

Collective Guilt, Selective Exclusion: Iraq's Candidate Screening Process

March 2020



Collective Guilt, Selective Exclusion: Iraq's Candidate Screening Process

March 2020

Dr. Amal Hamdan



The author wishes to thank Zeinab Abdelkarim, Chad Vickery, Erica Shein and Elizabeth Reiter Dettmer for their enthusiasm, insightful reviews and inputs on key research points for this paper.



Collective Guilt, Selective Exclusion: Iraq's Candidate Screening Process
Copyright © 2020 International Foundation for Electoral Systems. All rights reserved.

Permission Statement: No part of this publication may be reproduced in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system without the written permission of IFES.

Requests for permission should include the following information:

- A description of the material for which permission to copy is desired.
- The purpose for which the copied material will be used and the manner in which it will be used.
- Your name, title, company or organization name, telephone number, fax number, email address, and mailing address.

Please send all requests for permission to:

International Foundation for Electoral Systems
2011 Crystal Drive, 10th Floor
Arlington, VA 22202
Email: editor@ifes.org
Fax: 202.350.6701

Cover photo: A road is covered with political parties' campaign materials. © Mohammad Shahid Reza

About IFES

Vision: Democracy for a better future.

Mission: Together we build democracies that deliver for all.

As the global leader in democracy promotion, the International Foundation for Electoral Systems (IFES) advances good governance and democratic rights by:

- Providing technical assistance to election officials
- Empowering the underrepresented to participate in the political process
- Applying field-based research to improve the electoral cycle

Since 1987, IFES has worked in over 145 countries – from developing democracies, to mature democracies.

For more information, visit www.IFES.org.

Table of Contents

<i>Overview</i>	2
<i>I. Introduction: Transitional Justice Tools</i>	6
<i>II. Defining Lustration, Vetting and Purges</i>	8
<i>III. Best Practices and Guidelines for Vetting Processes</i>	11
<i>IV. Electoral Vetting Lessons from Bosnia and Herzegovina and Afghanistan</i>	13
<i>V. The Baath Party and De-Baathification in Iraq</i>	19
<i>V.i. Legislation Regulating De-Baathification: The Accountability and Justice Law</i>	23
<i>V.ii. Candidate Screening Process in Iraq</i>	24
<i>VI. Conclusion</i>	28
<i>VII. Recommendations for Designing Electoral Vetting in Post-Conflict, Post-Authoritarian Contexts</i>	29
<i>About the Author</i>	31

Overview

States emerging from armed conflict, dictatorships or authoritarian rule often struggle to implement fair and effective transitional justice. A critical element of transitional justice is the vetting process countries increasingly are putting in place to register candidates who are running for political office in transitional elections, yet it is one of the least studied elements of transitional justice mechanisms.¹ This paper contributes to this discussion by describing comparative examples and approaches that countries have implemented and suggests a set of recommendations that legislative drafters, election administrators, enforcement institutions and the broader international community should consider when designing and implementing transitional justice systems. The transition process in Iraq is a recent and critical example of problematic candidate vetting processes; accordingly, this paper will devote particular attention to the Iraqi transition process to illustrate the importance of individual responsibility, clarity in the law and due process protections.

It is not uncommon for countries transitioning from conflict or authoritarian rule to implement vetting processes that gauge the integrity of candidates running for office, particularly with regard to abuses committed under the previous regime. Integrity in the vetting context refers to a person's adherence to human rights standards under international laws.² The vetting process focuses on determining whether a candidate's prior conduct in this regard warrants exclusion from public office.³ Transitional justice literature ascribes a host of benefits to vetting in the wake of a conflict or authoritarian regime change, including improving the trustworthiness of public institutions by removing individuals whose integrity makes them untrustworthy to fulfill their public mandate.⁴ If properly implemented, vetting in the election context can validate the electoral process in countries emerging from conflict or transitioning to democracy.⁵ Experts warn, however, that badly administered or compromised electoral vetting processes potentially undermine the credibility of electoral processes.⁶

¹ Office of the United Nations (UN) High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Vetting: An Operational Framework*, (2006), p. 32; see also Pablo de Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 523, 538.

² This is in line with transitional justice experts' definition, which, when assessing an individual's integrity, considers his or her "involvement in gross violations of human rights or serious crimes under international law. ... 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." Individuals who fail to meet this standard of integrity should be disqualified from public employment. See Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 22; see also Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 21.

³ In line with Roger Duthie, "exclusion" as used in this paper refers to both terminating employment and disqualifying access to public posts. Roger Duthie, Introduction, in Alexander Mayer-Rieckh and Pablo De Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, (New York: Social Science Research Council, 2007), p. 17.

⁴ Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 22; see also Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 21.

⁵ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 2.

⁶ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 2.

Although electoral vetting – vetting of electoral candidates to ban individuals who have perpetuated or been involved in human rights abuses⁷ – is the subject of this paper, we also looked to other vetting processes to glean lessons that could be applied to electoral vetting.⁸ Although international laws do not explicitly address vetting processes,⁹ transitional justice practitioners and the United Nations (UN) have established guidelines for vetting processes to conform with international human rights standards and best practices, on the premise that there is no “one-size-fits-all” approach to vetting and, consequently, such processes require country- and context-specific approaches.¹⁰ Experts advise that vetting processes should conform to at least three best practices to bolster the validity and fairness of such mechanisms. Vetting processes should:

- Respect the principle of individual responsibility by establishing criteria that are based on an assessment of individual acts and not group membership;
- Be governed and regulated by explicit and clear legal mandate(s); and
- Incorporate due process guarantees.

The sheer magnitude and severity of the crimes committed under Saddam Hussein and Baath Party rule have made Iraq “one of the most complex cases of transitional justice” since the end of World War II.¹¹ Ensuring the integrity and credibility of Iraq’s elections is fundamental to its transition to democracy. Iraq held its most recent parliamentary elections in May 2018. While the electoral law has been amended a number of times since the removal of Saddam Hussein in 2003, a process to screen and disqualify electoral candidates has been applied consistently. The process to disqualify electoral candidates in Iraq was modelled according to the principles found in the controversial de-

⁷ Restrictions in electoral vetting processes do not refer to the most common restrictions applied in countries such as requirements based on age, minimum level of education or criminal convictions for serious offenses. The term electoral vetting, as used in this paper, adopts the term as used by the International Center for Transitional Justice.

⁸ Vetting processes have also been applied to public sector institutions. For example, after more than 50 years of authoritarian military rule and a civil war, El Salvador established a vetting process in 1992 that only targeted its armed forces, which had been involved in the disappearances of citizens and had “regularly committed” illegal executions. See Rubén Zamora with David Holiday, *The Struggle for Lasting Reform: Vetting Processes in El Salvador*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 84; p. 87; see also Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 17.

⁹ Jurist and international human rights expert Federico Andreu-Guzmán observes that although international human rights instruments do not explicitly address vetting, some statutes provide “important clues” for vetting processes to be fair. International statutes relevant to vetting – particularly in terms of access and exclusion to public office – are highlighted in Section III of this paper. See Federico Andreu-Guzmán, *Due Process and Vetting*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 451.

¹⁰ These operational guidelines and criteria are based on international laws relevant to vetting are highlighted in Section III of this paper. Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, p. 504; see also Andreu-Guzmán, *Due Process and Vetting*, p. 449; see also *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 546-564; see also Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 1-32.

¹¹ Eric Stover, Hanny Megally and Hania Mufti, ‘Bremer’s “Gordian Knot”’: Transitional Justice and the US Occupation of Iraq,’ *Human Rights Quarterly*, 27:3, (2005), p. 833.

Baathification program, which, when initially launched in 2003, sought to eliminate the Baath Party structure and remove its leaders “from positions of authority and responsibility in Iraqi society.”¹²

Given that Iraq's candidate screening process has been widely criticized as highly politicized, dangerous, not selective enough and lacking due process,¹³ this paper evaluates the process through a framework based on these best practices for vetting. An evaluation of candidate screening in Iraq through the proposed framework finds that the measures taken contravene critical best practices. First, rather than respect the principle of individual responsibility, the criterion to screen candidates is based on group membership – specifically, rank in the Baath Party – regardless of individual acts or integrity.¹⁴ Processes that adopt criteria for exclusion based on group membership are distinguished from vetting processes as purges. Since the criteria to assess electoral candidates is based on membership in the Baath Party, from a transitional justice perspective it would be a mischaracterization to classify candidate screening in Iraq as electoral vetting; it is a purge. This is not surprising, given that Iraq's candidate screening process was inspired by the de-Baathification program, which is also widely considered a purge¹⁵ that contravenes international standards.

Second, this paper finds that in Iraq there is no legal framework explicitly establishing electoral vetting. The absence of a legal mandate clearly defining the procedure and criteria to screen electoral candidates has made the process vulnerable to selective implementation by allowing the committee overseeing de-Baathification, the Accountability and Justice Commission (AJC), to broadly interpret de-Baathification legislation and establish criteria to exclude candidates.

Finally, Iraq's candidate screening process does not incorporate a basic individual due process guarantee, the right to a hearing.¹⁶ An independent body, the Cassation Board,¹⁷ was established to allow disqualified candidates to appeal their exclusion.¹⁷ The Cassation Board is empowered to

¹² Article 1, Coalition Provisional Authority (CPA) Order Number 1, ‘De-Baathification of Iraqi Society,’ (May 16, 2003), p.1. <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB418/docs/9a%20-%20Coalition%20Provisional%20Authority%20Order%20No%201%20-%2005-16-03.pdf>

¹³ These criticisms arose ahead of the 2010 parliamentary elections after the committee in charge of candidate screening, the Accountability and Justice Commission (AJC), banned 511 candidates from running in elections for ties to the Baath Party. This incident is explored in detail in Section V of this paper. See International Crisis Group, “Iraq's Uncertain Future: Elections and Beyond,” Middle East Report No. 94, February 25, 2010, p. i; see also Michael E. O'Hanlon and Kenneth M. Pollack, “Iraq's Ban on Democracy,” The Brookings Institution, January 18, 2010. <https://www.brookings.edu/opinions/iraqs-ban-on-democracy/> See also Marina Ottaway and Danial Kaysi, “De-Baathification as a Political Tool: Commission Ruling Bans Political Parties and Leaders,” Carnegie Endowment for International Peace, January 26, 2010. <https://carnegieendowment.org/2010/01/26/de-baathification-as-political-tool-commission-ruling-bans-political-parties-and-leaders-pub-24778>

¹⁴ The ranks excluded from standing in elections are highlighted in Section V.

¹⁵ The de-Baathification program is based on criteria to exclude individuals from public office depending on their membership and rank in the Baath Party. This is discussed in further details in Section V of this paper. Duthie, Introduction, Mayer-Rieckh and de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 18.

¹⁶ The UN Commission on Human Rights and transitional justice experts concur for vetting procedures to meet fair procedural guarantees, individuals should be ensured a hearing. See Andreu-Guzmán, *Due Process and Vetting*, p. 452; p. 469.

¹⁷ The Cassation Board was established in the 2008 de-Baathification legislation, the Accountability and Justice Law, which remains the primary law currently governing de-Baathification. It is a panel of seven judges nominated by the Supreme Judicial Council. Importantly, it functions as part of Iraq's Cassation Court and,

overrule decisions taken by the AJC and can reinstate disqualified candidates.¹⁸ Candidates disqualified by the AJC have 30 days from the date that they are informed of their banning to appeal the decision to the Cassation Board. However, excluded candidates are not informed of their exclusion in a hearing: The AJC informs disqualified candidates, by writing, and candidates can submit appeals to the Cassation Board only through written submissions. Despite the establishment of an appeals mechanism, experts maintain that procedural guarantees remain weak since individuals are not granted the right to contest the AJC decisions in a hearing.¹⁹

This paper concludes that the process to screen candidates in Iraq falls short of meeting recommended best practices for vetting. Given that a badly administered or compromised electoral vetting process in a post-conflict or post-authoritarian transition potentially jeopardizes the credibility²⁰ and integrity of the electoral process, the findings in this paper raise significant concerns regarding the integrity of Iraq's elections.²¹

Outline

As electoral vetting is a form of transitional justice, the paper begins by briefly defining the concept and various transitional justice mechanisms. Section II defines and distinguishes vetting, lustration and purges. Within transitional justice literature, "vetting" is often used interchangeably with "lustration" and "purges" because of a lack of agreement of the basic definitions of these terms.²² This is particularly relevant for policymakers to avoid designing electoral purges when the intention is to design and implement electoral vetting processes.²³ Section III highlights best practices for vetting processes to conform with international human rights standards and best practices, in line with the guidelines established by transitional justice practitioners and the UN, and some international statutes of relevance to electoral vetting.²⁴ Section IV examines the criteria and legal

subsequently, is independent from the AJC. The Cassation Board was established to hear appeals related to anyone subject to the de-Baathification process and not electoral candidates specifically. See Article 2, Clause 9 and Article 15, The Accountability and Justice Law. See also Miranda Sissons and Alexander Mayer-Rieckh, 'Briefing Paper: Iraq's New "Accountability and Justice" Law,' International Center for Transitional Justice, (January 22, 2008), p. 7.

¹⁸ Article 17, The Accountability and Justice Law.

¹⁹ Sissons and Mayer-Rieckh, 'Briefing Paper: Iraq's New "Accountability and Justice" Law,' p. 12, p. 14.

²⁰ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 2.

²¹ Electoral system scholars highlight inclusion – the right for every citizen to vote and be elected – as a key criterion for assessing electoral integrity. See Sarah Birch, *Electoral Malpractice*, (Oxford: Oxford University Press, 2011), p. 17; see also see also Andreas Schedler, 'Elections Without Democracy: The Menu of Manipulation,' *Journal of Democracy*, 13:2, (2002), p. 40.

²² Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p.18.

²³ Clarifying these terms is not only useful for policymakers but also researchers, for as Aysegul Keskin Zeren rightly points out, "the terminological uncertainty as to how to operationalize these concepts remains the biggest caveat of vetting research." Aysegul Keskin Zeren, 'Iraq's Struggle with de-Ba'athification Process,' *Global Change, Peace & Security*, 29:1, p. 59.

²⁴ Since this report focuses specifically on vetting processes that are applied within the context of screening election candidates, it is largely concerned with the aspect of vetting that covers access to public service or public office and not the dismissal or removal of public employees. Therefore it mainly considers international laws that are relevant to vetting processes aimed at access to public service and not those that are more relevant to vetting processes entailing removals. For international laws that, although they do not explicitly address vetting, offer some criteria that may be relevant to vetting aimed at removing individuals from public

mandate that regulated electoral vetting processes in two countries where it was applied, Bosnia and Herzegovina and Afghanistan, since a comparative approach allows us to better evaluate candidate vetting policies and to draw lessons for best practices. This assessment demonstrates that electoral vetting processes, such as Bosnia and Herzegovina's, which clearly defined criteria to disqualify candidates and respected the principle of individual responsibility, left little room for political manipulation and consequently, electoral vetting did not undermine the legitimacy of elections. On the other hand, the case of Afghanistan illustrates how electoral vetting may become highly selective as a result of a poorly defined legal framework and calls into question the legitimacy of its elections.

As discussed above, Section V delves into Iraq, the primary case covered in this paper. It begins by briefly describing the Baath Party's role in human rights violations and the ranks within its internal hierarchy. It then examines the design and underlying principles of the program to "cleanse" the system of the Baath Party, de-Baathification and the primary legislation regulating de-Baathification, the Accountability and Justice Law. This law is relevant since the AJC – the entity overseeing electoral candidate screening – points to provisions in the Accountability and Justice Law to justify the criteria to exclude candidates belonging to some ranks in the Baath Party. Section V then describes the process and criteria to screen electoral candidates in Iraq. It finds that because the criteria to exclude candidates is not clearly defined in any legal framework explicitly governing candidate screening, this process has become vulnerable to selective implementation. The paper concludes with specific recommendations to overhaul the process to screen candidates in Iraq and general recommendations for designing electoral vetting processes in similar post-conflict contexts transitioning from authoritarian rule to democracy.

I. Introduction: Transitional Justice Tools

States emerging from armed conflict, dictatorships or authoritarian rule often implement transitional justice practices to address large scale or systematic human rights violations and the legacies of repressive predecessor regimes after the transition from one political regime to another.²⁵ Transitional justice mechanisms to address crimes committed by the previous oppressive regime have various objectives, ranging from helping societies to deal with their past by "obtaining

posts for gross human rights violations, see the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted by the UN General Assembly, Resolution 55/89), which provides that persons who may be involved in extrajudicial, arbitrary or summary executions or in acts of torture or mistreatment, shall be "removed from any position of control or power, whether direct or indirect, over complaints, witnesses and their families, as well as over those conducting investigations" (Principles 15 and 3 (b)). Similarly, the Declaration on the Protection of All Persons from Enforced Disappearance (adopted by the UN General Assembly, Resolution 47/133) stipulates that alleged perpetrators of a forced disappearance must be suspended "from any official duties during the investigation" (Article 16). Andreu-Guzmán, Due Process and Vetting, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 450-451.

²⁵ Ruti G. Teitel, 'Transitional Justice Genealogy,' *Harvard Human Rights Journal*, 16, (2003), p. 69; see also Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective*, (New York: Cambridge University Press, 2004), p. 1.

some combination of truth, justice, rule of law”²⁶ to reforming institutions with the goal of preventing future human rights abuses.²⁷ The most well-known and studied transitional justice mechanism is criminal prosecutions, particularly those carried out within an international legal framework, such as the Nuremberg Trials.²⁸ Alternative transitional justice mechanisms developed outside the realm of criminal justice, beginning in nascent democracies in Latin America where, following the collapse of repressive military regimes in the 1980s, it was deliberated whether international criminal justice would be more successful than domestic trials.²⁹ During discussions in Argentina on whether to impose accountability through criminal law, dilemmas related to rule of law arose, which led to the development of another transitional justice tool: the truth commission.³⁰ A truth commission may be defined as “an official body, often created by a national government, to investigate, document, and report upon human rights abuses within a country over a specified period of time.”³¹ Some prominent examples of truth commissions were those established in Latin America and South Africa.³² Another well-known transitional justice mechanism is reparations, which

²⁶ Cynthia M. Horne, ‘The Impact of Lustration on Democratization on Postcommunist Countries,’ *The International Journal of Transitional Justice*, 8, (2014), p. 496.

²⁷ Eric Stover, Miranda Sissons, Phuong Pham and Patrick Vinck, ‘Justice on Hold: Accountability and Social Reconstruction in Iraq,’ *International Review of the Red Cross*, 90:869, (2008), p. 8; see also Claire Greenstein and Cole J. Harvey, ‘Trials, Lustration, and Clean Elections: The Uneven Effects of Transitional Justice Mechanisms on Electoral Manipulation,’ *Democratization*, 24:6, (2017), p. 1195.

²⁸ The Nuremberg Trials were trials held in Germany between 1946 and 1949 in which Nazi leaders were indicted and tried as war criminals by the International Military Tribunal, which was composed of judges from the United States, Britain, France and the Soviet Union. More recent examples transitional justice criminal prosecutions include the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. Transitional justice by means of international rather than national trials became more common after World War II; according to prominent legal and transitional justice scholar Ruti Teitel, this was due to the failed national trials in Germany after World War I. Benefiting from the hindsight of history, after World War II transitional justice in Germany eschewed national prosecutions and sought international criminal accountability for the Reich leadership. See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, (New York: Alfred A. Knopf Inc., 1992); see also Teitel, ‘Transitional Justice Genealogy,’ p. 69, p. 72; see also Duthie, Introduction, in Alexander Mayer-Rieckh and Pablo De Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 17.

²⁹ Specifically, these discussions were raised in Argentina after the Malvinas (Falkland Islands) War in 1982. See Teitel, ‘Transitional Justice Genealogy,’ p. 75. For a thorough examination of discussions of whether or not the military could be subject to trial for previous abuses, subsequent deliberations over the legal quandaries that emerged for trials, the domestic trials that ensued and a discussion regarding the hypothetical implementation of an international justice mechanism in the Argentinian context, see Carlos S. Nino, ‘The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina,’ *The Yale Law Journal*, 100:8, (1991), p. 2619-2640.

³⁰ Rule-of-law dilemmas that emerged, following attempts to impose accountability through criminal law, included “retroactivity in the law, tampering with existing laws, a high degree of prosecutorial selectivity, and a comprised judiciary.” See Teitel, ‘Transitional Justice Genealogy,’ p. 76-77.

³¹ Teitel, ‘Transitional Justice Genealogy,’ p. 78. Although it is beyond the scope of this paper, it is worth noting that there are various definitions of truth commissions. The commonality of these definitions is that an officially sanctioned body investigates gross human rights violations over a period of time. For a summary of various definitions in the literature on truth commissions, see Geoff Dancy, Hunjoon Kim, Eric Wiebelhaus-Brahm, ‘The Turn to Truth: Trends in Truth Commission Experimentation,’ *Journal of Human Rights*, 9:1, (2010), p. 47-49.

³² It is worth noting that not all truth commissions are aimed at reconciliation. The truth commission established in Argentina, for example, was not aimed at reconciliation, while the South African model was aimed at both truth and reconciliation. See Teitel, ‘Transitional Justice Genealogy,’ p. 78.

seek to offer some form of material or symbolic compensation for “harms endured by some members or sectors of society.”³³

Vetting processes are recognized as the least studied transition justice mechanism.³⁴ Societies emerging from conflict or authoritarian rule are often marked by a fundamental crisis of trust in the public sector and vetting, if fairly executed, aims to (re)establish civic trust and (re)legitimize public institutions by “excluding from them persons who have committed serious abuses in the past.”³⁵ As discussed below, “vetting” is often used interchangeably with “lustration” and “purges.” This paper explores the differences between these terms and adopts the distinction offered by transitional justice practitioners and UN guidelines.³⁶

II. Defining Lustration, Vetting and Purges

Lustration refers to the programs in Central and Eastern Europe after the fall of communism in 1989 to screen groups of people – particularly politicians, public officials and judges – to determine if they had been members or collaborators of the secret police or worked with the repressive apparatus of communist regimes, to disqualify or ban them from public office.³⁷ In Czechoslovakia, the first country to enact lustration laws in 1991, these efforts were aimed at removing officials from key positions by either disqualifying high-ranking Communist cadres, secret police members and their collaborators in the newly formed administration and security forces or downgrading them to lower positions.³⁸

³³ Pablo de Greiff, Introduction: Repairing the Past: Compensation for Victims of Human Rights Violations, in ed., Pablo de Greiff, *The Handbook of Reparations*, (Oxford: Oxford University Press, 2006), p. 1. Material compensation may take the form of concrete benefits, such as cash payments. German payments to the state of Israel and Jewish victims of the Holocaust are recognized as an unprecedented landmark in the history of reparations. Symbolic reparations include apologies, such as U.S. reparations to Japanese Americans who were interned during World War II. For German reparations to Israel and Jewish victims of the Holocaust, see Ariel Colonomos and Andrea Armstrong, *German Reparations to the Jews After World War II: A Turning Point in the History of Reparations*, in de Greiff, ed., *The Handbook of Reparations*, p. 390. For a discussion on types of reparations and particularly reparations in the United States, see David C. Gray, ‘A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice,’ *Washington University Law Review*, 87, (2010), p. 1043-1103.

³⁴ Office of the UN High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States. Vetting: An Operational Framework*, (2006), p. 32; see also Pablo de Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and Pablo de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 523, 538.

³⁵ Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 488-489; p. 485.

³⁶ De Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 524.

³⁷ It is important to note that using the term lustration to refer specifically to the laws and processes that were named as such in Central and Eastern Europe is in line with transitional justice expert Roger Duthie. See Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 18. For the definition of lustration see Roman David, ‘Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001),’ *Law & Social Inquiry*, 28:2, (2003), p. 387, 388; see also Zeren, ‘Iraq’s Struggle with de-Ba’thification Process,’ p. 59.

³⁸ Roman David, ‘From Prague to Baghdad: Lustration Systems and their Political Effects,’ *Government and Opposition*, 41:3, (2006), p. 348.

Lustration differs from vetting in terms of institutional targets: Lustration explicitly prohibits the banning of individuals from standing in elections while vetting processes and purges may be extended to screen and disqualify candidates for elected positions. This distinction was codified regionally by the Parliamentary Assembly of the Council of Europe, to ensure that vetting and lustration programs comply with rule-of-law requirements. Specifically, in the absence of international laws that explicitly address lustration, in 1996 the Parliamentary Assembly of the Council of Europe produced guidelines that state that lustration laws should not be used to ban individuals from standing in elections, emphasizing that “lustration shall not apply to elective offices [and] ... voters are entitled to elect whomever they wish.”³⁹

Vetting refers to processes applied to the public sector within a given country to assess the integrity of individuals – that is, prior actions or behaviors particularly in relation to their respect for fundamental human rights and rule-of-law standards – to determine their suitability for public office.⁴⁰ Depending on the specific context of a country, vetting processes may target a broad range of institutions, a specific institution or only certain positions within an institution.⁴¹ In post-conflict contexts, for example, vetting tends to focus on institutions implicated in serious human rights

³⁹ Doc.7568, Paragraph e, ‘Measures to Dismantle the Heritage of Former Communist Totalitarian Systems,’ June 3, 1996. <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=7506&lang=EN> Ukraine’s lustration law is a recent example conforming with guidelines that this mechanism shall not be applied to elected offices. The adoption of a lustration law in late 2014 occurred after thousands of anti-government protesters staged peaceful protests in Kiev in 2013 when President Viktor Yanukovich refused to sign a political association and free trade agreement with the European Union (EU) in favor of stronger ties with Russia. After the police attacked protesters and anti-government activists, the protests escalated into the nationwide Euromaidan movement, which rallied against corruption in the Yanukovich government and human rights violations. The protesters demanded institutional reforms to “cleanse” the state apparatus from public officials of the Communist era (1919-91) and affiliates of the Russia-leaning Yanukovich regime. When at least 88 people, mainly protesters, were killed by uniformed snipers and street fighting with riot police, President Yanukovich agreed to sign a deal to transfer powers to Parliament and stepped down. Ukraine’s lustration law (No. 1682-VII “On Government Cleansing”), adopted later that year, set conditions to dismiss or ban for a period of either five or 10 years particular individuals from extensive public administration positions, including government (the prime minister, vice prime minister, head of the National Bank), the prosecutor general, military forces, police services and courts. In line with lustration guidelines, these procedures were not extended to elected positions, including the president, parliamentarians, mayors and others holding directly elected positions. As this author was unable to find an official translation of Ukraine’s Law on Government Cleansing, the English text relies on the European Commission for Democracy Through Law (Venice Commission) Final Opinion on the Lustration Law, Opinion No. 788/2014, June 19, 2015. See BBC, “Ukraine protests after Yanukovich EU deal rejection,” November 30, 2013, <https://www.bbc.co.uk/news/world-europe-25162563>; see also BBC, ‘Ukrainian MPs vote to oust President Yanukovich,’ February 22, 2014, <https://www.bbc.co.uk/news/world-europe-26304842>; see also Yuliya Zabyelina, ‘Lustration Beyond Decommunization: Responding to the Crimes of the Powerful in Post-Euromaidan Ukraine,’ *State Crime Journal*, 6:1, (2017), p. 55, p. 63-64, p. 67 see also Article 1 (1), Ukraine Law on Government Cleansing, Venice Commission) Final Opinion on the Lustration Law, Opinion No. 788/2014, June 19, 2015, p. 4; Ukraine Law on Government Cleansing, Venice Commission, Final Opinion on the Lustration Law, Opinion No. 788/2014, p. 10.

⁴⁰ Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 1; see also Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 17, p. 20.

⁴¹ Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 20.

violations, primarily in security and judicial sector institutions.⁴² In post-authoritarian contexts, where collaboration with a repressive regime may implicate individuals across a wider range of institutions, vetting may take on a broader range of targets to include electoral posts.⁴³ Importantly, experts emphasize that vetting designates processes in which the criteria of assessment relate to individual conduct, which therefore calls for individual review.⁴⁴

Vetting processes may become purges where mere membership in a political party or affiliation with a group, rather than individual conduct, is the basis for exclusion from public positions.⁴⁵ *Purges* exclude individuals based upon their membership in or affiliation with a group, including political parties, rather than their individual responsibility for the violation of human rights.⁴⁶ Examples of purges include the de-Nazification program in Germany and more recently, the de-Baathification program in Iraq, which was consciously modelled on de-Nazification.⁴⁷

Having clarified the working definitions of vetting, purges and lustration, it is important to highlight that this paper adopts the distinction of these terms as offered by transitional justice practitioners and UN guidelines.⁴⁸ Differentiating between these mechanisms is relevant to this paper to accurately distinguish between screening programs that disqualify electoral candidates (electoral vetting) and conform with best practices and those that are purges. The next section identifies some key criteria, according to transitional justice experts and the UN vetting guidelines, for vetting processes to comply with international human rights statutes.

⁴² El Salvador, for example, after a 12-year civil war (1980-92) established a vetting process limited to the armed forces and only senior commanding officers. The armed forces, under the previous authoritarian military regime, regularly committed illegal executions and disappearances of citizens. Similarly, shortly after conflict ended in Bosnia and Herzegovina, where according to Alexander Mayer-Rieckh, "the police did not enforce the law impartially and the courts did not fairly render justice," vetting focused on the police and judiciary. Rubén Zamora with David Holiday, *The Struggle for Lasting Reform: Vetting Processes in El Salvador*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 84; p. 87. Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 21; see also Alexander Mayer-Rieckh, *Vetting to Prevent Future Abuses: Reforming the Police, Courts, and Prosecutor's Office in Bosnia and Herzegovina*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 181; p. 195-200.

⁴³ Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 21.

⁴⁴ De Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 524.

⁴⁵ Federico Andreu-Guzmán, *Due Process and Vetting*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 456.

⁴⁶ Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 18.

⁴⁷ Dobbins et al., *Occupying Iraq: A History of the Coalition Provision Authority*, p. xxvi.

⁴⁸ De Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 524.

III. Best Practices and Guidelines for Vetting Processes

Experts acknowledge that the process of establishing the criteria for vetting is “often politically contested and controversial.”⁴⁹ For vetting to be considered fair and equitable, transitional justice practitioners broadly concur that vetting processes should respect the principle of individual responsibility by establishing criteria based on assessments of individual acts rather than group membership.⁵⁰ In its vetting guidelines, the UN emphasizes that vetting measures “should be based on the individual participation in and responsibility for past abuses” using individual records.⁵¹ Membership in groups, including political parties, should not be the primary criterion of exclusion.⁵² Vetting processes based on mere political affiliation or group membership, including in the structures of services of the state, espouse collective responsibility⁵³ and collective punishment, both of which contravene international statutes. Assessments based on group membership tend “to cast the net too wide and to exclude persons of integrity who bear no responsibility for past abuses. At the same time, group exclusions may also be too narrow and overlook individuals who committed abuses but were not members of the group.”⁵⁴

The principle of individual responsibility stems from international statutes expressly banning collective punishments. Notable international instruments affirming the principle of individual responsibility and prohibiting collective punishments include the Fourth Geneva Convention (Article 33),⁵⁵ the Protocols Additional to the Geneva Conventions of 12 August 1949 (Article 75),⁵⁶ and the Rome Statute (Article 25).⁵⁷ Vetting processes that fail to respect the principle of individual responsibility may also infringe on the right to be elected, guaranteed under Article 25 of the International Covenant on Civil and Political Rights (ICCPR), the “gold standard” for international law in terms of access to public service. Article 25 establishes access to public service – which includes the right to be elected – as the right of every citizen that signatory states are obligated to ensure.⁵⁸

⁴⁹ Duthie, Introduction in Mayer-Rieckh and de Greiff, eds., *Justice and Prevention: Vetting Public Employees in Transitional Societies*, p. 23.

⁵⁰ Andreu-Guzmán, *Due Process and Vetting*, p. 458, 468; see also Alexander Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 505; see also Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 26.

⁵¹ The UN secretary-general paraphrased from Andreu-Guzmán, *Due Process and Vetting*, p. 458.

⁵² De Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 524.

⁵³ Andreu-Guzmán, *Due Process and Vetting*, p. 468.

⁵⁴ *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 561.

⁵⁵ Article 33 stipulates no person may be punished “for an offence he or she has not personally committed. Collective penalties ... are prohibited.” See Fourth Geneva Convention of 1949, Article 33, “Individual responsibility, collective penalties, pillage, reprisals.”

⁵⁶ Article 75 (4) (b) stipulates that “no one shall be convicted of an offence except on the basis of individual penal responsibility.” See Protocol Additional to the Geneva Conventions of 12 August 1949, Article 75, “Fundamental Guarantees.”

⁵⁷ Article 25 (1) stipulates that “a person who commits a crime within the jurisdiction of the Court shall be individually responsible.” See Rome Statute of the International Criminal Court, Article 25, “Individual Criminal Responsibility.”

⁵⁸ Article 25, (a), (b), (c), International Covenant on Civil and Political Rights (ICCPR), p. 179, 267. Although Article 25 alludes to the possibility of restrictions, it states that they should not be “unreasonable.” While the

In line with the principle of individual responsibility, the Human Rights Committee⁵⁹ finds that vetting measures excluding individuals on the basis of political party membership, without considering individual responsibility in crimes or human rights violations, raises “serious issues under Article 25 of the Covenant.”⁶⁰

Thus, experts broadly concur that vetting processes that exclude individuals based solely on affiliation with a group or political party contravene the principle of individual responsibility.⁶¹ Finally, the principle of individual responsibility is recognized as a defining criterion that differentiates vetting processes from purges: According to vetting guidelines produced by the UN, measures that rely on individual records constitute vetting processes, while disqualifying individuals on the basis of political party association or political opinion constitutes “wholesale purges.”⁶²

Vetting is prone to political manipulation.⁶³ To avoid political misuse, experts advise that vetting processes be governed by explicit legal mandates that clearly define the criteria for exclusion to avoid the possibility that an electoral vetting process becomes a vehicle for settling scores. Vetting procedures that lack clarity and definition are vulnerable to selective application that can be used to eliminate political opponents or risks degenerating into political purges.⁶⁴ The UN guidelines for vetting suggest establishing legislation for vetting that complies with “constitutional and international norms, and be clear and precise in order to establish legal certainty and avoid ambiguity and political interference.”⁶⁵ Other legal mandates, such as a formal peace agreement with specific reference to vetting or a Security Council resolution, may also be used to establish legal certainty of vetting.⁶⁶

ICCPR does not specify what constitutes unreasonable restrictions, an addendum to Article 25 adopted in 1996 requires grounds for exclusion be established by law and based on “objective and reasonable criteria.” See Clause 4, Addendum, General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Article 25).

<https://www.osce.org/odihr/elections/19154?download=true>

⁵⁹ This is the body of independent experts at the UN that monitors implementation of the ICCPR by its signatory states.

⁶⁰ “Final observations of the Human Rights Committee: Czech Republic,” CCPR/CO/72/CZE, August 27, 2001, paragraph 24, quoted in Andreu-Guzmán, *Due Process and Vetting*, p. 457.

⁶¹ Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 505.

⁶² Report of the UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ‘Vetting the Public Service’ Paragraph 52, (2004), p. 18.

http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616

⁶³ De Greiff, *Vetting and Transitional Justice*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 527-530.

⁶⁴ Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 507.

⁶⁵ Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p.10.

⁶⁶ For example, the vetting process established in El Salvador was part of the UN-brokered peace accords. See Rubén Zamora with David Holiday, *The Struggle for Lasting Reform: Vetting Processes in El Salvador*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p.87; see also Mayer-Rieckh, *On Preventing Abuse: Vetting and Other Transitional Reforms*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 506.

Vetting programs should also incorporate and respect due process guarantees.⁶⁷ Vetting programs that fail to incorporate due process standards are at risk of being politically manipulated, which, experts warn, could further fuel instability and anger in transitional societies.⁶⁸ The UN and experts recommend incorporating into a vetting program individual due process rights, which include judging an individual based on his or her conduct,⁶⁹ the right to appeal adverse decisions to a court or other independent body⁷⁰ and the right to a fair and public hearing.⁷¹

Finally, transitional justice experts recommend that any vetting process be carried out for a limited period, on grounds that such procedures could potentially have a destabilizing effect.⁷² Experts warn that individuals excluded or removed from public employment who are unable to find alternative work may turn to criminality and destabilize an already sensitive political balance.⁷³ Additionally, the duration of a vetting program could affect the general perception and understanding of vetting's rationale. An open-ended vetting program could create significant political conflicts by lending itself to accusations that its continued implementation is to exclude political opponents.

While these guidelines were produced for vetting processes in general and not electoral vetting specifically, it is possible to extend these best practices to evaluate candidate screening programs. The framework to assess candidate screening in the case studies in this paper is premised on these vetting guidelines: the principle of individual responsibility, clearly defined legal framework and criteria and due process guarantees. We first examine electoral vetting in Bosnia and Herzegovina and Afghanistan and the lessons learned from these cases before examining Iraq's candidate screening process.

IV. Electoral Vetting Lessons from Bosnia and Herzegovina and Afghanistan

Electoral vetting in Bosnia and Herzegovina was established in the aftermath of conflict and the brokering of a peace agreement – the 1995 General Framework Agreement for Peace in Bosnia and Herzegovina, more commonly known as the Dayton Agreement. The Dayton Agreement granted the Organization for Security and Co-operation in Europe (OSCE) unambiguous authority to supervise

⁶⁷ Office of the UN High Commissioner for Human Rights, *Vetting: An Operational Framework*, p. 25; see also Andreu-Guzmán, *Due Process and Vetting*, p. 449.

⁶⁸ Sissons and Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq,' p. 36.

⁶⁹ Sissons and Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq,' p. 32

⁷⁰ Report of the UN Secretary-General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,' (2004), Paragraph 52.

⁷¹ The basis for these due process standards is the ICCPR. According to Article 14, Clause 1 of the ICCPR: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights, ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." See Andreu-Guzman, *Due Process and Vetting*, p. 459 and the ICCPR.

⁷² Sissons and Mayer-Rieckh, 'Briefing Paper: Iraq's New "Accountability and Justice" Law,' p. 13; see also Sissons and Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq,' p. 2.

⁷³ *Vetting Public Employees in Post-Conflict Settings: Operational Guidelines*, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 553-554.

and conduct elections as it saw fit,⁷⁴ and mandated the OSCE create a Provisional Election Commission (PEC) for this purpose.⁷⁵ Although the international community had supervised elections in other post-conflict settings,⁷⁶ Bosnia and Herzegovina was unique in that the peace deal granted an international organization authority to establish and enforce electoral rules; this consequently empowered international actors to lead in establishing and defining vetting criteria.⁷⁷ The peace deal mandated the PEC be comprised of international and national actors: Its chairperson was also the head of the OSCE Mission and included representatives of the country's former warring factions (a Bosniak Muslim, a Croat and a Serb).⁷⁸ In case of dispute within the PEC, the chairperson had the final say.⁷⁹ In effect, the chairperson's word "was the law."⁸⁰ In 1996, ahead of Bosnia and Herzegovina's first post-war general and municipal elections, United States Ambassador and head of the OSCE Mission Robert Frowick, in line with the Dayton Agreement, was appointed the PEC chairperson.⁸¹ Although the Dayton Agreement did not stipulate candidacy prohibitions, it empowered the PEC to establish candidacy eligibility requirements.⁸² In accordance with this authority, in 1996 the PEC issued electoral vetting criteria applicable to municipal and national legislation elections that year.⁸³ The principal drafter of these rules was an international staff member, John Mercer Reid, Canada's senior OSCE representative.⁸⁴ The vetting criteria that was established respected the principle of individual responsibility: Article 15 of the PEC's rules and regulations stipulated that "no person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal, may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina."⁸⁵ Additionally, Article 46 stated,

⁷⁴ Article II, Clause 7, Annex 3, 'Agreement on Elections,' The General Framework Agreement for Peace in Bosnia and Herzegovina. <https://www.osce.org/bih/126173?download=true>

⁷⁵ Article II, Clause 8, Annex 3, 'Agreement on Elections,' The General Framework Agreement for Peace in Bosnia and Herzegovina.

⁷⁶ The UN-supervised elections in Namibia in 1989 and Cambodia in 1993. Daniel J. Blessington, 'From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina,' *American University International Law Review*, 13:3, (1998), p. 642.

⁷⁷ International actors largely controlled the vetting processes applied to Bosnia and Herzegovina's police and judiciary sectors. See Duthie, Introduction, in Mayer-Rieckh and de Greiff, eds., *Justice as Prevention: Vetting Public Employees in Transitional Societies*, p. 33; see also Mayer-Rieckh, *Vetting to Prevent Future Abuses: Reforming the Police, Courts and Prosecutors' Offices in Bosnia and Herzegovina*, p. 181.

⁷⁸ Article III, Clause 7, Annex 3, 'Agreement on Elections,' The General Framework Agreement for Peace in Bosnia and Herzegovina.

⁷⁹ Article III, Clause 7, Annex 3, 'Agreement on Elections.' The General Framework Agreement for Peace in Bosnia and Herzegovina.

⁸⁰ Blessington, 'From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina,' p. 577.

⁸¹ The other international members in the Provisional Election Commission (PEC) were John Mercer Reid, a senior Canadian representative in the OSCE, and Sir Kenneth Scott, a former ambassador to Yugoslavia from Great Britain.

⁸² Article III, Clause 5, Annex 3, 'Agreement on Elections,' The General Framework Agreement for Peace in Bosnia and Herzegovina.

⁸³ Article 3, 'Rules and Regulations,' PEC, OSCE-Mission to Bosnia and Herzegovina, https://aceproject.org/main/samples/em/emx_1006.pdf

⁸⁴ Mercer recalls that the Bosniak Muslim, Serb and Croat representatives in the PEC were very engaged and nonpartisan. Skype Interview, John Mercer Reid, November 28, 2019.

⁸⁵ Article 15, 'Rules and Regulations,' PEC.

“no person who is under indictment by the International Tribunal for the Former Yugoslavia and who has failed to comply with an order to appear before that Tribunal may stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina. As long as any political party maintains such a person in a party position or function, that party shall be deemed ineligible to participate in the elections.”⁸⁶

This demonstrates that from the outset, the electoral vetting process in Bosnia and Herzegovina meets two critical best practice requirements: The criteria to disqualify electoral candidates are based on individual integrity, therefore meeting the standard of individual responsibility, and a legal mandate clearly defines criteria and explicitly governs electoral vetting, leaving little room for arbitrary interpretation and implementation.

The PEC’s rules and regulations also established a code of conduct for political parties and candidates; parties were obliged to accept the code before a party or candidate could be registered.⁸⁷ The PEC was empowered to disqualify candidates on a party list if the party violated the code of conduct.⁸⁸ Article 122 obliged parties and candidates to “respect the right of other parties and candidates participating in the elections to conduct their campaigns in a peaceful environment ... they will refrain from ... any threat of retaliation or reprisal against supporters of other parties and candidates.”⁸⁹

The electoral vetting process also respected due process requirements by incorporating a provision allowing political parties to appeal an adverse decision, thereby meeting the third recommended criterion according to vetting guidelines. The rules and regulations mandated that political parties submit the names of candidates to the PEC ahead of elections for approval; anyone found ineligible could be replaced by the political party within 48 hours.⁹⁰ Additionally, the PEC established a supervisory body, the Elections Appeals Sub-Commission, and empowered it with authority to ban political parties from participating in elections, if the party was deemed to have violated principles in the Dayton Agreement or the PEC’s rules and regulations.⁹¹ Political parties could appeal to the

⁸⁶ Article 46. These rules were also applicable to independent candidates. See Article 56, ‘Rules and Regulations,’ PEC.

⁸⁷ Articles 119-124, ‘Rules and Regulations,’ PEC.

⁸⁸ Article 123, ‘Rules and Regulations,’ PEC.

⁸⁹ Article 122, ‘Rules and Regulations,’ PEC. John Reid, the principal drafter of these rules, said he deliberately targeted political party leadership “because that is the only way you can control a system where voters vote for party lists.” Bosnia and Herzegovina implements a form of proportional representation electoral system that allows political parties to draw up candidate lists. Reid quoted in Blessington, ‘From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina,’ p. 574.

⁹⁰ Article 44, ‘Rules and Regulations,’ PEC.

⁹¹ Article 141 stated “the Election Appeals Sub-Commission may prohibit a political party from running in the elections, decertify a party already listed on the ballot, remove a candidate from a party list or an independent candidate from the ballot when it determines a violation of the principles established in the General Framework Agreement for Peace in Bosnia and Herzegovina or the Rules and Regulations established by the Provisional Election Commission has occurred. The Election Appeals Sub-Commission may set and apply pecuniary or other appropriate penalties for actions carried out with intent to disrupt the electoral process.” ‘Rules and Regulations,’ PEC.

Elections Appeals Sub-Commission within three days of receiving decisions from the PEC that their party or candidate was banned. The Election Appeals Sub-Commission's decision was final.⁹²

Ahead of municipal and parliamentary elections in 1996, these rules were put into action. Seven candidates who were members of the Party of Democratic Action (SDA), the major nationalist party of Bosnia and Herzegovina's Muslim population, were disqualified from the party's list, after the head of a rival Muslim party, Haris Silajdžić, was bludgeoned while campaigning. Silajdžić's party, the Party for Bosnia and Herzegovina, filed a complaint with the PEC, which referred the matter to the sub-commission. Their investigation found that "violently pro-SDA mobs had caused the disturbances" leading to the attack which, along with previous incidents of campaign violence and intimidation directed against Silajdžić, constituted a violation of the Dayton Agreement and the rules and regulations of the PEC.⁹³ The sub-commission, pursuant to articles from the code of conduct, disqualified the first seven names from the SDA's party list for municipal elections in Cazin, where the attack occurred.⁹⁴

Ahead of the 1996 parliamentary elections, PEC Chairperson, U.S. Ambassador Robert Frowick, used his authority to threaten to ban the ruling Serb party, the Serb Democratic Party (SDS), from participating in elections unless its party leader Radovan Karadžić, a Bosnian Serb personally indicted by the UN war crimes tribunal, resigned as party chief. Frowick maintained that justice demanded that Karadžić remove himself from politics.⁹⁵ The threat to ban the SDS from elections worked; Karadžić resigned as party leader.⁹⁶

In 2001 Bosnia and Herzegovina passed an election law that entrenched criteria similar to those established by the PEC to ban electoral candidates. The election law established a Central Election Commission that replaced the PEC.⁹⁷ The Central Election Commission assumed responsibility for vetting electoral candidates to make sure they met eligibility criteria.⁹⁸

The electoral vetting process maintained criteria based on individual integrity, regulated by a clearly defined legal mandate and included due process guarantees, thereby meeting best practice standards. The election law clearly states that individuals who have been found guilty of war crimes and "serious violations of humanitarian law" are banned from standing in elections.⁹⁹ Individuals and political parties prohibited from standing in elections include:

⁹² Article 48, 'Rules and Regulations,' PEC.

⁹³ Blessington, 'From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina,' p. 583-584.

⁹⁴ Blessington, 'From Dayton to Sarajevo: Enforcing Election Law in Post War Bosnia and Herzegovina,' p. 585.

⁹⁵ The Washington Post, 'Ambassador Robert Frowick; Served in the Balkans,' January 31, 2007,

<http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001734.html?noredirect=on>

⁹⁶ The Irish Times, 'Karadžić steps down as president clearing the way for Bosnian elections,' July 20, 1996. <https://www.irishtimes.com/news/karadzic-steps-down-as-president-clearing-way-for-bosnian-elections-1.69103>

⁹⁷ <https://www.izbori.ba/Default.aspx?CategoryID=114&Lang=6&Id=807>

⁹⁸ Article 4.1, 2001 Election Law of Bosnia and Herzegovina.

⁹⁹ Article 1.7, 2001 Election Law of Bosnia and Herzegovina.

- Individuals serving a sentence imposed by the International Criminal Tribunal for the former Yugoslavia (ICTY);
- Individuals under indictment by the ICTY;
- Political parties or coalitions that maintain such a person “in a political party position or function” as established by the first two criteria.¹⁰⁰

Basic due process procedures were also respected since political entities were granted the right to appeal Central Election Commission decisions in hearings.¹⁰¹ If the Central Election Commission upheld its ruling, candidates could appeal to the Appellate Division of the Court of Bosnia and Herzegovina.¹⁰²

In 2006, the law broadened the scope of criteria to include sentences imposed by courts besides the UN. Article 1.7a stipulates:

“No person who is serving a sentence imposed by a court of a foreign country or has failed to comply with an order to appear before a court of a foreign country for serious violations of humanitarian law where the International Criminal Tribunal for the Former Yugoslavia has reviewed his or her case file prior to arrest and found that it meets international legal standards, may ... stand as a candidate or hold any appointive, elective or other public office in the territory of Bosnia and Herzegovina.”¹⁰³

In January 2006 the electoral law was again amended to include additional criteria to ban candidates found to have violated or obstructed the implementation of the Dayton Agreement.¹⁰⁴ Importantly, the law set a firm time limit, until December 31, 2007, on banning individuals under the new criteria, on grounds that “norms that limited human rights could have temporary character only.”¹⁰⁵ Most

¹⁰⁰ Article 1.6, 2001 Election Law of Bosnia and Herzegovina, [http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/004%20-](http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/004%20-%20Election%20Law%20of%20Bosnia%20and%20Herzegovina/BH%20Election%20Law%2023-01.pdf)

[%20Election%20Law%20of%20Bosnia%20and%20Herzegovina/BH%20Election%20Law%2023-01.pdf](http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/004%20-%20Election%20Law%20of%20Bosnia%20and%20Herzegovina/BH%20Election%20Law%2023-01.pdf)

¹⁰¹ Article 6.6, Clause 5, 2001 Election Law of Bosnia and Herzegovina

¹⁰² Article 6.9, Clause 1, 2001 Election Law of Bosnia and Herzegovina.

¹⁰³ Article 1.7a, Election Law of Bosnia and Herzegovina, as per the amendment adopted in March 2006.

<http://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/004%20-%20Election%20Law%20of%20Bosnia%20and%20Herzegovina/BH%20Election%20Law%20Amendments%2024-06.pdf>

¹⁰⁴ Paddy Ashdown, then high representative for Bosnia and Herzegovina, the international institution set up to oversee the implementation of the civilian aspects of the Dayton Agreement, amended the electoral law to include criteria to ban individuals “who had been removed from public office by decision of the High Representative for action or inaction” violating the Dayton Agreement; individuals who had been removed from a military command or office as a result of engaging in activities that violated or threatened the peace process; and individuals who had been “de-authorized or denied certification by decision of the International Police Task Force Commissioner” for obstructing the implementation of the Dayton Agreement. There were specific circumstances for these exclusions. According to a member of the Central Election Commission of Bosnia and Herzegovina, the high representative intervened at the time to prevent police officials “who were destructive” and opposed reforms to the police force from running in elections after they were dismissed from the police force. E-mail communication with Irena Hadziabdic, member of the Central Election Commission of Bosnia and Herzegovina, October 25, 2018.

¹⁰⁵ E-mail communication with Irena Hadziabdic, member of the Central Election Commission of Bosnia and Herzegovina, October 25, 2018.

importantly, by clearly defining criteria, the electoral law in Bosnia and Herzegovina leaves no room for interpretation and, consequently, leaves little maneuvering room for political manipulation. Electoral vetting in Afghanistan, however, demonstrates that criteria respecting individual responsibility in itself is insufficient for a good electoral vetting process. To avoid the arbitrary interpretation and implementation of electoral vetting it is equally important that the criteria for exclusion is clearly defined and entrenched explicitly in the legal mandate governing vetting.

Although Afghanistan's 2004 Constitution states that electoral candidates to the National Assembly and the presidency should "not have been convicted of crimes against humanity,"¹⁰⁶ no one has been prosecuted for war crimes in Afghanistan, where the justice system has been criticized as "heavily biased in favour of those with money and power."¹⁰⁷ The Afghan electoral law established criteria to exclude potential candidates from standing in elections but lack of clearly defined terms rendered it open to interpretation and subsequently, selective implementation. Article 15 of the Afghan electoral law stipulated that individuals "who practically command or are members of unofficial military forces or armed groups" are banned from running in elections.¹⁰⁸ These criteria, however, were criticized for not clarifying or defining official military forces or armed groups; neither was it clearly defined what it meant to "practically command" or to be a "member" of armed groups, which made the process vulnerable to political manipulation.¹⁰⁹

In response to local and international pressure, the 2005 election organizers created a system to screen candidates for links to "illegal armed groups;"¹¹⁰ however, the terms "illegal" or "unofficial armed groups" were not precisely defined in any legal mandate.¹¹¹ The vetting process in Afghanistan's 2005 elections was criticized as highly selective and politicized, not only on account of these ambiguities but also as a result of the process. The entity that was charged with identifying candidates with armed groups, the Joint Secretariat of the Disarmament and Reintegration Commission (JS),¹¹² found that 1,100 candidates had links to armed groups, but many were not disqualified, out of fear that some candidates' exclusion could pose a security risk.¹¹³ If any of the JS

¹⁰⁶ Article 85, Clause 2 and Article 62, Clause 3, The Constitution of Afghanistan (2004).

<http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf>

¹⁰⁷ Andrew Reynolds, Lucy Jones and Andrew Wilder, 'A Guide to Parliamentary Elections in Afghanistan,' Afghanistan Research and Evaluation Unit, (2005), p. 15.

¹⁰⁸ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 15.

¹⁰⁹ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 15-16.

¹¹⁰ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 18.

¹¹¹ The vetting process was based on data collected through the Disbandment of Illegal Armed Groups, an Afghan government program supported by the UN and international donors. See Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 3. For details of the Disbandment of Illegal Armed Groups program and its international support see UN Development Programme, Disbandment of Illegal Armed Groups (DIAG) Project and Related Projects. Phase I Evaluation Report. (2006).

¹¹² The voting members of the Joint Secretariat of the Disarmament and Reintegration Commission (JS) included local and international components. The JS was comprised of the chair of the Disarmament and Reconciliation Commission, representatives from the ministers of Defense and Interior, UN Assistance Mission in Afghanistan/the Afghanistan New Beginnings Program, the National Security Directorate, the Coalition Combined Forces Command Afghanistan and the International Security Assistance Force. Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 22.

¹¹³ "Deliberations took place within the JS, during which voting members weighed in against including many of the names on the list. Members of the JS apparently said they lacked sufficient evidence to exclude nearly 900

member agencies wanted to ensure that a candidate was not disqualified, that agency would either refrain from sharing information about the candidate's links with armed groups or cite security reasons for not disqualifying the candidate, even though there was evidence of links to armed groups.¹¹⁴ This process was deemed to lack credibility.

A lesson to draw from electoral vetting in Afghanistan is the importance of clearly defined and explicit criteria to exclude candidates; otherwise, the process is vulnerable to interpretation and selective implementation.¹¹⁵ In stark contrast to Bosnia and Herzegovina, the Afghanistan example demonstrates how the lack of clarity in the law can make the vetting process open to manipulation. The lack of clarity, combined with a process that operates from a "collective guilt" perspective, which lacks individual due process protections, can lead to a process that, ultimately, undermines the overall trust in the electoral process, as is demonstrated by the Iraq de-Baathification example.

V. The Baath Party and De-Baathification in Iraq

In Iraq a process to ban candidates has been used in every election held since the end of Saddam Hussein's regime in 2003, even though no legal framework is in place that explicitly establishes electoral vetting. Instead, the justification and criteria to screen electoral candidates are drawn from the de-Baathification program, launched after the removal of Saddam Hussein's authoritarian regime in 2003.¹¹⁶ The de-Baathification program was introduced to remove members of the Baath Party that dominated the Hussein government from positions of authority and to ban them from future employment in the public sector. Since the process in Iraq to screen and disqualify electoral candidates is inspired by de-Baathification, it is useful to briefly explore the structure of the Baath Party before examining the design, implementation and underlying assumptions and principles espoused by the de-Baathification program.

The Baath Party was the ruling party in Iraq from 1963 until 2003. In 1968 Saddam Hussein's wing of the Baath Party carried out a coup to take control of the country and in 1979 Hussein declared himself president.¹¹⁷ For 35 years the Baath Party was the chief "instrument of political oppression"

other candidates, even provisionally, or that it was unwise to do so because their removal posed a security risk. Apparently, a single opposition was sufficient to cut a name from the list." Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 23.

¹¹⁴ Ayub et al., 'Vetting Lessons for the 2009-10 Elections in Afghanistan,' p. 30.

¹¹⁵ Electoral vetting continues in Afghanistan. The criteria for electoral vetting is unchanged and it remains unclear how a person may be proven to be – or not to be – a commander of an illegal armed group. The lack of clarity has enabled arbitrary implementation, allowing some candidates with links to armed groups to run while disqualifying others. For details see David Ennis, 'Analysis of the Electoral Legal Framework of Afghanistan,' International Foundation for Electoral Systems, (February 28, 2006), p. 12; see also Fabrizio Foschini and Gran Heward, 'The Alchemy of Vetting,' Afghanistan Analysts Network, (July 16, 2010); see also Noah Coburn and Anna Larson, 'Undermining Representative Governance: Afghanistan's 2010 Parliamentary Election and Its Alienating Impact,' Afghanistan Research and Evaluation Unit Briefing Paper Series, (February 2011), p. 6; see also Ali Yawar Adili, 'Afghanistan's Incomplete New Electoral Law: Changes and Controversies,' Afghanistan Analysts Network, (January 22, 2017), p. 9.

¹¹⁶ The de-Baathification program never specifically mandated screening electoral candidates. As will be shown in this section, candidate screening in Iraq is based on the ad hoc interpretation of multiple frameworks, including the 2005 Constitution and the 2008 Accountability and Justice Law.

¹¹⁷ Stover et al., 'Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq,' p. 844.

in Iraq.¹¹⁸ Baath Party records indicate that its membership structure was highly hierarchal: There were 11 ranks, found in Figure 1.1 from highest to lowest, to which party members belonged.¹¹⁹ Although many Iraqis voluntarily joined the Baath Party because they either believed in its ideology or could benefit from being a Baathist, it is well founded that citizens came under extensive pressure to join the party to get jobs.¹²⁰ The requirement to join the party was strongly enforced, in particular, among teachers and university professors, who were elevated to the more senior firqa (division member) ranks, since their role in society was deemed important.¹²¹ Consequently, the Baath Party filled jobs at every level of society and “systematically penetrated every stratum of society.”¹²²

Figure 1.1 Baath Party Hierarchy

Party Rank (in Arabic)	Baath Party Rank (in English)
A'du Qiyyada Qutriyya	Command Council Member
A'du Maktb	Bureau Member
A'du Fara'	Branch Member
A'du Shu'ba	Section Member
A'du Firqa	Division Member
A'du A'mil	Active Member
A'du Mutaddarib	Member in Training
Nassir Mutaqaddim	Advanced Supporter
Nassir Murashah	Candidate for Membership
Nassir	Supporter
Mu'yyid	Initiate

**Individuals belonging to these ranks were banned by the CPA from positions in future government institutions.*

¹¹⁸ Roman David, 'From Prague to Baghdad: Lustration Systems and their Political Effects,' *Government and Opposition*, 41:3, (2006), p. 366.

¹¹⁹ Notions that the Baath Party records were not meticulous have been dispelled by researchers, such as Abbas Kadhim and Joseph Sassoon, who accessed the Hoover Institution at Stanford University, which received 11 million pages of Iraqi Baath Party archives, including party membership lists, covering the period of 1968-2003. The Hoover Institution received the archives in 2008. According to Kadhim, the director of the Iraq Initiative at the Atlantic Council, who spent three years studying the Baath Party archives at the Hoover Institution, the Baath Party records indicate that each member had a personal dossier that cited his or her rank, date of joining the party and the date of oath of allegiance. Kadhim says that this applied to members in every rank: "Say what you like about the Baath party, they were the best documenters in the universe." The Baath Party ranks in Figure 1.1 is based on Kadhim's analysis of the party records. This paper also adopts Kadhim's English translations of the party ranks, since there are no standardized English translations of the Arabic terminology, which has contributed to analytical confusion. Skype Interview with Abbas Kadhim, December 15, 2018. See also Joseph Sassoon, *Saddam Hussein's Ba'th Party: Inside an Authoritarian Regime*, (Cambridge: Cambridge University Press, 2012), p. 1.

¹²⁰ It is well founded that many individuals joined the Baath Party to keep their jobs and support their families. See Stover et al., 'Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq,' p. 846; see also Sassoon, *Saddam Hussein's Ba'th Party: Inside an Authoritarian Regime*, p. 53.

¹²¹ Stover et al., 'Bremer's "Gordian Knot": Transitional Justice and the US Occupation of Iraq,' p. 849. Skype Interview, Abbas Kadhim, Director of the Iraq Initiative at the Atlantic Council, December 15, 2018.

¹²² Sassoon, *Saddam Hussein's Ba'th Party: Inside an Authoritarian Regime*, p. 6.

The Baath Party oversaw severe human rights abuses, including the use of chemical weapons against its own civilian population, mass executions of thousands of government opponents and the disappearance of more than 300,000 Iraqis.¹²³ It would be a fallacy to assume that higher-ranking members of the Baath Party were involved in or committed human rights violations while those in junior ranks were not. Observers note that many party members belonging to the senior ranks of *firqa* (division member) and even *shu'ba* (section member) could be described as “benevolent,”¹²⁴ in that they were not at all involved in human rights abuses. For example, often university professors and teachers belonged to the senior *firqa* (division member) rank but were not involved in perpetuating human rights violations, while the Baath Party archives suggest that low ranking members were involved more directly in actions, such as writing reports or notes for the party about the activities in their neighborhoods that eventually led to executions or torture.¹²⁵ Therefore, rank in the Baath Party is not necessarily indicative of an individual’s deeds or integrity.

The architects of the de-Baathification program, however, engineered a system that penalized Iraqis solely on the basis of membership in the Baath Party. Shortly before the U.S.-led invasion of Iraq, a Pentagon unit proposed de-Baathification to “cleanse the system” of the Baath Party.¹²⁶ In December 2002 a draft proposal recommended de-Baathification with the objective of eliminating the Baath Party and any “remnants of Saddam’s regime” in Iraq.¹²⁷ In line with this approach, L. Paul Bremer III, a career diplomat in the U.S. State Department, formally launched the de-Baathification program shortly after arriving in Baghdad in May 2003 to serve as the chief administrator of the Coalition Provision Authority (CPA), a temporary body created to oversee the administration of government in Iraq.¹²⁸ Bremer’s first order of business was to issue CPA Order Number 1, a directive launching de-Baathification and which, human rights and transitional justice experts say, “set the course for years to come for how Iraqis would confront the legacy of past crimes.”¹²⁹

The CPA directive banned all individuals belonging to four ranks – *a’du qiyyada qutriyya* (command council member), *a’du fara’* (branch member), *a’du shu’ba* (section member) and *a’du firqa* (division member) – which the CPA identified as the highest ranks in the Baath Party – from positions in

¹²³ Niesen, ‘Banning the Former Ruling Party,’ p. 551; see also Stover et al., ‘Bremer’s “Gordian Knot”’: Transitional Justice and the US Occupation of Iraq,’ p. 834.

¹²⁴ Skype Interview, Abbas Kadhim, director of the Iraq Initiative at the Atlantic Council, December 15, 2018.

¹²⁵ In his assessment of the Baath Party records, Abbas Kadhim says he came across reports written by members of the lowest rank, *mu’yyid* (initiate), that led to executions. See also Zeren, ‘Iraq’s Struggle with de-Ba’thification Process,’ p. 68. Skype Interview, Abbas Kadhim, director of the Iraq Initiative at the Atlantic Council, December 15, 2018.

¹²⁶ The Office of Special Plans was a Pentagon unit under the supervision of Under Secretary of Defense for Policy Douglas J. Feith. Aysegul Keskin Zeren, ‘Iraq’s Struggle with de-Ba’thification Process,’ *Global Change, Peace & Security*, 29:1, (2017), p. 64.

¹²⁷ U.S. Defense Secretary Donald Rumsfeld shared a memo titled “Principles for Iraq-Policy Guidelines,” which apparently stipulated this. Quoted in L. Paul Bremer III, ‘How I Didn’t Dismantle Iraq’s Army,’ *The New York Times*, Op-Ed, September 6, 2007.

¹²⁸ As chief administrator of the CPA, Bremer was responsible for the temporary governance of Iraq and given all executive, legislative and judicial functions of the state. Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority*, p. 111-112.

¹²⁹ Eric Stover, Miranda Sissons, Phuong Pham and Patrick Vinck, ‘Justice on Hold: Accountability and Social Reconstruction in Iraq,’ *International Review of the Red Cross*, 90:869, (2008), p. 6-7.

future government institutions.¹³⁰ Individuals in these ranks were not assessed to determine if they had participated or perpetuated in human rights abuses. The underlying assumptions of this policy were that these ranks represented the party elite and its members must have committed gross human rights violations.¹³¹ Thus, from its inception, de-Baathification espoused the principle of collective guilt and punishment by relying on criteria of party membership rather than individual integrity.¹³²

In the first 18 months of de-Baathification, an estimated 30,000 party members were dismissed from public post positions.¹³³ By 2007, de-Baathification had resulted in some 85,000 Iraqis, most of them Sunni Arabs, losing their jobs.¹³⁴ De-Baathification fanned rising sectarian tensions by mainly, but by no means exclusively, targeting Sunni Arabs. As one observer noted, de-Baathification

“signalled to Iraq’s Sunnis that they would be stripped of their jobs and status in the new Iraq. Imagine if, after apartheid, South Africa’s blacks had announced that all whites would be purged from the army, civil service, universities and big businesses. In one day [de-Baathification] ... upended the social structure of the country ... [and] fuelled the dissatisfaction of the Sunnis, who now had no jobs but plenty of guns.”¹³⁵

Initially, the CPA oversaw the implementation of the de-Baathification program, with assistance from the Iraqi De-Baathification Council (IDC), an entity composed of Iraqi citizens appointed by Bremer.¹³⁶ Soon after, a U.S. senior governance adviser to Bremer recommended that a purely Iraqi body, which would be “more sensitive to the nuances of the policy,” oversee the implementation of de-Baathification.¹³⁷ Bremer agreed and proposed to the Governing Council, the CPA-appointed Iraqi

¹³⁰ The CPA directive did not identify the second highest rank in the Baath Party hierarchy, a’du maktb (bureau member). It is not clear if this suggests, as some observers have noted, that the CPA had insufficient information about the structure of the Baath Party or if members of this rank were included in the most senior ranking. Note that the CPA translation of these ranks is different than those used in this paper; for the sake of consistency, the translation in this paper relies on those offered by Abbas Kadhim. See Article 2, CPA Order No. 1, (2003), p. 1.

¹³¹ Sissons and ‘A Bitter Legacy: Lessons of De-Baathification in Iraq,’ p. 11.

¹³² This policy and the failure to make individual assessments was broadly criticized. See Diamond, ‘What Went Wrong in Iraq,’ p. 43; see also Hollywood, ‘The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq,’ p. 118-119.

¹³³ This included some 6,000 to 12,000 educators. See Stover et al., ‘Bremer’s “Gordian Knot”’: Transitional Justice and the US Occupation of Iraq,’ p. 845.

¹³⁴ Hollywood, ‘The Search for Post-Conflict Justice in Iraq: A Comparative Study of Transitional Justice Mechanisms and Their Applicability to Post-Saddam Iraq,’ p. 116.

¹³⁵ Fareed Zakaria, Book Review. “‘The Assassins’ Gate’: Occupational Hazards,” The New York Times Sunday Book Review. (October 30, 2005). <https://www.nytimes.com/2005/10/30/books/review/the-assassins-gate-occupational-hazards.html>

¹³⁶ In a memo addressed to the U.S. defense secretary, Bremer said that IDC was meant to “put an Iraqi face” on the de-Baathification process. See memo from Ambassador J. Paul Bremer to Secretary of Defense regarding the Iraqi de-Baathification Council, May 22, 2003, quoted in Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority*, p. 117. For the establishment of the IDC, see Coalition Provisional Authority (CPA) Order Number 5, ‘Establishment of the Iraqi De-Baathification Council,’ Section 2, (1), (May 25, 2003). <http://www.casi.org.uk/info/cpa/030525-CPA-Order-5.pdf>

¹³⁷ Memo from Ambassador Ryan Crocker to Ambassador Bremer, July 9, 2003, quoted in Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority*, p. 117.

provisional government, that it create a de-Baathification commission because “Iraqis, not the CPA, are best positioned to continue De-Ba’athification and make any necessary changes to its implementation.”¹³⁸ Weeks after receiving Bremer’s memo, the Governing Council created the Higher National De-Baathification Commission and selected Ahmad Chalabi to head the commission.¹³⁹ Chalabi, described by a former senior CPA adviser as “the most aggressive and politically ambitious advocate of radical de-Baathification,”¹⁴⁰ swiftly took a harder line by extending the de-Baathification process to include election candidates, with the aim of excluding Baath Party members from the political process.¹⁴¹ Under international pressure to reform de-Baathification, the Iraqi Parliament in 2008 passed legislation to regulate the de-Baathification program. Although the de-Baathification legislation does not explicitly establish electoral vetting, the committee overseeing de-Baathification points to this legislation as the framework for screening and banning electoral candidates.

V.i. Legislation Regulating De-Baathification: The Accountability and Justice Law

The Supreme National Commission for Accountability and Justice Law No. 10 – hereafter referred to as the Accountability and Justice Law – is the primary legislation governing de-Baathification. The Accountability and Justice Law has been rightly criticized for perpetuating “a system that is largely based on guilt by association” because it does not consider individual records or deeds.¹⁴² The Accountability and Justice Law establishes a seven-person committee, the AJC, whose role is to oversee the continued implementation of de-Baathification.¹⁴³

The Accountability and Justice Law delineates the functions of the AJC as

- “the prevention of the return of the Baath Party ideologically, administratively, politically and in practice, under any name, to power or public life in Iraq;”¹⁴⁴ and
- “the purification of government institutions ... and Iraqi society from the Baath Party in any shape or form.”¹⁴⁵

These provisions lack clarity and have allowed for expansive interpretation of the de-Baathification program’s institutional targets: Although there are no provisions in the Accountability and Justice Law explicitly stating that de-Baathification include electoral candidates, since 2008 the committee

¹³⁸ Memo from Ambassador Bremer to the Iraq Governing Council, August 10, 2003, quoted in Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority*, p. 117.

¹³⁹ Letter from Ahmad Chalabi to Ambassador Paul Bremer, September 17, 2003, summarized in Dobbins et al., *Occupying Iraq: A History of the Coalition Provisional Authority*, p. 117.

¹⁴⁰ Larry Diamond was a senior adviser to the CPA from January to April 2004. See Diamond, ‘What Went Wrong in Iraq,’ p. 43.

¹⁴¹ Sissons and Rieckh, ‘Iraq’s New “Accountability and Justice” Law,’ p. 5.

¹⁴² Sissons and Rieckh, ‘Iraq’s New “Accountability and Justice” Law,’ p. 2.

¹⁴³ The law established that the commission would be comprised of seven members who represented the different “components” (this term, rather than “minorities,” is used in the Iraqi Constitution to describe its various ethnic and religious communities and has been extended to legislation and other legal frameworks). The primary analyses of this legislation is based on the Arabic text; its translation in this paper is unofficial. See Article 1, Clause 1; Article 2, Clause 4, The Accountability and Justice Law.

¹⁴⁴ Article 3, Clause 1, The Accountability and Justice Law.

¹⁴⁵ Article 3, Clause 2, The Accountability and Justice Law.

in charge of overseeing de-Baathification, the AJC, has used this law as the starting framework through which it has implemented electoral candidate screening.

V.ii. Candidate Screening Process in Iraq

Iraq has yet to establish any legal mandate explicitly establishing criteria and guidelines to screen electoral candidates, which has left the AJC to interpret existing laws and to establish its own criteria. The result is the AJC uses criteria to exclude candidates according to their rank and membership in the Baath Party,¹⁴⁶ as premised in the AJC's interpretation of Article 6 of the Accountability and Justice Law and, to a lesser extent, the 2005 Iraqi Constitution. Article 7 of the 2005 Constitution states that the "Saddamist Ba'ath" will be banned from political participation in Iraq.¹⁴⁷ According to the AJC, this provision necessitates screening all electoral candidates to assess whether they were ever Baath Party members and, since the Constitution bans the Baath Party from political participation, the Constitution mandates banning its members from standing in elections.¹⁴⁸

The Accountability and Justice Law defines a Baath Party member (a'du) as a person who pledged an oath of allegiance to the party. Article 6 bans individuals who had belonged to the rank of "member (a'du) and above," without listing the ranks above member, from the post of director general in public institutions. According to the AJC, this provision necessitates banning individuals who had pledged allegiance to the Baath Party from contesting elections.¹⁴⁹ Individuals are not assessed for their acts but for their rank in the party: An AJC member claims that anyone who had pledged allegiance to the Baath Party was also "willing to carry out all the practices of the party in repressing the Iraqi people."¹⁵⁰ In line with this, individuals who were members of the lowest three ranks the AJC identifies in the Baath Party hierarchy, found in Figure 1.2, are entitled to run in elections since these ranks would not yet have pledged an oath of allegiance, according to Bassam al-Badri, the head of the AJC.¹⁵¹ On the other hand, individuals in the a'du mutaddarib (member-in-training) rank

¹⁴⁶ There is little public information regarding the AJC's process and criteria to ban candidates. The findings here are based on in-depth telephone interviews conducted by this author with two out of six AJC members: Bassam al-Badri, who also heads the AJC, and AJC member Fallah Hassan Shanshul. Although the Accountability and Justice Law mandates the AJC be comprised of seven members, currently it is composed of only six members because the Kurdish representative has not taken their seat as a result of disagreements within the Kurdish community over who should be appointed.

¹⁴⁷ Article 7 states "any entity or program that adopts, incites, facilitates, glorifies, promotes, or justifies racism or terrorism or accusation of being an infidel (takfir) or ethnic cleansing, especially the Saddamist Ba'ath in Iraq and its symbols, under any name whatsoever, shall be prohibited. Such entities may not be part of political pluralism in Iraq." Article 7, Iraq's Constitution of 2005.

https://www.constituteproject.org/constitution/Iraq_2005.pdf?lang=en

¹⁴⁸ Telephone Interview with AJC member Fallah Hassan Shanshul, November 18, 2018, and AJC Chief Bassam al-Badri, November 27, 2018.

¹⁴⁹ Article 6, Clause 8, The Accountability and Justice Commission Law.

¹⁵⁰ Telephone Interview with Hassan Fallah Shanshul, November 18, 2018.

¹⁵¹ The AJC identifies 10, rather than 11, ranks in the Baath Party hierarchy; it does not identify a junior rank, Nassir Murashah (candidate for membership). The reason for this is unclear. Although the AJC acknowledges it holds a rich body of information on the Baath Party, observers have criticized Iraq's candidate screening committee for not engaging in a coherent analysis of the Baath Party functions, structure and membership profile. Without this analysis, they warn, it is "impossible" for Iraq to conduct a well-targeted and coherent vetting program. For criticism of the AJC, see Miranda Sissons and Abdulrazzaq Al-Saiedi, 'A Bitter Legacy: Lessons of De-Baathification in Iraq,' International Center for Transitional Justice, (2013), p. 33. Telephone Interview with AJC Chief Bassam al-Badri, November 27, 2018; Telephone Interview with AJC member Fallah Hassan Shanshul November 18, 2018.

and above would have sworn allegiance to the Baath Party, and consequently, candidates found to have belonged to the first seven ranks may be disqualified from running in elections.

Figure 1.2 Baath Party Hierarchy According to the AJC

Party Rank (in Arabic)	Baath Party Rank (in English)
A'du Qiyyada Qutriyya	Command Council Member
A'du Maktb	Bureau Member
A'du Fara'	Branch Member
A'du Shu'ba	Section Member
A'du Firqa	Division Member
A'du A'mil	Active Member
A'du Mutaddarib	Member in Training
Nassir Mutaqaddim	Advanced Supporter
Nassir	Supporter
Mu'yyid	Initiate

**Individuals belonging to these ranks may be disqualified from running in elections.*

AJC member Hassan Shanshul explains the rationale for excluding candidates on the basis of whether they had pledged allegiance to the Baath Party:

“Those that have pledged their allegiance to the Baath Party – at that time – this means they believed in everything that the Baath Party was doing – including their crimes committed against the Iraqi people – for them to have reached this rank in the party ... This means that this individual has absolute faith in everything that was carried out by the president of the defunct regime and the defunct Baath Party – including their crimes and violations of human rights at the time. And those that were in the ranks from active member and above – they defended the policy of the regime, the oppression of Iraqis. ... These people believe in a perverse concept. If these people reach the Iraqi Parliament and Cabinet they will be involved in drafting legislation. They will participate in running the government and they will participate in the leadership of the political system and this is banned by the law out of concern for the population! These people have an oppressive and perverse concept – and it is out of concern for the population [that they are banned].”¹⁵²

It is clear that the criteria to ban electoral candidates in Iraq is premised in guilt by association rather than individual conduct. By establishing criteria to ban candidates based on rank in the Baath Party rather than individual acts, the screening process in Iraq violates the principle of individual responsibility and espouses a policy of collective guilt, thereby failing to meet a critical best practice standard. The measures in Iraq to ban electoral candidates more closely resemble a purge rather than electoral vetting, based on transitional justice and UN criteria distinguishing vetting processes from purges. Despite the controversies surrounding this practice, there appears to be no time limit to end candidate screening in Iraq.

¹⁵² Interview with Hassan Fallah Shanshul, November 18, 2018.

The procedure in Iraq to ban electoral candidates also fails to meet the second best practice requirement, a legal mandate in place that explicitly governs electoral screening. This has made the process vulnerable to selective implementation and has been used as tool to exclude political figures. Ahead of the 2010 parliamentary elections the AJC banned 511 candidates from running in elections for ties to the Baath Party.¹⁵³ While most of the banned politicians were minor players in the election, the most prominent among the banned candidates were Sunni Arabs – including one of Iraq's most prominent Sunni politicians, Saleh al-Mutlaq – and then Defense Minister Abd al-Kader Jassem al-Obeidi.¹⁵⁴ Al-Mutlaq had been a member of the Baath Party but left the party in the late 1970s; likewise, Al-Obeidi was a Baath Party member who turned against the party in the 1990s, after which he was imprisoned and tortured by Saddam Hussein's regime.

The AJC justified the disqualifications partly on the basis of Article 7 of Iraq's 2005 Constitution.¹⁵⁵ After coming under U.S. pressure, an appeals court was set up to review the bans.¹⁵⁶ Initially, the appeals court lifted the ban on all disqualified candidates to allow them to participate in elections, while reserving the right to examine each case – and each candidate's ties to Saddam Hussein's regime – until after elections.¹⁵⁷ The court said it had examined appeals by banned candidates and found no grounds to exclude them from standing in elections.¹⁵⁸ This ruling sparked a backlash from the AJC and the Dawaa Party, an influential Shia political party: The AJC claimed that the court had behaved unconstitutionally while then Prime Minister Nouri al-Malaki's Daawa Party declared that the appeals panel could only rule on individual cases.¹⁵⁹ Maliki, "in a stunning example of political interference," persuaded the appeals court to reverse its decision to delay its review and agree to an immediate screening of 171 candidates who had lodged an appeal.¹⁶⁰ Within days, the court reversed 26 disqualifications, including Defense Minister al-Obeidi, while the decision to ban 145 others, including al-Mutlaq, was upheld.¹⁶¹ However, Maliki soon backtracked on al-Mutlaq's exclusion from the political process: Following months of deadlock to form a Cabinet, Maliki

¹⁵³ See International Crisis Group, "Iraq's Uncertain Future: Elections and Beyond," Middle East Report No. 94, February 25, 2010, p. i.

¹⁵⁴ Michael E. O'Hanlon and Kenneth M. Pollack, "Iraq's Ban on Democracy," The Brookings Institution. January 18, 2010. <https://www.brookings.edu/opinions/iraqs-ban-on-democracy/>

¹⁵⁵ Marina Ottaway and Danial Kaysi, "De-Baathification as a Political Tool: Commission Ruling Bans Political Parties and Leaders," Carnegie Endowment for International Peace, January 26, 2010. <https://carnegieendowment.org/2010/01/26/de-baathification-as-political-tool-commission-ruling-bans-political-parties-and-leaders-pub-24778>

¹⁵⁶ Peter Niesen, 'Banning the Former Ruling Party, Constellations, 19:4, (2012), p. 551; see also "Court Lifts Ban on Iraq Election Candidates," The National, February 4, 2010. <https://www.thenational.ae/uae/court-lifts-ban-on-iraq-election-candidates-1.607475>

¹⁵⁷ In Iraq, Banned Sunni Candidates Back in the Race,' The Christian Science Monitor, February 3, 2010. <https://www.csmonitor.com/World/2010/0203/In-Iraq-banned-Sunni-candidates-back-in-the-race>

¹⁵⁸ "Court Lifts Ban on Iraq Election Candidates," The National, February 4, 2010. <https://www.thenational.ae/uae/court-lifts-ban-on-iraq-election-candidates-1.607475>

¹⁵⁹ "Court Lifts Ban on Iraq Election Candidates," The National, February 4, 2010. <https://www.thenational.ae/uae/court-lifts-ban-on-iraq-election-candidates-1.607475>

¹⁶⁰ International Crisis Group, "Iraq's Uncertain Future: Elections and Beyond," p. 31.

¹⁶¹ International Crisis Group, "Iraq's Uncertain Future: Elections and Beyond," p. 31.

appointed al-Mutlaq deputy prime minister.¹⁶² This demonstrates how the lack of a legal mandate to regulate electoral vetting enables its arbitrary implementation according to political considerations.

Finally, the process to ban candidates in Iraq also falls short of meeting a basic individual due process requirement, the right to a hearing for candidates to contest decisions of exclusion. The process to screen electoral candidates begins with candidate nominations. All political parties, coalitions and independent candidates submit the names of potential candidates to Iraq's electoral commission, the Independent High Electoral Commission (IHEC). IHEC then submits candidate lists to the AJC. An AJC information unit maintains an archive of the Baath Party membership lists.¹⁶³ Candidate screening occurs on the basis of this archive and, consequently, the AJC's access and control over the Baath Party records is central to the screening process. The AJC submits the names of all candidates to the information unit, which checks if names match their records or files indicating an individual's rank in the Baath Party. If candidates are found to have belonged to any of the top seven ranks in Figure 1.2, their names and the documents that indicate their senior party rank are sent to a legal unit within the AJC that verifies whether the document corresponds with the criteria for disqualification and validates the authenticity of the records. The validity of documents is verified according to whether the documents include official stamps or if there are any inaccuracies that may indicate that the documents are unreliable.¹⁶⁴

Excluded candidates are not granted hearings at any stage in the process. If the AJC deems it has sufficient evidence banning a candidate, it informs, in writing, the political party or coalition that submitted the candidate's name. Candidates disqualified by the AJC have 30 days from the date that they are informed of their ban to appeal to the Cassation Board by submitting a written appeal. The Cassation Board's rulings are final.¹⁶⁵ Despite the establishment of an appeals mechanism, experts

¹⁶² The National, 'Al-Maliki takes the reins in Iraq once more,' December 22, 2010. <https://www.thenational.ae/world/mena/al-maliki-takes-the-reins-in-iraq-once-more-1.543878?videoId=5770738884001>

¹⁶³ Extensive controversies surround the Baath Party membership records. It is widely recognized that government offices were looted after the invasion and many documents, including membership records, were removed. Millions of state security documents were swept up by the U.S.-based Iraq Memory Foundation (IMF), Iraqi political and religious groups, local nongovernmental organizations, along with "thieves and opportunists," to use the Baath Party records for blackmail and to extract revenge. There was a thriving trade in the sale of these documents, including membership records. Entities buying documents on the black market included the IMF, the CPA and the Pentagon. The AJC insists it possesses party membership records that accurately indicate membership and rank of Baath Party members. According to AJC Chief Bassam al-Badri, the AJC archives includes records from the registers of important government ministries, including Defense and Interior, former security and military bodies registers, the command council offices (Qiyada qutriyya), the highest rank in the Baath Party, registers. Additionally, Badri says in 2003 U.S. military forces obtained Baath Party records and provided a copy to the precursor of the AJC, the Higher National De-Baathification Commission. It is important to note that although Badri used the Arabic term for U.S. military forces, it is possible that these records were those obtained by the Department of Defense. See Bruce P. Montgomery, 'Immortality in the Secret Police Files: The Iraq Memory Foundation and the Baath Party Archives,' *International Journal of Cultural Property*, 18, (2011), p. 313-314. Interview with Bassam al-Badri, November 27, 2018.

¹⁶⁴ Telephone interview with AJC member Fallah Hassan Shansul, November 18, 2018.

¹⁶⁵ Many excluded candidates relied on due process guarantees in Iraq's most recent parliamentary elections in May 2018, to seek reinstatement after the AJC initially banned them. Ahead of those elections, 230 out of 375 candidates the AJC initially banned appealed their exclusion to the Cassation Board. The Cassation Board

maintain that due process guarantees in Iraq remain weak since excluded candidates are not granted the right to contest their exclusion at a hearing.¹⁶⁶ Overall, the process to ban candidates in Iraq is deeply flawed: It falls short of meeting all three best practices for electoral vetting to meet standards of fairness and international human rights statutes.

VI. Conclusion

Electoral vetting processes should conform to at least three recommended best practices: The criteria to disqualify candidates should be based on individual deeds or integrity and not group membership; the process should be governed by a legal mandate that clearly defines guidelines for electoral vetting; and individual due process protections should be ensured. In Bosnia and Herzegovina the criteria for electoral vetting was premised in assessments of individual acts, rather than group membership, which were clearly defined in legal mandates put in place to govern the process. This left little room for the ad hoc implementation or political manipulation of electoral vetting. Additionally, the law ensured excluded individuals had the right to a hearing, thereby meeting minimum individual due process protections. The case of Afghanistan demonstrates how the lack of clarity in the law and criteria can make the electoral vetting process vulnerable to selective implementation, which could undermine the legitimacy of elections.

The process in Iraq to ban electoral candidates also fails to meet best practices for fair electoral vetting. Not least of its shortcomings is the continued reliance on party rank as opposed to individual acts as the main criteria to ban candidates. By espousing a policy of collective guilt as opposed to individual responsibility, Iraq's process to ban electoral candidates more closely resembles a purge than electoral vetting. Given that purges can create further abuse, resentment and mistrust, it is essential that Iraq reevaluate its process to screen electoral candidates.¹⁶⁷ Additionally, a legal framework to explicitly govern electoral vetting that clearly defines criteria for exclusion has yet to be introduced, although candidate screening has been used in each election since 2003. Finally, although an independent appeals mechanism was established, individual due process guarantees are lacking since excluded candidates are not granted hearings to contest the findings of the AJC and can only appeal through written submissions. At the very least, Iraq should overhaul the process to screen candidates by setting clear criteria and procedures for the AJC to follow, which respects rule-of-law best practices and is embedded in law; as a matter of priority this entails setting explicit criteria that disqualifies candidates based on individual acts and integrity – that is, involvement in gross human rights violations – and not rank in the Baath Party.

upheld the AJC's decision for 186 of these candidates and overturned the ban on 44 others. This information was provided by the AJC.

¹⁶⁶ Sissons and Mayer-Rieckh, 'Briefing Paper: Iraq's New "Accountability and Justice" Law,' p. 12, p. 14.

¹⁶⁷ Stover et al., 'Justice on Hold: Accountability and Social Reconstruction in Iraq,' p. 18.

VII. Recommendations for Designing Electoral Vetting in Post-Conflict, Post-Authoritarian Contexts

If electoral vetting processes are implemented in countries emerging from authoritarian rule, conflict or both, designers should keep in mind the following recommendations to protect the integrity of elections:

A legal mandate clearly defining the positions subject to vetting is recognized by experts as a prerequisite for any vetting process.^[161] If electoral candidates are going to be vetted and potentially banned from running in elections, taking away their fundamental right to run for office,¹⁶⁸ there needs to be a clearly defined and firm legal basis for taking away this right. Failing to clearly stipulate that electoral candidates will be targeted in a vetting process risks the political misuse of this process, as those in charge of vetting could use it to exclude political rivals.

Clearly defined criteria that respect the principle of individual responsibility must be established in a legal framework. Transitional justice practitioners recognize that vetting processes can be misused for political purposes; to avoid this they recommend that a vetting process respect international human rights standards: in particular, the principle of individual responsibility.^[162] Exclusions on the sole basis of groups, including political parties, not only violate international standards but could cast the net too wide and exclude candidates who bear no individual responsibility for past abuses. Simultaneously, group exclusions based on party rank and membership may be too narrow and overlook individuals who committed abuses. Electoral vetting should contain substantive and due process protections and be based on individual rather than collective responsibility.

Electoral vetting processes should be subject to a clear time limit. They should not be implemented indefinitely and this time limit should be defined from its inception in a legal mandate.

As running as a candidate is a right protected by Article 25 of the ICCPR, evidence used to disqualify candidates must be of the highest quality and corroborated by multiple, reliable sources. A process that relies solely on single sources – political party personnel files, for example – is more vulnerable to political misuse since it is widely recognized that during periods of conflict, information about abuses is often covered up and evidence is destroyed; additionally, personnel files may be stolen, manipulated or destroyed.^[163] Therefore experts advise that vetting processes rely on multiple sources to corroborate claims of wrongdoing and meet minimal due process protections. If an electoral vetting process relies solely on a single source – political party files, for example – and individuals who may have committed abuses obtained and destroyed files that documented their participation or perpetration of human rights violations, they may be allowed to stand in elections simply because the process relied on a single source. Therefore, transitional justice experts recommend that to collect reliable integrity data in a post-conflict transitional period, background information may need to be sought proactively from a variety of sources.^[164] Sources of

¹⁶⁸ See ICCPR, Article 25

information include personnel files, court records, party files, election registers, nongovernmental organization reports, truth commission reports (where available), media reports and independent investigation reports.^[165] Additionally, providing the public with an opportunity to come forward with information is also recognized as a potentially useful avenue to collect information on the integrity of candidates. Where the security situation permits, lists with the names of candidates may be broadly publicized and a contact point could be established to receive information on the background of candidates.^[166] To prevent this exercise from political misuse, it is necessary to rely on multiple sources.

To build confidence in the process and reduce uncertainty experienced by electoral candidates subject to vetting, the public needs to be aware of an electoral vetting process through public awareness campaigns. Experts recommend that a vetting process include a public information aspect since this could preempt later concerns and doubts on the validity of the process.^[167] Additionally, they recommend that the design of the process itself be informed by broader consultations with civil society organizations.^[168]

The criteria for electoral vetting should be determined by an independent special ad hoc commission comprised of international and national staff whose members are broadly respected and not associated with former – or, in states where conflict has continued, current – warring factions. The experience of electoral vetting in Bosnia and Herzegovina provides important lessons of the potential role of international actors in defining electoral vetting criteria, within the fragile political environment of countries emerging from conflict, an authoritarian regime or both, to prevent the process from becoming a purge to settle scores with those perceived to be affiliated with the former abusive regime. Experts recognize that establishing an independent commission may be challenging in a country emerging from conflict and recommend that broad consultations with independent authorities, such as the constitutional court where it exists or an international institution precede the appointment of members of the vetting committee.^[169] Additionally, it is vital that the ad hoc commission is supported by a multidisciplinary staff, including lawyers and technical experts, to support the decision-making process. Given that this requires substantial financial support, which may be scarce in a post-conflict setting, and the importance of an effective and fair vetting process, experts acknowledge that international support to establish and run an ad hoc commission is often necessary. However, experts recognize that domestic ownership, where possible, is preferable to an internationalized process, “as it contributes to the legitimacy of the process, ensures the application of local know-how, and provides a better basis for domestic buy-in and sustainability.”^[170] Thus the inclusion of some international members may be at least considered to increase the independence and legitimacy of the vetting commission.

About the Author

Dr. Amal Hamdan is an electoral systems, governance and legal framework expert. Her Ph.D. research, conducted at the Political Economy Department of King's College London, focuses on the process of electoral system reforms within institutional contexts where the Constitution assigns extensive powers favoring the executive branch at the expense of the legislative, using four little-studied electoral reforms in Lebanon from 1950-60 as case studies. Previously, before electoral systems and their potential for inclusive and democratic governance captivated her, Hamdan was a Middle East-based senior news and program producer with Al-Jazeera Television, where she spent 12 years covering political developments in the Middle East and active conflict in Lebanon, Syria and Iraq, before embarking on a Ph.D. to change careers.



Global Expertise. Local Solutions.
Sustainable Democracy.