

# ictj briefing

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## Hearings and Decision Making During Transitional Vetting Processes

### Insights from Kenya

#### Introduction

In recent years, increased attention has been paid to transitional vetting and other forms of screening of state agents in the aftermath of large-scale human rights violations. (For a definition of vetting, see Box 1.) Some important work has been done on the design and implementation of vetting processes.<sup>1</sup> However, research and writing on the subject are nevertheless limited, and many questions about vetting remain unanswered. This is especially true for practices that occur at the micro level and for the mechanics of vetting more broadly.<sup>2</sup>

This report, which focuses on research conducted in Kenya, draws attention to some of the less studied aspects of vetting, concentrating on the processes by which vetting bodies hold hearings and come to decisions about cases. In Kenya, a police vetting exercise started in 2013. Since then, more than 5,000 police officers have been screened. We examined the vetting process and carried out interviews with a range of actors who were involved in the hearings. We also collected and analyzed transcripts of hearings and studied court rulings as they related to the vetting process.

Using the data we gathered from these sources, we identify in this report obstacles and pitfalls that have been little discussed in relation to transitional vetting processes. More specifically, we seek to illustrate how the attitudes and beliefs of commission members can affect hearings and case rulings. We deliberately use the word *illustrate* instead of *prove* because our data on hearings and decision making in Kenya are rich but incomplete for the purposes of comprehensive evaluation and causal analysis. We are thus able to generally identify challenges and problems in Kenya's vetting processes, but we are not in a position to discuss their full scope and precise effects.

We argue that Kenya's experience with police vetting suggests that attending to the attitudes and preferences of commission members can help in understanding the decisions

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<sup>1</sup> Alexander Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies* (New York: Social Science Research Council, 2007).

<sup>2</sup> For instance, little is known about why citizens file complaints, why state agents share information about colleagues, how state agents act or perform in front of commissions, and how commissions come to decisions.

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**About the Authors**

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**Box 1. Transitional Vetting**

*Transitional vetting* refers to a process that is designed to remove or otherwise disempower state agents who committed human rights violations or who engaged in other forms of serious professional misconduct. It is carried out in order to build or restore accountable, legitimate, and effective public institutions. Transitional vetting occurs after periods of large-scale human rights violations, systemic corruption, and other serious abuses of office. Because the circumstances of each situation are different, transitional vetting is a special, one-off process with a unique, ad hoc nature.

they make in various cases, and the ways they reach those decisions, for three related reasons. First, we observed that there can be considerable—legal—*discretion* in transitional vetting, enabling personal preferences and attitudes to influence hearings and decisions. Second, we learned that nearly all decision makers in Kenya were *inexperienced* in vetting or similar administrative processes, which is not unusual in transitional vetting. However, for some commission members, this inexperience raised feelings of insecurity and a desire to establish authority, among other things. It also allowed decision makers' emotions to creep into the hearings. Third, we found that *cleavages* within society may increase the likelihood of biased decision making. Schisms are not uncommon in contexts of transitional justice, with transitional vetting processes usually following episodes during which the salience of social divisions within society increased.<sup>3</sup>

We believe that these challenges related to decision making in Kenya should be taken into account in both the design and the execution of transitional vetting processes. Without consideration of these factors, it is likely unfair decisions will be made, which would undermine one of the fundamental objectives underlying vetting: to restore or rebuild legitimate and trustworthy public institutions. To be clear, the issue is not that commission members have attitudes and preferences that affect their decision making. This is the case for all adjudicators. The issue is that in contexts where vetting is needed, the absence or inadequacy of clear regulations, guidelines, and review processes may allow those attitudes and preferences to have undue influence on decision making, leading to perceptions of unfairness.

It is important to clarify that this report's focus on the micro-level dynamics of vetting is not meant to downplay the significance of the macro-level context. As we point out, there are critical ways in which larger political and institutional contextual factors affect decision making within vetting processes. The policy implications should therefore not be considered in isolation from the political and technical support that any vetting process requires to be effective.

A final caveat for this report is that transitional vetting comes in many forms and variations; the Kenyan process, in which every member of an institution was subjected to a public hearing before a panel of lay adjudicators, is just one option. In the conclusion, we consider the lessons from this study and discuss how findings from the Kenyan case may apply to other instances of vetting and to transitional justice processes more generally.

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3 See Elisabeth Jean Wood, "The Social Processes of Civil War: The Wartime Transformation of Social Networks," *Annual Review of Political Science* 11 (2008): 539-561.

**Box 2. The Police Vetting Process**

In 2013, Kenya began a police vetting process led by the newly established National Police Service Commission (NPSC). The process was implemented in response to the role the police force played in the 2007–2008 post-election violence as well as its reputation for engaging in corruption, extrajudicial killings, and torture. As a part of a more comprehensive police reform program, the vetting process was meant to screen every member of the Kenya police for suitability and competence. In practice, the commission focused on senior offices and then on particular formations; it never got beyond the traffic police. Out of an estimated 80,000 officers in service, the inaugural commission vetted 5,993 officers, of which 5,548 were retained and 445 were found unsuitable and therefore dismissed. (Some officers were reinstated after a review of their cases.)

**Existing Research and Discourse**

Vetting has been understood as an essential, if narrow, element of transitional justice because of (a) its potential impact on the legitimacy of state institutions and therefore the public trust in those institutions and (b) its contribution to filling the impunity gap, due to its punitive effects. In 2004, the United Nations (UN) secretary general's report on transitional justice and the rule of law listed "vetting and dismissals" among the measures that constitute its definition of transitional justice.<sup>4</sup> In 2006, the UN Office of the High Commissioner for Human Rights and the UN Development Programme published versions of operational guidelines for vetting initiatives, which situated vetting within transitional personnel reform and reviewed the parameters, standards, design, and desired outcomes of such processes.<sup>5</sup>

Vetting is an element of the notion of *guarantees of nonrecurrence*, as articulated in the UN Principles to Combat Impunity, which encompass a range of institutional reform measures (including vetting), legal reform measures, and measures to disband parastatal armed groups.<sup>6</sup> In contrast to the principles of justice, truth, and reparation, guarantees of nonrecurrence are the least developed principle and comprise a fairly limited set of measures to prevent the recurrence of gross human rights violations.<sup>7</sup> More recent articulations of guarantees of nonrecurrence have expanded beyond this narrow list of measures to embrace constitutional reform and efforts outside the realm of institutions, such as providing support to civil society and implementing cultural interventions.<sup>8</sup>

4 UN Security Council, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, S/2004/616\*, Aug. 23, 2004, 4, 9, 17–18.

5 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: UN, 2006); United Nations Development Programme, *Vetting Employees in Post-conflict Settings: Operational Guidelines* (New York: UNDP, 2006).

6 UN Economic and Social Council, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, Feb. 8, 2005, Principle 36.

7 Alexander Mayer-Rieckh and Roger Duthie, "Principle 35: General Principles," in *The United Nations Principles to Combat Impunity: A Commentary*, ed. Frank Haldemann and Thomas Unger (Oxford: Oxford University Press, 2018), 383–391.

8 UN General Assembly, *Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence*, Pablo de Greiff, A/HRC/30/42, Sept. 7, 2015; Alexander Mayer-Rieckh, "Guarantees of Non-Recurrence: An Approximation," *Human Rights Quarterly* 39, no. 2 (2017): 416–448; Naomi Roht-Arriaza, "Measures of Non-repetition in Transitional Justice: The Missing Link," in *From Transitional to Transformative Justice*, ed. Paul Gready and Simon Robins (Cambridge: Cambridge University Press, 2019), 105–130.

Vetting has been the subject of research, including an ICTJ edited volume that features case studies and essays on a number of countries, including Bosnia and Herzegovina and El Salvador.<sup>9</sup> Research on *lustration*, the term often used to refer to the institutional screening of public officials for collaboration with regimes in the formerly communist countries of Eastern and Central Europe, often overlaps with the literature on vetting.<sup>10</sup> Other types of personnel reform processes—some of which are more like purges in the sense that they, in contrast to most other vetting processes, focus on group affiliation rather than individual conduct—have been implemented in Libya, Iraq, and post–World War II countries.<sup>11</sup>

When vetting targets security institutions, such as the police and the military, that were involved in committing or facilitating human rights violations, it can constitute an important element of security sector reform (SSR). SSR is a broad effort to improve the effectiveness and accountability of security institutions within a framework of human rights and the rule of law.<sup>12</sup> However, the literature and policy materials on SSR often do not make explicit connections to transitional justice or vetting.<sup>13</sup>

Finally, vetting is consistent with the framework of the 2015 Sustainable Development Goals (SDGs), particularly SDG16, which calls for the promotion of peaceful, just, and inclusive societies. Within SDG16, 16.1 addresses the reduction of all forms of violence; 16.3 describes the rule of law and access to justice; 16.5 focuses on the reduction of corruption; and 16.6 upholds the development of effective, accountable, and transparent institutions.

Most research and policy discourse on vetting have focused on its design, practice, and relationship to broader processes such as transitional justice, security sector reform, and guarantees of nonrecurrence. There has been little, if any, analysis of decision-making dynamics at the micro level.

## Relevance of Decision Making

Why should we focus on hearings and decision making in vetting processes? There are several reasons. First, the extent to which wrongful conduct is addressed by vetting bodies,

9 Mayer-Rieckh and de Greiff, *Justice as Prevention*.

10 Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, "Explaining Lustration in Central Europe: A 'Post-communist Politics' Approach," *Democratization* 12, no. 1 (2005): 22–43; Jens Meierhenrich, "The Ethics of Lustration," *Ethics and International Affairs* 20, no. 1 (2006): 99–120; Roman David, "From Prague to Baghdad: Lustration Systems and Their Political Effects," *Government and Opposition* 41, no. 3 (2006): 347–372; Mayer-Rieckh and de Greiff, *Justice as Prevention*; Cynthia M. Horne, "Vetting and Lustration," in *Research Handbook on Transitional Justice*, ed. Cheryl Lawther, Luke Moffett, and Dov Jacobs (Cheltenham, UK: Edward Elgar, 2017), 424–441.

11 Mieczysław P. Boduszyński and Marieke Wierda, "Political Exclusion and Transitional Justice: A Case Study of Libya," in *Transitional Justice in the Middle East and North Africa*, ed. Chandra Lekha Sriram (Oxford: Oxford University Press, 2017), 141–160; Eric Stover, Hanny Megally, and Hania Mufti, "Bremer's 'Gordian Knot': Transitional Justice and the US Occupation of Iraq," *Human Rights Quarterly* 27, no. 3 (2005): 830–857; 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: Cambridge University Press, 2006), 59–88, and 89–123.

12 Alexander Mayer-Rieckh, "Dealing with the Past in Security Sector Reform," The Geneva Centre for the Democratic Control of Armed Forces, SSR Paper 10 (2013); Alexander Mayer-Rieckh and Roger Duthie, "Enhancing Justice and Development Through Justice-Sensitive Security Sector Reform," in *Transitional Justice and Development: Making Connections*, ed. Pablo de Greiff and Roger Duthie (New York: Social Science Research Council, 2009), 214–249; Heiner Hänggi, "Security Sector Reform," in *Post-conflict Peacebuilding: A Lexicon*, ed. Vincent Chetail (Oxford: Oxford University Press, 2009), 337–349.

13 UN General Assembly and Security Council, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform, Report of the Secretary-General, A/62/659-S/2008/39*, Jan. 23, 2008.

and the degree to which politics or bias shape their decision making, affect the legitimacy of the state and the ability to successfully restore or establish normative orders.<sup>14</sup> This is relevant not only for the immediate victims of human rights violations but also for other members of society. Even if they are not physically hurt, people have often lost trust in norms and public institutions, having observed norm violations by state agents.<sup>15</sup>

A second reason for studying hearings and decision making related to vetting has to do with the functioning of the institution being vetted, such as the police. If police officers observe that colleagues who engaged in wrongful behavior are excused, or that those who did not engage in wrongful behavior are punished, they are less likely to believe that a vetting process is fair, and that the actors in charge of the process are committed to the restoration of professional and just institutions. Establishing the objectivity of vetting is crucial. Fairness in vetting signals to those within the institution and to society as a whole that there is an institutional commitment to the rule of law and accordingly helps to uphold procedural justice within an organization. Impartial, evenhanded vetting is also more likely to identify and weed out unfit state agents, contributing to the establishment of an institution that is professional and acts according to the rule of law.

### Discretion

It could be argued that a good legal design guards against vetting decisions that are overly influenced by the preferences and attitudes of decision makers. However, political science research on judicial decision making has shown that adjudicators, even those in mature democracies, *always* have discretion. Even if they are well trained and trying to follow the law, adjudicators always bring experiences and beliefs that affect their decisions. Indeed, examinations of judicial rulings reveal variations that cannot be explained by the law only; the preferences, attitudes, and beliefs of adjudicators matter.<sup>16</sup>

Discretion, exercised in a situation in which the law or the context allows or forces decision makers to apply their own judgment to particular issues, is also relevant to transitional vetting. In fact, there is even more discretion in those cases, partly because the rules for vetting processes are always new and therefore in need of more interpretation, as transitional vetting usually involves ad hoc and one-off processes (see Box 1). Two examples from the Kenyan case illustrate the issue of discretion and the possible outcomes thereof—in particular, different treatment of similar cases—in transitional vetting. The first pertains to in camera sessions; the second concerns rules of evidence.

### In Camera Sessions

The regulations for Kenyan vetting state, “The vetting process shall be open to the public provided that the Commission may decide to hold in camera proceedings in order to protect the right of privacy of any person in the vetting process or if it is in the interest of justice or national security.”<sup>17</sup> Officers who were to be vetted could apply for an in camera session on these grounds, and the commission had the authority to grant or refuse such a request.<sup>18</sup> Crucially, however, the vetting regulations did not provide details about how

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14 Pablo de Greiff, “Theorizing Transitional Justice,” in *Transitional Justice*, ed. Melissa Williams, Rosemary Nagy, and Jon Elster, NOMOS, vol. 51 (New York: New York University Press, 2012), 31-77.

15 Pablo de Greiff, “Vetting and Transitional Justice,” in *Justice as Prevention*, 522-545.

16 Allison Harris and Maya Sen, “Bias and Judging,” *Annual Review of Political Science* 22 (2019): 241-259.

17 NPSC Regulation 5.

18 *Ibid.*

requests should be submitted or what criteria should be used to assess them. Transcripts from vetting hearings show that the resulting discretion often caused similar cases to be treated differently.

The following two excerpts illustrate the differential treatment. In the first instance, the panel chair decided to honor a request for an in camera session.

Police officer: Sir, I am requesting for even two or three minutes to have a private session, sir.

Panel chair: With the Commission?

Police officer: Yes, sir.

Panel chair: Away from the media, or when you say private session, what does that mean?

Police officer: That is *in camera*, sir.

Panel chair: *In camera*, yes, *in camera*. You will always give us good information in good time, but in the circumstances, since you are the last person, we will then excuse, ask the media to excuse us, and we listen to what you have to tell us *in camera*. Thank you media, we look forward to seeing you tomorrow. [The media leaves.]<sup>19</sup>

In another session, however, the request for an in camera hearing was denied. The police officer told the panel chair that he would discuss matters related to security, which was one of the grounds for holding an in camera session. But the chair argued that the police officer should have first submitted a letter stating his request. In the absence of a letter or other detailed information provided to the secretariat before the hearings, the chair reasoned, a request to meet in camera should be refused.

Police officer: Chairman, I am ready, but the matters I am going to talk here is touching on security, so can it be out of camera? It is a request.

Panel chair: Well, when there are matters that touch on national security, we will already have seen that the matters are touching on the national security... [U]sually you do a letter in which you explain the circumstances and you hand it over to the secretariat. It gives room to the Commission to sit down, look at it, and weigh it to determine where it belongs...

Police officer: I didn't write a letter.

Panel chair: Okay, did you speak to any member of the secretariat and give details?

Police officer: Yes, I did that but I can't remember the name of the officer, but I told him to whisper to you so that if I be given a chance, it should be off

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19 Verbatim record, National Police Service Commission, vetting interviews of traffic police officers, Golf Hotel, Kakamega, Aug. 18, 2016.

camera but all in all if the vetting is to take me through with the camera, I am ready also.

Panel chair: Very well, the officer said you did not give him sufficient reason for it to be held *in camera*; he said you simply mentioned you wanted it *in camera* but you did not give details. Such is the decision of the Chairman because your vetting is a matter of public concern, public interest, and in the interest of public participation being total. I have decided we shall be able to carry out the vetting in full view of the public.

Police officer: That is right, sir.<sup>20</sup>

In this second example, the chair of the panel explained that the police officer should have documented his reasons for requesting an in camera session and provided them in advance of the hearing. The vetting regulations do hold that there are acceptable grounds for moving to a private session, and the police officer mentioned one of those reasons to the chair but not to the secretariat. In the first example, however, the officer did not submit his request in advance either, and yet, the panel chair decided to grant the request. The issue, then, is not in itself that the panels reached different decisions but rather that there was no clear procedure to be followed in making such decisions.

### Rules of Evidence

The concept of rules of evidence was also open to interpretation and thus carried the potential for unfair treatment—that is, treating similar cases differently. The so-called principles for vetting in Kenya provide that “the vetting process shall not be bound by strict rules of evidence and the proof applicable shall be that of a balance of probabilities.”<sup>21</sup> In the aftermath of conflict or gross human rights violations where good evidence is lacking, and in the context of an administrative form of justice, this principle may be appropriate. But irrespective of the question of appropriateness, the principle offers considerable room for interpretation. A former commissioner explained how the commission dealt with evidence.

When we came to decide whether this man is going home or not going home, it was not like being before a magistrate where you must prove beyond a reasonable doubt that this person did this action. But we were looking at the probability that he did it, so it was not like...you have to prove all that. But we listened to his answers to the questions, and how he answered them, and then we made up our minds whether he is culpable or he is not culpable.<sup>22</sup>

Evidence was also judged this way in the case of Belvin Wanjiru Namu, a chief inspector of police with traffic duties. She was vetted in 2016 and found unfit for service. Namu and her husband had a family company running *matatus* (minibuses). The National Police Service Commission (NPSC) assumed this constituted a conflict of interest. Namu disagreed and brought the case to court. The judge overruled the NPSC’s decision, arguing that there was no evidence.

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20 Verbatim record, National Police Service Commission, vetting interviews for senior superintendents and superintendents of police, Noble Hotel and Conference Centre, Eldoret, March 19, 2015.

21 NPSC Regulation 4(f).

22 Interview, Nairobi, April 24, 2019.

Although the petitioner was involved in traffic duties, there was no evidence at all that her position allowed the company's vehicles to receive preferential treatment or that they did not comply with the law. Being a traffic officer is not a permanent engagement. One may act as a traffic officer one day and perform different duties another day. *The question of conflict must be clear and not presumptive.*<sup>23</sup>

Unlike in the application of rules pertaining to in camera sessions, the commission did not treat similar cases differently here. However, this does represent a situation where a single regulation could be subject to very different interpretations. The court argued that a conflict of interest can be established only if there is clear proof. In contrast, it indicated that the commission was acting on the belief that a *presumption* of a conflict of interest was sufficient. While we did not specifically examine the commission's hearings in this regard, it would not be surprising to find that its relaxed interpretation had resulted in different outcomes in similar cases. This is a problem that a higher standard of evidence may help to address.

### Other Issues Contributing to Discretion

In general, struggles with evidence may be anticipated in cases of transitional vetting, not only because of the challenges of collecting credible evidence but also because in situations where transitional vetting is applied, society is usually calling for dismissals and other kinds of repercussions for wrongdoing.<sup>24</sup> One of the commissioners in Kenya even claimed that civil society was calling for a "blood bath." On the one hand, these kinds of social pressures may push some decision makers in vetting processes toward further widening their discretionary space or to test the limits of that space.

On the other hand, there were also pressures against vetting in Kenya. Another commissioner recalled, "Remember at the beginning...we received a real human head cut and brought to the office, to the chair with a message, 'you are next.'"<sup>25</sup> Opposing pressures from political leaders or the institution undergoing vetting may lead decision makers to interpret rules in a narrow manner and allow law-breaking state agents to escape accountability more easily. The effect of these two pressures, pushing in opposite directions, on a vetting process will depend on the particular context, but it is important to be aware of this dynamic.

A final issue contributing to discretion, especially at the local level, is a lack of oversight. At the local level, decision makers' actions are harder to monitor, and thus their room to maneuver may be greater. This does not mean that discretion always generates greatly diverse decisions. But, there is more potential for discretion to be exercised in smaller, local contexts. In the Kenyan case, local hearings were significantly shorter, less well prepared, and, as a former panelist observed, more "haphazard" than hearings at the central level. The panelist stated: "As vetting moved from the first eight [police ranks, at the central level] to other ranks [that is, as it moved from the central to the local level], it became much more disorganized. It became much more uncoordinated. It became much more,

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23 Petition no. 86 of 2018, *Belvin Wanjiru Namu v. NPSC*, par. 33; emphasis added.

24 Here we are not talking about discretion in the sense of rules providing room for interpretation but about decision makers' attitudes toward rules that in turn create more or less space for interpretation. Underlying this understanding of discretion is the belief that discretionary spaces are the outcome of (a) the wording of rules and (b) decision makers' approach to their general role and to the rules.

25 Interview, Nairobi, April 25, 2019.



for lack of a better term, very much haphazard. There was no set of questions to speak of. Therefore, it would be up to you as a panelist to decide, what is it that I want to ask this officer.”<sup>26</sup>

### Inexperience

Within this discretionary space, a large part of the decision-making process is often in the hands of people who were not trained as adjudicators.<sup>27</sup> These inexperienced decision makers *may* behave in a way that is not neutral or objective. In the Kenyan case, three possible sources of problems can be identified: anger and frustration, uncertainty and a desire to establish authority, and an incomplete understanding of legal ethics.

### Anger and Frustration

First, we observed that panelists sometimes became emotional—angry and frustrated—because they felt that officers were being dishonest with them and perhaps were wasting their time. The following excerpt, involving a case in which a police officer asked for review, illustrates this issue.

Panel member: What surprises us is that even after being home for six months and you come back for a review, you are challenging us and asking if there is anybody who complained. Did you have the impression you are coming....

Police officer: Sir....

Panel member: Listen, hey, what is wrong with you, have you come for a contest?

Police officer: No, sir.

Panel member: So what is wrong with you?

Police officer: Continue, sir.

Panel member: You asked to come, you came to challenge the authority of the Commission?

Police officer: No, sir, I wanted to explain.

Panel member: Why would you be explaining if I haven't given you permission?

Police officer: Sorry, sir.

Panel member: Why are you cutting me short? Or you thought you are coming to court?

Police officer: No, sir.

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<sup>26</sup> Interview, Nairobi, Feb. 19, 2019.

<sup>27</sup> This is not always the case, especially not in cases of vetting of judiciaries.

Panel member: You have come to your employer to ask that an administrative decision which was made be changed in your favor, and it was expected you will come and give us the reason why you feel it needs to be changed, but instead you are asking us if somebody complained. Have you read the Vetting Regulations, have you read the Vetting Regulations?<sup>28</sup>

### Establishing Authority

A second challenge, and one that relates to the emotions of anger and frustration, is uncertainty. Decision makers in transitional vetting may feel insecure about their position, especially when they are civilians and the people who are being vetted are police. That uncertainty may incline decision makers to try to establish their authority during hearings, as the following excerpt illustrates. In the course of the conversation, the chair of a panel insisted that a police officer should always address him first, even when answering questions from other panelists.

Panel member: Officer X, how are you?

Police officer: Fine.

Panel member: Now.

Panel chair: Address the chairman. You are forgetting your etiquette. You are not in a quarrel with the Commissioner, are you?

Police officer: Even I appear not to be.

Panel chair: She has asked you how are you and you have said fine. I am not so sure that is the police etiquette.

Police officer: So I should address fine sir?

Panel chair: What did you say?

Police officer: I understand now because I am directly to the chairman. I never triggered my eyes to her.

Panel chair: Do you know you always address the chairman?

Police officer: Yes, I know, sir.<sup>29</sup>

The chair asserted that it was police etiquette to constantly, and only, address him. It is not clear what the source of this rule was, or whether it really was correct etiquette. In many other hearings, we did not observe police officers addressing the chair of a panel when responding to questions from other panelists. The police officer in this interaction nonetheless admitted that he knew he should have addressed the chairman, which, unless he was just trying to please the chairman, suggests that the custom had some basis in reality. Nevertheless, if it did formally exist, it seems to have been a rule that was not consistently practiced; in many other hearings, the rule was neither applied nor insisted upon.

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<sup>28</sup> Verbatim record, National Police Service Commission, vetting review interviews for traffic police officers from the Western Region, NPSC offices, Skypark, Westlands, July 14, 2017.

<sup>29</sup> Verbatim record, National Police Service Commission, vetting interviews for senior superintendents and superintendents of police, Noble Hotel and Conference Centre, Eldoret, March 19, 2015.

The desire to establish authority was evinced not only by civilian panelists and commissioners but also by those who had a police background. In some cases, although certainly not all, decision makers were adamant about etiquette in a way that appears to have been surprising to the police officers and also quite intimidating. This excerpt offers an example:

Panel member: Please sit down, Officer Y.

Police officer: Thank you, madam.

Panel member: Put your kofia [hat] on your left hand side. You are behaving as if you never matched [acted according to police procedure]. Left turn and right turn has gone, where is your left hand side?

Police officer: This side, madam.

Panel member: Yes, put it on the table. That is better. Sit nicely and pull the chair in front and be comfortable.

Police officer: Thank you.<sup>30</sup>

### Legal Ethics

A third source of difficulty for inexperienced decision makers arises in the absence of guidance in legal ethics. Institutions that make decisions should have a code of ethics so that adjudications are based on relevant and applicable rules or legal provisions. An ethical sensibility may be less ingrained in inexperienced decision makers as compared to experienced ones, making the need for a code of ethics even more stark. In the Kenyan case, for instance, some commissioners communicated with police officers they knew before a hearing, which is ethically dubious. One of the commissioners dismissed this as a problem because, she pointed out, the police officers who called her were mostly “clean.”

Most of the people were not going to go [be dismissed], they were just clean people. It was not like they were saying, “Please help me, I am coming before you.” They were just telling me, “I will be at the commission on this day.” Which panel? Panel two. If I am on that one, I will say, “Ah, what time?”<sup>31</sup>

When asked if the officers who had contacted her before a hearing were people that she knew personally, the commissioner responded, “Yes, these are people I knew. And for me three quarters of the people we vetted were clean.”<sup>32</sup>

The fact that the majority of police officers were deemed “clean” appeared to justify, for the commissioner, the ex parte communication with them. However, she clarified that she would, when necessary, step down from a case, for example if she had had a negative past interaction with the police officer who was going to be heard. She explained:

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<sup>30</sup> Verbatim record, National Police Service Commission, vetting interviews for traffic police officers, Kunste Hotel, Nakuru, Aug. 30, 2016.

<sup>31</sup> Interview, Nairobi, April 23, 2019.

<sup>32</sup> Ibid.

If I found somebody I didn't want to vet—maybe I worked with him, maybe I punished him one time, maybe I didn't like him to come—I swore I would ask for the person to be swapped.<sup>33</sup>

But, she added, the police officers themselves could not ask for a commissioner to step down or to switch panels.

Interviewer: Could they switch panels? Could they for instance sign up for another?

Commissioner: No, no, no, they could not switch panels, but as the chair, if I [the chair] felt that I didn't want to interview this person because of this, I could ask my colleagues in another panel, can we switch?

Interviewer: Could it also be the other way around? Suppose I felt uncomfortable with you because we had a fight in the past, you were....

Commissioner: No, no, they did not have that.<sup>34</sup>

The final remark here refers to the problematic fact that the vetting process did not allow for an officer who was being vetted by a panel member with whom she had been in conflict with in the past—leading to the potential for (real or perceived) biased treatment—to request another panel or other panel members.

### Impact

The above described tendencies and issues are problematic because they could affect hearings and decision making in ways that contribute to unfair outcomes. Decision makers who become emotional or feel the need to establish their authority vis-à-vis an officer will probably engage in a different line of interrogation than decision makers who are less preoccupied by questions of status and power. Similarly, decision makers who communicate with police officers before hearings may be affected by that communication, or, more importantly, the perception is likely to arise that they were affected. Further research is needed to see whether this kind of differential treatment ultimately results in different outcomes for similar cases. But it would not be surprising to find that it does. Even if the outcomes are equivalent, though, the unequal treatment of officers—that is, unfairness in the *process*—may contribute to officers' beliefs and public perceptions that vetting *outcomes* are also unfair.

### Tensions and Cleavages

A more fundamental issue that could potentially affect the fairness of decision making involves tension—that is, tension beyond that of individual cases. Transitional vetting always takes place in a context of tension. This may lead to state agents evading accountability, on the one hand, or to the instigation of purge-like processes, on the other. These two different types of outcomes can be traced back to two different types of tension.

First, there are tensions between the institution that is undergoing vetting (e.g., the police) and the actors who are responsible for the vetting. In vetting of the security sector, which often has good relations with the political establishment, political leaders some-

33 Ibid.

34 Ibid.

times interfere with vetting processes. A former panelist, for instance, recalled how political leaders became involved in police vetting in Kenya.

We noticed the political establishment realized we were very serious. They [political leaders] had their own people in the police service so the chairman started getting calls and we kept telling the chairman, don't succumb to those calls.... But one day we were seated in our homes, watching TV, then we saw our chairman say so and so will be vetted again. But that is not what we decided.<sup>35</sup>

A second type of tension that often affects transitional vetting stems from cleavages. *Transitional* vetting always follows a socially disturbing episode—a period of repression during authoritarianism, widespread human rights violations during internal armed conflict, or abuses committed during electoral violence. During these episodes, ethnic, religious, and political schisms tend to become deeper and more pronounced.<sup>36</sup> These divisions may in turn affect hearings and decision making. A past panelist explained,

From what I saw in other reports, in the media reports, I think that yes, especially for the senior officers, ethnic considerations were there. Without necessarily giving a lot of details, I know that there were some senior police officers who had been accused and there was substantive evidence to show that they were involved in violations of rights, but who were spared. And even the way they were responding in the panel would make you think that this is someone who knows that there is nothing you can do.<sup>37</sup>

Another panelist also observed how a fellow panel member was trying to support a co-ethnic officer who was being vetted. The panelist reported,

I could see the senior police officer [a panelist] try to really...prop up his officer [an officer being vetted] because it was a person from his area.... from the same ethnic community.... We could see him struggling to assist him but at the end of the day the officer was sacked, so that is how fair the board was.<sup>38</sup>

## Policy Implications

The design and implementation of the police vetting process in Kenya exhibited many problematic elements, including the disparate compositions of the commissioners and panelists, the failure to collect and corroborate evidence, the insecurity of those within and outside of the commission, poor communication, a lack of transparency, and the failure to focus on human rights violations—all of which led to disillusionment among civil society and the public. (See the report *From Optimism to Disillusionment: Examining Civil Society Perceptions of Police Vetting in Kenya*, published concurrently with this briefing paper.) Analysis of micro-level decision making within the process reveals specific policy implications to consider when developing vetting strategies in other contexts. In particular, addressing issues related to discretion, the experience of decision makers, and social cleavages can help to avoid some of the design, scope, and expertise problems that arose in the NPSC process.

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35 Interview, Nairobi, June 11, 2019.

36 See, for example, Wood, "The Social Processes of Civil War."

37 Interview, Nairobi, July 19, 2019.

38 Interview, Nairobi, June 11, 2019.

**Discretion (process design and scope).** Our research suggests that the rules of the process should be clearly defined to limit their scope for interpretation by commissioners and to provide commissioners with more guidance about transparency and rules of evidence, including in their interpretation of notions such as “balance of probabilities.” Greater attention and more resources should also be devoted to the collection of evidence, which may reduce commissioners’ reliance on poor evidence and therefore limit their ability to exercise discretion. Consideration should be given to the process’s level of centralization, which needs to balance the consistency of decisions and outcomes with decision makers’ flexibility and sensitivity to local dynamics. Perhaps most importantly, a vetting process should have an internal review mechanism to ensure that decisions are made according to the regulations. Finally, providing adequate support to ensure transparency, monitoring, coordination, and participation by civil society can restrict the scope of decision makers’ discretion.

**Experience (process design and personnel expertise).** The study points to the importance of the individuals selected for vetting panels, particularly in terms of the types of experience they bring with them. Decision makers must be granted authority and confidence, they must have appropriate training in administrative justice processes and legal ethics, and they must be able to draw on an institutional code of ethics so that they can effectively perform their functions. Few societies will be able to draw on a wide body of expertise in the specific field of transitional vetting. However, those that have a high degree of professionalization (such as Kenya) should be able to take steps to improve the skills of those who are selected to participate in the vetting process. In contexts where professionalization or institutionalization are weaker, as is the case in many post-conflict societies, international expertise and support can be helpful.

**Cleavages (process design).** Tensions and schisms are clearly issues that relate in part to bigger political and social divisions within a transitional society and are, as a result, beyond the control of the people who are designing and implementing a vetting process. Nevertheless, given the specific ways in which macro-level and micro-level cleavages and strains interact, the research identifies a number of measures that could minimize the negative repercussions for decision making. First, support should be provided to vetting bodies to help them to resist or manage pressure from outside sources, particularly the government. Politics cannot be removed entirely from the process, but mechanisms should be installed to help vetting bodies maintain their independence. Second, more clarity can be established regarding the roles of and relationships between different groups within the commission, such as members of the police force and civilians.

Micro-level analysis of decision making highlights the necessity of crafting better guidance and rules, offering training, recruiting the right personnel, clearly defining roles, and providing adequate resources. But these actions cannot exist in a vacuum: they are facilitated and hindered to varying degrees by the larger political, social, institutional, and economic contexts. Taking such steps, in other words, may depend on macro-level decision making and dynamics that affect the support that is provided to both permanent and ad hoc institutions, thus affecting their very capacity and independence. Vetting must be considered as a process that both shapes and is shaped by the broader context.

## Conclusion

Vetting, as a measure designed to reduce impunity for serious human rights violations and prevent their recurrence, can be a valuable element of institutional reform in the aftermath of violent conflict, political repression, electoral violence, and widespread corruption. However, the contexts in which vetting is needed most—where societies are divided, institutions are weak or corrupt, and resources are scarce—are often the most challenging ones in which to implement it. In Kenya, the police vetting process did not live up to expectations, particularly from a human rights perspective. It is therefore unclear how much it contributed to objectives such as preventing the recurrence of violations.

One of the reasons for engaging in vetting is that it can be considered an enabling condition of other transitional justice measures, as it increases the legitimacy and integrity of the institutions that play a role in implementing those measures. When vetting processes are particularly flawed, though—including, for example, when they offer few procedural guarantees—they may make the implementation of other justice measures more difficult. Vetting is a process that is frequently subject to political manipulation. A great deal of publicity surrounds transitional prosecutions and truth-telling exercises, particularly truth commissions. In stark contrast, vetting processes, despite sometimes involving thousands or tens of thousands of people, more often than not take place with little public scrutiny and provide minimal or weak procedural guarantees. Further, contrary to even the best outcomes of prosecutions or truth-telling endeavors, vetting affects some degree of control of public institutions, which creates a strong incentive for people to engage in it for partisan political purposes.

This report represents a first attempt to examine how a combination of factors—discretion, decision makers' experience, and social tensions—can affect the outcomes of vetting processes, and therefore the perceptions and the legitimacy of these processes. This report particularly focuses on micro-level decision making, which is affected by the values, beliefs, and behaviors of individuals. Most analyses of vetting focus on broad elements of design, which, while obviously important, do not fully explain the legitimacy and effectiveness of the process. While the sample size of interviews conducted for this project is small, it still allows for the identification of some key issues. Further research is needed to develop our understanding of decision making and its impact on vetting. This report makes a number of recommendations for strategically approaching vetting efforts in the future, underscoring how the design of a vetting process, the structure of decision making, and the political context in which vetting takes place combine to affect the perceptions and therefore the legitimacy of vetting, a crucial element of transitional justice.




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