there is a certain practice accompanied by an *opinio juris*. In recent years several states — including Spain, South Africa, Uruguay and El Salvador— have solved domestic problems by resorting to amnesty laws, which indicates a countervailing practice, and the relevant members of the Argentine Supreme Court in this case fail far short of satisfying their burden of demonstrating the *ius cogens* rule against amnesties that they posit.

In sum, we are left with no legal arguments supporting the conclusion reached by the Supreme Court in *Simón*. For the reasons suggested in this note, the Court’s decision amounts in effect to a breach of the rule of law as embodied in the Argentine Constitution. Despite the laudable aim of preventing and punishing all crimes against humanity, this decision is therefore regrettable.

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37 Case *Simón*, Judge Maqueda at §§ 49, 57, 62, 56, 88 and 89, Judge Boggiano at §§ 28 and 40-43, Judge Lorenzetti at §32, and Judge Highton de Nolasco, at §32.

38 Brownlie, I., *Principles of Public International Law*, sixth edition (Oxford: Oxford University Press, 2003), 7 (on custom, quoting decisions of the ICJ) and 488-490 (on *ius cogens*).


40 See footnote 37 above. In her favourable case note Bakker recognizes that ‘the peremptory nature of the obligation to prosecute all crimes against humanity has not been generally accepted in the legal literature. An important factor explaining this hesitation is the asserted insufficiency of state practice supporting such a peremptory norm’. Bakker, supra note 19, at 1114.