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A Reply to Professor Nino

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As one of the chief architects of President Alfonsín's program of human rights prosecutions, Carlos Nino well understands the dilemmas surrounding a nascent democracy's efforts to punish the crimes of a prior regime, and his lucid account of the Argentine experience enriches our own understanding. Citizens of nations confronting similar dilemmas are well advised to heed Professor Nino's caution against the excessive demands of "maximalists." But in attributing their views to me, Professor Nino is wide of the mark.[1]

In different regions of the world, it has been my privilege to work with men and women who dedicate their lives to transforming the abstract law of nations into the daily practice of peoples. Their accomplishments are too dearly bought for me ever to contend, as Professor Nino suggests I have, that a fledgling democracy should sacrifice the results of their efforts to rigid maxims or to maximalist demands.[2]

That international law must "take into account [the] complexities" of situations prevailing in such countries as Argentina, Professor Nino and I are in full accord. It is precisely the recognition of those complexities on which my entire thesis turns. As my article urges, international law does not require governments to commit political suicide. Doctrines of exception, described in my article, assure that generally applicable duties do not have this effect.

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1. Although my brief observations in this note address what I believe are the crucial issues raised in Professor Nino's comment, Nino, *The Duty to Punish Past Abuses of Human Rights in Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991), a number of the views that he attributes to me may create a misleading impression of the positions set forth in my article. I did not suggest, for example, that the outcome of the torture trials in Greece could be attributed only to "legal technicalities." *Id.* at 2624 n.16. *But see* Orentlicher, *Settling Accounts: The Duty To Prosecute Human Rights Violations of a Prior Regime* 2537, 2599-600 n.273 (1991). Nor did I suggest that it was politically feasible for the Alfonsín administration to set a "short time limit for the trials beyond employing the . . . procedures" described in Professor Nino's piece. Nino, *supra*, at 2624. *But see* Orentlicher, *supra*, at 2599 n.270.

2. These experiences have also made clear to me that hard-won rights must be secured against the destructive effects of impunity. Particularly noteworthy in this regard is the Philippine experience. Shortly after President Corazon Aquino succeeded Ferdinand Marcos, several of her advisors, who had been human rights lawyers when Marcos was President, privately told me that they believed prosecutions of military officials for violations committed during Marcos's tenure would be destabilizing. Several years later, the same officials told me that, in retrospect, they wished that international human rights organizations had pressed the Aquino government to institute human rights prosecutions. The government's failure to do so, they believed, had emboldened the military to launch successive coup attempts, and had further eroded military discipline. Human rights violations had, following a temporary lull, begun to surge once again. Human rights lawyers numbered prominently among the new victims.

Nor are any of the general duties imposed by international law as "blunt an instrument" as Professor Nino makes them out to be. Professor Nino is wrong to assume that the duties examined in my article would, if invoked in Argentina, have bolstered the position of maximalists by vesting their demands with the authority of "positive international law." I argue that international law does *not* require successor governments to prosecute all those who participated in a past system of human rights violations—as maximalists would have them do. How, then, could the requirements of international law enable Alfonsín's opponents to "point[] out that the government was not complying with its international obligations, or even that it was a sort of pariah in the international community," because it stopped short of wide-ranging prosecutions?

If the Argentine government erred in its decisions, it erred as a matter of strategy, not as a matter of law. By retreating from prosecutions already instituted, the government left the impression that it was too weak to prosecute those it believed were deserving of punishment. That is, to be sure, a failure of sorts. But it is merely a political failure—one of nerve rooted in a perception of the government's own powerlessness—and not a breach of international law.[3]

It is, I suspect, on the authority of international law that Professor Nino and I differ most.[4] It is flattering, but quite inaccurate, for Professor Nino to characterize as "Orentlicher's duty" the established obligations of states under international law to prosecute certain atrocious crimes. I did not create those duties. They arise, in some instances, by virtue of explicit requirements set forth in human rights conventions.[5] They arise, in others, under treaties as they have been authoritatively interpreted by international judicial bodies.[6] And they arise, as well, under customary law as interpreted by, among others, the American Law Institute.[7] Contrary to Professor Nino's suggestion, they have repeatedly been the basis of international condemnation and enforcement efforts.[8] There

3. Although the Alfonsín government's retreat from prosecutions was not itself a breach of international law, the law barring further prosecution of most potential defendants, whose passage was secured by the Alfonsín government in 1987, established a "superior orders" basis for impunity that is inconsistent with well-established principles of international law. *See* Orentlicher, *supra*, at 2605 n.300-01.

4. Professor Nino finds it implausible that "the population at large" may not be free to overturn international law by popular plebiscite. Yet it is well established that national law can breach a state's international obligations, however such a law may have been enacted. *See* Orentlicher, *supra* note 1, at 2553, 2597 & nn.62, 260-61.

5. *See id.* at 2562-68.

6. *See id.* at 2568-83.

7. *See id.* at 2583-84.

8. *See id.* at nn.213, 310 and at nn.204-06 and accompanying text; *see also id.* at 2573-83 (decisions of international bodies interpreting human rights treaties to require punishment of grave violations). That those duties are inadequately enforced, there can be no doubt. Professor Nino's perception that governments have been unwilling to press other states to institute human rights trials is understandable. The Reagan Administration took no position on the Alfonsín government's prosecutions, and the Bush Administration was silent about the pardons granted by Alfonsín's successor. The U.S. government has been somewhat more outspoken in pressing for human rights prosecutions in several other countries, such as Haiti and El Salvador.

is, of course, an irony—one that I can only regret—in Professor Nino's reluctance to recognize these international obligations: they support the very prosecutions for which he deserves no small measure of credit—and which surely count among his nation's proudest accomplishments.