# TRANSITIONAL JUSTICE AND THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

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**Remarks prepared for the Latin American Studies Association Annual Conference**
*Panel: The national and international selectivity of human rights trials in Latin America*
Washington D.C.
1 June 2013

Let me start by thanking Ulrike and Rosario for bringing this panel together and for extending the invitation to participate.

**Preliminary points on selectivity:**

This is a panel on the selectivity of justice and human rights trials in Latin America. I therefore thought that it would be useful to spend a few moments to think through what we might mean by the term of 'selectivity'.

Indeed, there are an increasing number of human rights trials addressing 'dirty war' period human rights abuses in a number of countries in Latin America. Although this is a remarkable development given the prevailing impunity norm that characterised much of the early period of transitional justice, what needs to be noted is the unevenness of this trend of 'post-transitional justice', to use Cath Collins' terminology. It is in this context that I think Ulrike and Rosario are right in inviting us to think about the 'selectivity' of human rights trials in Latin America, both in terms of the factors that explain this feature of ongoing human rights trials and in terms of its consequences.

It seems to me that there are at least five distinct understandings of 'selectivity', or what I would like to term 'logics of selectivity':

1. First, there is **'uncontrolled' or random selectivity** – a selection that happens as a result of factors beyond one's control. Closely related to this when considering human rights advocacy for example, is to channel one's efforts wherever and whenever the circumstances allow – 'picking your fight' if you will – as dictated by external factors beyond your control.

2. Second, there is **discriminatory selectivity** – i.e. the unjust treatment of different categories of people or things, on the grounds of, e.g. race, age, or sex. Or, the other side of the coin, the recognition and understanding of difference, and in order to ensure genuine equality give preferential treatment to an individual or a group. This idea of selective treatment - or 'positive discrimination' - prompts questions regarding what characteristics of individuals, groups, acts, and events give rise to legitimate reasons for differential treatment.

3. Third, and closely related, there is **principled selectivity** - i.e. when selection is based on a set of principled criteria that are transparent, legitimate, and appropriate (or not). For example, selecting worst cases of violations - which invites further questions of what counts as worst - in turn necessitating a further set of criteria.

4. Fourth, there is **selectivity out of necessity** - for example, in situations of resource constraints when practically you have to choose what to focus on between similarly deserving objectives.

5. Fifth, there is **strategic selectivity** – when, e.g., in human rights litigation paradigmatic cases are selected in order to illustrate patterns of abuses, with the view that these cases will unlock a chain reaction of progress on other similar future cases.

As should be apparent, there is significant overlap between these categories, and indeed other logics of selectivity might be derived from them. It is nonetheless important, I think, when examining the variation in the adoption of trials, as well as exploring their consequences, to be as explicit as possible in one's understanding of selectivity.

With these preliminary points in mind, let me now turn to, in my remaining time, the role of the Inter-American Human Rights System in shaping transitional justice trends in Latin America.

**IAHRS and Transitional Justice in Latin America**

In short, the question here is: how can a focus on the IAHRS help us to understand the main panel themes? That is, the distinct logics of selectivity at play in processes of transitional justice in Latin America, the drivers of selectivity, and their consequences.

In the first instance it is important to note that the IAHRS came of age through its engagement with the dilemmas of transitional justice. At the beginning of the 1980s, it was a weakly institutionalised and mainly promotional system consisting of a Commission and a Court without any cases. From the mid-1980s onwards however, the IAHRS started to increasingly insert itself into transitional justice struggles in multiple ways.

I would like to highlight two main aspects of the impact of the Inter-American Human Rights System on transitional justice trends in Latin America that I think are relevant for our discussion today about the selectivity of human rights trials:

**1. First, there is the role of the IAHRS in the construction of a set of rules, norms and principles of transitional justice.**

In the early stages of the democratic transitions in the Southern Cone, the international influences on transitional justice were limited. Confronted with the dilemmas of transitional

justice governments had few international precedents to draw from to guide government policies. International human rights jurisprudence at the time was of limited concrete help.

Moreover, in the early stages of the transitional period, the regional human rights system was not sufficiently developed to play an active role in the attempts to hold the military accountable for their human rights abuses. In terms of human rights activism, although increasingly professionalized human rights NGOs more actively started to use the IAHRS, the learning process among the actors involved was still in its incipient stages.

However, the influence of the IAHRS would grow significantly over time, especially as the system developed a jurisprudence that emphasised the right to truth and individual judicial redress.

In particular, the IAHRS has adopted an increasingly robust position on the legitimacy of amnesty laws in the region.

Most famously, in the 2001 *Barrios Altos* judgement the Court ruled that two self-amnesty laws granted by the Fujimori regime to itself violated the victims' rights of access to justice.

The *Barrios Altos* case, together with subsequent cases related to amnesty provisions in Chile, Uruguay, and Brazil, consolidated the IAHRS' position on impunity. The Court has defined impunity as a systematic failure to investigate, prosecute, arrest, adjudicate, and convict those who are responsible for violations of rights protected by the American Convention.

Its condemnation of impunity is twofold. One the hand, for societies, impunity "fosters the chronic repetition of human rights violations." On the other, for victims and their family members impunity fosters "the total defenselessness of the victims and their next of kin, who have the right to know the truth about the facts".

In sum, following the transitions to democracy in Latin America, the Inter-American system has played an important role in developing norms regarding transitional justice as they pertain to the scope of amnesty laws. The IAHRS dealings with amnesties in particular have given rise to a broad set of obligations that public institutions have to ensure accountability, reparations, compensation and restitution of victims.

Now, clearly, as a legal and judicial system, the IAHRS has reinforced the dominance of legal and judicial strategies in the field of transitional justice – its 'legal bias' if you like.

For proponents, the pursuit of trials demonstrates that law can prevail over politics, and that the criminal prosecution of abuses can assist in breaking the 'wall of impunity'.

Now, it is important to note that the IAHRS is a human rights entity and can therefore only attribute state responsibility for violations. However, it is clearly the case that the IAHRS

jurisprudence has fed into domestic criminal proceedings in a number of Latin American countries where trials are currently underway.

Yet, there are, of course, significant limits to what legal and judicial mechanisms can achieve in relation to transitional justice outcomes. In the first instance, there are the limits inherent in the recourse to judicial procedures and logics in addressing complex social and political problems; these are the common challenges inherent in any process of judicialization.

Moreover, the pursuit of criminal accountability aims primarily at the prosecution and punishment of individuals. But, there are inherent limitations in retributive approaches to criminal justice, especially in the context of large-scale organised political violence. Simply given the vast number of cases in such contexts, attempts to establish individual criminal responsibility tend ultimately to be unsatisfactory. Although the prosecution of individual cases may be symbolically very significant, to focus on a handful of cases may invite accusations of selectivity and further contribute to the politicisation of the judicial system.

And, clearly, judicial proceedings do not mean the absence of politics – they are both fundamentally driven by politics, and in turn, shape politics. This may mean that the politicised pursuit of trials may exacerbate the perception of selective justice.

But, it is also important to recognise that the IAHRS does not exclusively mandate judicial resolutions to transitional justice. After all, trial justice is only one form of accountability. Indeed, transitional justice advocates may need to think carefully about the conditions under which amnesty laws can 'work' as accountability mechanisms.

Overall then, returning to the themes of this panel – the IAHRS has indeed reinforced the legal and judicial bias in TJ practices in Latin America, with all its inherent tensions. Although the IAHRS is not a criminal justice regime, the cases that it pursues are selective in terms of the number of cases adopted and ruled upon, the types of violations, and, in certain ways, the countries dealt with.

The logics of selectivity, then, are apparent in the strategic character of litigation, the limited resources available (necessity), and, of course, because of the many factors beyond the system's control that affect the way it operates.

2. There is a **second dimension of the IAHRS that I would like to briefly touch upon before closing – that is the social and political relationships that the IAHRS has developed over time.** These relationships add an important layer to the selective impact of the system.

There are indeed significant differences between countries in the region when it comes to the diffusion of IAHRS norms related to transitional justice in general, and amnesties in particular.

A significant part of these differences – or selective impact if you will – can be explained by the significant variation among civil society organizations in their use of the system.

I can only briefly state here that the differentiated engagement with the IAHRS by human rights organizations reflects varied capacities in terms of degree of professionalization, their levels of legal and technical expertise, and their access to international resources and human rights networks. The organisations that score high on these dimensions are able to integrate the IAHRS into their advocacy work – such as Argentina's CELS. The organisations that do not, have difficulties in taking advantage of the IAHRS.

But, beyond civil society activism, it is also important to see domestic judiciaries as political actors. There are significant differences in the willingness of judges to engage with international human rights law, including the jurisprudence of the IAHRS.

Understanding the sources of this variation can be tricky. Some key factors include different degrees of judicial independence, but also divergent national legal traditions, patterns of legal education, and engagement with the transnational legal community.

To sum up then - there is a discernible regional trend of "post-transitional justice" increasingly challenging the political bargains of the democratic transitions. This trend is most clearly reflected in the rising number of human rights trials regarding the past underway in a number of countries in Latin America. Yet, state responses to civil society activism and judicial processes challenging these amnesties continue to vary quite considerably.

I have argued here that the reasons for these differences lie primarily in the respective domestic contexts. Certain countries and issues are indeed privileged, but for reasons that in large part have to do with differential capacities of mobilisation.

Yet, the IAHRS does select to pursue certain cases – and the criteria for selection are very rarely transparent. Clearly, the case adoption by the IAHRS involves a significant portion of strategizing. However, resources are scarce, which makes some type of selection of how to invest limited resources necessary. And, as the jurisprudence on amnesties show, but also that on reparations, the IAHRS has had ripple effects that go beyond individual cases pursued.

Thank you.