

Introduction

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In countries emerging from periods of armed conflict or authoritarian rule, efforts to address the legacies of massive human rights abuses—that is, transitional justice—have taken a number of different forms. The most well-known, researched, and studied of these measures has been criminal prosecutions, particularly those carried out at the international level, such as the Nuremberg Tribunal, the International Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda.¹ Outside the realm of criminal justice, truth-telling efforts, in particular truth commissions (most famously in South Africa and Latin America), have garnered a great deal of attention and study.² Recent studies of massive reparations efforts of an administrative nature aimed at the victims of human rights abuses within countries have added to the literature on reparations, which had previously focused on reparations between states, particularly following World War II.³

Vetting is another major category of transitional justice measures that countries in transitions to peace and/or democracy frequently employ, but that has been less studied than prosecutions, truth telling, and reparations. The term “vetting” is used in this volume to refer to processes for assessing an individual’s integrity as a means of determining his or her suitability for public employment. “Integrity” is used here to refer to “a person’s adherence to relevant standards of human rights and professional conduct, including her or his financial propriety.”⁴ Thus, vetting processes are aimed at screening public employees or candidates for public employment to determine if their prior conduct (including, most importantly from a transitional justice perspective, their respect for human rights standards) warrants their exclusion from public institutions. “Exclusion” here includes both terminating employment and restricting access to employment—firing and hiring. Vetting may be thought of primarily as a form of “administrative justice” because it involves the application of administrative law, which regulates the operation of administrative agencies and their relations with other branches of governments and the public. According to Ruti Teitel, administrative justice “illuminates law’s

distinctive potential for restructuring the relation of the individual to the political community in the transition.”⁵ Vetting is also inherently an element of institutional reform, in that even the most minor of vetting efforts will lead to changes in the makeup of the personnel of a public institution.⁶

There is a lack of agreement in the literature on the definition of basic terms, such as “vetting,” “lustration,” “screening,” “administrative justice,” and “purging,” which are often used interchangeably. Jon Elster, for example, refers to “administrative justice, that is, purges in the public administration,”⁷ while Martha Minow notes that “the removal of categories of people from public office or benefits” is “sometimes called a purge, and sometimes ‘lustration.’”⁸ Kieran Williams, Brigid Fowler, and Aleks Szczerbiak define lustration as “the systematic vetting of public officials for links to the communist-era security services.”⁹ Jens Meierhenrich takes lustration to refer to “the purification of state institutions from within or without. The practice of lustration ordinarily revolves around, first, the screening of candidates for public office; second, the barring of candidates from public office; and third, the removal of holders from public office.”¹⁰ As the terms are used in this volume, purges differ from vetting in that purges target people for their membership in or affiliation with a group rather than their individual responsibility for the violation of human rights. Purges are most commonly associated with denazification in Germany and the actions taken against collaborators in France following World War II,¹¹ and, more recently, the de-Baathification process in Iraq. “Lustration” is used in this volume to refer specifically to the laws and processes that were named as such in the former communist countries of Eastern and Central Europe¹² (although some argue that lustration, depending on the country, straddled or crossed the line between vetting and purging¹³).

The term “vetting” itself has been used to describe screening processes of public employees for criteria that do not include human rights considerations, but focus instead on issues related to the security of the state, such as in South Africa and Northern Ireland.¹⁴ Nevertheless, there is an emerging concept of vetting among international actors that corresponds to the definition used here, which comes from “Vetting Public Employees in Post-Conflict Settings: Operational Guidelines,” a document produced by the ICTJ in collaboration with, and with the financial support of, the United Nations Development Programme (UNDP).¹⁵ (Similar versions of these guidelines have been published by the UNDP¹⁶ and by the Office of the UN High Commissioner for Human Rights.¹⁷) Similarly, the UN Secretary-General’s 2004 report, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, defines vetting the public service as “usually entail[ing] a formal process for the identifica-

tion and removal of individuals responsible for abuses, especially from police, prisons services, the army and the judiciary.” The report points out that the UN has been involved in such processes in Bosnia and Herzegovina, Kosovo, Timor-Leste, Liberia, and Haiti.¹⁸

The frequency with which post-conflict and post-authoritarian countries engage in vetting processes and the growing attention they are receiving from international actors reflect an awareness of the relevance of vetting in transitions. In the words of Meierhenrich, “Although lustration is just one of many institutions of *jus post bellum*, it is arguably one of the most important. The pursuit of administrative justice affects the reconstitution of the public sphere—literally and figuratively—in more fundamental ways, and thus more far-reaching ways, than most other institutions of transitional justice.”¹⁹ Given the significance of vetting, it is surprising that no comprehensive, comparative, and thematic study exists on the subject.

This volume, which is one of the end products of a multiyear research project undertaken by the International Center for Transitional Justice, aims to fill this research gap. It contains nine country-specific case studies: Argentina, El Salvador, Greece, South Africa, Bosnia and Herzegovina, Poland, Hungary, the Czech Republic, and East Germany. Four of the cases come from former communist countries of Eastern and Central Europe, and focus on the lustration and vetting laws and procedures developed there; they provide a revealing comparison of how vetting processes can differ in similar contexts. The cases of El Salvador and Bosnia and Herzegovina provide us with two examples of how vetting may play out in post-conflict societies (Bosnia and Herzegovina also representing a post-communist situation), in which international actors tend to have a more important role. Argentina, Greece, and South Africa are cases of non-communist, post-authoritarian transitions (South Africa and Argentina representing both post-authoritarian and post-conflict situations), although their differences make them difficult to group together. What is apparent from these three cases, however, is the significant role that transitional politics play in shaping and limiting the extent of vetting processes.

The project’s case studies constituted a first phase of research, which revealed that vetting is much more than a mere technical exercise in personnel reform. A second phase of the research project, therefore, aimed to address the broader, key practical, political, legal, and moral issues in order to clarify a number of fundamental conceptual questions related to vetting as a measure of transitional justice. This second phase included four thematic studies focusing on issues that cut across the case studies and frequently arise in the design and implementation of vetting programs: information gathering

and management; due process; vetting and its relationship with other institutional reforms; and vetting and transitional justice.

In practice, there is no one-size-fits-all approach to vetting; in each case, the designers of a vetting process must make a number of basic decisions concerning what they want to achieve and how they want to achieve it. In the following sections, I briefly discuss nine basic decisions, as well as how they have in fact been made in the cases in this volume. These are:

- *Targets*: What are the institutions and positions to be vetted?
- *Criteria*: What misconduct is being screened for?
- *Sanctions*: What happens to positively vetted individuals?
- *Design*: What are the type, structure, and procedures of the vetting process?
- *Scope*: How many people are screened? How many people are sanctioned?
- *Timing and Duration*: When does vetting occur and how long does it last?
- *Rationale*: How is vetting justified? What are the reasons for vetting?
- *Coherence*: How does the vetting relate to other measures of institutional reform? How does it relate to other transitional justice measures?

All of these decisions will be affected by the transitional context in which vetting occurs; I therefore conclude with some comments about such contexts. An examination of how these decisions have been approached reveals that, strictly speaking, the processes described in this volume do not always follow the same definition of vetting. Sanctions, for example, may not necessarily involve exclusion, but rather public disclosure or transfers within the public sector. The conduct being screened for may tend toward affiliation rather than abuses. Nonetheless, in every case included in this volume, the effort to reform institutions in the transition out of war or authoritarianism involved certain processes that we can describe as vetting or that function similarly to vetting. This is the case even in South Africa and Argentina, where politics blocked formal vetting as a potential avenue for the pursuit of justice.

TARGETS: WHAT ARE THE INSTITUTIONS AND POSITIONS TO BE VETTED?

Vetting refers to processes applied to the public sector within a given country. There is no case of vetting in a post-conflict or post-authoritarian transition, however, in which vetting has been applied to the entire public sector. Vetting

processes are applied only to certain institutions. Furthermore, as the “Vetting Guidelines” in this volume explain, vetting can target an entire institution, or it can target only certain positions within an institution or certain categories across institutions. The decision may depend on available resources, political considerations, or the human rights records of certain units. Whatever the case, a “clear definition of the positions subject to vetting is a prerequisite for any vetting process.”²⁰

From a human rights perspective, the most important institutions to be vetted would be those most responsible for having committed human rights violations, or for allowing them to occur, under the previous regime or during the conflict. In post-conflict situations, therefore, vetting tends to focus on those institutions implicated in serious, violent human rights abuses, primarily in the security sector and judicial sector institutions. In El Salvador, for example, following the twelve-year-long civil war, vetting processes occurred in the early 1990s in the armed forces and as part of the creation of a new civilian police force, and were accompanied by limited mechanisms to improve judicial accountability. In post-Dayton Agreement Bosnia and Herzegovina, where, according to Alexander Mayer-Rieckh, in this volume, “the police did not enforce the law impartially and the courts did not fairly render justice,” and consequently, “public confidence in the rule of law remained low,” vetting processes focused on the police and the judiciary.

In some post-authoritarian cases, where less violent misconduct such as collaboration may have implicated members of a wider range of institutions, vetting can also take on a broader range of targets, including electoral posts, universities, and the media. In the Czech Republic, for example, the lustration procedure reached a “wide range of public offices,” according to Jiri Priban in this volume, including the judiciary and prosecution office, the civil service, constitutional bodies, the army and police, intelligence services, the national bank, the state media, press agencies, state corporations, universities, and the Academy of Sciences. In Hungary, those affected have included members of parliament; ombudsmen, members of the Constitutional Court, the president and vice president of the Supreme Court, and the chief prosecutor; the public administration at the highest level, including the president and members of the cabinet; the police; and the media. Screening of the media in Hungary eventually included, according to Act No. XCIII (2000), “those who have the effect to influence the political public opinion either directly or indirectly.”²¹ In Poland, the lustration statute stated that persons holding public offices had to make lustration declarations, including the president, members of parliament, and senators; the head of the civil service; directors in ministries,

central offices, and state regional administrations; judges, procurators, and advocates; and certain members of the media.²²

Vetting in post-authoritarian countries, however, is not always applied so broadly across public institutions. In Greece, for example, explains Dimitri Sotiropoulos in this volume, “vetting has led to different outcomes in various political and administrative institutions.” There, vetting was applied to universities, the justice system, the military, and the police and gendarmerie; although the government passed specific legislation regarding only the vetting of academics and judges, the processes themselves ended up being most extensive in the universities and military. In unified Germany, explains Christiane Wilke in her chapter, vetting had a profound impact within the public sector, including universities, but it was applied unevenly at different levels of the system.²³ In post-Apartheid South Africa, which straddled the line between a post-authoritarian and post-conflict case, and in Argentina, broad decisions were made *against* vetting the public sector at all.²⁴

CRITERIA: WHAT MISCONDUCT IS BEING SCREENED FOR?

The criteria of a vetting effort are the specific types of misconduct that vetting authorities look for in an individual’s past. Each vetting process operates on the basis of certain criteria. These also vary across institutions, transitional contexts, and time. In post-communist Eastern Europe, for example, authorities often vetted for evidence of nonviolent actions that constituted violations of “public trust,” such as past collaboration with secret service institutions, while in post-conflict countries members of security institutions have been screened for violent abuses, such as war crimes, crimes against humanity, and crimes of genocide.

There should be certain minimum standards of integrity, however. According to the “Vetting Guidelines”:

As a general rule, involvement in gross violations of human rights or serious crimes under international law should always disqualify a person from public employment. These include in particular genocide, war crimes, crimes against humanity, extrajudicial execution, torture and similar cruel, inhuman, and degrading treatment, enforced disappearance, and slavery. These are serious crimes which indicate a lack of integrity at a level that fundamentally affects a person’s credibility to hold public service.

Decisions concerning minimum criteria can be informed by international laws and norms. In Bosnia and Herzegovina, for example, the police certification program excluded officers who had committed “acts and/or omissions, and/or functions from the period of April 1992 to December 1995, which demonstrate the inability or unwillingness to uphold internationally recognized human rights standards.”²⁵ Similarly, in Argentina, where challenges to candidates for elected posts have revolved around the definition and reach of the term “suitability,” which is a requirement under the National Constitution, links have been made to international human rights instruments and international human rights law.²⁶

The determination of criteria, however, is often politically contested and controversial; understandably so, because these criteria reflect one way for a society to judge what was morally (if not necessarily criminally) unacceptable behavior in the past, as well as what the minimum standards of integrity in public institutions will be in the future. As Sotiropoulos comments in his chapter on Greece:

Where should the vetting process stop in regard to persons who worked for the authoritarian regime?... Even though one should differentiate, for example, between a military general and a conscript (hierarchical differentiation), as well as between a policeman who escorts a member of the democratic resistance to the torture chamber and a janitor of an armaments factory (sectoral differentiation), it is not easy to arrive at a consensus about where to draw the line.

Furthermore, the determination of vetting criteria will depend upon what can be feasibly implemented. As the “Vetting Guidelines” point out, “An integrity standard that is difficult to verify is unlikely to be useable in practice.” Serge Rumin demonstrates in his chapter on information management that vetting relies on the availability, reliability, and measurability of information and evidence.

In Greece, for example, institutions were screened only for people who had *actively* supported or identified with the junta, notes Sotiropoulos, in part because it would have been impossible to measure the actual support for the regime of the much larger number of officials who simply continued working for the state apparatus “as they would have done for any kind of rule.” In Germany, formal vetting criteria were established, but in practice “evidentiary problems” limited which criteria could actually be applied. As Wilke explains, the Ministry of State Security (Stasi or MfS) files, which were the most

accessible files, provided “the single most used and reliable source for the vetting process.” As a result, broader “public discussions about culpability, collaboration, and suitability for public office narrowed down” to one category of misconduct, namely, working for or collaborating with the Stasi. In the Czech Republic, the feasibility of verifying criteria actually led to a change in the law. Initially, the lustration law disqualified from holding public office those who had held positions in a political body or the repressive secret police, state security, and intelligence forces, as well as those who had collaborated with these entities. It turned out, however, that it was often technically impossible to distinguish between someone who had collaborated and someone who had in fact been a victim of the secret police, due to the unreliability of the secret police files; as a result, the criterion of collaboration became so controversial that it was annulled.²⁷

SANCTIONS: WHAT HAPPENS TO POSITIVELY VETTED INDIVIDUALS?

Vetting efforts also vary in an important, yet often underemphasized way—the sanction applied to individuals whose vetting results are positive. Positive vetting results lead not only to the exclusion or the removal of the public official from his or her post, but to a range of other sanctions as well. The nature of the sanction is important directly and symbolically for both individuals and the process as a whole. If the vetting has a punitive rationale (see below), then it matters whether a person is fired, suspended, offered a retirement package, transferred, given less responsibility, or simply has his or her past exposed. If the vetting is aimed at transforming institutions in order to prevent the recurrence of abuses, then it matters whether those who committed past abuses are actually removed from those institutions or not.

In Bosnia and Herzegovina, police officers who did not receive certification were no longer authorized to exercise police powers; they were terminated from employment and were not allowed to work with any law enforcement agency in the country. All judges and prosecutors had to reapply for their own positions as part of an open competition, and while some were not reappointed on the basis of “incriminating conflict-related information,” this was not made explicit and did not prohibit them from future appointments. As Mayer-Rieckh notes, some have called these exclusions “nonprosecutorial sanctions.” In El Salvador, the Ad Hoc Commission recommended that 103 officers be “transferred or dismissed”; some were sent abroad to diplomatic posts, some were retired from active duty, and some initially took leave with pay and retired later.²⁸ In Greece, as Sotiropoulos explains, “removal or dis-

qualification” covered a range of sanctions, including “placement in inactive rosters, forced retirement, transfer to insignificant posts, annulment of promotion, or temporary suspension of duty.” In Argentina, successful *impugnaciones* have led to military promotions being rejected, with no further consequences necessarily stemming from this rejection (although it is assumed that, given the reasons for the failure to gain the promotion, military careers will come to an end).²⁹

In the former communist countries in Eastern Europe, as well, vetting and lustration sanctions spanned the full spectrum. In the Czech Republic, what some refer to as “radical” lustration involved disqualification from holding office.³⁰ In Germany, employees who were to be dismissed were often offered the option of consensually terminating their contract rather than being fired, a move that would avoid the stigma of being fired but would also forfeit their ability to challenge the decision in court. In some places, many people who thought they would be exposed by the vetting procedure preemptively quit and took jobs elsewhere; these numbers would not show up in official vetting figures but can still be considered representative of people indirectly sanctioned.³¹ In Poland, what Adam Czarnota in his chapter in this volume calls “soft” lustration did not punish previous actions at all, only a “lustration lie”; those who made truthful declarations of collaboration with the secret services suffered no immediate consequences, since the system was designed to let the electorate decide whether someone with that past deserved to be voted into office. It was only those whose lustration declarations were determined to be false who lost their jobs as well as the “moral qualification to hold public office and a ban on holding one for ten years.”³² Hungary, finally, actually implemented a process referred to as “sanctionless lustration,” whereby individuals who were determined to have performed the activity in question were given the option of resigning or having the decision of the commission made public; “those who leave their office voluntarily are exempted from the explicit sanction of the law,” write Elizabeth Barrett, Péter Hack, and Ágnes Munkácsi.

DESIGN: WHAT ARE THE DIFFERENT TYPES OF VETTING PROCESSES, THEIR STRUCTURES, AND PROCEDURES?

Vetting measures also differ greatly in terms of their design. At a broad level, the most common type of vetting process is an administrative *review* of the past activities of the employees of a public institution. Such reviews occurred in various forms in East Germany, Greece, the Czech Republic, Hungary,

Poland, and El Salvador. In Bosnia and Herzegovina, however, a review process for the police was designed and implemented alongside a *reappointment* process for the judiciary and courts, in which all judges and prosecutors were removed from their positions and had to reapply in an open competition.³³ In Argentina, where a comprehensive review or reappointment process has not been politically possible, human rights groups have managed to use existing institutional mechanisms to challenge, through a process of *impugnación*, the promotion of military officers against whom there is evidence of past human rights abuses, as well as the credentials of candidates for elected office who are ethically unsuitable for similar reasons.³⁴

Within these broad types, however, there will also be different structures and procedures. As the “Vetting Guidelines” point out, it may be possible in certain instances to use existing procedures and bodies to screen public employees. In most cases, however, a new set of procedures is developed and at least one vetting body is created to perform or oversee the process; such bodies must have their members selected, staffs hired, financial and material resources apportioned, and security provided. In Germany, explains Wilke, two basic models of vetting commissions were employed “in response to different institutional demands and structures”: an administrative one, composed of unelected members of the institution; and a pluralistic one, composed of a mixture of elected and appointed members of the institution to be vetted and outsiders with professional expertise. Furthermore, vetting bodies can be centralized in one commission handling vetting for all public institutions, or they can be more decentralized and deal with vetting in one sector or one institution only. In the formerly communist countries of the Czech Republic, Poland, and Hungary, for example, the review processes were centralized; in Germany and Greece, in contrast, the case study authors describe the vetting as “decentralized” and “fragmented.”³⁵

Crucial to how vetting is designed and implemented, from a transitional justice perspective, are the procedural standards that the process maintains. As both Federico Andreu-Guzmán and the “Vetting Guidelines” point out in this volume, it is procedural guarantees that distinguish vetting from purges by ensuring that they conform to international human rights standards. According to Andreu-Guzmán, a fair and equitable vetting process will be one that is legitimate, safeguards human rights, is objective, is governed by the rule of law, is based on the principle of individual responsibility, and is relatively autonomous from criminal and regular disciplinary procedures. The specific minimal procedural guarantees necessary to achieve this in a vetting process

that involves removal or dismissal of employees, he argues, include the right to appeal an adverse decision to a court. Procedural guarantees should also be considered in relation to vetting sanctions: the more severe the sanction, the more rigorous should be the due process standards.

SCOPE: HOW MANY PEOPLE ARE ACTUALLY VETTED?

Scope refers to the size, extent, or reach of a vetting process, in terms of the number of individuals actually vetted. The measurable size of a vetting process includes both the number of people who are screened and the number of people who are positively identified as having engaged in the activity in question and who may then subsequently receive sanction. The scope of vetting processes varies widely across the cases; it is a function of decisions about the institutions and positions to be screened and the chosen criteria. And, as with many other elements of vetting, the actual number of people affected by vetting will also depend on other factors, such as the availability and reliability of information.³⁶

In post-apartheid South Africa, Jonathan Klaaren argues in this volume, where there was a choice made against vetting, and where public institutions transformed themselves primarily through processes of affirmative action and “rationalization” (integrating the apartheid-era public services), there were still some personnel selection procedures that, in certain instances, concerned themselves with human rights issues. The closest thing to vetting in the South Africa case was the Goldstone Commission, a judicial commission of inquiry, the work of which led to the dismissal of twenty-three senior commanders of the military intelligence.³⁷ In El Salvador, the Ad Hoc Commission requested information on the army officer corps of more than 2,000 individuals, but carried out interviews of only some of them; 103 of those were either dismissed or transferred for committing human rights violations.³⁸

More extensively, in Poland, where vetting is still ongoing, close to 24,000 individuals had completed lustration declarations by the time of writing; by 2004, 278 of these declarations had been positive and the Lustration Court had ruled on 103 cases of negative declarations, finding 53 of them untrue.³⁹ In East Germany, Wilke provides the figures for two city administrations. In Greifswald, out of 1,553 screened employees, 58 people were identified as having worked for the Stasi, and 18 of them were dismissed (5 of whom successfully sued for continued employment). In Dresden, about 520 out of 18,000 employees in 1990 lost their jobs because of vetting. In the East German

institutions examined by Wilke, however, “the numbers of dismissals were small in comparison to the job losses caused by shrinking public budgets.”

In Bosnia and Herzegovina, vetting was more comprehensive in the sectors in which it was applied. Between 1999 and 2002, the United Nations Mission in Bosnia and Herzegovina screened all 23,751 employees of the ministries of interior who presented themselves for the certification process; certification was denied to 481 officers. In the judiciary, between 2002 and 2004 the High Judicial and Prosecutorial Councils had to review the applications of approximately two thousand persons for appointment and reappointment to judicial and prosecutorial positions; 30% of incumbents were not reappointed, although only at times was this because of war-related misconduct.⁴⁰ In the Czech Republic, finally, at the larger end of the spectrum, rates of disqualification ranging between only 3% and 5% still mean that tens of thousands of people from a number of different government institutions have been barred from holding public office, as the total number vetted has reached over four hundred thousand.⁴¹

If a vetting process restricts its criteria for exclusion to individual behavior, then the percentages of each institution’s personnel that are dismissed tend to be quite small. Nevertheless, vetting may, in certain cases, lead to the dismissal of an “unacceptably large number of employees,”⁴² doing harm to the capacity of institutions—capacity that less-developed countries may not be able to do without.⁴³ Such “human capital costs” may be particularly high when institutions are purged rather than vetted.⁴⁴ In Iraq, for example, despite the concerns of Iraqis and outside observers about the effects that a wide-scale de-Baathification policy would have on the country’s ability to rebuild itself, the Coalition Provisional Authority ordered such a policy, which led to the firing of approximately thirty thousand former members of the Baath Party, including six thousand to twelve thousand educators. Concerns over the negative impact of the process later led to the return to their jobs of thousands of those dismissed.⁴⁵ At the same time, however, if most individuals in a particular institution do fit the individual criteria for exclusion, a vetting program would have to weigh the human capital costs of firing them all against the damage that would be done to the institution’s legitimacy if they all remained.

TIMING AND DURATION: WHEN DOES VETTING OCCUR AND HOW LONG DOES IT LAST?

The case studies demonstrate that vetting processes differ widely in their timing and duration. Timing refers to when, during a transition, vetting begins;

duration refers to how long the process lasts. The timing and duration of vetting will usually reflect the political landscape of the transition period; they will also be determined in part by other characteristics of the process, such as the numbers of institutions, positions, and people to be vetted.

In Greece, vetting of the academic community began swiftly, with legislation being passed within weeks of the collapse of the military regime in 1974, and lasted ten months. In the military, vetting proceeded gradually and in piecemeal fashion until the aftermath of an aborted coup in February 1975. Similarly, in El Salvador, the Ad Hoc Commission, which vetted the military, began working in May 1992, just four months after the final peace accord was signed; it was initially to last only three months and was then extended for another month, delivering its final report in September of the same year.⁴⁶

In Poland, on the other hand, the lustration law did not become valid until 1997 and was not enforced until 1999, nine years after the issue was first raised. At the time of writing, it had been in operation for six years, and there are discussions of broadening the process, sixteen years after the beginning of the transition. In Hungary, demand for lustration began in 1990, but the first law was not passed until 1994; lustration remains a high-profile issue sixteen years after the fall of communism, as new cases continue to arise. In Argentina, politicians and human rights organizations have been challenging military promotions for individuals accused of committing human rights violations since 1984, one year after the fall of the military dictatorship.⁴⁷

Timing can be important because of its potential impact on institutions. Individuals who are excluded from institutions early on in a transition will generally have less influence in the design and building up of those institutions than individuals who are excluded later. In Poland, for example, the fact that vetting was delayed for almost a decade meant the continued influence of members of the communist regime in the post-communist government structures. As Czarnota argues, in his chapter on Poland, “One of the critical factors in determining the effectiveness of lustration, particularly when the aim is to eliminate dangers to the new regime, is timing.” Duration, for its part, is worth considering because of how it may affect the general perception and understanding of vetting’s rationale. In the Czech Republic, writes Priban, the continued prolongation of the lustration law was “widely criticized as contradicting its original purpose and spirit. One of the main justifications of the law at the time of its drafting, which emphasized only a temporary effect of its discriminatory measures, thus turned out to be false.”

RATIONALE: WHAT ARE THE REASONS FOR VETTING?

The primary *outcomes* of a vetting process exist at the individual and institutional levels: individuals will be screened and sanctioned, which will generally have at least some impact on the institution. But what is the *rationale* for engaging in vetting? As mentioned above, the reasons for vetting public institutions can be numerous and contested. They can be both broad and long term, as well as narrow and short term, and they can change over time. One can, nonetheless, draw conclusions about the rationale behind vetting programs from the demands made by the public, justifications made by the politicians and designers, the mandates and legislation, and the nature of the process itself. At a broad level, the case studies in this volume suggest at least two important reasons for vetting: to punish the perpetrators, and to transform institutions in order both to safeguard the democratic transition and to prevent the recurrence of human rights abuses. These rationales are not mutually exclusive, and they are not necessarily considered with equal weight.

Some see a clear, nonpunitive, primary rationale behind vetting. In Greece, writes Sotiropoulos, vetting “does not have a punitive rationale. . . . The rationale for vetting is linked to the legitimacy of the new democratic regime.” Similarly, in Bosnia and Herzegovina, Mayer-Rieckh argues that the main purpose of vetting was to build fair and effective institutions that would prevent future recurrences of human rights abuse, rather than punishment. In the Czech Republic, explains Priban, the lustration law was initially motivated as a response to the less fair and unregulated practice of “wild lustration,” political instability, and public concern with the potential damage that the presence of secret police agents could have within the new democratic institutions and processes. According to a judgment of the Czech Constitutional Court in 2001, the lustration law still had a “legitimate aim, which is the active protection of a democratic state from the dangers which could be brought to it by insufficiently loyal and little trustworthy public services.”⁴⁸ According to Pablo de Greiff, in his chapter in this volume, the most defensible of the various justifications for engaging in vetting is that it may prevent the recurrence of human rights violations, not by deterring individual behavior, but by helping to dismantle networks of criminal activity.

The reasons for vetting are not always agreed to by all, however, and they can change over time. In Poland, for example, says Czarnota, while “the aim of the lustration law was the security of the state and the elimination of potential political blackmail,” “in Polish public opinion there is another aim that is not explicitly stated in the statute, namely the realization of some sort of transitional justice.” Similarly, in East Germany, a gap existed between those

who conceptualized vetting as quasi-retributive and those who saw it as a way to measure loyalty to the state. In this case, the degree to which these different understandings of the rationale of vetting affected its implementation changed as the transition progressed. As time passed, the initial social understanding of vetting, which was “self-consciously retributive,” gave way to a more legal understanding of vetting, through which it was, according to Wilke, “codified and implemented with a utilitarian and prospective concern about the establishment of a loyal and credible service.” This was partly due to political changes but also partly due to the idea that the passage of time allowed an individual to demonstrate that he or she could act according to the new society’s laws and norms. In Hungary, write the case study authors, the lustration debate began with a concern over blackmail and only later with a “general moral cleansing.”⁴⁹

COHERENCE: HOW DOES VETTING RELATE TO OTHER MEASURES OF INSTITUTIONAL REFORM? HOW DOES IT RELATE TO OTHER TRANSITIONAL JUSTICE MEASURES?

The coherence of a vetting program refers to its relationship with broader programs of institutional reform and transitional justice. As mentioned above, vetting has an institutional impact and is therefore an element of institutional reform. Mayer-Rieckh explains, however, that vetting can be implemented as a stand-alone measure or as part of a broader program of institutional reform that seeks to change an organization’s structure and mandate. This degree of coherence has implications regarding a vetting program’s rationale. In his chapter on this topic, Mayer-Rieckh argues, “as a stand-alone measure, vetting is generally insufficient to ensure that abuses are not repeated. A coherent and holistic approach to transitional reform is necessary—albeit not sufficient—to effectively prevent abuses from recurring.” Other reform measures that reinforce vetting in the aftermath of massive abuse, he explains, are those seeking to improve accountability, independence, representation, and responsiveness.

In the cases in this volume, vetting has been implemented in varying degrees alongside or as part of a broader program of institutional reform. In South Africa, institutional reform was only in small part concerned with human rights violations and cleansing the public sector of people with certain backgrounds.⁵⁰ In Germany, according to Wilke, where vetting did focus on people’s past wrongdoing, vetting in the public sector was still only “the first step in a large-scale process of restructuring and personnel reduction.” Just

how much a vetting process is part of a larger program of institutional reform will depend on a number of factors, such as the particular model employed. A reappointment process, such as that used in the judiciary of Bosnia and Herzegovina, explains Mayer-Rieckh, in general provides a “better opportunity” than a review process to implement other reforms such as those addressing gender and ethnic imbalances.

Vetting is a measure of institutional reform, and institutional reform, in turn, can be an element of a comprehensive transitional justice policy. De Greiff discusses this type of coherence in his chapter in this volume. At the pragmatic level, according to him, vetting can “facilitate the application” of other measures of transitional justice, in particular criminal prosecutions, truth-telling efforts, and reparations to victims, and in this sense act as an “enabling condition.” Conceptually as well, argues de Greiff, vetting relates to other transitional justice measures through its trust-inducing potential.

Support for such a holistic approach to transitional justice, which suggests that the different measures reinforce each other and are insufficient on their own, can be found in the case studies. In El Salvador, for example, the report of the truth commission, which named names and provided a systematic critique of the armed forces, gave impetus to the wholesale vetting of the military leadership.⁵¹

It seems that incoherence with other transitional justice measures, however, is more often the case. In Bosnia and Herzegovina, despite the establishment of the International Criminal Tribunal for the Former Yugoslavia, there has been so far little else in the way of transitional justice. In Greece, prosecutions did accompany vetting, but only for a small circle at the leadership level.⁵² In Germany, Wilke argues that the failure to prosecute those who were politically responsible while dismissing low-level informers from their jobs was seen to undermine the legitimacy of the vetting process. In Argentina, the lack of established criminal responsibility actually hindered vetting efforts that could have relied on the evidence generated by trials. As Barbuto explains, it may be precisely because a “process of impunity” has lasted for more than twenty years that efforts to hold people accountable within the political sphere have also lasted so long and been the subject of so much debate.

TRANSITIONAL CONTEXT

Finally, it must be remembered that decisions about vetting processes take place within a broader context of the political transition that the country is

undergoing. This context can affect the design, implementation, and outcome of the vetting process in a number of ways. First, at a broad level, transitions from war to peace provide a sometimes very different context than transitions from authoritarianism to democracy.⁵³ This can influence vetting processes in a number of ways, such as criteria and scope. In post-authoritarian societies, for example, as mentioned above, vetting is more likely to involve screening members of public institutions for evidence of nonviolent forms of collaboration with the former regime, while post-conflict societies tend toward screening for violent, gross human rights violations. At the same time, however, post-authoritarian vetting, while searching for more “moderate” crimes, will often cast a much larger net because many more citizens are implicated.

Furthermore, the type of transition can shape the challenges and debates that vetting efforts will confront. As Rumin explains in his chapter on gathering and managing information, the nature of a vetting process will always be at least partially a function of the information that is available, which, in turn, will be partially a function of the nature of the former regime. The post-authoritarian governments in the former communist countries in Eastern Europe had at their disposal overwhelming amounts of secret police files on their citizens, files which are of uncertain reliability but are often the subject of much political debate and controversy. Post-conflict governments, on the other hand, are often faced with an almost complete absence of records. Instead of deciding how to handle mountains of evidence, they must design vetting processes with an eye to gathering whatever information they can, through the use of such tools as questionnaires. Of course, this will not necessarily be the case. In Argentina, for example, the clandestine character of state terror meant that hardly any official information at all was available, which meant that human rights groups had to rely on the information they themselves had gathered in order to challenge the integrity of members of the military.⁵⁴

Second, the specific political context in which the transition occurs can affect the nature of a vetting process. For example, in El Salvador and Bosnia and Herzegovina, where international actors played important roles in the respective peace processes, vetting processes were initiated in large part due to strong international pressure (and in the latter, were largely controlled by international actors⁵⁵). In Greece and Argentina, political considerations limited the transitional governments’ desire and/or ability to apply more extensive vetting efforts; in Greece, political stability in the face of tense relations with Turkey and preparation for integration into the European Economic Community was the top priority; in Argentina, in the immediate aftermath

of the transition, the power retained by the military and particularly its threat of uprising constrained the government's ability to pursue formal vetting.⁵⁶ In post-communist Eastern Europe, some commentators have argued that variation in the timing and form of lustration can best be explained by privileging "the dynamics of post-communist politics" over more historical factors such as the "mode of exit" from communism.⁵⁷ In South Africa, finally, Jonathan Klaaren argues that a choice was made against vetting as part of the larger political compromise that ended years of conflict, authoritarianism, and apartheid.

NOTES

- 1 For a study of war crimes tribunals since World War I, see Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2001). For analyses of recent criminal prosecutions in the aftermath of conflict, see the first three studies on Timor-Leste, Kosovo, and Sierra Leone in the ICTJ's *Prosecutions Case Studies Series* (New York: ICTJ, March 2006).
- 2 For a study of truth commissions, see Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2001).
- 3 For the most comprehensive study of massive reparations programs, see Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), which resulted from a multiyear research project conducted by the ICTJ. See also K. De Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens, eds., *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (Antwerpen: Intersentia, 2005).
- 4 ICTJ, "Vetting Public Employees in Post-Conflict Settings: Operational Guidelines," in this volume, hereinafter "Vetting Guidelines."
- 5 Ruti Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), 8. Lustrations in the Czech Republic are described as an "administrative law measure," in that each one is "an administrative decision that states facts important for legal qualification for certain jobs in state administration and state-owned companies"; see chapter by Priban in this volume. Vetting is also related to criminal justice in a number of different ways and, to be done fairly, requires procedural justice; see chapter by Andreu-Guzmán in this volume. Vetting can also be conceived of as other forms of justice, such as retributive justice, in that it punishes perpetrators, or distributional justice, in that it can lead to the redistribution of resources.
- 6 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume.
- 7 Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge; New York: Cambridge University Press, 2004), 92.
- 8 Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 136.
- 9 Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, "Explaining Lustration in Central Europe: A 'Post-communist Politics' Approach," *Democratization* 12, no. 1 (2005): 22–43, at 23.
- 10 Jens Meierhenrich, "The Ethics of Lustration," *Ethics and International Affairs* 20, no. 1 (Spring 2006): 99–120, at 99.
- 11 See David Cohen, "Transitional Justice in Divided Germany after 1945," and Henry Rousso, "The Purge in France: An Incomplete Story," in *Retribution and Reparation in the Transition to Democracy*, ed. Jon Elster (Cambridge; New York: Cambridge University Press, 2006).

- 12 See the chapters on the Czech Republic, Hungary, and Poland in this volume; Williams, Fowler, and Szczzerbiak, “Explaining Lustration in Central Europe”; and Tina Rosenberg, *The Haunted Land: Facing Europe’s Ghosts after Communism* (New York: Vintage, 1996).
- 13 See chapter by Andreu-Guzmán in this volume.
- 14 For South Africa, see chapter by Klaaren in this volume; for Northern Ireland, see Kieran McEvoy and Ciaran White, “Security Vetting in Northern Ireland: Loyalty, Redress and Citizenship,” *The Modern Law Review* 61, no. 3 (1998): 341–61.
- 15 Hereafter, “Vetting Guidelines.” Although these refer directly to vetting in post-conflict situations only, their development benefited substantively from all the country case studies in this volume. They represent an effort both to establish more firmly the concept of vetting and to make this concept operational.
- 16 Available at http://www.undp.org/bcpr/documents/jssr/trans_justice/Vetting_Public_Employees_in_Post-Conflict_Settings.pdf.
- 17 Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States—Vetting: An Operational Framework* (New York and Geneva: OHCHR, 2006).
- 18 United Nations Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General*, UN Doc. S/2004/616, August 23, 2004, 17–18.
- 19 Meierhenrich, “The Ethics of Lustration,” 103.
- 20 “Vetting Guidelines” in this volume.
- 21 See the chapter by Barrett, Hack, and Munkácsi in this volume.
- 22 See the chapter by Czarnota in this volume. It is only in Hungary and Poland that elected offices were subject to vetting; it is in these countries, however, that a positive result itself carried no direct punishment (see the section on sanctions below).
- 23 Wilke points out one implication of uneven application of vetting: the federal unemployment offices, which were not vetted before the mid-1990s at all, provided an avenue of employment, or a “safe haven,” for individuals dismissed elsewhere in the public sector.
- 24 The South African government did end up dismissing twenty-three officers from military intelligence, but this was in response to public pressure and not an example of systematic vetting; see chapter by Klaaren in this volume. In Argentina, efforts have been made to challenge military promotions and candidates for elected office, but again these are not formal vetting processes; see chapter by Barbuto in this volume.
- 25 International Police Task Force Policy P10/2002, para. 2(h); see chapter by Mayer-Rieckh in this volume.
- 26 See chapter by Barbuto in this volume.
- 27 See chapter by Priiban in this volume.

- 28 See chapter by Zamora with David Holiday in this volume.
- 29 See chapter by Barbuto in this volume.
- 30 See chapter by Priban in this volume.
- 31 See chapter by Wilke in this volume.
- 32 Some individual institutions on their own decided to fire or otherwise sanction employees who had made positive declarations—a “side effect” or “extension of the lustration statute”; see chapter by Czarnota in this volume.
- 33 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume. For a comparison of review and reappointment process, see Mayer-Rieckh’s chapter on vetting and other transitional reforms in this volume.
- 34 See chapter by Barbuto in this volume.
- 35 Germany also provides several examples of what might be called an “unofficial reappointment” process. There, a number of university departments were completely dissolved purportedly because they were superfluous—as part of the “unraveling,” or *Abwicklung*—but were soon thereafter reopened, says Wilke, which “raised the question whether wholesale *Abwicklung* was used to circumvent the requirement of individual review before dismissing employees;” see her chapter in this volume.
- 36 In Hungary, for example, proof of “lustratable” activity included signed declarations or reports of activity, but, suggest the case study authors, given the “great numbers of documents destroyed, it is perhaps not surprising that such extensive proof of involvement was found only rarely.” See chapter by Barrett, Hack, and Munkácsi in this volume; see also chapter by Rumin in this volume.
- 37 See chapter by Klaaren in this volume.
- 38 See chapter by Zamora with Holiday in this volume.
- 39 See chapter by Czarnota in this volume.
- 40 See chapter by Mayer-Rieckh on Bosnia and Herzegovina in this volume.
- 41 See chapter by Priban in this volume.
- 42 “Vetting Guidelines” in this volume.
- 43 South Africa, for example, according to Maryam Kamali, chose not to implement a formal vetting process in part for such practical reasons: it “could not afford to dismiss large numbers of its professionals until a new generation of qualified professionals became available.” Germany, on the other hand, could afford vetting because it “had cadres of willing and qualified unemployed professionals in the western part of the country ready to take over.” Maryam Kamali, “Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa,” *Columbia Journal of Transnational Law* 40 (2001): 89–141, at 136.
- 44 As Peter Boettke and Christopher Coyne explain, “Human capital resided in individuals who had to work within the system.... Eradicating those tied to the system indiscriminately will result in a loss of human capital that will be counter-productive to future

- reform.” Peter J. Boettke and Christopher J. Coyne, “The Political Economy of Forgiveness: The Necessity of Post-Atrocity Reconciliation,” *Society* 44, no. 2 (2007 forthcoming).
- 45 Eric Stover, Hanny Megally, and Hania Mufti, “Bremer’s ‘Gordian Knot’: Transitional Justice and the U.S. Occupation of Iraq,” *Human Rights Quarterly* 27, no. 3 (August 2005): 830–57.
- 46 See chapters by Sotiropoulos and Zamora with Holiday in this volume.
- 47 See chapters by Czarnota; Barrett, Hack, and Munkácsi; and Barbuto in this volume.
- 48 Quoted in the chapter by Priban in this volume.
- 49 See chapter by Barrett, Hack, and Munkácsi in this volume.
- 50 See chapter by Klaaren in this volume.
- 51 See chapter by Zamora with Holiday in this volume.
- 52 See chapters by Mayer-Rieckh on Bosnia and Herzegovina and Sotiropoulos in this volume.
- 53 Foreign or international occupation provides a third type of context that is not examined in this volume, but which also affects the nature of vetting. For a discussion of “lustration” under the U.S. occupation of Iraq, see Meierhenrich, “The Ethics of Lustration.” Claus Offe suggests that Germany offers a unique case because the German Democratic Republic ceased to exist and became part of the Federal Republic of Germany, which “came to play the role of the functional equivalent of the occupation regimes after the Second World War.” Claus Offe, *Varieties of Transition: The Eastern European and East German Experience* (Cambridge, MA: MIT Press, 1997), 86.
- 54 See chapters by Rumin and Barbuto in this volume.
- 55 See chapters by Mayer-Rieckh on Bosnia and Herzegovina, and Zamora with Holiday in this volume. In Liberia, the vetting of recruits for the newly established armed forces is being performed by DynCorp, a U.S.-based private security company, contracted for the task by the U.S. government. See Human Rights Watch, “Liberia at a Crossroads: Human Rights Challenges for the New Government,” Human Rights Watch Briefing Paper, September 30, 2005, <http://hrw.org/backgrounder/africa/liberia0905/>; accessed June 1, 2006.
- 56 See chapters by Sotiropoulos and Barbuto in this volume.
- 57 Williams, Fowler, and Szczerbiak, “Explaining Lustration in Central Europe,” 23; also discussed in the chapter by Barrett, Hack, and Munkácsi in this volume.