

## RESEARCH ARTICLE

# Mass Claims in Land and Property Following the Arab Spring: Lessons from Yemen

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The Arab Spring uprisings have released a flood of land and property conflicts, brought about by decades of autocratic rule. Expropriations, corruption, poor performance of the rule of law, patronage and sectarian discrimination built up a wide variety of land and property transgressions over approximately 30 years. The result has been the creation of longstanding, acute grievances among large components of national populations who now seek to act on them. If new, transitional or reforming governments and their international partners fail to effectively attend to such grievances, the populations concerned may act on them in ways that detract from stability. This article critiques the case of Yemen, whose transitional government, with international support, initiated a land and property mass claims process in the South in order to address a primary grievance of the southern population as part of the National Dialogue transition. A series of techniques are described that would greatly improve the mass claims process once it inevitably recommences after the Houthi conflict comes to an end. These improvements would attach more importance to socio-political realities and how to quickly attend to them, as opposed to an over-reliance on specific legalities. Such an approach could have wider utility among Arab Spring states seeking to address similar land and property grievances.

## Introduction

Land and property rights are one of the most important issues that has emerged in all of the Arab Spring states, including those hoping to avoid violent uprisings. The long history of opposition to certain governments in the Middle East and North Africa reflect a process of confiscations, poor performance of the rule of law regarding land rights, and the important role that lands and properties played in the patronage systems of governance. In aggregate, such acute problems regarding land and property now

form a common narrative that promises now to reshape new constitutions, legislation, policy formulation, social mobilization and transitional-justice processes for years to come (Schechla 2012).

One of the primary trends across Arab Spring states following the uprisings is the high number of land and property claims by those who were dispossessed over decades of patronage-based autocratic rule (e.g. UNHCR 2012; Schechla 2012; Rihan and Nasr 2001; Unruh 2016). Addressing such claims in a timely and effective manner will be critical to stability, governance, and economic and livelihood recovery.

This analysis looks at Yemen and the land and property rights problems that emerged in the South as a set of deep-seated grievances against the central government and the North. Prior to the Houthi insurgency, the government, the Gulf Cooperation Council and the UN had begun a mass claims program for land and property restitution in the South to address one of the primary grievances of the southern population. The attention given to land and property restitution in the South was considered critical to the building of stability and continuing unity of northern and southern Yemen (Republican decree no. (2) 2013; Lackner 2012). While currently suspended, the program will inevitably recommence once relative stability returns and the South seeks to move forward – with one important difference. Once the Houthi war ends, the situation surrounding the restitution of lands and properties will be much more complicated, acute, urgent and violent, given that blood has once again been shed between southerners and northerners. The Houthis (a group from northern Yemen) are allied with former president Saleh's forces, and northerners are considered responsible for the land and property confiscations in the South which have occurred since the unification of the country in 1990 to the present. In addition, the loss of life, dislocation, social upheaval and property destruction wrought by the Houthi conflict in the South (Economist 2015) will produce 1) a new tangle of claims that will mesh with those that the mass claims program initially intended to serve; 2) a large increase in the destruction and loss of documentary evidence for claims; and 3) a pronounced decrease in the patience of the post-conflict population with any perceived slowness on the part of the mass claims process to deliver timely results.

Regardless of whether or not the South remains unified with the North, the return of lands and properties confiscated and used in the patronage system operated

by the Saleh regime will be a priority. In Yemen's case, addressing longstanding and acute grievances surrounding land and property is more about creating the perception of social justice and less about legal propriety. Eventually, southern Yemen will need robust techniques to address its land and property restitution difficulties. These techniques will be useful in order to quickly and effectively determine which properties are to be returned, and to whom; who is to be given alternative lands or properties, and where; and who is to be compensated, by how much and in what form. If such a process is not seen as rapid, capable and fair by the general public, the subsequent public disillusionment could become problematic for the government. For example, Al-Qaeda in the Arabian Peninsula (AQAP) is quite adept at attaching itself to societal grievances in southern Yemen in order to grow its own constituency. Instead, if a post-Houthi government were able to adequately address such grievances, support for AQAP, or similar groups, could decrease (Zimmerman 2015).

This paper describes the author's experience in assisting the Yemeni government and the UN in creating and implementing this mass claims program. Subsequent to the section on methodology, the paper explores the background to the southern Yemen land and property difficulties during the Saleh government, and then moves on to delimit the land issues in the post-Saleh era after Yemen's Arab Spring, which began in 2011. The paper then critiques Yemen's mass claims program by detailing the types of claims, their complications and how they were dealt with by the Land Commission prior to the Houthi insurgency. This is followed by a description of improved mass claims techniques more adapted to the socio-political reality of southern Yemen, post-conflict. These techniques aim to quickly and effectively address the destabilizing grievances brought about by decades of conflict, expropriation and patronage.

## Methods

Data collection was conducted in southern Yemen in 2013 and 2014 while the author worked with the Southern Yemen Land Commission. This included individual and group interviews and working relationships with a total of 580 people. Legal, administrative and technical personnel from the Southern Yemen Land Commission, along with claimants from different governorates, socio-economic strata, ages, occupations, and tribal affiliations are included in this number. Additionally, individuals holding customary leadership positions of sultan, sheik and elder from different governorates were interviewed. Discussions were also held with personnel from The Land Authority, The Military Survey Office, The Aden Free Zone, housing and agricultural societies, the University of Aden, the Investment Authority, a university woman's association, the office of the Aden Governorate, the Aden Chamber of Commerce, the Ministry of Endowment (*waqf*), the Ministry of Public Works, the Ministry of Legal Affairs, the General Authority of Land Surveying and Urban Planning, the Ministry for Interior, and the Ministry for Defense. Discussions were held as well with activists, journalists, representatives of the southern separatist movement Al-Hirak, and various NGOs. United Nations personnel from the International Organization for Migration, the UN Development Programme, the UN Department of Political Affairs, and UN security were also consulted.

Work in Yemen was complemented by a review of the academic, legal, donor, government and NGO literature relevant to contemporary and historical aspects of Yemen's land and property rights, conflicts, dislocation and migration, tribes, general society, and economy. Mass claims restitution processes conducted in other countries were also reviewed. These included restitution processes in European, Middle Eastern, African, North American, Latin American and Asian countries. Particular focus was given to the

examination of the Southern Yemen Land Commission's documentation, including progress reports, bylaws, decrees, terms of reference, recommendations, as well as the development of the claims database.

## Land Rights in Southern Yemen: Background

### *The Saleh Era*

Land rights played a primary role in the patronage system of the Saleh government prior to its removal in 2012, during Yemen's Arab Spring. Land and property confiscations and reallocation were used to punish some groups and individuals and reward others. This played a large part in propping up the government for more than three decades (Hales 2010). In the South, the first land disputes arose in 1967 when the socialist regime of then South Yemen, abolished sultanates, expelled tribal sultans and sheiks, and claimed their land for the state (Day 2012; World Bank 2009). Many sultans and sheiks fled to Saudi Arabia during this time (Gaston 2015), prompting outsiders to the former sultanates to rent the land from the state, as tenants (Jerret 2014; Day 2012).

When Yemen and South Yemen unified in 1990, President Saleh encouraged the sultans and associated sheiks to return, and gave them their land back (World Bank 2009). In gratitude, the sultans gave the president approximately 20 per cent of the sultanate lands, apparently because they knew he would take it anyway (Jerret 2014). Prior to the sultans' return, however, many tenants who already occupied the land found themselves in a position to sell; in many cases the tenants were approached by outsiders who encouraged such sales. Simultaneously, former sultanate lands were seized by powerful political and military interests (Brehony 2011; Jerret 2014). When the sultans returned in 1990, they demanded their land back from those it had been sold to and seized by, and many of these cases ended up in court. However, the courts in Yemen are plagued by corruption and were

unable to process the high volume of cases, and thus were unable to resolve them (van Veen 2014). This situation encourages the sultans, sheiks and their kin to approach AQAP to resolve these conflicts. This is facilitated by the fact that a number of returning sheiks fought with bin Laden in Afghanistan, and so already had important connections to Al-Qaeda; in fact, one of the returning sultans actually helped to found AQAP (Gaston 2015; Johnsen 2012). Al-Qaeda in the Arabian Peninsula explicitly supports the southern secessionist movement Al-Hirak, and is currently actively engaged in trying to win over the local population in the southern governorates (Zimmerman 2015; Day 2012). At the time of publication, there are indications that AQAP is moving in behind Saudi-led coalition forces in an attempt to control areas liberated from the Houthis (Zimmerman 2015).

An additional complication regarding the sultanates in the South was the appointment of numerous sheiks by the Saleh government, and the land allocation function of the sheiks. Prior to the departure of the sheiks, at the onset of the socialist era, they had no land allocation role within the sultanates, and inherited their positions based on lineage. However, in order to engage in divisive patronage politics, the Saleh regime gave the sheiks a land allocation role, and also increased their number dramatically, appointing sheiks that were beholden to the Saleh regime (USAID 2010; al-Fadhli 2012). For example, in 1958 the Fadhli sultanate had thirteen sheikhs. Today, the sultanate has about 2800, as a result of Saleh's appointments (al-Fadhli 2012). The land disputes that were created by the many appointed sheiks thus became numerous and complicated. In the patronage system of the Saleh era, the government would provide certain sheiks with control over large amounts of land, which were then divided among others with whom the sheiks were connected, to retain favour with the regime. Thus, the sheiks allocated lands to

those they desired to be part of their own patronage system, often relieving the original occupants of their land and creating numerous confusing land problems that to this day are unresolved (Jerret 2014; USAID 2010). However, if a sheik fell out of favour with the regime, the latter would reclaim the land, ignoring the fact that the land had already been divided up and given to others. The confusion, ambiguity and disputes over sultanate land and the actions of affiliated sheiks was a primary tool used by northerners to seize, purchase and swindle southern lands from 1990 to the present, and particularly after the 1994 civil war (Hill et al 2013; Jerret 2014).

Subsequent to what is now widely recognized as a hasty unification of North and South Yemen in 1990, discontent in the South over unequal relations with the North led to a brief war in 1994 in which the North prevailed. One of the primary reasons for the war was the Saleh regime's drive to control land resources in the South (Day 2012; Brehony 2011).

Northern Yemen's victory led to two scenarios which significantly aggrieved the southern population. These were the dismissal of southerners from the country's military and civil services, and a two-decade surge of land expropriations in the South by northern political, economic and military elites and their associates (Salisbury 2013; Hill et al 2013; Al-Zwaini 2012). While examining this period in Yemen's history, Day (2012:157) notes that, '[i]ntergroup resource competition is one of the main factors that hardens group identities in opposition to outsiders'. Besides this, competition over scarce resources was greatly and purposefully exacerbated by the Saleh regime. Much of the instability and radicalism in the country today can be traced back to the dynamics surrounding the 1990 unification (e.g., Day 2012; Hill et al 2013).

The drive to acquire lands and properties in the South by northerners after the 1994 war took advantage of three facilitating

factors. First, because local inhabitants in the South tended to occupy small properties in crowded, urbanized areas before unification, large tracts of state land were left in a seemingly unoccupied and unclaimed status, which facilitated their takeover by northerners (Hill et al 2013). Second, not only did southern lands comprise a significant part of the patronage system of president Saleh and his associates, but these lands were also used to absorb the repercussions of land grabbing in the North. As a result, southern lands were frequently used as compensation for northern victims of land grabbing (Hill et al 2013). Third, southern lands were seen as a form of war booty by northerners who ignored, misused and ran roughshod over land and property laws, customs, forms of proof, and long-standing claims and occupation of lands. With southerners expelled from the civil service and the military after the 1994 war, the ability of political entities and legal enforcement to counter this trend declined significantly. As southern lands were increasingly appropriated by northerners, some southerners also engaged in land expropriation, believing they had more of a right to such a process than northerners. Animosity grew between the groups, and in 2007 an element of the largely peaceful separatist movement, Al-Hirak, became militarized and today operates in a number of areas in the South (Hill et al 2013; Salisbury 2013). Contributing to the overall problem is that the populations of the North and the South have opposite perceptions of the human – land relationship. The North has a large population, is geographically much smaller than the South and is land scarce, particularly with regard to usable land. The South has a smaller population, but a much larger land area and is regarded as land abundant (Hill, et al 2013); although arable land in proximity to water is scarce.

As of 2011, the proportion of cases in the Yemeni primary courts that concerned land and water disputes was estimated to

be between 50 and 85 per cent of all cases (Dabbas and Burns 2011; Hales 2010; YAVA 2010; World Bank 2000). The southern Yemen land confiscations alone are reported to amount to an area equal to the neighboring country of Bahrain; and Yemen's Parliament produced a 2010 report that warned unlawful land acquisition would spawn new unrest in Yemen and threaten social peace for years (Schechla 2012). Corruption in Yemen, especially in the governorates of Hudaida and Aden, were a main factor in the outbreak of the Arab Spring revolution and the overthrow of President Saleh in 2011 (Brehony 2011).

### ***Contemporary Southern Yemen***

Land-related conflicts, grievances, confusion and violence are a primary component of the current instability in Yemen (Zimmerman 2015; Hales 2010; al-Fadhli 2012). The number of people killed over land and water disputes per year rivals those killed in the Houthi conflict, the Southern secession conflict, and Al-Qaeda activities (Kambeck 2014; Hales 2010; al-Fadhli 2012). While the Saleh regime is gone, the sheiks he had installed continue in their land allocation role. These allocations are not coordinated with local and governorate land offices, such that there is ongoing confusion about what land belongs to whom, who claims what land, and by whom is it used. Appointed sheiks who use their sultanate affiliations to reallocate land into private holdings which are then sold, add particular confusion and animosity to the situation. These variable scenarios create competing meanings of what has transpired on sultanate land and what these lands have or have not become (privately held, lineage land, sultanate land, government land); as well as create competing narratives regarding what happened to who and when in land rights scenarios (Day 2012).

Following the unrest of Yemen's Arab Spring in 2011, and the Gulf Cooperation Council's (GCC) transition initiative in November of the same year, Yemen began

what was initially intended to be a two-year transition, but which lasted longer (Lackner 2012). As part of the GCC's National Dialogue process, the Dialogue Preparation Committee took substantive initiatives to address the concerns of southerners. Of the 20 demands this Committee submitted to President Hadi in August 2012 covering the national transition, eleven of these were about 'the southern issue', and included the restitution of, or compensation for all land and property that was confiscated. A Presidential Decree then created, 'The Commission to Consider and Address Land Issues' in January 2013 and located it in the southern city of Aden with the purpose, 'to address issues related to land ... in the Southern Governorates in order to complete the National Dialogue and National Reconciliation and as required by the Public Interest' (Republican decree no. 2 2013, p 1). How to accomplish this in a way that quickly and effectively addressed over two decades of accumulated grievances and animosity regarding land and property rights then became the primary challenge.

Gravely concerned about the enduring grievances attached to land and property confiscations in the South and their disruptive effects on national reconciliation, the GCC and a group of donors invested significantly in the Land Commission. However, the Land Commission needed to overcome several problems. Firstly, it faced issues of legitimacy because it followed three previous land commissions since the 1994 war, each of which were perceived to have accomplished very little (Novak 2010). Though the previous commissions had different mandates and the current commission has international backing and greater financial resources, the claimants themselves made little distinction. The Commission faced broad challenges regarding lack of evidence,<sup>1</sup> literacy and communication on the part of claimants who came from legally pluralistic backgrounds. In addition, there was no land registry and no effective deeds system or cadaster. Most importantly, those who illegally possessed

the lands and properties in question actively hindered the resolution of these cases using political tools. Despite these difficulties, within the first few months of its opening in 2013, it was overwhelmed with over 90,000 claims. Claims intake then reopened from the beginning of 2014 until March 20, 2014, and the number of claims continued to increase dramatically.

The Houthi incursion into southern Yemen in mid 2015 disrupted the functions of the Land Commission, along with all other state institutions, including those with whom the Land Commission needed to cooperate. The Houthis attempted to establish 'revolutionary committees' in all governorates under their control to monitor state institutions and ensure they performed according to Houthi priorities. The Houthi used force to control local populations; local forces that resisted Houthi advances did so primarily to defend their lands (Zimmerman 2015). As the Houthi rebellion pushed well beyond their traditional stronghold, the backlash among local tribes has garnered support for AQAP, particularly given the inability of the Yemeni government to prevail against the Houthis (Zimmerman 2015). The Houthis also faced resistance forces linked to Yemen's southern separatist movement Al-Hirak, and as a result Al-Hirak is now much more popular, militarized, and aggressive (Zimmerman 2015). At the time of writing the Houthi insurgency appears to have been pushed out of most of southern Yemen by a Saudi-led military effort.

## Categories and Complications

### *Claims categories*

This section describes the major categories of claims, as defined by the Land Commission, followed by a description of the primary complications affecting these categories. It is important to reiterate that these are categories of claims, not categories of disputes. The types of parties currently in possession of the lands

and properties in question, against whom claims have been lodged, are described above in the section, 'The Saleh Era'. While the categories are useful in terms of initial organization, significant further categorization will be needed so as to effectively render realistic and implementable decisions. The five major claimant categories comprise housing societies, investments, agricultural land, buildings and facilities, and individual properties.

Housing societies in southern Yemen are those which are primarily attached to forms of employment, either civil or military, and occasionally to non-employee groupings. This is a relatively large category, with 150 housing societies in the Aden area alone. The housing societies of just the former military employees number over 20,000 people. Of the societies in the Aden vicinity, 133 actually had land allocated to them during the 1994 war, with the remainder in some stage of application for lands. One problem is that there appear to be more individuals filing claims in this category than are on lists provided by housing society authorities.

While investment-related claims are lower in number than for other categories, they can be quite complicated and involve large sums of money. Subcategories have been created from investment claims and include: investment lands, commercial lands, commercial and housing lands, and small commercial properties. These sub-categories are then further grouped by geographic location, and then by root causes of the problem.

Claims against agricultural lands comprise ownership, leasing and rental cases lodged by individuals or groups. The Commission received over 8,500 cases for agricultural land claims prior to the Houthi conflict, with most of these involving large farms. The subcategories for agriculture include claims based on group and individual leases, land reallocated by sheiks, looted and damaged agricultural lands, and lack of provision of lands from past commissions'

decisions. A large number of claims stem from the government's 2012 war with AQAP in the southern governorates east of Aden. Irrigation facilities, agricultural fields and buildings, crops and livestock, boundary markers, wells, and farming equipment were damaged or destroyed as AQAP moved through the area pursued by government forces. In these situations there are concerns of some claimants' potential attachments to AQAP, and if shelter given to them was voluntary or not.

The buildings and facilities category includes factories and other properties currently owned by corporations or the government. While initially confiscated by the northern government, most of these have since been privatized. In addition, kiosks, some residences in slums and various informal buildings are also included in this category.

The individual properties category has one of the highest number of claims, due to the duplication of land sales and allocations, and multiple forms of land occupation. These involve primarily residences in urban areas, both houses with parcels of land attached as well as apartments. A primary problem is that a single confiscation of an apartment block (a common form of residential living in the socialist era) now results in numerous claims for residences. In addition, the very wide variety of housing, from large wealthy residences to small slum dwellings, and hence the wide variation in value and service provision at the time of confiscation, leads to many difficulties in determining compensation. This can be compounded by the attempt on the part of many claimants to seek additional compensation based on perceived increases in value of their confiscated property over time. However, many current occupants of these properties purchased them in good faith from those who initially confiscated them, and have since invested in these properties, so that their value is now many times what it initially was. This is a particular problem in

areas that were previously slums when they were confiscated, but are now developed middle-class residential areas; or where confiscated factories or commercial farms have been invested in by several parties. Further complicating the compensation to be awarded is the unknown nature of the compensation fund, which then influences the allocation formula.

### ***Complications in the Nature of the Claims***

In addition to Yemen's historical and contemporary difficulties regarding land and property in the South, the nature of the claims themselves submitted to the Land Commission are highly problematic. The claims are rife with ambiguity, confusion, misunderstandings and incomplete information regarding, evidence; timing; demarcation; overlapping claims; mixes of Islamic, customary, tribal and statutory law from different eras; power and influence; corruption and fraud; possible affiliation with extremist groups; and changes in property value, authority and legitimacy. Cases involving such difficulties would almost certainly be dismissed from conventional court proceedings based on state law, and yet in a mass claims transitional justice context they must be engaged and dealt with quickly, fairly and effectively in order to provide a sense of socio-political justice for an aggrieved population. This priority figures prominently alongside justice based on the legal merits of each case. This section examines some of the more challenging difficulties that the claims present.

Prior to the suspension of its activities, the Land Commission estimated that approximately 30 per cent of the claims lodged were not officially eligible, but instead were fraudulent, frivolous, outside the Commission's mandate, or duplicates. Fraudulent and frivolous claims present the challenge of how to make this determination quickly (and fairly) for the thousands of claims this applies to, and then screen

them out. Claims outside the Commission's official mandate include those pertaining to land and property expropriated before 1990, claims decided upon by previous commissions, and claims involving issues that fall under the responsibility of other institutions. Many of these claims reflect significant unattended grievances. The commissioners noted that these 'out of mandate' claims present a real dilemma in that, if not dealt with in some fashion, significant widespread animosity and resistance toward the Commission would likely develop. For example, some claims based on expropriations prior to 1990 include loss of land due to the brief 1986 civil war in South Yemen. Complicating the issue is that those southerners who lost land in the 1986 war joined with the northern forces in the 1994 war. When the northern forces engaged in land confiscations after the 1994 war, the southerners who fought with them not only benefited from the confiscations, but also sought to reclaim their former lands. This connected the two wars in terms of expropriation, claims and grievance. Other 'out of mandate' claims stem from lands nationalized in the 1970s under the pre-unification socialist government of South Yemen. Still others are based on applications for housing submitted to the state in the 1980s, but which are now submitted as claims seeking restitution for lands that were never granted.

For southern Yemen the cut off year of 1990 for 'out of mandate' claims constitutes a significant difficulty. While the establishment of a cut off date is a conventional technique in mass claims restitution programs, this is easier when land and property expropriation is connected only (or primarily to) a specific period of time in which certain events took place. The objective of such a cut off date is to manage the volume of claims, and address the most aggrieved population. However, establishing and enforcing such a date for mass claims processes in countries with a history of armed conflicts which include land

and property expropriations, can be quite problematic and entail significant risk. Fairly intricate, interconnected and often acutely negative socio-spatial relations are created in the course of forced dislocation, battlefield gains and losses, squatting, land grabbing, secondary occupation and occupation of new areas as conflicts and their repercussions progress, laying the foundations for the next conflict. As sequential wars occur, socio-spatial relations regarding land and property rights multiply, such that attending to claims that appear to be linked to specific dates and events, in reality are often also connected to previous dates and events. This is very much the case in southern Yemen. The country has been involved in eight wars over the last 50 years (Timeline 2015) with three of these, involving AQAP, Al-Hirak and the Houthis still ongoing at the time of writing. The expropriation-related events within the mandated timeframe of the Commission, and the land and property repercussions of previous wars are so tightly interconnected that the Land Commission ultimately made the decision to include claims from before 1990. Current President Hadi also gave a clear order to include claims dating back to a time prior to 1990. While this order is not part of the initial decree creating the Land Commission and its mandate, it should be seen as a clarification of the mandate and a recognition of the difficulty of creating a cutoff date in the southern Yemen context. President Hadi's clarification also demonstrated that his office supports the broader thrust of the mass claims process as part of a political strategy – something that should be taken into account in the compensation process.

Also outside the Commission's mandate are claims that had already been decided upon by previous land commissions but have not been implemented, resulting in a variety of claims being filed again with the current Commission. These include alternative lands awarded as compensation that were already claimed or occupied by others; the same land being allocated to different

housing projects that were to serve as claims remedies; and lands awarded as compensation that were unoccupied due to the lack of basic services or insecurity. Also included in this list are the decisions to award alternative land as compensation, but which then were never allocated; lands returned to individuals but which continued to be occupied by others; and, those who illegally took over someone's house and was evicted by a previous commission, subsequently submitting a claim to the current Commission for compensation due to this eviction. The justification for submitting these claims to the current Commission is that the inability of previous land commissions and associated authorities to implement and enforce decisions constitutes an additional land and property transgression in itself that should now be addressed.

An additional type of claim that is outside the Commission's mandate comprises those that should instead be taken up by other land and property institutions. These claims reflect the everyday needs of a population's relationship with land and property – such as completing property transactions, obtaining licenses, dealing with inheritance issues, surveying and demarcation, and the resolution of a variety of common disputes. Those that submit such claims to the Commission do not misunderstand the purpose of the Commission, and they do understand that their claims should be dealt with by other relevant government institutions. The problem is that these institutions suffer from profound dysfunction, low capacity, disorganization and lack of cooperation. And because the Land Commission is seen as new, having federal and international support, and is active and organized, such claims are instead submitted to the Commission in the hopes of having these relatively common needs attended to. The dilemma for the Commission is that these types of claims are so numerous, and constitute such an accumulation of unattended

needs, that they risk becoming a significant set of grievances if the Commission does not address them.

Overlapping and duplicate claims is a significant issue; it exists in various forms, and creates much ambiguity and confusion. Besides the overlapping claims due to sheik activity noted previously, there are additional cases involving agricultural lands that were used as compensation by earlier land commissions, but which are also claimed by tribes and lineages. This results in claims filed with the current Commission by both the claimant who was to receive compensation and the tribe/lineage.

A different form of overlapping claims occurs in the context of Islamic law. Under the Islamic inheritance law invoked by the claimants in Yemen, heirs have the right to file claims to land and property expropriated from a forbearer. This allows a number of heirs (often comprising more than one generation) to file a claim to the same land or property that a forbearer was dispossessed of. This has significantly increased the number of individuals claiming land and property or compensation for its loss. Also in the context of Islamic law are complications resulting from the confiscations of *waqf* properties.<sup>2</sup> Restitution of *waqf* involves answering the questions of who can legitimately file a claim on behalf of who, to what purpose the property is to be returned, and if restitution is not possible, how and to whom will alternative properties or compensation be offered. This is complicated by the fact that the purpose of *waqf* is to benefit a specific sector of the population in perpetuity.

Duplicate claims often involve issues related to group vs. individual claims. Depending upon the claim type, claimants are encouraged to file as part of a group. However, a portion of these file both individual and group claims. Thus, while group claims for housing societies, apartment blocks, sets of employees, certain tribes and

lineages do exist, many members of these groups have also applied for restitution on their own, either because they were not aware of the broader group claim, desired to be assessed separately, or are attempting to receive two properties – one under each claim.

The disruptive effects of power and influence on land and property restitution is well known (Bradley 2015; Fay and James 2009). In southern Yemen certain powerful, influential individuals ended up with valuable lands as a result of the 1994 war. The Land Commission noted that some senior northern military commanders were creating obstacles for the resolution of certain claims and that political will would be needed to address these claims. Unfortunately, this political will was lacking. Particularly problematic will be expropriated lands that contained investments, such as buildings and factories. To compensate for their value, destruction, or lost revenue will be a prolonged, complicated and expensive proposition. In addition, well placed individuals who have benefited from land confiscations have sought to legalize their occupation, making it difficult to return these to their original owners.

## **Transition from Bureaucracy to the Treatment of Evidence**

### ***The mass claims approach prior to the Houthi conflict***

Before the suspension of its activities, the Land Commission pursued its mass claims program on a both a case-by-case basis, and as group claims.<sup>3</sup> The bureaucratic process focused on documentary evidence provided by claimants. This procedure, however, was unable to cope with the volume of claims, the urgency of the socio-political need, the reality of claimants, and the low institutional capacity of government entities charged with implementation. The bureaucratic procedure was comprised of 14 multi-component steps to forward the claim to the president of the country for final approval. The steps needed

to actually implement the president's decision were so numerous, opaque, convoluted, controversial and difficult, that for the two years the Commission was in operation, not a single claim decision had actually been implemented. This was a significant problem. The national and international community supporting the Commission strongly indicated that the population in the South needed to see 'movement' in their cases, and warned of the political tensions that could ensue if this did not occur. They further recommended that the Land Commission tailor its work to produce timely and impactful decisions, rather than waiting for all of the database, personnel and legal infrastructure to be put into place. This highlights the overall objective of mass claims land and property restitution programs, which is to prioritize the perception of social justice as opposed to the legal technicalities of the claims themselves.

The Commission's approach to claims processing was compounded by misunderstandings between the Commission and the public. The public had unrealistic expectations with regard to the time needed to resolve claims, the implementation process, the amounts (money or land) to be awarded as compensation, and individual eligibility. The public was also unaware of the Commission's progress. This led to the perception that there was perhaps no progress, or that progress was very slow. Unless such expectations and the public information deficit can be managed once the Commission resumes its activities, the risks are that the public will become disillusioned, lose trust in the Commission, and opt for more problematic resolution alternatives. The importance of an effective communication strategy and expectation management applies not only to claimants, but also to the general public. It was noted during fieldwork that even people with no land claims were watching to see if the rule of law could be established with regard to property rights. These people are

prospective participants in the tenure system, assuming its fairness and effectiveness as part of the broader transition in Yemen is proven.

### ***Evidence and objectives***

One of the most difficult objectives for legal professionals to grapple with in transitional justice land and property restitution programs is the need to move away from examining the merits, evidence and specifics of each individual case to form decisions. The slowness and cost of such an approach is prohibitive, and runs counter to the overall purpose of large-scale mass claims restitution. Rather than considering the legal merits of individual cases,

[t]he objectives of resolving mass claims are to provide real justice to the victims of the events which gave rise to the claims, and to allay the disruptive discontent within a nation or society that unresolved wrongs perpetuate (IBPCA 2006).

Thus mass claims programs need to utilize a variety of innovative evidentiary techniques to facilitate the timely processing of numerous claims, create an impact of socio-political relevance, and render justice effectively despite the complicated claims (e.g., Rosenfeld 2013; IOM 2008; Jeffress 1991; Haersolte-van 2006).

The problem of how to treat evidence in transitional justice land and property restitution programs is that the relevant procedural law must indicate what is appropriate. Such procedural law in a transitional justice context is different than the procedural law that resides in state law. Claims processing under state law focuses on the adequacy of documentary evidence. However, in transitional justice restitution programs, such evidence is highly problematic and necessitates a very different approach and process (e.g., Fay and James 2009; Haersolde 2006). Claimants often provide partial, informal, unverifiable or non-relevant documentary evidence.

Sometimes no documents are provided if lands were held under tribal or customary tenure, properties were informally held, or if documents were destroyed by war, the current occupier, over time, or abandoned during dislocation (Unruh 2014).<sup>4</sup> Historical documents are often used, including colonial and pre-colonial era documents together with attestations of lineage, inheritance and purchase records. However, the surge in falsified land and property documents during and after wars tends to decrease the overall value of documentation (Unruh 2011). Further complicating the process is that those who have taken over lands and properties (or who have subsequently purchased them) often do have documentation, usually issued by the state which facilitated the initial confiscation and reallocation, or obtained as the current occupants seek to solidify their occupation (Unruh 2011). Thus the primary challenge becomes how to process evidence that returnees do have, taking into account the socio-political realities and more effective mass claims processing.

Reliable methods are needed to address the realities and urgencies of land restitution in southern Yemen, as these are connected to instability, trust-building in government institutions, separation or continued unity with the north, the role of AQAP, and recovery from the Houthi war. The next section describes techniques that are more suited to the southern Yemen reality than the bureaucratically heavy and legally rigid approach taken by the Land Commission prior to the Houthi conflict. The intent here is to present the southern Yemen case as an example of mass claims restitution in countries which experienced an Arab Spring. In these areas, local officials might be tempted to pursue large volumes of claims according to conventional legal processes; however, the socio-political realities call for a transitional justice approach. In such cases, the driving theme is not the integrity of the law, but rather the prevailing socio-political realities and urgency. Rather than expecting claimants to adhere

to the rigid legal and evidentiary rules, the process should address the needs of claimants. This means that officials need to work with the evidence that is available (minimal as it might be) and find ways to build upon, corroborate and use such evidence.

### **Connecting Treatment of Evidence with the Realities of Mass Claims** *Standards of proof, burden of proof and plausibility*

The pressure on restitution processes to evaluate and quickly decide upon many thousands of claims, has led a number of mass claims programs to alter the standards of proof compared to more conventional practices (Singh 2006; IOM 2008). This is not only due to the need to provide timely decisions and remedies for claimants, but also because of the difficulties that claimants might encounter in providing adequate evidence as a result of forced dislocation, travel, and residence elsewhere under arduous conditions. Using lower standards of proof in a mass claims proceedings allows for evidence that may be incomplete, indirect, partial or of a lower value. For example, a number of mass claims processes have accepted documents such as bills, receipts, water and electricity documents, or service related documents – essentially anything that demonstrates that the claimant once resided in the area where the property confiscation took place (e.g., Haerosolte 2006; Heiskanen 2006). In addition, documents that proved when and where a claimant took up a new residence in a different location could corroborate the approximate date when the initial land or property was confiscated and the claimant or claimant group was dislocated (Singh 2006). Accepting lower standards of proof can be especially useful for the rapid processing of lower value claims. Conversely, a higher standard of proof might be needed to process high value claims (which will be fewer in number) (Singh 2006).

Another option in cases where the claimants lack evidence is to reverse the burden of proof, as long as the basic right of a fair trial is maintained. Thus, the burden of proof shifts from the claimant to the current occupant. In this case the occupant would need to prove that either 1) they are the legitimate owner by way of a series of legitimate transactions 2) they acquired the land or property in a legitimate way, or 3) the claim the claimant is making is false. Shifting the burden of proof can be easier when it occurs from a weaker to a stronger party, such as the state – in which case the state would have to prove one or more of the three constructs noted above. A related approach is to relax the claimants' burden of proof but not that of the current occupant. Such an approach would need to be accompanied by a minimum standard of evidence, which the claimants would need to meet to discourage potential fraudulent claims (Das and Van Houtte 2008).

Using a 'plausibility' construct together with lower standards of proof for partial, incomplete and indirect evidence, signifies that it is plausible (but not certain) that the evidence presented does in fact support a claim to loss of land or property (IOM 2008). Such a likelihood becomes stronger if there is no other evidence that disagrees with the evidence presented (Haersolte-van 2006). The Claims Resolution Tribunal for Dormant Accounts in Switzerland identified three criteria in the use of 'plausibility' that appear to be widely useful (Das and Van Houtte 2008). The first criteria is that the claimant (or claimant group) produces the documents and information that can be reasonably expected, given their circumstances. Thus, a judge will assess the difficulty of the claimants' circumstances and the evidence that the claimant has provided, in order to determine if the evidence is reasonable. The second criteria is that the judge needs to decide if a reason exists that fraud or forgery might affect the claim. The final criteria is that the judge needs to determine if any other

person(s) has better or identical evidence for the same claim.

The UN Compensation Commission (UNCC) during the 1990 – 1991 Gulf War, accepted evidence that only needed to demonstrate 'satisfactorily' that a claim or group of claims was eligible for compensation. The standard of proof was lowered even further for certain categories of urgent claims as set out in specific guidelines for quicker processing. For such claims only 'simple documentation' of the facts was needed (Holtzmann and Kristjansdottir 2007). The guidelines were constructed so that they designated a monetary value limit (of the property claim); claims below this required even lower standards of evidence. The UNCC regulations demonstrated that the lower the compensation to be awarded, the lower the standard of evidence needed (Singh 2006). Thus, the large numbers of similar claims submitted to the UNCC that were below an established monetary value, required lower evidence standards and so were quickly resolved. The UNCC also used the lower evidence standard for claims that were very similar in location, time, or the manner in which the property was confiscated or lost (Singh 2006).

The UNCC also established an evidentiary threshold that provided for the acceptance of evidence deemed 'appropriate to the conditions' of the claimants' dislocation from the property in question (Singh 2006). In other words, if property confiscation took place in such a way that the claimant did not have the time, money, awareness or literacy to gather, produce, or record the necessary documentary evidence, then a more relaxed standard of proof was used which was suitable to property confiscation under such conditions (Singh 2006). In this context the plausibility standard was used, so that the claimant simply needed to demonstrate that it was plausible or 'likely' that, given the circumstances of the confiscation, the claimant was entitled to compensation. This approach directly connects the

treatment of evidence to socio-political realities.

### ***Evidentiary patterns and presumptions***

Use of evidentiary patterns and presumption methods are valuable because they can address both the poor quality or lack of documentary evidence, and the need for timeliness in investigating individual claims. Patterns of evidence that emerge from a certain group of claims can be quite useful in making judgments for the whole group; these frequently involve hundreds or thousands of cases (IOM 2008). Often those claimants that had land or property confiscated under similar circumstances will provide similar evidence, however partial or oblique; this enables the establishment of a pattern of evidence. These patterns can then be used to help define a particular group of claimants, and the pattern itself can become useful evidence. The greater the number of similar claims, the more solid the pattern and the stronger each individual claim becomes (Haersolte-van 2006). The pattern can be particularly useful in deciding upon claims in which a claimant only has partial evidence, but which fits the broader pattern, and thus signifies that the case can be included in the group to receive a group decision (Haersolte-van 2006). Such patterns of evidence can be developed and applied in a number of ways.

Similarly, 'presumptions' can be useful because many claims arise out of the same locations, events or periods of time. Many confiscations were committed by the same group or type of people – such as the military or those from a certain part of the country, as in the case of southern Yemen. In these situations, the lack of evidence can be compensated for by presumptions justified by widely known information or general knowledge about what went on during a certain period of time in a particular area (Karrer 2005; Singh 2006; IOM 2008). For example, if it was proven that a claimant, or numerous claimants, lived in a certain location at a particular period

in time, and it was generally known that land confiscations were occurring in that area during that period, then it can be 'presumed' that the claimant's land was indeed confiscated, even though evidence is lacking. Presumptions are most useful when adequate evidence is scarce, absent or difficult to gather. They can be considered to be true until other evidence becomes available which attests strongly to the presumption of being untrue (Das and Van Houtte 2008). Similarly, because many land and property losses tend to occur in the same market and economic conditions during a certain period of time, the value of property losses for a group of similarly-sized or same-purpose properties can be reasonably calculated for the purpose of compensation (Heiskanen 2006).

A number of contemporary mass claims programs make use of such presumptions. The Arbitral Commission on Property, Rights and Interests in Germany; the United Nations Compensation Commission for the Iraq-Kuwait conflict; The Claims Resolution Process for Dormant Accounts (Switzerland); and the International Organization for Migration Commission for Real Property Claims, all made use of presumptions in managing claimants' lack of evidence (Holtzmann and Kristjansdottir 2007). Some mass claims programs that have used presumptions formulate decisions in precise and detailed terms, in order to avoid creating new injustices (Holtzmann and Kristjansdottir 2007).

### **Precedent-Setting**

Precedent-setting techniques are often used together with other techniques. Using precedent-setting techniques, certain individual claims are selected to be decided upon earlier in the claims-processing program because they are representative or typical of many claims of a similar type (IOM 2008). This 'representativeness' can be determined by various grouping techniques, such as evidentiary patterns, plausibility or

presumptions. The setting of a precedent can establish the legal basis to then make a similar (or the same) decision for an entire category of claim. Therefore, those with similar types of claims would not need to possess all of the required evidence; the sole requirement is that they belong to the type of claim for which a precedent has been set (Haersolte-van 2006).

Precedent-setting was used effectively by the Iran-United States Claims Commission to solve claims following Iran's 1979 Islamic revolution; by the International Organization for Migration; and by the Housing and Property Claims Commission in Kosovo (Holtzmann and Kristjansdottir 2007). In the first case of Iran-related claims, the Commission selected nine cases, in which each one represented a different sub-category. These nine cases were then considered and decided upon by the Commission, establishing precedents for each sub-category. This successful effort was accomplished without the aid of computers; each precedent-setting case was carefully considered one by one, but decisions were then rendered very quickly for entire sub-categories of claims based on the precedents (Holtzmann and Kristjansdottir 2007). An additional advantage of this technique is that it provides consistency in decision-making. This is important in a number of ways, not the least of which is consistency across ethnic, sectarian, religious, or other divides common in war-affected societies.

### **Matching and Non-Party Evidence**

Some mass claims processes have been able to computerize the resolution of large numbers of claims by matching a few specific facts in the claims with information in other databases that were not constructed for land and property rights purposes (Holtzmann and Kristjansdottir 2007; IOM 2008). Such 'non-party evidence' is generally held by governments, non-governmental organizations, the private sector and international organizations. In other words, this is evidence that is not held by the claimant, but

which may support or corroborate evidence brought forth by the claimant or facts about the case (IBPCA 2006; Dans and Van Houtte 2008; Singh 2006; Haersolte-van 2006). Even seemingly unrelated information can be used for this purpose. This technique seeks to corroborate certain events that took place which resulted in dislocation and loss of land and property; or that certain assertions regarding land and property rights are or were true. While use of non-party evidence has been worthwhile, the technique has now become particularly valuable because contemporary conflicts produce immense quantities of event-related information that, unlike during earlier wars, is now accessible via the internet, such as news and other reports; twitter feeds; and photos and videos produced by cell phones, security cameras, aircraft and satellites. Lynch et al (2015) describe the different databases derived from social media and various analyses which provide insight into specific events, processes, locations, and constituencies that can be used to corroborate different types of restitution claims. Such analyses can likewise contribute to the development of evidentiary patterns. Matching can also provide a rough screening function by separating out claimants that are not matched with certain non-party evidence. The matching of non-party evidence has been used effectively by the UNCC for the Iraq-Kuwait conflict, and by the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina (Singh 2006).

### **Oral Testimony as Evidence**

In cases where documentary evidence is lacking or is in need of corroboration, verbal evidence has been accepted by a number of mass claims processes (e.g., Singh 2006; Wiget 1995; OTP 1994). The treatment of oral (or 'parol') evidence in legal proceedings regarding land and property rights has advanced significantly in recent years. Such evidence can either be a recitation of events or assertions (e.g., who owns what), or can

be bound up in oral histories and oral traditions, particularly for peoples without a documented past. Legal approaches in the treatment of this form of evidence include techniques such as thematic coherence; corroboration; and the analysis of oral tradition as attached to landscape using criteria of validity, reliability and consistency (e.g., Hoffman 1984; Wiget 1995). Importantly, oral forms of evidence do not detract from the notion of a 'fair trial' in claims proceedings. Ultimately it is the value of such evidence that can make it important in transitional justice processes.

In the case of the UNCC, the oral evidence that was accepted included detailed descriptions of the land or property in question, with the assumption that such intimate knowledge would be known by a former occupant of the land. In the case of the land restitution program in post-apartheid South Africa, oral history handed down from one generation to another was allowed as evidence (OTP 1994). This form of evidence is legally termed 'heresy' (repeating what someone else said), and is generally not allowed under normal circumstances in court proceedings. However, in the transitional justice context of South Africa, the South African Commission recognized that most people affected by the apartheid era dislocations (including their descendants) only had verbal evidence to support their cases. In this case, the Commission prioritized social perceptions of justice over strict legal proceedings (OTP 1994).

Often verbal evidence is used to corroborate other forms of evidence. For the UNCC the question of how much weight to give verbal evidence depended on if it was able to corroborate verbal evidence with other evidence. The UNCC also allowed verbal evidence from witnesses (persons that were not the claimant) such as relatives and neighbors who might have known that the claimant was the previous owner or occupant, or that confiscation took place (Singh 2006).

## Conclusion

Acute land and property rights grievances have emerged as a fundamental component of the Arab Spring, with significant implications for stability, recovery, reform and economic and livelihood development. The Yemen case illustrates one of the more significant patterns that will continue to emerge as states attempt to manage a restitution process able to address the accumulation of land and property-related grievances in a timely and effective manner. The intention here is that the lessons from Yemen may be of use to similar efforts in other Arab Spring states.

One final note is warranted. The overall goal of any mass claims land and property program is to process as many claims as quickly and fairly as possible. The techniques noted here (among others), either singly or in combination, are designed to facilitate rapid decisions for large numbers of claims. One problematic aspect of such an approach is that it constitutes a form of 'rough justice' (Karrer 2005). This occurs as some viable claims are excluded, while other undeserving claims are included in specific group decisions. This is inevitable, such that the question becomes, as Karrer (2005) asks in the context of mass claims and rough justice – how rough? Issues of urgency, volume of claims and the potentially destabilizing activities of the most aggrieved segment of the population (if their claims are not quickly addressed) must be carefully considered when weighing the 'roughness' of justice against the desired speed and coverage of decisions. These are more socio-political considerations than legal, and the tension between these two aspects of mass claims processing must be carefully managed. This can be challenging when, as is usually the case, the personnel assigned to conduct claims processing come from legal backgrounds where the propensity is to treat each case on its legal merits. At the same time, however, the size of the claimant pool, degree of grievance, and the socio-political urgency are important. Thus, the stakes for effectively managing this

tension are high. The repercussions of land and property expropriations, reallocation, forms of 'cleansing', discrimination, patronage, and dysfunction visited on significant segments of populations within Arab Spring states will present real risks for future stability and development, unless they can be effectively addressed.

### Competing Interests

JU completed paid consultancy work from UNDP as part of the data acquisition for this study.

### Notes

- <sup>1</sup> While the lack of evidence was problematic, in transitional justice processes such as mass claims, it is up to the Commission to produce the procedural law regarding evidence during their work.
- <sup>2</sup> A *waqf* is an Islamic law religious endowment of land or property, and is generally considered to be inalienable.
- <sup>3</sup> Part of the potential of the current Commission is that the five commissioners themselves are respected judges who are from southern Yemen.
- <sup>4</sup> In Yemen it has been estimated that up to 90 per cent of land ownership is informal (Dabbas and Burns 2011).

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