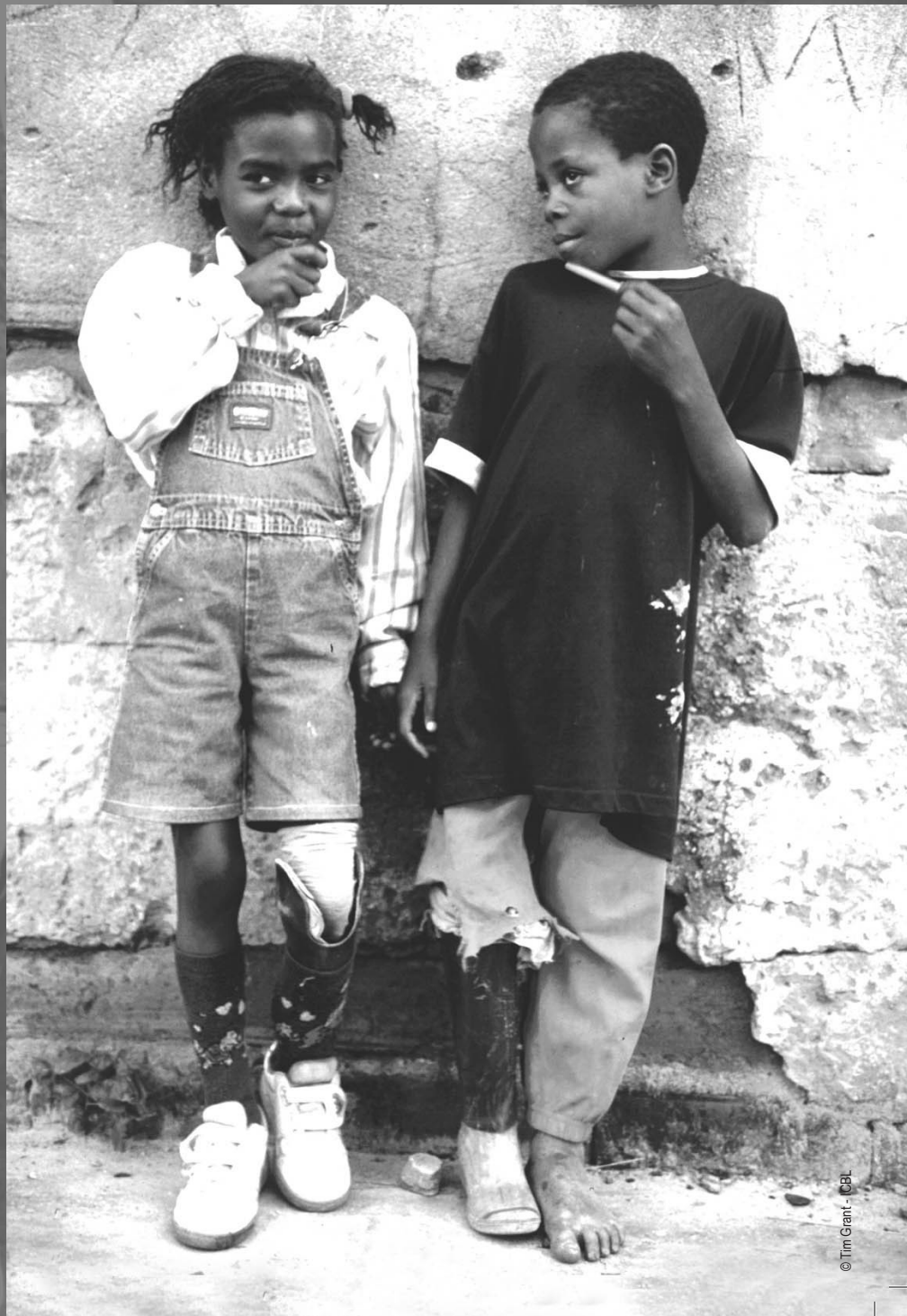


**HANDICAP
INTERNATIONAL**

What rights for mine victims?

Reparation, compensation:
from legal analysis to political perspectives.



Handicap International
April 2005



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Foreword

by Nathalie Herlemont-Zoritchak¹

For more than 20 years, Handicap International has been providing assistance to victims of landmines and other explosive devices, whilst pursuing the global objective of improving the situation of people with disabilities both in terms of access to care and services, and also with regard to their ability to exercise their rights in society. It was this constant presence in difficult environments that persuaded us of the need to focus our attention beyond immediate action in order to try and prevent the disabling situations that we were witnessing in our day-to-day work. That Handicap International should, from 1992, participate actively in the creation and development of the International Campaign to Ban Landmines (ICBL) thus became evident: obtaining a total ban on landmines would mean preventing new victims, preventing further such dramatic disabling situations. We thus learnt to convince, whilst still endeavouring to assist. The great victory in 1997, the adoption of the Mine Ban Treaty, was proof that we were on the right road. We had finally got it, this convention that was to prevent the dissemination of landmines, develop mine-clearance and support the victims!

We knew, however, that adoption of a new *de jure* norm is born of compromise. Consequently, we had to accept that the definition of the offending weapon would be restrictive but vague, and that the duty to provide assistance to victims would be affirmed, but somehow conditioned by the “each state Party in a position to do so” sentence in the text that the 123 countries were going to sign in December 1997. And yet, in the true tradition of NGOs, and more particularly of those linked to the « without borders » movement, Handicap International is fiercely devoted to the recognition of the victims’ rights to assistance. Therefore,

whilst participating fully in the ICBL’s efforts to obtain the universalization and correct application of the treaty, we felt it was also essential to take action towards developing assistance and the recognition of victims’ rights. We became part of the ICBL’s working group focusing on mine victims assistance, and attempted, whenever possible, to highlight the need to increase the funding allocated to this assistance, and also to place the issue of the right to reparation and compensation at the centre of the debate. On this last point in any case, the response from the decision-makers has been underwhelming...

Whilst not at all discounting the treaty of Ottawa and the progress it represents, we wanted to explore the sources of the law and its evolution in order to identify aspects, within and beyond the treaty of Ottawa, that could be useful to victims in their attempts to obtain recognition.

The deadly and often fratricidal confrontations of the 1990s convinced public opinion and, very often, political powers, that the end of a conflict does not signify reconciliation: the victims expect to receive justice; for them it is an essential part in a healing process that may open up possibilities for renewed co-existence, if not total reconciliation. The International Criminal Tribunals, the International Criminal Court, the Special Court for Sierra Leone, the Justice and Peace Commissions... attempt to give a concrete expression to this demand. For mine victims, however, there is no special provision authorising them to claim reparation or compensation. Yet their wounds are all the more painful, and tainted with a hopeless feeling of guilt, because these victims themselves detonated the weapon that mutilated them. These wounds cannot heal unless the innocence of the victim, and consequently the existence of external responsibility, is acknowledged.

¹ Nathalie Herlemont-Zoritchak, doctor in Political Science, is head of the Strategic Policy service within Handicap International’s Executive Director’s office. She has directed the production of this publication.

During a workshop organised in Lyon in 2001, with the help and expertise of academicians and professionals, we identified a number of ideas for developing the rights of landmine victims, both at a national and international level². Among these possible ways forward, the introduction of provisions and measures in favour of people with disabilities seemed evident to us. Indeed, landmine victims are generally people in disabling situations; assisting landmine victims and improving the situation of people with disabilities are thus very closely related.

In this area, it must be said, there have been some encouraging developments over recent years. Disability issues are now included more frequently in political agendas, and the work being done to prepare the future **United Nations Convention on the promotion and protection of the rights and dignity of persons with disabilities** has had a significant mobilising effect. However, these aspects do not provide a response to certain dimensions of landmine accidents. Moreover, as landmine victims are often also civilian victims of wars, they are concerned by other provisions found in international law, in addition to the Treaty of Ottawa.

We did not want to create a framework exclusively for landmine victims, so we have adopted an approach that is at once global and specific, taking account of a double imperative: enabling victims to participate fully in society; meeting their needs by developing the specific measures required. The issue of the right to reparation and the right to compensation seemed to us to be a specific and overriding concern for victims of landmines and other devices with similar effects. The absence of special or adapted provision, and the absence even of a constructive debate on this question, convinced us to carry out an in-depth study.

The work that we are presenting today is not only a legal exploration of current or future possibilities, of difficulties and pitfalls, outrageous oversights. It should also be seen as an indignant protest against the nonchalance of States and the producers of lethal devices, little inclined to acknowledge and assume their responsibilities. It should also be heard as an appeal to organisations and authorities specialised in the accompaniment of victims, particularly legal accompaniment, to take up this issue. Finally, it is a way of saying to victims that their determination is not in vain, that political intent constantly needs pointing in the right direction and that their demands contribute towards this. In December 2004, during the summit for a mine-free world in Nairobi, the State parties to the Mine Ban treaty adopted an action plan in which they qualified victim assistance as an “obligation”.

However, action on behalf of the victims does not end with the Treaty of Ottawa.

Because, today, other weapons with the same effects (unexploded cluster munitions, for example), not prohibited by the treaty, are being used widely; and because the

right to reparation and the right to compensation are not yet recognised for victims of landmines and devices with similar effects.

Questions remain with regard to how such a law would be implemented. Yet the interest shown by the victims themselves, in particular during the debates organised in Nairobi, proves that this subject has already gone beyond the academic discussion stage.

² See HANDICAP INTERNATIONAL, *Pour le développement d'un droit des victimes de mines / Towards the development of the rights of landmine victims / Hacia el desarrollo de los derechos de la víctimas de la minas*, Lyon: HI, 2002, 29 p.



Introduction to Handicap International's report "what rights for mine victims"

by Elke Schwager*

Elke Schwager is a lawyer and research fellow with the Heinrich Böll Foundation. At Handicap International's request, she kindly accepted to write the article presenting the contents of this report.

An incalculable amount of people are affected by landmines. The estimated number of landmine survivors worldwide is between 300,000 and 400,000. In 2003 alone³, 8,065 new victims of mines and unexploded ordnance were recorded. Not included in this number are the unregistered victims and victims which suffer from landmines not because of a direct injury. Examples are family members of the injured or killed landmine victim who have to suffer from the consequences of losing a previously non disabled member of the work force, or face a psychological injury. Others have to cope with the serious social, economic and environmental implications of landmines: mined land, for example, prevents farmers from using it for agriculture. Landmines constitute non-biodegradable and toxic garbage, which disturbs the ecosystem and reduces the soil productivity.

In order to prevent future landmine victims, the international community has achieved a remarkable goal by adopting the **Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction**⁴. As the title suggests, the convention focuses on prohibiting the development, the production and the use of anti-personnel mines. It constitutes a major step forward in the fight against anti-personnel mines. However, the Convention has two weak points: States like the U.S., China, Russia or Pakistan, which are major landmine producers, are not party to the Convention. Further, the interest of past and actual civil victims is taken into account only by Art. 6 Para.

3 of the Convention, according to which "each State Party in a position to do so shall provide assistance for the care and rehabilitation, and social and economic reintegration of mine victims". This stipulation, affirming an obligation to assist victims, leaves it to a certain discretion of the states as to whether to help mine victims. The requirement to assist landmine victims was however reaffirmed by the State Parties during the first Review Conference of the convention in Nairobi in 2004⁵.

Landmine victims might also rely on other provisions and sources to obtain appropriate assistance. A right to redress would give the landmine victims a secure basis for their needs. It has also a further implication: if the producer and/or the employer of landmines have to pay for the damage the landmines have caused, the production and the employment of the landmines becomes expensive and therefore unattractive. In this report Handicap International has undertaken a considerable effort to examine whether existing mechanisms provide for redress for landmine victims. The analysis studies different areas of international law: human rights, international humanitarian law, environmental law, as well as national laws in order to remind all effects of mines and to compile the potential legal means which could be claimed by landmine victims. As a second scope of the study, the research on compensation mechanisms for various harms and damages reveals that different models can be studied. Therefore a comparative analysis on the applicability of these different models in the area of landmine victims' compensation appears relevant.

*Elke Schwager is currently writing a doctoral thesis on "Jus post bellum. Claims of landmine victims"

³ INTERNATIONAL CAMPAIGN TO BAN LANDMINES (ICBL), *Landmine Monitor 2004*. Washington: Human Rights Watch, 2004, p. 47-49.

⁴ Adopted in Ottawa on 18 September 1997, entry into force on 1 March 1999, 2056 UN Treaty Series, p. 211, C.N.163.2003.

⁵ Action N°36 of the *Nairobi Action Plan*, adopted at the First Review Conference on 3rd December 2004. Available on-line at: www.reviewconference.org

The question on redress for landmine victims belongs to the ongoing debate regarding claims for victims of war. The actual discussion started in the 1990s with claims concerning forced labour and the so called “comfort women” during the Second World War. Recent conflicts occupy courts as well; individuals harmed by the NATO bombing in the Federal Republic of Yugoslavia⁶ or by British troops during the military intervention against Iraq⁷, have filed claims before national courts. Within the system of the United Nations, the issue is subject to the **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Violations of Humanitarian Law** prepared by Special Rapporteurs for the Commission on Human Rights⁸. The point of view taken by the different courts and academics varies considerably. This confusion is sometimes the result of a lack of differentiation.

When considering a right to reparation for landmine victims under current law, it is important to distinguish between rights under international and national law, and between rights vis-à-vis a state or a non state actor. Further, a potential right for landmine victims has to be distinguished from the enforcement of the right i.e. the procedural capacity to exercise the right. The enforcement may take place in international or national proceedings.

Following this distinction, Handicap International examines first the international law to see whether there is a claim for individuals arising out of the general regime of state responsibility or special provisions.

Under international law, a right for victims of violations of human rights or international humanitarian can no longer be denied access to justice by the established argument that the individual is not a subject of international law⁹. It was even in the area of international humanitarian law, where the individual was vested first with rights and obligations under international law¹⁰. The reason therefore is the need to protect an individual independently of the assistance of its state in situations of international armed conflict, where the state’s authority may be weak or even undergo changes¹¹.

The acknowledgement of individual rights does not automatically lead to a right to redress in case of a violation of the individual right. Indeed, the general principle under international law, that every breach of international law by a State entails its international responsibility¹², is traditionally only valid on the inter-state level¹³. However, Art. 33 Para. 2 of the Draft Articles of the International Law Commission states that this principle, on which the Draft Articles are based, is “*without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.*” The draft thereby accepts that an obligation to pay reparation may also exist towards individuals¹⁴. And indeed, the developments in the field of human rights make it difficult to explain why an individual should be the holder of a primary right, for example a human right, but not of the accompanying secondary right, the right to reparation¹⁵. The observation is also made by the judges of the International Tribunal for the Former Yugoslavia who state: “*Thus, in view of these developments, there does appear to be a right to compensation for victims under international law*”¹⁶. If the landmine victim is a victim of a violation of a rule of international law of which he/she is the bearer, he/she might have a right to compensation. In the report Handicap International discuss further whether specific provisions, Art. 3 of the IV. Hague Convention 1907, Art. 91 Additional Protocol I, Art. 75 Rome Statute, and stipulation of the UNCC¹⁷, the EECC¹⁸ and the regional human rights conventions provide for an individual right to compensation. The existence of a right to redress under international law does not imply the existence of an appropriate enforcement mechanism for this right. To recite the judges of the International Tribunal for the Former Yugoslavia: “*The question then is not so much is there a right to compensation but how can that right be implemented*”¹⁹. Indeed, neither Art. 3 of the IV. Hague Convention 1907 nor Art. 91 Additional Protocol I foresee a mechanism by which the individual could enforce the rights it purported to grant. This has led some courts to reach the conclusion that in the absence of an enforcement mechanism there can be no subjective right²⁰. This reasoning cannot be substantiated however,

⁶ For a report on the decisions of Dutch courts see L. ZEGVELD, *Remedies for victims of violations of international humanitarian law*, IRRC 2003, p. 497 at p. 502, 504; in Germany see LG BONN, *NJW* 2004, 525 et seq.

⁷ High Court CO/2242/2004 AI –Skeini.

⁸ See the three versions prepared by T. VAN BOHVEN: E/CN.4/Sub.2/1993/8; E/CN.4/Sub.2/1996/17 and E/CN.4/1997/104, the draft by its successor C. BASSIOUNI: E/CN.4/2000/62, and the revised version prepared by Alejandro SALINAS: E/CN.4/2004/57.

⁹ R. MCCORQUODALE, “The Individual and the International Legal System”, in: *International Law*, M. EVANS (ed.), 2003, p. 300 et seq.

¹⁰ K. IPSEN, *Völkerrecht*, 5th ed. 2004, § 67 Note 3.

¹¹ K. IPSEN, *Ibid*, § 67 Note 4.

¹² Article 1 of the Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session 2001, *Report of the International Law Commission on the work of its Fifty-third session*, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IVE.1, p. 43.

¹³ Article 33 para. 1 of the Draft articles on Responsibility of States for internationally wrongful acts, *op.cit.*

¹⁴ M. SASSOLI, *State Responsibility for Violations of International Humanitarian Law*, IRRC 2002, p. 401 at p. 418.

¹⁵ K. DOERING, „Handelt es sich bei dem Recht, das durch diplomatischen Schutz eingefordert wird, um ein solches, das dem die Protektion ausübenden Staat zusteht, oer geht es um die Erzwingung von Rechten des betroffenen Individuum?“ In: *Der diplomatische Schutz im Völker- und Europarecht*, G. RESS/ T. Stein (ed.), 1996, p. 13 at p. 16.

¹⁶ *Victims’ Compensation and Participation*, Appendix to the Letter dated 2 November 2000 from the Secretary-General addressed to the President of the Security Council of 3 November 2000, UN Doc. S/2000/1063, pp. 11-12, para. 21.

¹⁷ United Nations Compensation Commission.

¹⁸ Eritrea Ethiopia Claims Commission.

¹⁹ *Victims’ Compensation and Participation*, *op. cit.*, para. 22.

²⁰ “X et al. v. the Government of Japan”, Tokyo High Court, Judgment of 8 February 2001, *Japanese Annual of International Law*, 2002, p. 142 at 143.

as the bearing of a right has to be differentiated from the procedural capacity to enforce it²¹. Thus, a right under international law exists independently of the procedural capacity to enforce it under international law²².

Consequently, the report examines the different existing mechanisms like the International Court of Justice, the International Criminal Court, the UNCC, EECC, and the regional courts for human rights to ascertain whether they can be used to enforce a victims' right. One option is the possibility to enforce international rights before domestic courts. If civil proceedings under domestic laws are available for victims of violations of international humanitarian law or human rights law²³, then they are suitable for landmine victims to claim redress. Civil proceedings can be initiated by the victim itself as he/she will enjoy procedural capacity before domestic courts. A case can be filed independently of the existence of a crime. Further, before a civil court, the victim is not dependent on the help of its home state, as is usually the case when enforcing its rights under international law. This subjection is disadvantageous for the victim, as its rights might be sacrificed due to political considerations.

The report also examines remedies available under domestic law, concentrating on the issue of product liability. Further, landmine victims can generally seek reparation under the national *ius delictum*. A violation of international humanitarian law and human rights law usually constitutes a relevant violation under the *ius delictum* as well²⁴. In the event of such violation, the landmine victim can claim damages from the state responsible for the use of the mine or the person laying the mine. However, if the landmine causing injury was used in compliance with the *ius in bello*, the international humanitarian law might be invoked as justification for the wrongdoing. It is debatable whether one can rely on this justification if the landmine explodes after the armed conflict has ended. Sometimes it is argued that in a time of war the national law system is suspended and that therefore no claims under domestic law can arise²⁵. This view is unsustainable. There is no reason and no mechanism to explain why the domestic law system should cease to operate in time of an armed conflict. Potential rights under domestic law exist in parallel to potential rights under international law, which might have arisen from the conflict²⁶. A right to reparation might also arise out of special laws enacted to regulate the consequences of an armed conflict. Claims under the *ius delictum* and product liability are available in most of the domestic legal orders. The great

advantage of claims under domestic law is therefore that there is no need to create a new basis for claims.

Claims under national law are enforced by individuals. Some national legal systems provide the possibility of group actions, appropriate for example in situations of mass production. In such group actions, the plaintiff seeks recovery for all members of the group he/she is representing²⁷. The enforcement of potential claims under national law may be confronted by different obstacles, which are examined by the report.

In its second part, the report of Handicap International describes steps which can be undertaken by the international community to set up appropriate mechanisms.

It does so by reviewing existing national compensation funds for the victims of terrorism, the International Oil Pollution Compensation Fund (IOPC), and the United Nations Voluntary Fund for Victims of Torture. Even if none of these funds can offer an immediate pattern for a compensation mechanism to landmine victims, each single one gives a rather interesting viewpoint.

Existing victims of terrorism compensation mechanisms²⁸ are useful in both identifying and developing compensation mechanisms for landmine victims. However the simple transposition of the victims of terrorism compensation model to one for landmine victims does not address a number of problems, including for example the lack of national infrastructure capable of providing medical reports and certificates, proof of costs, and loss of earnings.

Regarding the IOPC, the system of no-fault liability which is its basis, seems appropriate when dealing with antipersonnel mines. It offers the advantage of avoiding situations of conflict (in the search for liability or fault) which could result in harming the victim even more or reducing his/her chances of obtaining compensation. And yet the IOPC proves to be adapted to a specific scope that does not really fit the concerns of landmines victims.

Studying the United Nations Voluntary Fund for Victims of Torture, Handicap International assesses that victims of torture and victims of mines are faced with the same type of needs, medical and psychological care and sometimes socio-economic assistance, although methods for providing assistance may differ, as the type of trauma suffered is not comparable in the two cases. Unfortunately, an individual victim cannot obtain assistance from the Fund if she/he is not represented by an NGO; and the Fund itself faces difficulties to gather adequate contributions.

²¹ PCIJ, "Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (The Peter Pázmány University v. The State of Czechoslovakia)", *P.C.I.J. Series A/B*, No. 61, 1933, p. 207 at p. 231; A. RANDELZHOFFER, "The Legal Position of the Individual under Present International Law", in A. RANDELZHOFFER / C. TOMUSCHAT (eds.), *State Responsibility and the Individual*, 1999, p. 231 at p. 234.

²² R. McCORQUODALE, "The Individual and the International Legal System", *op. cit.*, p. 300 at p. 304.

²³ The U.S., for example, authorizes foreign plaintiffs under the Alien Tort Claim Act to base their substantive claims on a violation of international law norms. The Torture Victim Protection Act creates liability under U.S. law where under "color of law of any foreign nation" an individual is subject to torture or extra judicial killing. This remedy is open to any individual but excludes acts committed on behalf of the U.S. government as well as those committed by purely private actors.

²⁴ For Human rights violation see G. FISCHER, "Schadenersatzansprüche wegen Menschenrechtsverletzungen im Internationalen Privat- und Prozessrecht", in: *Festschrift für Walter Remmers*, 1995, p. 447, at p. 450 et seq.

²⁵ GERMAN FEDERAL SUPREME COURT OF JUSTICE (BGH), "Distomo", *NJW 2003*, p. 3488 et seq.; GERMAN HIGH COURT (LG Bonn), *NJW 2004*, 525 et seq.

²⁶ BVerfGE 94, p. 315 at p. 329; B. HESS, "Kriegsentschädigungen aus kollisionsrechtlicher und rechtsvergleichender Sicht", *id* p. 115 et seq.

²⁷ P.H. LINDBLOM, "Group Actions and the Role of the Courts – A European Perspective", *FORUM Internationale*, n°. 23, May 1996, p. 1 at p. 12.

²⁸ The study describes the working of two compensation schemes: the Guarantee Fund for Victims of Acts of Terrorism and other Violations of the Law (France); the Criminal Injuries Compensation mechanism (Northern Ireland).



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None of the existing funds examined in this report provides an ideal solution. However, a study of these different models might be useful for identifying and perhaps developing compensation mechanisms for landmine victims. It would seem necessary to discuss the compensation issue at a political level in order to establish whether or not such mechanisms should be included in the Mine Ban Treaty.

The varied and numerous observations made in the report show how tremendous are the efforts still needed to offer landmine victims proper reparation and compensation. They also stress a wide range of potentialities.

DEFINITIONS

In order to study the issue of reparation and compensation for victims, a number of global definitions need to be established, and in particular “antipersonnel mine”, “antipersonnel mine victim”, and “antipersonnel mine accident”, used by Handicap International.

An antipersonnel mine is a “device placed on or in the ground, or on another surface and designed to explode or splinter due to the presence, proximity, or contact of a person²⁹”. The following categories of landmine should be distinguished:

- Antipersonnel mines are designed to wound or kill people, either by blast effect or splintering;
- Unexploded ordnance (UXO) scattered over the ground can be regarded as anti-personnel weaponry because it remains active, unstable, highly explosive, and can be activated by the contact of a person even after the end of the conflict³⁰. The 1997 Ottawa Treaty³¹ only covers antipersonnel mines. However, we would suggest that any compensation scheme be extended to UXO accidents.

Very often, the words “landmine” and “antipersonnel mine” are used without differentiation.

According to Handicap International³², antipersonnel mine

and UXO victims should include

- All persons who have been killed or injured by a landmine or an UXO, whatever the nature of the physical, psychological or sensorial damage caused;
- Family members of the killed, injured, or mutilated persons;
- All persons who, because of action or negligence related to the use of landmines or UXO, have either collectively or individually been the object of economic and/or social injury, or suffered any other serious infringement of their fundamental rights, preventing them from carrying out their normal activities³³.

Finally, it should be noted that the definition of a “victim” as given in the *Landmine Victim Assistance World Report 2001* includes “All persons who have been killed or injured” without specifying the status of the victim (civilian or combatant)³⁴.

Various other landmine victim definitions should also be taken into account, most notably those developed within the framework of the International Campaign to Ban Landmines (ICBL) and by specialised United Nations Agencies³⁵.

The definition of a landmine accident is that of a sudden delivery of chemical, physical, or thermal energy due to the explosion of an antipersonnel mine, causing individual or collective damage.

Landmine accidents are recognised as such when they produce a victim, that is, a person who is killed or injured³⁶, but should also include the less restrictive definition noted above.

This study is based on a broad definition of “victim”, which does not focus only on the survivors. It is therefore difficult to estimate the number of victims in the world. Data collected each year by the Landmine Monitor gives the number of survivors (estimated at around 300,000 according to the Landmine Monitor 2003) and the numbers of casualties and deaths due to landmines and unexploded ordnances each year (the number of people injured or killed by landmines is estimated at between 15,000 and 20,000 each year, 8,065 were identified in 2003 according to the *Landmine Monitor 2004*³⁷).

²⁹ HANDICAP INTERNATIONAL, *Landmine Victim Assistance World Report 2001*, Lyon: HI, 2001, p.333.

³⁰ *Id.*, p.333.

³¹ Document No. 8, *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, Ottawa, (September 18, 1997). p.324 [Hereinafter *Ottawa Convention*].

³² HANDICAP INTERNATIONAL, *Towards Real Assistance to Landmine Victims*, Lyon: HI, 2000, 9p.

³³ *Id.*, p.3. This definition contrasts with a more restrictive one adopted by the *Ottawa Convention*, which defines a landmine victim as a person injured or killed as a direct result of a landmine accident. Compensation should however be payable on the basis of a more global definition of landmine victim.

³⁴ Should soldiers and combatants injured by landmines as part of a military operation be able to claim compensation if such a compensation fund was established? These combatants, injured in the course of their military activities, often receive compensation from their government. Moreover, the fight against mines is based on the deeply unfair and inhuman effects of mines on civilians. The question remains open to discussion.

³⁵ HANDICAP INTERNATIONAL, *Towards Real Assistance to Landmine Victims: op. cit.*

³⁶ HANDICAP INTERNATIONAL, *Landmine Victim Assistance World Report 2001, op. cit.*, p. 333.

³⁷ INTERNATIONAL CAMPAIGN TO BAN LANDMINES, *Toward a mine-free World: Landmine Monitor Report 2004*, NY: HRW, 2004, p 47-49.



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I- The right to reparation for landmine victims

“Adequate, effective, and prompt reparation shall be intended to promote justice by redressing gross violations of international human rights or serious violations of humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered³⁸”.

The obligation to make good any breach of the law that has caused harm to another person constitutes a basic principle of all judicial systems. However, the question that raises as regard to the application of this principle in favour of antipersonnel mines victims is to know whether they can be considered as victims of violations of law.

Reparations must, as far as possible, remove all consequences of the illegal act and re-establish the state of affairs that would have existed had the act not been committed. However, when the illegal act has already produced irreversible effects, alternative reparations must be found, and this may take the form of an indemnity.

For this study, it has to be mentioned that the term “reparation” involved the engagement of a responsibility of an actor by a jurisdiction and directly addresses the individual or organisation that wrongs the victim.

The term “compensation”, will be used in the study as a recognition of the loss endured by the victim without necessarily addressing the author of the wrongful act. It covers on the one hand, all reasonable accommodations that have to be guaranteed to victims in order to obtain equalization of opportunities. On the other hand, it can take the form of indemnities.

Generally speaking, a certain number of criteria must be established in order to obtain reparation or other forms of compensation:

- The existence of harm.
- The existence of a fault having caused the harm³⁹.

- The establishment of a connection between the victim and the crime/violation that led to the injury.

- In some countries, the recognition by a judicial institution that the person who committed the fault is responsible for the harm, whether or not the fault was intentional, is also a condition.

In the case of landmine victims, establishing a right to reparation implies that there has been a violation of existing law. That being the case, it is advisable to make a list of the different points of law that, if violated, might allow landmine victims to claim reparations.

Another worthwhile approach is to study previous legal submissions to find out which national and international jurisdictions are disposed to recognize a victim's right to reparation.

Lastly, we should examine current developments in international law and consider how these may help to further the rights of landmine victims.

1. Existing law: regimes of responsibility / liability and areas of the law relating to damage or injury caused by landmines

A regime of responsibility / liability exists in all judicial systems. However, it does not include the same criteria from one judicial system to another and from one field of law to another.

³⁸ Article 16 of the Draft Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Humanitarian Law, United Nations, E/CN.4/2004/57.

³⁹ The existence of fault constitutes a precondition for reparations in international law; in national law, however, this is not always the case. In administrative law, the existence of fault logically constitutes the common law of liability, but concerns about improving the situation of victims and the phenomenon of collective risk has led to a growing acceptance of the concept of no-fault liability. The latter for the most part has its origins in jurisprudence, but it has been increasingly recognized in laws enacted in France (as well as many other countries that have a civil code of law). This is the logic behind France's creation of its guarantee Fund for victims of acts of terrorism. Despite the absence of fault, therefore, the government may be held liable for compensating a victim of landmines on its territory.

In all systems of law, both at national and international levels, actors have agreed multiple obligations. They consist on actions or omissions of different natures. If these obligations are not executed, the responsibility / liability of the actor in cause can be engaged. In other terms, the breach of an obligation is constituted when an act is not in conformity with what is required under the relevant judicial system.

The engagement of such a responsibility / liability has generally fundamental legal consequences: it may create other obligations, which are called secondary obligations. They may consist, on the one hand, in the obligation to cease the illegal act and to guarantee the non-repetition of the violation. On the other hand, secondary obligation for an unlawful act may consist in the reparation of the non-execution of the primary obligation. Reparation should, as far as possible, remove all consequences of the illegal act and re-establish the state of affairs that would have existed had the act not been committed. This form of reparation is called *restitutio in integrum*. However, when the illegal act has already produced irreversible effects, alternative reparation must be found, and this may take the form of financial compensation.

Doctrine and State practice have differentiated kinds of responsibility / liability. They depend on the criteria that have to be invoked to create responsibility / liability. As a result, fault-based responsibility / liability is engaged when harm occurs and when the violation of law has to be linked with a fault of the perpetrator that has made the violation in cause. On the other side, strict responsibility / liability do not need the existence of a fault to be engaged. The victim of the injury has only to prove the existence of harm, a breach of law and the connexion between the harm suffered and the wrongful act. In other terms, according to this regime, a perpetrator is responsible / liable for the breach of an obligation without regard to fault as an additional factor. The rules of law may also provide for the engagement of strict responsibility / liability on the basis of harm or injury alone. This type of responsibility / liability is most appropriate in case of ultra-hazardous activities, and activities entailing risk or having other similar characteristics.

We shall be looking at national and international law dealing with the use of antipersonnel mines. Under international law, reparation for damages due to the use of antipersonnel mines could be claimed against States as part of general international responsibility for wrongful acts. Moreover, some specific legal instruments could be used in order to engage responsibility. As specific fields of international law, it is the international humanitarian law and especially **Additional Protocol I of the Geneva Conventions**, Protocol II of the **Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate**

effects (CCW), and the **Convention on the prohibition of the use, stockpiling, production, and transfer of antipersonnel mines and on their destruction** (the Ottawa Convention, also known as the Mine Ban Treaty) which are relevant. Other areas of international law which have to be taken into consideration as well are international environmental law and human rights law. Under national law, we shall examine tort law as well as product liability.

1.1. Responsibility of States for Wrongful Acts

According to Article 2 of the **Draft articles on Responsibility of States for internationally wrongful acts**⁴⁰,

“There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”

Under Article 31 of the Draft, the responsible State is under an obligation to make full reparation for the injury caused by the wrongful act.

However, it has to be mentioned that these Draft articles have no binding force. Their legal value remains recommendatory.

In the case of antipersonnel mine victims, establishing a right to reparation implies that there would be a violation of existing law.

In the hypothetical case of a legal use of antipersonnel mines (i.e. before the Ottawa Convention came into effect for States Parties, or – in the case of States that have not signed on to this Convention – when their use conforms to the other standards, such as international humanitarian law, environmental law, human rights law etc.), the State could not be held liable. The non-compliance with an international obligation prohibiting the concrete use of antipersonnel mines entails the responsibility of States.

General international law recognises State responsibility for the use or the laying out of landmines. That is the case for any action from an official member of the regular army of one State.

As regards armed rebel groups, States cannot, at first, be liable for their acts. However, *“the conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instruction of, or under the direction or control of that State in carrying out the conduct”*⁴¹. Thus, the mines laid out by armed groups can, by this disposition, be attributed to a State.

However, the illegal conduct of persons, other than officials, in practice, cannot easily engage the international responsibility of a State and this, even if this act is

⁴⁰ Report of the International Law Commission on the work of its Fifty-third session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1

⁴¹ Article 8 of the Draft Articles “Responsibility of States for internationally wrongful acts”, Report of the International Law Commission, fifty-third session, (2001). The Draft Articles have been reaffirmed in a declaration of the United Nations General Assembly.

considered as internationally illegal. In other terms, if the link between one State and a person (or a group of persons) is not proven, the first would not be liable for the conduct of the last. Concerning armed rebel groups, States are obliged only to protect civilians from the dangers resulting from the conduct of such groups⁴² (e.g. by clearing mines from the zones under their control and keeping civilians out of such areas).

The responsibility of States under international law presents a great weakness. Indeed, in case of a general prohibition of landmines, a claim for a wrongful act of a State could only be made by another State. In other terms, victims of landmines cannot invoke directly state responsibility in order to claim reparation for the harm they suffered.

In order to avoid the denial of justice which would result from such a situation, the national State of the injured person shall take up the latter's defence and act on his behalf. Following this espousal of the individual's claim the latter is transformed into a matter between States. The State is then said to be exercising diplomatic protection in favour of its national. Once again, the possibility for a state to engage international responsibility of another state is only relevant in case of a prohibition of landmines in general or of the concrete use in question. Diplomatic protection can be a mean for reparation in favor of victims. However, in this procedure, such a reparation remains to the willingness of States, and it is said that it is the State which is considered as being violated in its own right.

That is why, various conventions and points of law are relevant for this study in order to list aspects of law linked to the use of landmines. They present proper characteristics. As a result, besides the general regime there are some special rules in some instruments, as for example the Additional Protocol I of the Geneva Conventions.

1.2. Additional Protocol I to the Geneva Conventions

Humanitarian law is founded on the idea that the individual is unique and entitled to respect, and that the life and dignity of the individual are precious and inalienable, even during time of war. It therefore tends to balance the protection of civilians and military necessity. This principle was established in the **Saint Petersburg Declaration of 11 December 1868**: *"The necessities of war ought to yield to the requirements of humanity."*

Additional Protocol I (1977) codifies and advances the fundamental principles of international humanitarian law regarding warfare.

Parties engaged in international armed conflict have to respect the principle of proportionality, make a distinction

between the civilian population and combatants, and not use weapons and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. The question of responsibility of a party to an armed conflict and the liability to pay compensation is addressed by article 91 of Additional Protocol I:

"A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of armed forces."

It is arguable whether the article, which is based on Article 3 of the **IV. Hague Convention of 1907**, provides for compensation to the State and to individual victims⁴³. If the use of antipersonnel landmines constitutes a violation of the Geneva Conventions or its Additional Protocol I, antipersonnel mines victims could then claim compensation pursuant to this article. Therefore, we shall examine whether the use of antipersonnel landmines constitutes a violation of the Geneva conventions or its Additional Protocol I.

Article 51 para. 2 of Additional Protocol I to the Geneva Conventions stipulates: *"The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."*

Article 51 para. 4 concretises the rule of distinction between civilians and combatants. It stipulates that: *"Indiscriminate attacks are prohibited. Indiscriminate attacks are:*

- (a) those which are not directed at a specific military objective;*
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective;*
 - or*
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol*
- and consequently, in each of such case, are of a nature to strike military objectives and civilians or civilian objects without distinction."*

There are situations where antipersonnel mines were intentionally and systematically laid or dropped, with no clear military objective, in areas frequented by villagers and other such civilians. These seem to be attacks on civilians, forbidden under art. 51 para. 4 lit. a Additional Protocol I, even if the effects of some of these mines are only felt years later. However, it is quite difficult to prove

⁴² This general principle for the protection of civilians in time of war is an obligation for all parties to the conflict. This principle is a custom of international humanitarian law.
⁴³ L.ZEGVELD, *Remedies for victims of violations of international humanitarian law*, IRRIC 2003, p. 497 at p. 506; F. KALSHOVEN, *State Responsibility for Warlike Acts of the Armed Forces*, 40 ICLQ (1991) p. 827 at p. 847 for Art. 3 of the IV Hague Convention.



that laying mines constitutes an attack on civilians. In a period of armed conflict, explosions that affect civilians tend to be seen as collateral damage in most cases.

If actual intent cannot be proven, the lack of a clear and legitimate military objective⁴⁴ should serve to define such antipersonnel mines use as an indiscriminate attack on civilians in breach of art. 51 para. 4 Additional Protocol I.

A more difficult case would be where a military objective might be present, but the landmine use exceeded what was necessary for that military objective, such as the mining of an entire village or farming area near a waterhole when the military objective is to avoid the enemy supplying. In this type of situation, the method of combat was not limited to a specific military objective and so could be deemed an indiscriminate attack.

Because of their long lasting effects, antipersonnel landmines without any self neutralisation mechanism could be regarded as a weapon which effects cannot be limited according to art. 51 para. 4 lit. c Additional Protocol I. Such an interpretation would be in accordance with the idea expressed in Art. 1 of the **Hague Convention VIII of 1907**. The latter Convention prohibits the laying of unanchored automatic submarine contact mines unless they become harmless one hour after leaving their user's control and the laying of anchored mines unless they self-neutralize should their anchorage be disrupted. It is reasonable to suppose that the spirit of the text is aimed at ensuring that, by drifting, such weapons do not represent a danger to non-combatants or prove impossible to find once the conflict is over. Antipersonnel mines may also be displaced by climatic changes and natural disasters. Furthermore, if the antipersonnel landmines are remotely delivered, their location cannot be controlled and marked. As a result, they pose a degree of threat similar to that of drifting underwater mines. The same could be said about manually delivered mines for which the location cannot be guaranteed.

Article 35 para. 2 of Additional Protocol I contains another fundamental principle of international humanitarian law, seen as customary international law⁴⁵. It states that:

"It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering."

The rule, valid for combatants as well as civilians, does not list the types of weapon of a nature to cause superfluous injury or unnecessary suffering. This generic prohibition raises a fundamental question: At what point can we say that a weapon causes superfluous injury or unnecessary suffering? Two interpretations are possible. The first interpretation takes the phrase to refer to injuries that are gratuitous in relation to the military advantage

sought, thus applying an utilitarian concept. A second interpretation considers the gratuitous injuries in relation to the level of injury that, if sustained by the victim, would put him/her out of action. This second concept is more medical and focuses on the harm sustained by the victim. It appears that, so far, the utilitarian concept has been favoured in interpretations of this Article. A weapon causes superfluous injury or unnecessary suffering under both concepts if there is a weapon which while achieving the same military advantage causes less harm.

Antipersonnel mines containing unusual materials such as plastic splitters cause more harm than antipersonnel landmines containing ordinary materials. Therefore, they could be considered as weapons causing superfluous injury or unnecessary suffering. An antipersonnel landmine containing plastic splitters is also forbidden under **Protocol I of the CCW**, which prohibits the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays. Another example for a type of mine causing superfluous injury or unnecessary suffering is an antipersonnel mine containing more than the 30 gram explosive necessary to injure heavily a combatant.

If the use of an antipersonnel landmine is forbidden under international humanitarian law, victims have a right to compensation according to Art. 3 of the IV Hague Convention and Art. 91 Additional Protocol I. However, the question is to which forum victims can bring their claims. The problem is that a breach of international humanitarian law does not automatically give rise to a right of action for individual victims.

1.3. Protocols II and V of the CCW

Protocol II of the Convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects (CCW) restricts the use of mines, booby traps, and other such devices, and prohibits the use of certain types of mines. Its main clauses are intended to ensure that mines will only be used against military objectives, never indiscriminately, and that a certain number of precautions will be taken to protect civilians. Protocol II applies to international conflicts and, since its revision in 1996, to non-international armed conflicts.

In particular, the revised Protocol II stipulates that the deployment of all landmines, booby traps, and other such devices must be registered, that remotely delivered antipersonnel mines must be equipped with self-destruct and self-deactivation mechanisms, and that all antipersonnel mines must be detectable; it prohibits the use of mines, booby traps, and other such devices that explode when detected with magnetic equipment.

⁴⁴ Disallowing as a legitimate military objective, for example, using terror as a means of forcing civilians to flee their property and thereby gaining these civilian areas for occupation.

⁴⁵ Advisory Opinion of International Court of Justice, *legality of the use by a state of nuclear weapons in armed conflicts*, 8 July 1996.

Furthermore, the modified Protocol II establishes a framework intended to facilitate the removal of munitions. Article 3(2) stipulates that each side in a conflict is responsible for all the mines and booby traps it has used. All information concerning mined areas must be registered and retained. After the cessation of active hostilities, the parties involved in the conflict are obliged to take all necessary measures to protect civilians from the effects of minefields, mined zones, mines, booby traps, and other such devices in the zones under their control. All mined or booby-trapped zones must be cleared without delay after the cessation of active hostilities. These obligations were reaffirmed with **Protocol V on explosive remnants of war** signed by the States on November 28, 2003, which states an obligation for the States to clear their territory of all explosive remnants of war that threaten civilians after the conflict and to share information about the location of unexploded ordnances in order to improve the efficiency of the marking and the mine clearance. Protocol V also invites the Parties *“in a position to do so [to] provide assistance for the care and rehabilitation and social and economic reintegration of victims of explosive remnants of war”*.

However, Protocol II has a number of weaknesses.

First of all, the definition of antipersonnel mines creates a deliberate legal vagueness, which excludes from the ruling all devices that are “principally designed” for a purpose other than as antipersonnel devices, regardless of the antipersonnel effects they might have.

Furthermore, the text of the modified Convention seems to justify the use of so-called “intelligent” mines (programmable mines equipped with self-destruct and self-deactivation mechanisms, mines deployed by remote methods, and the like), thus promoting a new generation of mines.

Finally, the Convention does not define any mechanisms for control, surveillance, or sanctions in the case of violations. The CCW does not contain any clause concerning the question of responsibility in case of a violation of a stipulation of the convention and its protocols. Therefore, the general regime of state responsibility applies.

1.4. The Mine Ban Treaty

The **Mine Ban Treaty** prohibits the production, stockpiling, use, and transfer of antipersonnel mines. In Article 2(1), it defines the antipersonnel mine as:

“a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.”

The total ban of the use of antipersonnel mines constitutes a big progress in the battle against antipersonnel mines as the treaty was ratified by 144 States, as of 31st December 2004.

However, the Mine Ban Treaty contains some weaknesses. Article 2 (1) specifies:

“Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped”.

Yet such devices do in fact function as antipersonnel mines. The International Campaign to Ban Landmines (ICBL) emphasizes this fact, and also expresses its concerns that Claymore mines (directional fragmentation mines) are not all prohibited by the Ottawa Convention, despite the fact that they can easily be adapted for use with trip wires, making them equivalent to antipersonnel mines. In addition, the Ottawa Convention does not address the issue of bomblets, although unexploded bomblets have the same effect as antipersonnel mines⁴⁶.

Moreover, the only procedure envisaged by the Convention for dealing with the non-observance of its articles by a State Party is for other States to lodge a complaint. The States Parties must then decide, via a two-thirds majority, on a response to any violation of the Convention after consultation with the UN General Secretary. The main problem with this mechanism is that it has never been implemented; States are reluctant to use it because of diplomatic pressures and the fear that they themselves might run afoul of the Convention at some point.

In addition, although the Convention does require States to present an annual report on its application (Article 7), it does not require this to be drawn up by an independent authority, and there is no body of experts to evaluate these annual reports. Although NGOs and individuals may condemn violations of the Convention, they have no voice in the assembly of States Parties. The onus is entirely upon the States. If a State takes no action in the case of a violation of the Convention – by, for example, a company that produces mines – there is no recourse available except against the State itself (the obligation to exercise due diligence). The Convention makes no provision for a system that would allow direct, non-State control over the use of anti-personnel mines. However, during the Nairobi Summit in December 2004, the States parties reaffirmed the need to call armed non-state actors to account for violations of the convention⁴⁷.

Finally, the Convention does not make direct provision for compensation in the case of a violation. The Article that comes closest to this idea is the one dealing with assistance for victims (Article 6, Paragraph 3), which allows for assistance with the care and rehabilitation of antipersonnel mines victims as well as their social and economic reintegration and programmes to raise awareness of the dangers of antipersonnel mines. The ICBL working group on victims assistance interpreted

⁴⁶ HANDICAP INTERNATIONAL, *Cluster munitions systems: situation and inventory*, Lyon: HI (August 2003), 64 p.

⁴⁷ Action n°64 Nairobi Action plan adopted at the First Review Conference on 3rd December 2004: *Ending the suffering caused by anti-personnel mines*.



this article in a sense of a real obligation from the States, to finance and support victims assistance as a whole. If the voluntary solidarity remains the basis of the actual mechanism, in adopting the Nairobi Action Plan 2005-2009, the State Parties admitted the obligation contained in this article⁴⁸.

1.5. International environmental law

Landmines can have serious consequences for the environment. They prejudice economic development by disrupting the biosphere's life support systems and diminishing the capacity of the environment to supply the raw materials and natural resources. This is also true as regard to UXO.

The consequences are multiple:

- Mines and UXO deny access to natural resources. In poor countries landmines have denied land to farmers, pastoral communities and returning refugees and internal displaced persons. There is a loss of vast tracts of arable land from safe use for decades, and disruption of transportation and agricultural markets.
- Mines have covered large tracts of the earth's surface with non-biodegradable and toxic garbage. They cause irreversible damage to ecosystems, including prolonged direct damage to soil through shattering and displacement, destruction of soil structure, and increased vulnerability of soil to water and wind erosion. In Vietnam, for example, landmines have reduced the soil productivity in rice yield by 50%⁴⁹.
- Mines and UXO deplete biological diversity by destroying flora and fauna, and killing wildlife⁵⁰.
- Moreover, the loss in productivity of farmlands and the displacement of communities have generated exploitations of new fragile and marginal environments and speed the depletion of resources and destruction of biological diversity.

Unfortunately, the retrieval of landmines also has a detrimental effect on the environment. In the process of clearing Iraqi minefields, bomb disposal units ploughed up large areas of the desert, tearing up and damaging fragile and slow-growing vegetation and destroying habitat for numerous animal species⁵¹. Moreover, the substances used for the retrieval of landmines have also noxious effects on soil structure and on water table that could be contaminated.

According to the Institute of International Law⁵², dealing

with "Responsibility and liability under international law for environmental damage", environmental law creates different obligations.

Indeed, according to article 1 of this report:

"the breach of an obligation of environmental protection established under international law engages responsibility of the state (state responsibility) entailing as a consequence the obligation to re-establish the original position or to pay compensation".

In the field of antipersonnel mines in link with environment, the obligation to re-establish the original position could consist in mine clearance in order to restore the ecosystem of the location.

Moreover, *"the rules of international law may also provide for the engagement of the strict responsibility of the state on the basis of harm or injury alone. This type of responsibility is most appropriate in case of ultra-hazardous activities and activities entailing risk or having other similar characteristics"* (Article 4). The strict responsibility of the state on the basis of harm or injury alone would mean that no fault of the state has to be proved to engage its responsibility; the use of landmines could be seen as damage to environment by itself.

Existing conventions concerning international environmental law create obligations to states. The States parties to these different conventions have to respect these norms dealing with responsibility for damages caused to environment. As a result, one could imagine making a link between effects on environment generated by landmines and by hazardous and noxious substances dealt in different conventions. Thus, these specific environmental conventions could by extension apply to the use of landmines and explosive remnants of war. By this way, a general mechanism of responsibility and reparation could be established in order to help victims of landmines in terms of environment. A State whose territory was mined by another State could therefore conceivably go before an international authority to claim reparation for a breach of international environmental law.

Finally, some instruments of international environmental law have especially developed strict responsibility of operators. Applied to landmines, operators could be seen as all persons who are in relation to the exploitation, at any stage, of landmines. More precisely, they could be producers and users. Thus, these operators can be held responsible for damages caused to environment, without any fault to be proven⁵³. However, these mechanisms

⁴⁸ *Ibid.* Action n°36 "States Parties in a position to do so will act upon their obligation under Article 6 (3) to promptly assist those States Parties with clearly demonstrated needs for external support for care, rehabilitation and reintegration of mine victims..."

⁴⁹ ABDHESH GANGWAR, "Impact of War and Landmines on Environment", Centre for Environment Education, (20th April 2003)

⁵⁰ Bears in Croatia, clouded leopards, snow leopard and royal Bengal tiger in India, elephants in Africa and Sri Lanka, silver black mountain gorillas in Rwanda, snow leopard in Afghanistan. In Libya, gazelles have disappeared from sites that were mined during World War II. Reference note supra.

⁵¹ Conference "Landmines - Challenges to Humanity and Environment", 20 April 2003 organized by Indian Institute of Peace, Disarmament and Environmental Protection, Nagpur, India and Global Green Peace, Srinagar, Jammu & Kashmir, India at Srinagar, India.

⁵² Session of Strasbourg, 1997

⁵³ That is the case for example in the International Convention on Civil Liability for Oil Pollution Damage, under article 9.

can only be made before national courts. No international jurisdiction can engage the responsibility of individuals. This approach aims to transpose effects due to landmines to specific effects due to other substances that are dealt with into international conventions on environment. Some of these texts cannot be applied to damages caused by landmines, even by extension of their dispositions. That is the case of the **UN Convention on the law of the sea**. Indeed, although it has been recognised that the use of landmines has noxious effects on rivers and water table in the sense that TNT and RDX⁵⁴ are lethal to mammals, aquatic micro-organisms, and fish, it has not been proved that landmines affect marine environment.

Concerning damages to environment, article 3 of the **Convention on Biological Diversity**⁵⁵ stipulates: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” The Convention enounces in its article 14 that “the Conference of the Parties shall examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter”. According to these dispositions, states have the obligation to ensure that activities carried out under their jurisdiction are not harmful to other state’s environment⁵⁶. This obligation has been first affirmed by the “Trail smelter” arbitration⁵⁷. It has also been emphasized by the International Court of Justice which has stated that “the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment⁵⁸”.

Therefore, they would not be allowed to use landmines in a way that could have effects outside their territory. As demonstrated above the use of landmines depletes biological diversity and destroys fauna and flora. Military strategists stress that landmines are placed near borders with a defensive purpose. However, we can emphasize that these military actions, using landmines near borders,

can have effects on the environment of the other state and would thus be prohibited under this convention. The terms of the article 14 do not create any obligation for States to give reparation. It only entails a recommendation to examine this issue of reparation.

Moreover, by this Convention, states are invited to establish thematic reports concerning the implementation of their obligations⁵⁹. An example is given in the “*Thematic report on mountain ecosystems*”⁶⁰. By this way, states have to notify different threats and causes of damages to mountains ecosystems. According to India, ‘inter-state border disputes’ as well as wars, are parts of them. As a result, the use of landmines, as weapons used in conflicts and borders disputes, could be also part of causes of damages to environment.

The 1972 **Stockholm Declaration** concerns human environment. It is part of soft law and thus creates no responsibility to states. By its nature, it cannot bind States. It may however be seen as one of the cornerstones of modern international environmental law. Principle 24 of this declaration demands international cooperation in order to “control, prevent, reduce, and eliminate” environmental damage, and Principle 21 holds States responsible for ensuring that activities carried out under their jurisdiction and control do not cause environmental damage in other States. These two Principles, reiterated in 1992 in the Rio Declaration (Principles 7 and 2, respectively), may be invoked in matters concerning the production and use of antipersonnel mines⁶¹.

Other more general principles of international environmental law may also apply, such as the principle of preventative action, which requires a State to take measures to protect the environment before damage occurs⁶². Furthermore, Principle 16 of the **Rio Declaration**, known as “the ‘Polluter Pays’ Principle”, obliges the polluter to bear the cost of measures deemed necessary by the public authorities to restore the environment to an ‘acceptable’ state⁶³.

With regard to the particular situations of armed conflict, the use of landmines is much more relevant than in time of peace. Indeed, effects of war, and especially of landmines, on humans and their environment continue even after the coming of peace. “*Today, some battlefields of the First and Second World Wars, to give only two examples, remain unfit to cultivation or dangerous to the population because of the unexploded devices (especially*

⁵⁴ TNT means “Trinitrotoluene” and RDX “research Department Explosives”.

⁵⁵ Convention on Biological Diversity, adopted at the Earth Summit of Rio de Janeiro in 1992.

⁵⁶ For more information, see the Environmental Committee’s Report of the OECD Council, *Responsibility and liability in relation to transfrontier pollution* (1984).

⁵⁷ *Trail smelter arbitration*, (Canada v. United States), 11th March 1941.

⁵⁸ Advisory opinion of the ICJ, *Legality of the threat or use of nuclear weapons*, (8th July 1996).

⁵⁹ This scheme can be related to this of the Ottawa Convention. Indeed, this Convention on landmines institutes the same obligation to make annual reports in order to control the effective implementation of the dispositions.

⁶⁰ Indian thematic report concerning this issue available on the Biodiversity Convention site: <http://www.biodiv.org/doc/world/in/in-nr-me-en.pdf>

⁶¹ Tara ASHTAKALA, “Producer liability. A report for Landmine Monitor 2000”, document distributed at the *Responsibility and Compensation* symposium, Geneva, 8-9 February 2002, pp. 1 and 2.

⁶² Philippe SANDS, *Principles of International Environmental Law*, 1995, Chapter 6, quoted by Ashtakala, Tara, *op. cit.*, p. 2.

⁶³ “National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”



mines) still embedded in the soil⁶⁴. International law has to ensure the protection of environment against damages resulting from military activities. Indeed, principle 24 of the Rio Declaration affirms that: “*Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in time of armed conflict and cooperate in its further development, as necessary.*”

Some rules of international humanitarian law deal with the protection of environment in time of armed conflict. However, these dispositions included in the Additional Protocol I are not part of customary international law. As a result, they can only bind States part to this Additional Protocol.

Article 35 (3) of the **Geneva Conventions’ Additional Protocol I of 12 August 1949** is relevant to the field of damage caused by landmines to environment. It enounces that “*it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment*”. This article is controversial and its application depends on the interpretation of the terms. However, the Committee on Disarmament aimed to clarify its dispositions⁶⁵.

Article 55 of the same Protocol concerns especially the “*protection of the natural environment*”. It stipulates: “*Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population*”. Thus, this article has an anthropocentric approach, in the sense that it aims to protect human survival.

As previously mentioned, not all damages to environment are considered as illegal under international humanitarian law. In other terms, damages to environment which are not “*widespread, long term and severe*” are tolerated under this article.

However, one can, once more, assume that effects of antipersonnel mines can be seen as creating “*widespread, long-term and severe damage to the natural environment*”. Indeed, it seems reasonable to assume that antipersonnel mines, which have a considerable destructive impact on the environment, go beyond the limits accepted by international humanitarian law.

Dispositions of the Additional Protocol I to the Geneva Conventions could prohibit the use of antipersonnel mines because of damages caused to environment. Moreover, after the 1991 Gulf War, numerous States expressed support for the creation of a new convention on the protection of environment during a period of armed conflict. With the same prospect, the Council of Europe made its recommendation 1495⁶⁶.

As landmines have noxious effects on environment, international environmental law can be applied to their use. Consequently, if the use of landmines by a State is inconsistent with its obligation under international environmental law, victims of this violation may claim for reparation.

1.6. International Human Rights Law

When antipersonnel mines are deployed close to populated areas (e.g. in fields, along roads, or around watering places), thus posing a significant threat to the lives of individuals and communities, their use might be contrary to certain human rights such as the right to life and bodily security, the right to food, the right to access to safe drinking water, the right to choose one’s place of residence, and others. These rights are protected by legal instruments as, for example, the **Universal Declaration of Human Rights** (adopted on December, 10th 1948) and the **International Covenant on Civil and Political Rights** (adopted on December, 16th 1966). Unlike international humanitarian law, these may be invoked in any situation, be it war or peacetime. However, in time of war or other public emergency, derogations from some rights are permitted. The articles which are valid in time of war as well, as for example the right not arbitrarily to be deprived of one’s life, are interpreted according to the *lex specialis* in this context, the international humanitarian law.

Article 8 of the Universal Declaration of Human Rights states that an individual whose fundamental rights are violated can apply to the courts in his or her own country. Individuals could conceivably cite the violation of their fundamental rights in order to try to obtain reparations for harm caused by antipersonnel mines so long as the State in question has implemented the international treaty in such a way so as to give rise to an actionable right in the domestic court. The same grounds might form the basis for a claim before a regional human rights court (e.g. the European Court of Human Rights; Inter-American

⁶⁴ Antoine BOUVIER, “Protection of the natural environment in time of armed conflict” [Translation: Handicap International], *International Review of the Red Cross* n° 792, (31/12/1991) p.599-611.

⁶⁵ It is the understanding of “the Committee that, for the purposes of this Convention, the terms “widespread”, “long-lasting” and “severe” shall be interpreted as follows:

a) “widespread”: encompassing an area on the scale of several hundred square kilometres;

b) “long-lasting”: lasting for a period of months, or approximately a season;

c) “severe”: involving serious or significant disruption or harm to human life, natural economic resources or other assets.”

Report of the Conference of the Committee on Disarmament, Vol. I, United Nations General Assembly, 31st session, supplement No. 27, A/31/27, p. 91.

⁶⁶ Recommendation 1495: *Environmental impact of the war in Yugoslavia on Southeast Europe*, adopted by the Assembly of the Council of Europe on 24 January 2001 (5th sitting). <http://assembly.coe.int>. It advocates for the establishment of a convention on the prevention of environment damages resulting of the use of military force. According to this recommendation, joint discussions with the OSCE should be engaged, on drawing up a convention on the prevention of environmental damage as a result of military force and crisis-defusing measures aimed, in particular, to ensure compliance with Articles 55 and 56 of Protocol I to the Geneva Conventions of 1949.

commission/court⁶⁷) for reparations from a State⁶⁸. According to Art. 41 of the **European Convention on Human Rights** and Art. 63 para.1 sent. 2 of the **American Convention on Human Rights**, the courts can rule that compensation shall be paid to the victim of a violation of human rights.

1.7. National law

At national level, certain theories of liability may be invoked to establish landmine producers' liability to the victims⁶⁹. These bases for liability would apply equally to landmine producers and their component suppliers.

By viewing landmines as a product manufactured for profit, the relevant substantive laws regarding potential liability are relatively straightforward. Landmine producers made business decisions to enter the competitive landmine market where they designed, manufactured and marketed their products in the hopes of generating financial profits. Under the law, those landmine producers are no different than producers of any other product, although landmine producers may have certain defences available to them that are discussed further below. In terms of the bases for liability, however, they are no different.

Under U.S law for example, products liability can be based on either negligence or strict liability. Negligence places blame on a defendant for failing to act with ordinary care, whereas strict liability focuses on the plaintiff's injuries rather than the defendant's behaviour.

Negligence is an age-old concept that can be defined as conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm. A defendant will be held liable for his negligence if his failure to act with ordinary care causes injury to another. Regardless of their intended use, landmines are products and landmine producers have breached their duty of care if, through their landmine design or manufacture, the producers could have reduced the risk of injury to civilians. This would be especially true in the instance of post-conflict civilians who are injured long after the hostilities when a simple and relatively inexpensive self-destruct or self-defusing mechanism could have prevented the injury.

Understandably, this argument appears morally disputable because no distinction should be made between types of landmines and that doing so tacitly undermines the wider struggle against landmines in general. Any effort to use

this negligence argument would require an acceptance that securing compensation for victims today takes priority over the longer term concept of banning landmines, and the belief that the wider struggle will not in fact be undermined by securing compensation for victims in this manner.

The theory of strict liability may be more acceptable and could even be more effective in pursuing compensation for the victims. Strict liability, unlike negligence, does not look to place blame on the defendant. Rather, it focuses on the plaintiff's injuries and places the cost of the injury on the person most able to absorb the loss. Strict liability is divided into two separate concepts: products defects, and abnormally dangerous products.

Defective product strict liability is based on the idea that a producer of a defective product is in the best position to either insure against the loss or to spread the loss among all consumers of the product. This liability attaches even if the producer has acted with reasonable care. The public policy behind this theory is directly applicable to the case of landmines, including: the substantial cost of injury to a victim as compared with the ability to insure the risk of injury by the producer; the public interest in discouraging producers from marketing defective products; the inability to prove negligence because of the secretive nature of the manufacturing process; and the inability of the plaintiffs to investigate thoroughly the safety of a particular product.

In terms of viewing landmine production and use as an abnormally dangerous activity, the definition includes six factors:

- 1) the existence of a high degree of risk of some harm to the person, land or property of others;
- 2) the likelihood that the harm that results from it will be great;
- 3) the inability to eliminate the risk by the exercise of reasonable care;
- 4) the extent to which the activity is not a matter of common usage;
- 5) the inappropriateness of the activity to the place where it is carried out; and
- 6) the extent to which its value to the community is outweighed by its dangerous attributes.

The production of landmines meets every condition under this definition.

The problem with strict liability is that many landmine producers produce only component parts of landmines. Should a component part maker be held strictly liable even

⁶⁷ Inter-American system has heard right to life cases for indigenous groups affected by environmental damage – similar arguments could be made for mine devastation.

⁶⁸ See part 2.2: enforcement at regional level.

⁶⁹ Cf. ASHTAKALA, Tara, *op. cit.*, p. 4s.



though its particular part may not have been defective or its contribution may not be abnormally dangerous? Case law and other legal guides suggest that the knowledge of the component maker can be a factor – did the component maker know the component would be used in a landmine – and the component maker may be liable if it participated in the integration of its component into the landmine. Otherwise, the strict liability approach could offer a good way of establishing producers' liability, and, unlike the negligence approach, could do so without having to make any distinction between the types of landmines involved.

Other, but less promising, theories of liability that might be used include negligent entrustment or intentional torts. A defendant can be held liable under a negligent entrustment theory if he supplies a product that is highly dangerous, has specific knowledge of the buyer's dangerous intent or is witness to the buyer's conduct that clearly shows the buyer's unsuitability to use the product, and, with this knowledge, then displays a reckless disregard for the safety of the buyer or others whom the buyer may injure. In the case of landmines, this theory would at best apply where the producers sold the landmines to users who were likely to transfer the landmines to irregular forces, terrorists or criminals. Intentional tort claims, of course, require intent. It would be necessary for landmine victims to prove that the producers actually intended to cause their injuries and, although theoretically possible involving transferred intent or for certain types of intentional torts, this approach probably would not be applicable for most landmine victim situations.

The creation of national solidarity Funds for mine victims in the countries affected by antipersonnel mines is another idea worth promoting. This fund could, for example, be modelled on the Guarantee Fund for Victims of Acts of Terrorism (FGTI) instituted in France by the law of 6 July 1990, or the Fund set up by a Quebec law in 1972 to provide compensation for victims of criminal acts. Certain other countries have adopted compensation procedures for crime victims (29 countries have established such mechanisms⁷⁰). Colombia, for example, has established a system for awarding financial compensation to victims of a terrorist or guerrilla action, an act of war, or a massacre. There is, however, no evidence that landmine victims have benefited from it⁷¹.

2. Enforcement

The preceding chapter looks at avenues that might allow individuals, whether or not through the intermediary of their States, to obtain a right to reparation if they have been harmed by landmines. As we have seen, some of these avenues remain very problematic when it comes to using them effectively.

It is far from certain that, if legal proceedings were launched against States or landmine producers, these actions would be followed by concrete results. Nevertheless, some legal cases are worth studying and may serve as precedents regarding this issue.

Indeed, with the aim to enforce existing laws giving right to reparation for landmines victims, some jurisdictions made them competent in hearing claims related to this issue. These jurisdictions are both at international and regional levels.

Moreover, the example of national cases, as class actions, can be significant.

2.1. At international level

Given that, at international level, there are no legal institutions with general jurisdiction, the effective application of international law often generates complex problems. The simplest way of persuading States to respect their international obligations is thus through bilateral or multilateral negotiations. Failing this, it is possible to take a case to the International Court of Justice, but only if all the States involved recognize its jurisdiction. In the absence of any means of international compulsion, if a State refuses to cooperate, it is hard to envisage a solution that could be applied in practice.

2.1.1. The International Court of Justice (ICJ)

The International Court of Justice has sole power to rule on the interpretation of international law. If it recognized that States had a duty to make reparations to landmine victims, this would represent a great step forward for victims' rights. To the present day, the Court has never given a ruling on this issue.

The ICJ has a double brief: to settle, in accordance with international law, legal disagreements submitted to it by the States, and to give advice on legal questions posed by those specialized bodies and institutions of the United Nations (UN) that are entitled to do so.

It has no powers of compulsion, but its rulings and precedents may be considered a source of law.

Insofar as only the bodies of the UN are entitled to request advice, it is important to determine which body might most legitimately solicit this advice, or the request will be refused by the ICJ. To solicit advice, specialized bodies must prove a link between the request and their own area of expertise; in other words, if the advice is solicited by the WHO (World Health Organisation), the WHO has to prove that the issue of landmines is directly linked to its mandate (in this case, the right to health). Of possible relevance, the ICJ has, in the past, rejected a request from the WHO for advice

⁷⁰ See the site of the Office for Victims of Crime: <http://www.ojp.usdoj.gov/ovc/intdir/intdir.htm> for more information.

⁷¹ On the subject of national and international compensation Funds, see the second part of the study.

on the legality of using nuclear weapons in light of their effects on health. The ICJ decided that the issue was not within the area of expertise conferred on the WHO by its mandate⁷². The advice was subsequently solicited by the General Assembly, whose wider mandate gives it greater legitimacy before the ICJ, which then agreed to rule on the issue. If advice were to be solicited on reparations due to landmine victims, the request should therefore be made by the General Assembly.

It is very unlikely that the ICJ will state that there is a general obligation for states to pay reparation to antipersonnel mine victims. The Ottawa Treaty is only binding on its member States and has no retrospective effect.

That being so, there is another type of legal proceeding that might lead the ICJ to pronounce on the question of reparation for landmine victims. If State A wishes to obtain reparations from State B for harm caused by landmines laid on its territory by State B, it can make a deposition to the ICJ. The jurisdiction of the ICJ is subject to one essential condition, however: both States must recognize the jurisdiction of the ICJ and agree to bring their dispute before this jurisdiction. Moreover, such proceedings have certain limitations: since the Court has no power to compel, it cannot force States to obey its rulings, nor can it apply sanctions if they choose not to.

Ultimately, settlement of the dispute is made from one State to the other; victims are not consulted, and reparations, if made, go to the State and not to individual victims unless such measures have been provided for within the framework of a treaty between the two States. For example, at the end of the Second World War, Japan signed a peace agreement with the Allies. In this treaty, the funds allocated were to be used, in part, to compensate individuals who had been prisoners of war in Japan⁷³.

The Court has rendered two decisions on the use of maritime mines, both within a context of inter-State relations.

In the “*Corfu Channel Case*”, two British warships were damaged and members of the crew were killed when the ships struck anchored maritime mines in the Northern Corfu Channel. The People’s Republic of Albania must have been aware of the minefield, but did not notify its existence to the British ships. The Court ruled⁷⁴ that the Hague Convention VIII of 1907 relating to the laying of unanchored automatic submarine contact mines is only applicable in time of war. However, the omission of Albania, which occurred in time of peace, violated “*elementary considerations of humanity, the principle of the freedom of maritime communication, and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*”.

In the case “*Nicaragua v. the United States of America. Military and Paramilitary Activities in and against Nicaragua*”⁷⁵, the ICJ examined the allegations of Nicaragua that the mining of Nicaraguan ports or waters was carried out by United States military personnel or persons of the nationality of Latin American countries in the pay of the United States.

After examining the facts, the ICJ “*established that, on a date in late 1983 or early 1984, the President of the United States authorized a United States Government agency to lay mines in Nicaraguan ports, that in early 1984 mines were laid in or close to the ports of El Bluff, Corinto and Puerto Sandino, either in Nicaraguan internal waters or in its territorial sea or both, by persons in the pay and acting on the instructions of that agency, under the supervision and with the logistic support of United States agents; that neither before the laying of the mines, nor subsequently, did the United States Government issue any public and official warning to international shipping of the existence and location of the mines; and that personal and material injury was caused by the explosion of the mines, which also created risks causing a rise in marine insurance rates.*”

The ICJ decided “*that, by laying mines in the internal or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America had acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to interrupt peaceful maritime commerce.*”

The ICJ stated further “*that the United States of America, by failing to make known the existence and location of the mines laid by it, [...] has acted in breach of its obligations under customary international law in this respect;*” and

“*that the United States of America was under an obligation to make reparation to the Republic of Nicaragua for all injury caused to Nicaragua by the breaches of obligations under customary international law enumerated above.*”

The ICJ recognized that the use of mines was, in the present case, contrary to international law, and that the United States had failed in its duty to mark out the mines. The ICJ demanded reparations for the harm suffered.

However, the importance of this decision in matters of jurisprudence should not be overestimated:

- This ruling applies in a context of conflicts between two countries and is based on the recognition that there had been an illegal use of force. Consequently, it is not the use of mines *per se* that was condemned by the ICJ.
- Moreover, if a country wanted the ICJ to recognize the illegal nature of the use of mines on its territory by another State, it would need the other State to agree to

⁷² *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request for Advisory Opinion Submitted by the World Health Organisation), November 1995.

⁷³ Article 16 of the 1951 San Francisco Peace Treaty between Japan and the Allies, and the 1956 agreement between Japan and the Netherlands.

⁷⁴ I.C.J. Reports 1949, p. 4, at p. 22.

⁷⁵ I.C.J. Reports 1986, p. 14 at p.149.



bring the case and to recognize the jurisdiction of the ICJ. It is worth pointing out that, in the affair mentioned above, the United States did not admit the competence of the Court and did not follow the decision.

- Reparations must be granted from one State to another, without consulting victims and with no guarantee that they will receive individual compensation. Mine victims' rights are therefore not necessarily enhanced.

2.1.2. Mixed claims commissions

In some settings, quasi judicial bodies have been set up ad hoc to compensate war victims. This is the case for instance of the **Eritrea Ethiopia Claims Commission or the United Nations Compensation Commission (UNCC)** concerning the first Gulf war. These bodies do not work similarly which generates injustices between victims. For instance, a victim can get compensation from the Eritrea-Ethiopia Claims Commission only if there has been a violation of international humanitarian law. Such an approach generates significant inequalities between victims; for the same kind of prejudice, in one case the cause will be attributed to a violation of humanitarian law, whereas in the other the prejudice will be due to permissible collateral damages. Thus, for example, in a ruling on 28th April 2004⁷⁶, the Eritrea-Ethiopia Commission had to deliver a judgement on a complaint lodged by Ethiopia accusing Eritrea of having used anti-personnel mines indiscriminately, deliberately even, against civilian Ethiopians. In its decision, the Commission began by determining what legal basis to apply in determining whether or not the use here of anti-personnel mines was a violation of the law.

It considered that, in as much as neither of the two parties had signed the mine-ban treaty or Protocol II of the Convention on Conventional Weapons (CCW) at the time of the events, only customary law applied. It further considered that the Treaty of Ottawa and most of the provisions in Protocol II of the CCW were too recent and State practice with regard to these two legal instruments too sporadic and diverse to constitute customary law. Only certain provisions of Protocol II of the CCW relative to mine-fields, the prohibition of the indiscriminate use of mines and the protection of civilian populations are constituents of customary law.

Once the legal basis had been established, the Commission delivered its judgement on the question of whether the use of anti-personnel mines by Eritrea was effectively contrary to international customary law. In the case in point, it considered that the mines had been placed in front of the Eritrean armed forces' fixed positions and were thus used defensively in conformity with international customary law. Insofar as the damages suffered by the civilians occurred after the retreat of the Eritrean troops during the Ethiopian offensive, the court considered that

it was understandable for the Eritrean forces not to have been able to decontaminate the zone before leaving.

Thus, on the question of Eritrea's responsibility, which, if engaged, would entitle victims to compensation, the Commission judged that, *"the evidence indicates that Eritrea made extensive use of anti-personnel landmines, but it does not demonstrate that there was a pattern to their unlawful use. For liability, the Commission would have to conclude that landmines were used in ways that intentionally targeted civilians or were indiscriminate. The available evidence suggests, however, that landmines were extensively used as part of the defence of Eritrea's trenches and field fortifications. Thus, declarations citing the presence of anti-personnel mines also frequently refer to the presence of Eritrean trenches in the area/kushet concerned. In principle, the defensive use of minefields to protect trenches would be a lawful use under customary international law."*

Although it is regrettable that civilian victims are unable to obtain compensation for the prejudice caused by the mines, this judgement is not completely devoid of interest. First of all, the Commission mentioned the importance of the Treaty of Ottawa (paragraph 51). Furthermore, in carefully examining the circumstances in which the mines had been used and abandoned by the Eritrean forces, the Commission does not consider that the use of anti-personnel mines outside of the framework of the Treaty of Ottawa is always legal, but rather that it is worth analysing on a case by case basis. Consequently, it is possible that in different circumstances of mine use, the Commission may consider that compensation should be paid.

What is important to note is that these *ad hoc* mechanisms have been set up as part of the settlement of international disputes – in these cases, political and arbitral negotiations have led to an agreed set of terms for the mandate of the Commission⁷⁷.

In other cases, such as the Swiss Banks litigations in the US, claims commissions were established pursuant to court sanctioned settlement negotiations⁷⁸.

Given the specificity of the negotiations, it is understandable that there are differences in approach – e.g., in what issues were subject to the dispute, in what money was available for compensation, etc. What one must advocate for, therefore, is consistent principles of law, not necessarily a consistent result in all cases (in terms of quantum or nature of reparations).

The UNCC has adopted a more flexible approach which entitles landmine and ERW victims to seek for compensation. The UNCC was created in 1991 as a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait. This is a particular situation in the sense that because Iraq committed a

⁷⁶ Judgement by the Eritrea-Ethiopia Compensation Commission of 28th April 2004 : " Partial Award, Central Front Ethiopia's Claim 2 between the Federal Democratic Republic of Ethiopia and the State of Eritrea". Translation Handicap International.

⁷⁷ That is the case for the creation of the United Nations Compensation Committee, created by the way of the Security council resolution 692, dated on the 20th May 1991.

⁷⁸ On the 22nd November 2000, judge Korman, chief judge of the United States District Court, in the Swiss Banks settlement, approved the restitution plan for Holocaust victims. Funds are allocated by the way of different associations.

crime of aggression (or illegitimate recourse to force) and had been beaten, it had to support the war losses. Compensations are funded through Iraqi oil revenue. The UNCC compensates individuals, corporations, governments, and international organisations. It receives a large variety of claims classified in six categories according to the nature and the amount of the losses and damages and the nature of the claimants. Individuals who seek compensation have to submit their claims through their government.

A victim can receive compensation for an injury regardless of its direct cause and even if it is not considered as a violation of law, as long as the prejudice is linked with the invasion of Kuwait by Iraq. Thus, landmine and ERW victims have received compensation (even including trauma caused by witnessing a child being killed by a landmine) as part of the category D3 claims⁷⁹. Decisions on compensation being not opened to the public, it is difficult to evaluate the amount of the allocated financial compensation.

According to a UN report, there were several million mines and other pieces of unexploded ordnance in Kuwait at the end of the occupation. That report stated that “the most lasting environmental problem facing Kuwait will be that of mines and other unexploded ordnance”⁸⁰. Environmental damage can also be compensated by the UNCC. However, no claim has been submitted for the compensation of pollution of the territory by landmines and UXO.

The deadline for filing the claims in cases of damages and loss resulting from injuries sustained as a result of landmine and ordnance explosions has even been extended to take into account the long-term threat of these weapons, whereas filing deadlines for all other claims have expired. Landmine and ERW victims can make a claim before the Commission up to one year after the damage occurred⁸¹.

It is important to note that the right to compensation is not based on landmine use itself, but rather on the act of aggression perpetrated by Iraq. There are no judicial proceedings and no punitive procedures. The question of the liability for the use of landmine is not even raised since Iraq is responsible for all damages and loss due to military actions committed by either side. Therefore if the damage occurred during the period of the invasion, the work of the commission focuses only on the estimation of the compensation due.

Thus, compensation bodies set up after armed conflicts can lead to a compensation for landmine victims. However the exceptional and ad hoc aspect of these mechanisms

does not allow for harmonisation of the procedures and can generate inequalities between landmine victims.

2.2. At regional level

Regional jurisdictions concerning the protection of human rights have known a great development since few decades. Numerous States agree to see their responsibility engaged before a regional court for acts they have committed in violation of human rights.

As said, effects caused by landmines can be considered as violations of fundamental rights. Thus, victims of landmines could make requests before these regional courts in order to obtain reparation for the violation of their human rights.

That can be the case before the Inter-American Court of Human Rights. This latter has jurisdiction to engage the responsibility of one of the 21 member States of the **American Convention on Human Rights** in case of violation of rights protected by this text. An action brought by a landmine victim could be based on the violation of one of his/her fundamental rights such as right to life, right to have his/her physical integrity respected included in articles 4 and 5 of the Convention, or on article 22 that protects freedom of movement and residence. Moreover, 12 States parties to the Organisation of American States (OAS) have ratified the **Additional Protocol on Economic, Social and Cultural Rights**⁸². Among these rights are the right to a healthy environment and the right to food.

If one of these rights is considered as violated, the State liable can be under an obligation to reparation⁸³.

Nevertheless, no individual recourse can be made directly before the Inter-American Court. This limitation is a great weakness for victims. Only member States of the Inter-American Commission as well as the Inter-American Commission on Human Rights have this ability. This latter is an autonomous organ representing the OAS. It is authorized to examine complaints or petitions regarding specific cases of human rights violations from “any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organisation.” As a result, a petition lodged before the Commission cannot directly give right to reparation. The Commission is not assimilated to a jurisdiction; it can only make some recommendations. It cannot pretend to engage the responsibility of one State unless it brings an action before the Court. This latter is the only organ to have jurisdiction to impose reparation of a violation

⁷⁹ Category “D” claims are individual claims for damages above US\$100,000 each.

⁸⁰ Report to the Secretary-General by a United Nations mission, led by Mr. Abdulrahim A. Farah, former Under-Secretary-General, *Assessing the Scope and Nature of Damage Inflicted on Kuwait's Infrastructure During the Iraqi Occupation of the Country from 2 August 1990 to 27 February 1991* (S/22535, dated 22 April 1991), (the Farah Report); para. 538.

⁸¹ UNCC Governing Council decision S/AC.26/1992/12 on 25th September 1992, “*Claims for which established filing deadlines are extended*”.

⁸² Protocol of San Salvador, (San Salvador, 17th November 1988), entered into force on 16th November 1999

⁸³ According to article 63 of the Inter-American Convention, “if the Court finds that there has been a violation of a right or freedom protected by the Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”



of a right protected by the Convention. Such an action brought before the Inter-American Court of Human Rights, if achieved, could lead to circumvent the non-ratification of the Ottawa Convention by the United States for instance. Landmine victims could, through the Commission, make an action against this State or another member of the American Convention but non-signatory of the Ottawa Treaty, in order to engage its responsibility. However, the claim is only possible if there is effectively a violation of their human rights. In times of an armed conflict, they are interpreted according to international humanitarian law.

However, a major hindrance for such an engagement of responsibility is still the difficult link to establish between the State in cause and the prejudice due to the landmine. As a result, in addition to the lack of individual recourse available before the Court, victims of landmines are confronted to the difficulty of landmines traceability.

The African Court on Human and Peoples' Rights entered into force on 25th January 2004 by the mean of the **Protocol to the African Charter of Human and Peoples' Rights**. It has jurisdiction to guarantee the application of the Charter as well as any other relevant human rights instrument ratified by the States concerned. If the Court finds that there has been a violation of a human or people's right, *"it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation"*⁸⁴.

The referral to the Court is opened to members States and to African inter-governmental organisations. Requests made by individuals as well as non-governmental organisations are also possible but submitted to some conditions⁸⁵. By now, 15 member States of the Organisation of African Unity have ratified the Protocol instituting the African Court.

The institution of this recent regional jurisdiction can benefit in the future to landmine victims in the African continent. However, the optional jurisdiction of the African Court both for individual and non-governmental organisations' requests remains a great weakness. These requests are still submitted to the willingness of member States. One can nevertheless see some reparation possibilities in favour of landmine victims in actions brought before the African Court of Human and Peoples' Rights. Indeed, requests lodged by the numerous NGOs with observer status before the Commission can lead to an efficient mean in order to engage the responsibility of the African Charter members States. But, once again, concerning landmines, the problem of their difficult traceability can

be seen as a real obstacle for victims in order to summon States.

The European Court of Human Rights is an important jurisdiction acting for the protection of human rights at regional level. Both landmine and cluster munitions victims can see, by this mean, relevant actions in order to engage the responsibility of members States to the **European Convention for the Protection of Human Rights and Fundamental Freedoms**. To date, 45 States have ratified the Protocol N°11 to the Convention. This latter amends the Convention and establishes the European's Court obligatory jurisdiction for individual requests claiming for a violation of human rights. Indeed, under article 34 of the Convention, *"the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto."* Court's decisions are binding all member States. If the Court concludes to a breach of the Convention or of any of its protocols, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, it shall, if necessary, afford just satisfaction to the injured party. This just satisfaction includes generally costs and expenses award as well as, if appropriate, compensation for material and/or moral damage. As a result, any landmine victims are able to launch a case before the European Court if they can claim for a violation of a right from any State under the jurisdiction of the Court. The problem raising is that limitations are held for an individual claim to be entitled to proceed. Indeed, the risk of a potential violation of rights cannot, by itself, lead to entitle a claim to be made before the Court; one has to prove the damage occurred. That means that the person bringing a case before the European Court must be a victim.

According to *the Landmine Monitor Report 2003*, the Federation of Russia and Georgia, both members of the Council of Europe and therefore under the jurisdiction of the European Court of Human Rights, are still using antipersonnel mines. However, the prosecution of a State remains dependent on the difficult traceability of landmines. As said, the link between the use of landmine and its State user is difficult to make.

One could also advocate for a claim before the European Court against the use of cluster munitions by members States. Indeed it has been acknowledged that since 1991, Great Britain as well as the Netherlands have used cluster munitions systems. Moreover, 10 members States of the Council of Europe produce this type of arms⁸⁶. Individual requests for damages due to cluster munitions explosion

⁸⁴ Article 27 of the Protocol to the African Charter on Human and Peoples' Rights.

⁸⁵ Concerning the firsts, their right of recourse before the African Court must have been officially accepted by the State against which the violation is alleged. By now, Burkina Faso only has made a declaration allowing such an individual right. Non governmental organisations can make a request before the Court only if they are entitled with observer status before the African Commission on Human and Peoples' Rights. For the list of Non Governmental Organisations with observer status before the African Commission on Human and Peoples' Rights, see: http://www.achpr.org/english/_info/directory_ngo_en.html.

⁸⁶ HANDICAP INTERNATIONAL, *Cluster Munition Systems*, Annex 4, (August 2003).

can be based on fundamental rights as right to life (article 2 of the European Convention) or right to physical integrity (included in article 8). Moreover, responsibility of States can be engaged for a violation of other protected rights. Concerning cluster munitions, that can be the case of right of freedom of movement (article 2 of Protocol 4 to the European Convention, signed in 1963). Moreover, jurisprudence of the Court concerning international environment law can be advocated in favour of reparation for cluster munitions victims. Indeed, the Court has enlarged the right to the protection of life to the environmental scope⁸⁷. The right to a healthy environment seems by now indirectly protected by the Court jurisprudence. The presence of unexploded ordnance creates risks for the population living around the contaminated area. Finally, it is now clear that individuals do have a human right to effective access to information⁸⁸. As a result, victims of cluster munitions could bring a claim before the Court if it is proved that they had not been beforehand informed of the risks due to the contaminated environment in which they were living.

At date, although it can be acknowledged a certain activism from these regional jurisdictions, no violation has been invoked in relation to the use of antipersonnel mines or cluster munitions.

2.3. At national level

In order to estimate landmine victims' possibilities of claims at national level, the issue of jurisdiction has first to be studied.

Some examples of recourses have to be analysed such as class actions and associational representations which are interesting as regards victims' claims against States or producers.

However, causation as well as defences are obstacles with which victims can be confronted.

2.3.1. Jurisdiction

• Court's jurisdiction

The first problem at the national level is establishing that the courts have jurisdiction to decide a case brought by landmine victims. U.S. courts, for example, will only exert jurisdiction over a defendant that has some "minimum contacts" within that court's normal territory for jurisdiction. This applies to any type of entity including individuals, corporations, and even governments. The usual conditions to establish minimum contacts are: domicile; actual presence; conducting business in the territory; or if the claimed injury occurred in the territory. Ultimately, courts that are asked to exert their jurisdiction over a

defendant will consider whether subjecting that defendant to the court's jurisdiction would offend traditional notions of fair play and substantial justice.

So the type and circumstances of landmine producers affect whether or not a U.S. court would be willing to exert its jurisdiction over a case brought by landmine victims against landmine producers. From a U.S. perspective, landmine producers fall into four categories: U.S. corporations; foreign corporations; the U.S. government; and foreign governments. Courts in the U.S. could exert their jurisdiction over the U.S. corporations and U.S. government, and to some extent over foreign governments and foreign corporations (as long as those corporations are doing business in the U.S., even if that business does not involve landmine production).

Nevertheless, another method for establishing jurisdiction over foreign defendants is the **Alien Tort Claims Act** (ATCA) which grants U.S. courts jurisdiction as long as the injury claim also involves a violation of the "law of nations". For the application of the ATCA, courts have interpreted the "law of nations" to mean generally the laws dealing with the relationship among nations rather than individuals. This approach would allow U.S. jurisdiction over any type of foreign defendants without any need to prove minimum contacts, but the landmine victims' claims in the case, in addition to their claims regarding their personal injuries, would need to argue that either the landmines themselves or landmine use was a violation of international law.

• Universal jurisdiction

Another jurisdictional aspect concerns national enforcement of the universal jurisdiction. Universal jurisdiction aimed at the national implementation of states' obligations to bring to justice persons responsible for crimes under international law, such as genocide, crimes against humanity, war crimes, torture, extrajudicial executions and "disappearances".

The principle of universal jurisdiction can be seen as part of customary international law⁸⁹.

However, the study of national laws related to the application of universal jurisdiction involves some limits:

- First of all, it is very unlikely that a State would recognize the use of landmine as a crime⁹⁰. This interpretation is not commonly admitted and states would rather use their universal jurisdiction to prosecute crimes that are commonly recognized as such.

As mentioned in an Amnesty International report on universal jurisdiction, the states practise of universal

⁸⁷ ECHR decision, *Oneryildiz v. Turkey*, (18th June 2002).

⁸⁸ *Ibid.*

⁸⁹ It is mentioned in the Geneva Conventions, in the preambule of the International Criminal Court Statute and in different General Assembly resolutions. As a result, a state can legislate in favor of the universal jurisdiction of its national Courts. Moreover, even if national law of one state does not include universal jurisdiction, the Courts can apply it in the name of customary international law.

⁹⁰ See part 1.3.1 of this study.



jurisdiction do not allow to clearly define the kind of crimes that could be prosecuted⁹¹.

- Then, most of states require an element of connexion (such as territoriality, personality) to enforce the application of the universal jurisdiction in their courts. Belgium, which is considered as the pioneer country in term of application of the universal jurisdiction, enacted in 1993 a law to implement universal jurisdiction which does not require any elements of connexion (universal jurisdiction in abstentia), but repealed it on 1st August 2003, so that now an element of territoriality has to be established in Belgian courts as well⁹².
- The main limit of universal jurisdiction is the immunity which protects any persons with official functions. This principle was reaffirmed by the ICJ in a decision dated 14 February 2002⁹³.
- Finally, admitting that despite all the limits mentioned, a state would consider prosecuting a person responsible for the use of landmines in civilian areas under its universal jurisdiction law, it would aim at punishing the crime and not at providing reparation to the victims.

2.3.2. Collective claims

• Class actions

A class action would allow one or several landmine victims to represent other similarly-situated landmine victims without each victim having to take an active role in the litigation. By this way, victims would avoid important costs of claims made individually. Under U.S. law, there are a variety of types of class actions, depending in part on whether they are commenced in federal or U.S. State courts.

In general, however, successfully bringing a class action can be difficult and certain requirements must be met. First, there must be a sufficient number of class members so that it would be impracticable to simply join several in an individual lawsuit. Secondly, common questions of law or fact must exist. Further, the class member who acts as the representative must have the same interests and suffer the same injuries as the rest of the class members, and the representative must fairly and adequately protect the interests of the class. Finally, in the type of class action most appropriate for landmine victims, the common questions of law or fact must predominate over any questions affecting only individual class members, the class action must be superior to all other methods

of litigation, and there can be no undue management difficulties in bringing the class action.

Some of these requirements could be problematic since the situations of landmine victims from different States and regions of the world vary greatly, and the sheer number of victims with vastly differing languages and access to communications would raise enormous management difficulties. The only reasonable approach would be to divide the victims into multiple subclasses based on geographic areas where damages occurred. This would focus the common questions of law or fact and likely cause them to predominate over questions affecting individual members; it would enhance the potential for one or several victims to have the same interest and injury as other class members and to represent the class fairly and adequately; and it would ease the management and communications difficulties.

Example of a class action case regarding landmines brought against a state⁹⁴

In 2000, a group of 200 Kenyan nationals, victims of accidents caused by mines and unexploded ordnance, formed a class and brought a case in the British court against the British government. In the 1990s, the British army had carried out military exercises on Kenyan soil with the agreement of the Kenyan authorities. During these exercises, landmines were scattered over the territory and the contaminated zones were not subsequently cleared.

Here, the plaintiffs did not base their case on the Ottawa Treaty but on issues of environmental pollution and damage caused to the community. No verdict was declared because the case was settled out of court. The British authorities agreed to pay \$7 million in compensation to victims but did not accept liability.

This example is encouraging as well as interesting. The fault of the State in this particular case, although not recognized, is blatant, inasmuch as the mines were used for military training and not in the context of a war. It is a question, really, of fault by omission: the training zones were not cleared, leading to the contamination of Kenyan soil.

Such an example should not lead to disregard class actions limits as regards victims' rights. Thanks to this collective claim mechanism, some victims are able to exercise their rights and to obtain reparation. But the conclusion of this procedure is often dealt by way of a transaction, which makes it very dependant on the negotiations abilities of the victims and their representative. Moreover if the tran-

⁹¹ AMNESTY INTERNATIONAL, *Universal Jurisdiction - the duty of states to enact and enforce legislation* (September 2001), http://www.web.amnesty.org/web/web.nsf/pages/legal_memorandum.

⁹² From now, Belgian courts will only have jurisdiction over international crimes if the accused is Belgian or has his primary residence in Belgium; if the victim is Belgian or has lived in Belgium for at least three years at the time the crimes were committed.

⁹³ ICJ, case n°121, (14 February 2002), *Case concerning the arrest warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium).

⁹⁴ BBC News, *Kenya herdners accept UK pay-out, 22/10/02- ANANNOVA, MoD to compensate for landmine maimings 10/04/02*. See also the website of lawyers Leigh, Day and Co. : www.leighday.co.uk

saction can represent a precedent for future cases it might not appear as strong as a court decision. Furthermore, the risk of a shift towards commercialised justice remains high with this type of action.

• Associational representation

In US law, a possible alternative to class actions for landmine victims might be for a non-governmental organisation (NGO), in which the victims are members, to bring the lawsuit on their behalf. Such associational representation is allowed when: the individual members of the NGO would otherwise have standing to bring suit by themselves; the interests at stake are germane to the NGO's purpose; and, neither the claim asserted nor the relief requested requires participation by the members in the lawsuit.

For landmine victims, this would mean forming an NGO with the express purpose of seeking funding to assist landmine victims, but it also would mean that the victims could not seek individual monetary compensation because they cannot directly participate in the lawsuit under this approach. Rather, the NGO would seek funding for regional or global trust funds in support of other NGOs and agencies that, in turn, would provide care and support for landmine victims⁹⁵.

As collective procedure, this form of reparation can lead to bar one of the class actions limits: to extend victims support beyond the claim, and to keep future victims able to benefit precedent collective initiatives by the mean of instituted funds.

2.3.3. Specific obstacles in national law

At national level, victims can face some obstacles to the enforcement of claims. On the one hand, these difficulties can be linked to causation between the landmine and the injury suffered and on the other hand, to arguments that can be used by the defence.

• Causation

In US law, it might seem obvious that a victim's injury was caused by the explosion of a landmine, and indeed this can be shown to establish "general" causation, proving that the landmine is capable of causing such an injury. But "specific" causation also must be proved and, in the case of landmines, this is much more difficult. Specific causation requires proof that the individual landmine victim's injury was actually caused by a landmine from a specific landmine producer. Typically, landmine victims will not be able to prove the source of the landmine that caused their injury.

There are two solutions to this problem. First, the victims could argue that proof of general causation is sufficient. A recent and successful example of this argument in the U.S. courts involved a case against the producers of Agent Orange, a defoliant chemical used by the U.S. military that has been linked to several serious illnesses. In that case, the Court found that although none of those victims could prove which producer's chemicals caused the harm, each of the producer's chemicals could have caused the harm. All of the defendant producers were found liable and their respective shares of the liability were set at relative levels equal to their respective shares of the Agent Orange market. Landmine victims could assert the same argument in their case since they also could prove general causation but would find it virtually impossible to prove specific causation.

The second argument would assert an "enterprise liability theory." This theory originated in the U.S. in 1972 with a case involving blasting caps, which are often used at construction sites⁹⁶. Thirteen children who had been injured in twelve distinct situations in ten different U.S. States brought suit against the blasting cap producers. Since the victims could not prove which blasting cap that caused their injuries came from which producer, the court allowed the victims to name every blasting cap producer as a defendant since that list comprised the entire blasting cap industry. Even though no specific causation could be proven, and even though all of the defendants had adhered to the current safety standards of their industry, all were found liable⁹⁷.

Landmine victims, under this approach, would need to name all known landmine producers and then assert that if none of the producers could prove that they were not the maker of the particular landmines in question, they must be held liable for the victims' injuries in proportion to their share of the landmine market. If successfully argued, this approach would hold all landmine producers liable for a proportionate share of the victims' injuries unless a particular producer could avoid some liability by proving that their landmines could not have been a cause of the injuries (e.g., the producer's landmine were sold but never used, or were only used in a geographic area other than that where the victims were injured).

• Defences

Another obstacles to claims outcome at national level deal with arguments used by the Defence.

For the U.S. government and foreign governments, the most obvious and strongest defences would be based on concepts of governmental immunity. These are well established under U.S. law and only very narrow

⁹⁵ Examples of these types of cases have involved special interest organisations such as environmental groups (e.g., the Sierra Club) or labour unions. In the instance of landmine victims, it would be necessary for the NGO to have victims as its members, but that NGO would not need to have all landmine victims as its members in order to represent them.

⁹⁶ *Hall v. E.I. DuPont De Nemours & Co., Inc.*, 345 F. Supp 353 (E.D.N.Y. 1972).

⁹⁷ Another important U.S. case successfully using enterprise liability theory involved claims by cancer victims whose mothers, while pregnant, had ingested the prescription medication DES (diethylstilbestrol). Again, studies later revealed that DES was the general cause of the victims' cancer but no one DES producer could be proved to have supplied the DES that caused any individual victim's cancer. The court found that since the victims could not prove specific causation, justice required that the burden of proof shift to the producers to prove that any particular producer was not the source of the DES that caused the injury to any particular victim. In the end, the court found the producers liable and apportioned liability according to their respective shares in the DES market. *New York County DES Litigation (Wetherill c. Eli Lilly & Co.)* 678 N.E.2d 474 (N.Y. 1997).



exceptions to such defences are available. For example, immunity for the U.S. government would be very difficult to avoid unless the landmine victims could successfully argue that the U.S. government's use or export of landmines had violated the victims' civil rights, in which case the **Federal Tort Claim Act** (FTCA) mandates that the U.S. government be treated just as any private individual. Such an argument would not likely succeed, however.

Immunity for foreign governments in United States also would be problematic since the **Foreign Sovereign Immunity Act** (FSIA) provides only seven enumerated exceptions and only one of those might apply for landmine cases. Foreign governments are not protected by the FSIA for injuries or losses based "*upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and causes a direct effect in the United States.*" In a landmine case, the victims or their families would need to establish that at least some of their injuries or losses occurred in the United States (which might include injuries such as emotional distress). As with U.S. governmental immunity, the arguments to avoid foreign governmental immunity would be difficult to raise successfully.

This leaves the landmine producing U.S. and foreign corporations subject to U.S. court jurisdiction. This is not a significant reduction from the entire universe of landmine producers since most governments contract with private corporations to produce their landmines. In the U.S., virtually all landmines have been produced this way, and current estimates place the number of U.S. landmines at nine to ten million or more of the 60 to 80 million uncleared landmines located in dozens of countries. During its time from the 1960s to the mid-1980s as a leading world producer of landmines, the U.S. exported landmines to more than 30 countries.

These private landmine producers probably would not raise any of the conventional defences for personal injury cases such as: consent; assumption of risk; or contributory negligence. The fact situations of most landmine cases would not support these defences, and the defendant landmine producers would not want to raise defences that require placing any blame on the victims.

Another defences likely to be raised, however, would be the statute of limitations. Typically, a tort case such as one that a landmine victim might bring must be brought within two to three years of the injury. This time limit varies for different jurisdictions within the U.S., and other factors can affect its length, but in most events it is a relatively short period of time.

Nevertheless, "equitable tolling" principals can bar a defendant from raising the statute of limitations defence under certain circumstances where there was fraud, concealment, deception or other misconduct by the defendant. The essence of equitable tolling is that the statute of limitations does not run against victims who are unaware that they have a legal cause of action. A

recent example of equitable tolling involved a lawsuit brought in the U.S. by Holocaust victims to recover their assets decades after those assets were stolen, based on concealment by those defendants. In the case of landmine victims, the stronger equitable tolling argument would be based on the victims' lack of knowledge regarding their legal claims, and on their lack of access to U.S. courts.

Finally, another equitable tolling argument against the statute of limitations defence could be the "continuing violation doctrine" which states that the limitations period does not begin until the offence is complete. In the instance of landmines, an argument could be made that the offence will not be complete until all or a substantial amount of the landmines are removed or detonated. Since this is unlikely to occur for many years, landmine victims would be free to pursue their claims without being barred by time limitations.

Another remaining defence is the "government contractor defence." This would be available only to corporations that contracted with the U.S. government to produce landmines. Based on the current understanding of the landmine industry, this would include only U.S. corporations (also meaning that any landmine producing foreign corporations over which U.S. courts might exert jurisdiction would have few remaining viable defences). The government contractor defence essentially is an extension of the sovereign immunity defence available to the U.S. government. The policy behind the government contractor defence is to shield private entities from liability for products intended for use in armed conflict, thereby encouraging private entities to contract with the U.S. government for what are in essence government activities which, if conducted by the government, would otherwise be protected by sovereign immunity.

Required elements of the government contractor defence are: 1) the U.S. government approved reasonably precise specifications; 2) the product conformed to those specifications; and 3) the producer warned the U.S. government about dangers in the use of the product that were known to the producer but not the U.S. government. This defence would absolutely shield U.S. landmine producers from liability unless the victims could show that at least one of the elements is missing.

U.S. landmine producers almost certainly could prove the first element and, even allowing for some defectively produced landmines, the second element. The third element, however, provides room for argument as well as controversy. If the victims could show that the U.S. producers did not fully warn the U.S. government of the dangers of landmines, then the producers could not use the government contractor defence even if the landmines were produced to meet approved specifications. The landmine victims would need to show that had the U.S. government been aware when the landmines were produced that technology existed that could have reduced their danger, it would have changed the specifications to include that technology.

This is where the controversy begins. First of all, in terms of landmines, the only technology that might have reduced their danger involved self-destruct technology. This means, if it does not reduce the landmine capacity to harm at the moment of the explosion, can at least permit a faster neutralisation and then reduce its long term threat. This technology was available as early as 1964 but it likely would be impossible to prove that producers did not warn the U.S. government about the dangers of landmines without the technology. The only evidence of this failure to warn might reasonably be drawn from the U.S. experience in Vietnam where landmines caused 33 percent of all U.S. casualties and 90 percent of all mine and booby-trap components used against U.S. troops were of U.S. origin. If the U.S. government had been warned by producers about landmines without self-destruct technology, it is not logical (or moral) that the U.S. government would have ordered and continued to use landmines that were causing so many casualties to their own troops, not to mention endangering so many civilians for decades after the conflict.

The existence of self-destruct technology prior to production of the majority of landmines made by U.S. producers now littering the world can be proven even if the failure of the producers to warn the U.S. government can only be inferred. Another related approach does not require proof that the producer failed to warn, but rather that the producer used its own discretion in producing the product, in this case ignoring even the possibility of any “safer alternative,” and that the U.S. government then merely accepted the producers’ decisions.

Another, and somewhat less controversial, exception to the government contractor defence concerns the cost of changing the product compared with the cost of unintended injury from the product. In other words, if the financial burden of changing the landmine – whether through self-destruct technology or otherwise – is less than the cost of unintended injuries caused by the landmine, then the producer will be found negligent for failing to make the reasonable alterations and the government contractor defence will not be available. However, the evaluation of the unintended injury cost would not be easy to make.

Whether any of these arguments would be sufficient to overcome the government contractor defence is uncertain. At the very least, if the victims’ lawsuit could progress to the point that the U.S. landmine producers must argue whether or not they warned the U.S. government about landmine dangers or could have applied some technology to make them less dangerous to post-conflict civilians, the victims’ case might effectively be won.

The greater controversy, however, is that this legal approach does not conform with the position that no landmines, regardless of self-destruct technology, are safe for civilians or should be legal. In truth, such a case does not in any way address the issue of the legality of landmines under international law, nor could a ruling under U.S. law in favour of landmine victims be reasonably used in support of legitimising the use of self-destructing

landmines. In fact, the international law arguments against landmines would have no force in such a case under U.S. law except if they were necessary for gaining jurisdiction through the Alien Tort Claims Act approach (as discussed above under, “Jurisdiction”).

Unfortunately, the theory needed under U.S. law to overcome the absolute shield of the government contractor defence requires arguing that on the whole, at least in terms of post-conflict civilians, U.S. produced landmines with self-destruct mechanisms would have been less dangerous. This does not mean that any type of landmine is safe or acceptable, but only that the U.S. producers failed to adequately warn the U.S. government, or improperly used their own discretion in producing landmines, and so cannot shield themselves from liability.

The enforcement of landmine victims’ rights is thus conceivable before international, regional and national jurisdictions. However, obstacles to these legal actions have been exposed. They may affect the effectiveness of a right to reparation for landmine victims. Developments of general international law could be an interesting track for the development of victims’ rights.

3. Developments in international law: implications for landmine victims

Recently, the international community became aware of the necessary reparation of damages suffered by victims. The establishment of the International Criminal Court is an important contribution regarding this issue. There are as well interesting works and studies made by the UN Human Rights Commission. Nonetheless, these developments in international law raise the problem of their difficult applicability to the specificity of antipersonnel mines victims.

3.1. The International Criminal Court (ICC)

The adoption of the **Rome Statute of the International Criminal Court** in July 1998 marks an important development in victims’ rights at international level. It makes it possible for victims of crimes within the Court’s jurisdiction to associate in a court action with the public prosecutor, the result being that they can participate in all stages of the trial and obtain reparations.

The International Criminal Court is competent to rule on the most serious crimes and, consequently, ICC trials see the involvement of victims who have often suffered terrible wrongs. For the first time in human history, an international court has the power to order one individual to pay reparations to another individual. Under Article 75, paragraph 2 of the Rome Statute, the Court may order a convicted person to pay money for compensation, restitution or rehabilitation.

In accordance with Article 79 of the Rome Statute, the first Session of the Assembly of States Parties that took place in September 2002 established a trust Fund for the



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benefit of victims of crimes within the jurisdiction of the Court and their families (Resolution 6). The purpose of the Fund is to fully incorporate a reparative function into the overall mandate of the Court. The Trust Fund will work in tandem with the Court's reparation function under Article 75 of the Statute. Sometimes this will be money that the court orders an offender to pay as reparation. According to article 75(2) of the Rome statute, *"the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation"*. The funds can be allocated either to individuals or collectively to a group. -Collective awards are not necessarily money to a collectivity – they can also be symbolic awards, memorials etc... The Fund may make payments directly to victims or to other bodies, such as an aid organisation. A convict might not have the necessary funds to pay the compensation sum imposed by the Court; in this case, the Board of Directors of the Trust Fund may decide to use its voluntary contributions for the benefit of the recipient of the Court's award⁹⁸.

The question remains whether or not landmine victims come within the jurisdiction of the Court, and would therefore be likely to receive reparations by means of a trial in the ICC, or through the Trust Fund. Chapter 2 of the ICC's Statute lists the various crimes that come within the Court's jurisdiction. The next step is therefore to find out if landmine victims can be put in the same category as victims of these crimes.

• Genocide⁹⁹

The use of mines cannot be categorized as genocide unless it is considered as part of a deliberate intention to destroy an entire national, ethnic, racial, or religious group. Mines may, in fact, be employed with the intention of destroying an ethnic group. When they are made to look like toys or tins of tomatoes, for example, and then dropped in a village, the use of mines may be evidence of an intention to eliminate an ethnic group or community. Even if the Rome Statute does not refer specifically to antipersonnel mines, the means used to commit these crimes are not really important. The key thing is the result, i.e. the crime. The Rome Statute, for example, describes 'killing members of a group' as genocide, without specifying the means that might be used.

Nevertheless, the indiscriminate nature of landmine injuries probably rules out a charge of genocide, because the proof of the "intentional willing" remains absent.

• Crimes against humanity¹⁰⁰

In theory, the Court may not consider landmine victims to be victims of a crime against humanity either, inasmuch as this crime is committed *"in the context of a generalized or systematic attack launched against any civilian population"*. Once again, the indiscriminate character of the mine make the notion of *"generalized or systematic attack"* uncertain.

However, if the mines are deliberately deployed close to villages, or if armed groups knowingly force civilians to gather up or detonate mines as it happened in Burma in 2002¹⁰¹, might not this precise situation constitute a crime against humanity? Indeed, Article 7(1k) of the Court's statute defines crimes against humanity as *"other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"*.

Nevertheless, *"Attack directed against any civilian population"* means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack¹⁰².

Consequently, still using the Burmese case of forced de-mining as an example, proof would be needed that the casualties to which villagers fall victim are part of a deliberate policy aimed at harming a target population, and therefore that it is no longer a question of accident but rather of a criminal act.

Moreover, some authors can consider that damages to another State's environment caused by landmines can fall under the definition of such a crime. Indeed, according to Professor Doug Rokke, *"A nation's military personnel cannot willfully contaminate any other nation, cause harm to persons and the environment and then ignore the consequences of their actions. To do so is a crime against humanity"*¹⁰³.

• War crimes¹⁰⁴

As mentioned earlier, it is very difficult to prove that the use of mines in wartime constitutes a violation of the Geneva Conventions on the protection of civilians.

Among the definitions of war crimes that figure in the ICC Statute, there is Article 8 paragraph 2b: *"Intentionally launching an attack in the knowledge that such attack*

⁹⁸ External voluntary contributions to the Fund must first be approved by the Board of Directors of the Trust Fund, which will refuse those contributions that are incompatible with the objectives and activities of the aid Fund, or those where allocating the sum in the way that the donor demands would lead to a manifestly inequitable distribution of the available funds among the different groups of victims.

⁹⁹ Article 6 of the Court Statute.

¹⁰⁰ Article 7 of the Court Statute.

¹⁰¹ As mentioned in: INTERNATIONAL CAMPAIGN TO BAN LANDMINES, *Landmine Monitor Report: Toward a Mine-Free World(2003)*, op. cit., p. 567, forced mine clearing have been reported in Burma.

¹⁰² Article 7.2.1 of the Court Statute.

¹⁰³ Professor Doug Rokke, ex-director of the Pentagon's depleted uranium project is a former professor of environmental science at Jacksonville University and onetime US army colonel who was tasked by the US department of defence with the post-first Gulf war depleted uranium desert clean-up.

¹⁰⁴ Article 8 of the Court Statute.

will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

Does laying a landmine constitute such an attack? If so, it has never been recognized, although such an interpretation remains possible and largely legitimated by the high proportion of landmine civilian victims¹⁰⁵. The user of a mine with no self-destruct mechanism knows very well that the mine will have an effect over the long term, even after the end of a conflict. In laying such a mine, he has consciously exposed civilians to danger once peace has been restored. Furthermore, even if the mine has a limited life thanks to a self-destruct mechanism, there is no guarantee that it will only cause losses in enemy ranks; ‘collateral damage’ (the loss of civilian lives) may always be considered as exceeding the expected returns in terms of military strategy.

This being so, might the laying of antipersonnel mines be seen as a war crime? Can one prosecute a person who commits an act in wartime for the peacetime effects of that act?

Still using the Burmese example of forced mine clearing: does the fact of knowingly using a civilian to detonate a mine not constitute a war crime? This, however, would mean condemning the atrocity of forced mine clearing, and not the use of mines. The Court’s position could only permit such advancement of interpretation.

• The crime of aggression

The crime of aggression figures in the statute of the ICC. However, *“the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations”*¹⁰⁶.

Even if the States Parties have yet to find a definition of the crime of aggression that satisfies everyone, the illegal use of force probably does constitute such a crime.

Indeed, in the Nicaragua case¹⁰⁷, the illegal use of force has been recognised as a crime of aggression. That would not be automatically the case of the use of landmines since it is the circumstances and not the mean which has been retained. In the sub-mentioned case, mines have been effectively used, but it is not this element which lead the Court to qualify American acts as a crime of aggression.

Concentrating on the victim, it can be established that landmine victims can seek reparations through the ICC for one of the crimes mentioned above. However, one has to accept that, even if the Court did recognize that the use of a mine constituted a crime within its jurisdiction, the difficulty would be in proving the link between the victim and the mine user.

3.2. Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights and Humanitarian Law

Since the beginning of the 90’s the United Nations Human Rights Commission has been working on the issue of reparation and compensation for victims. Two experts assisted with the drawing up of a draft document, which is currently being reviewed by States and civil society organisations for their comments.

The **UN Convention against Torture** does not define the terms reparation, compensation and rehabilitation; it does not even contain any strict definition of the term ‘victim’. Two UN documents tend to bar this weakness: the **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power** and the **Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of gross Violations of International Human Rights and Humanitarian Law** (hereafter referred to as the “Draft Principles”).

One of the specificities of the Draft Principles is that they take as a starting point the needs and wishes of the victims themselves. As highlighted by the International Rehabilitation Council for Torture Victims¹⁰⁸, the Draft Principles approach the right to remedy from the victim’s perspective.

Although initially intended to compensate for a recognised gap in the UN Convention against Torture, the Draft Principles in fact go beyond this in focusing not only on violations that constitute acts of torture, but also on any gross violation of human rights and international humanitarian law. It is therefore interesting to study these draft Principles in the perspective of landmine victims.

First of all it is important to notice that although the previous Draft Principles¹⁰⁹ was directed at “*violations of international human rights and humanitarian right*”, the document was amended in October 2003¹¹⁰ to restrict the scope of the document to “*gross violations of human rights and serious violations of humanitarian law*”. These amendments to the text constitute a real step backward as far as landmine victims are concerned.

¹⁰⁵ According to *the landmine Monitor 2003*, *op. cit.*, (p39-40), 85% of landmine victims are civilians.

¹⁰⁶ Article 5.2 of the Court Statute.

¹⁰⁷ ICJ decision, *Military and paramilitary Activities in and against Nicaragua* (“Nicaragua v. United States”), 27th June 1986.

¹⁰⁸ <http://www.irct.org>

¹⁰⁹ UN doc E/CN.4/2000/62.

¹¹⁰ UN doc E/CN.4/2004/57.



In the amended Draft Principles¹¹¹, “a victim is a person or a collective group of persons who suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights”. A “victim” may also be “a legal personality, the representative of a victim, a dependant, a member of the immediate family or household of the direct victim, as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, suffered physical, mental, or economic harm”.

A victim as defined above is “one who suffers harm as a result of acts or omissions that constitute a gross violation of international human rights, or serious violations of humanitarian law.”

Whereas landmine victims could fit in the definition of victims as stated in the previous draft, the reference to “gross violations” may have constituted a significant bar. As it was mentioned previously, it is not yet admitted in the current jurisprudence whether the general use of a landmine constitutes a grave breach of humanitarian law. However, the specific use of several landmines can be in breach of international human rights. Further, in the Preamble of the draft Principles, it is considered that “gross violations of civil, political, economic, social and cultural rights includes the protection of life, physical integrity and other aspects essential to the human person and to human dignity”. A landmine victim could be considered as a victim of a gross violation of human rights.

The Draft Principles list a certain number of obligations on States, among which are the obligation to respect, ensure respect for and enforce international human rights and humanitarian law. These obligations are given in chapters 1 and 2. Articles 4 and 5 of chapter 3, however, focus more specifically on those gross violations of human rights and international humanitarian law that constitute crimes under international law. Because of their gravity, these violations require states to prosecute the alleged perpetrators and provide for universal jurisdiction. Statutes of limitation are not applicable. Regarding landmine victims, it is very unlikely for the time being and for the reasons already mentioned, that states will acknowledge the use of landmines as constituting a crime under international law. However, victims of landmines may still be entitled to claim certain rights, which include the right of access to justice, the right to reparation for harm suffered and other appropriate remedies, and the right of access to all information relevant to the violations (article 12).

1. The right of access to justice

It must be possible to exercise this right within the framework of existing domestic law and in accordance with international law. States must therefore ensure that violations of international law (Human rights and humanitarian law) can be prosecuted under national jurisdiction.

For the victims of landmine, it would mean that the violation of human rights (the use of landmine) they have suffered from is recognized as such in domestic law.

Article 13 states that the State also has an obligation to “make available all appropriate diplomatic and legal means to ensure that victims can exercise their rights to remedy and reparation for violations of international human rights or humanitarian law”. The mention of diplomatic means could be interpreted as assistance from the victim’s home State in obtaining compensation from another State liable for the harm he or she has suffered. Obviously, these diplomatic means are highly political and it is very unlikely, for example, that the Vietnamese government makes diplomatic means available to its citizen for obtaining reparation from the United States for the damage caused by the landmines laid by the US army in the 70s. Thus the use of diplomatic means may be discretionary according to which States are involved. Article 14 mentions that, in addition to individual access to justice, access should also be made available for groups of victim to make a collective claim. As it was mentioned previously, collective access to justice and reparation could prove to be a very useful approach for landmine victims.

2. Victims’ right to reparation

It is stated in chapter IX of the Draft Principles that “reparation should be proportional to the gravity of the violations and the harm suffered”. However, this raises the question of the correlation between the gravity of the violations and the extent of the harm suffered. No information indicates how the gravity of the violations will be assessed. It is likely that, in accordance with previous articles in the Draft Principles, a violation will be considered as “gross” when it constitutes a crime under international law. Does this mean that reparation will be calculated partly on the basis of whether or not the violation is gross? How will the gravity of those violations, not considered to be crimes under international law, be assessed?

In the case of landmine victims, the violation (use of landmines) does not necessarily constitute a crime under international law and some may argue that it does not constitute a gross violation either, and yet the harm suffered can be of extreme gravity (loss of one or several limbs, death of a family member). It is difficult, therefore, to imagine how the amount of reparation could be calculated. Furthermore, it would seem both difficult and unrealistic to talk about proportional reparation.

“In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for its acts or omissions constituting gross violations of international human rights and serious violations of humanitarian law norms” (article 16). This article would seem to be particularly relevant to landmine victims. Indeed, although the State may not be held liable for a wrongful act (the use of landmine), damage caused

¹¹¹ Articles 8 and 9.

by landmines is also due to an omission: the omission to clear the areas polluted by landmines after the end of the conflict, the omission to identify and close off access to polluted areas, the omission to warn and inform civilians about the danger and the location of landmines. Neither should it be forgotten that States are liable for acts committed by previous governments.

Article 16 also refers to a case in which the violation is not attributable to the State. In such a case, “the party responsible for the violation should provide reparation to the victim or to the State, if the State has already provided reparation to the victim”. As outlined in article 3(b), a State is obliged to “investigate violations [...] and, where appropriate, take action against the alleged perpetrators in accordance with domestic and international law”, this would mean that a State could, on behalf of a victim, claim compensation from the party held liable for the damage, whatever this party’s nationality. In a case where the liable party is unable or unwilling to meet its obligations, the victims’ home State should endeavour to provide them with reparation via the establishment of a national compensation/reparation Fund. In the case of harm caused by landmines, liability is often difficult to demonstrate: the liable party may be a rebel group, which has no legal status and may have disappeared since the wrongful act was committed, or a foreign state or identity that will not easily admit its liability¹¹².

If a foreign entity, in particular a State, is held liable, the claim for reparation takes on a very diplomatic aspect. The two States could bring the case before the International Court of Justice, but we have already seen the limits of this procedure¹¹³. The victims may be able to obtain reparation from his or her home State, but this would most likely be after diplomatic channels had failed, and would therefore be a lengthy process. Moreover, since the violation will not be considered a crime under international law, it is unlikely that the same means be made available to victims for claiming compensation. This is all the more so as, according to Chapter III, only crimes under international law require universal jurisdiction.

The establishment of a national Fund raises the issue of the financial resources available. If the State is not willing or not able to provide the funding, and this would certainly be the case in most of the countries where landmines victims are to be found, not only will the wrongful act remain unpunished but reparation will not be guaranteed either¹¹⁴.

Chapter X of the Draft Principles refers to different kinds of reparation:

• Restitution

“Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred” (article 22). In the case of landmine victims, especially in the case

of communities affected by landmines, restitution could mean clearance of the polluted area and the ability to return to the living or working area. However, restitution is not possible for physical injuries which resulted in permanent disability.

• Compensation

“Compensation should be provided for any economically assessable damage, as appropriate and proportional to the violation and the circumstances of each case, resulting from gross violations of international human rights and serious violations of humanitarian law” (article 22).

Each example listed in this article is relevant to the kind of damages suffered by landmine victims:

- Physical or mental harm, including pain, suffering and emotional distress,
- Lost opportunities, including employment, education and social benefits,
- Material damages and loss of earnings, including loss of earning potential;
- Harm to reputation or dignity,
- Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

• Rehabilitation

Rehabilitation is defined in a broad approach in article 23: it covers not only physical and psychological rehabilitation but also access to legal and social services.

Collective or community care-management of physical rehabilitation for landmine victims is often the best adapted. This highlights the appropriateness of collective procedures for reparation.

• Satisfaction and guarantee of non-repetition

Satisfaction is defined in the Draft Principles via a series of enumerations (apology, including public acknowledgement, commemorations and tributes to the victims, official declarations...). Such measures have a very symbolic value but are of great significance to the victims. Article 24 also mentions judicial or administrative sanctions against parties responsible for the violations as part of satisfaction. This is unlikely to happen in the case of reparation to landmine victims since liability for the wrongful act is difficult to prove. Nonetheless, the fact of admitting publicly that the use of landmines constitutes a gross violation of human rights or international humanitarian law, that the State’s omission to clear an area and to protect civilians constitutes a violation as well, will lead to an evolution in the jurisprudence. It is only through this kind of generalised recognition and statement that, in the long term, the use of landmines will be legally considered a gross violation of international law and custom.

As regards the guarantees of non-repetition, for landmine victims, this would mean the clearance of

¹¹² Judgment of the International Court of Justice: Nicaragua v. the United States of America, *Military and Paramilitary Activities in and against Nicaragua*. 27/06/86).

¹¹³ See part 2.1.1 of this study.

¹¹⁴ See section 2 of the part concerning right to compensation.



contaminated areas, and for the States that continue producing landmines, or importing and exporting them, this could mean an end to production and all forms of the commercialisation of landmines.

The question of the scope of the Draft Principles remains to be seen. In the Preamble of the amended draft, it is emphasized *“that the principle and guideline do not create new substantive international or domestic legal obligations but identifies mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and international humanitarian law which are complementary though different as to their norms”*. It is very likely that this new clarification, along with the restriction of the scope of the text now referring only to “gross” respectively “serious” violations¹¹⁵, may be due to the comments made by some of the States arguing that many of the principles had no basis in custom or in treaty¹¹⁵. Will the principles and guidelines be legally binding on the States or will they remain simple objectives? If they do become legally binding, what recourse would there be in the event of a State not complying with its obligations to provide reparation? All these questions are not settled yet; the role, the nature and the statute of this text is still a fundamental issue. If the text is adopted by the General Assembly, even if it does not acquire a legally binding status; it may still be an important reference for landmine victims.

4. Conclusions

Landmine victims could claim reparation for the prejudice they have suffered **before competent national courts**. These actions by individual victims depend on the procedural and material law conditions of each State.

The example of class actions in the United States is also an interesting idea. If all the conditions are met, landmine victims could group together as a class and make a claim in order to engage the liability of the landmine manufacturer that caused the injuries they have suffered.

In order to facilitate such legal actions, **the liability of the arms manufacturers should be more apparent**. One of the main problems consists in establishing a causal link. This difficulty could be resolved by improving landmine traceability.

Judicial action at national level should be taken by competent lawyers in this field. These lawyers should provide victims with judicial assistance and knowledge of the extent of their rights.

Moreover, if the use of a landmine constitutes a war crime, universal jurisdiction to prosecute this crime could be engaged. However, States may exercise international jurisdiction only if a certain territorial link exists. This condition should be softened.

Claims against States for violation of human rights can be filed by individuals or by their representatives in certain regional human rights courts.

Defending victims' rights requires increased direct and indirect judicial assistance. In addition to the mechanisms that already exist¹¹⁶, further assistance could be provided by non-governmental human rights organisations or any other relevant bodies in order to make claims more effective and efficient.

NGOs also have an important role to play in providing judicial assistance to victims; ensuring respect for procedural rules and rights and providing assistance in the constitution of the claim.

The aim is to inform victims of the range of possibilities for legal remedy and thus of compensation/reparation from jurisdictions they are not always familiar with.

NGOs should also be able to represent victims directly before regional courts in order to obtain reparation for damages due to landmines. In other words, NGOs could act as the victims' representatives.

The jurisdiction of international courts may be a means of engaging the responsibility of actors who violate international humanitarian law and international law on human rights. The engagement of international responsibility as well as individual criminal responsibility may be a means of improving victims' rights. States parties to the Ottawa Treaty could exercise their diplomatic protection on behalf of one of their nationals before the International Court of Justice in order to obtain reparation for prejudice suffered caused by the non-execution of an obligation by another State party.

The legality of the use of landmines could also be challenged by engaging individual criminal responsibility before the International Criminal Court. This international body has already created an important precedent with regard to incrimination in cases of rape. Organisations and associations for the defence of human rights obtained this incrimination through their persistent pleading before the ICC. This could also be the case for the use of landmines. In other words, if these organisations were more active with regard to the ICC, it could be possible to incriminate the use of landmines within the framework of actions taken against individuals.

¹¹⁵ United States Mission –Geneva Press Releases 2003 “General Comments of the United States on Basic Principles and Guideline on the Right to a Remedy for Victims of Violations of International Human Rights and Humanitarian Law”.

¹¹⁶ According to article 6 of the European Convention on Human Rights; article 8.2 of the American Convention on Human Rights; article 7 of the African Charter on Human and Peoples' Rights.



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II. Compensation Fund for mine victims

Despite changes in international law, mine victims have still not obtained real judicial recognition as an identified group. There have been some encouraging developments over recent years in the field of the rights of disabled people, and it is fully recognized that assisting landmine victims and improving the situation of people with disabilities are very closely related. However these aspects do not provide a response to certain dimensions of landmines harms. Given that, for the time being, the question of reparation for mine victims seems difficult to implement, it is worth examining whether the creation of a compensation fund could fill this gap.

Different systems could be envisaged for giving mine victims access to compensation: through national compensation mechanisms or through the creation of an international compensation Fund.

Examples of existing funds providing compensation for other kinds of injury and damage are interesting models to study. This document analyses three of them:

- Two national compensation funds for the victims of terrorism
- The International Oil Pollution Compensation Fund
- The United Nations Voluntary Fund for Victims of Torture

First of all, we need to identify which mine victims could obtain compensation from a hypothetical fund and what their needs would be in terms of compensation in order to then analyse the different models of compensation mechanism and the extent to which they could be applied to the area of mine victims.

1. What kind of compensation for mine victims and for what kind of injury and damage?

Mine victims are faced with three different kinds of damage and injury:

1. Physical injury requiring expenditure on health and care over the long term and may lead to death.
2. Injury to economic interest, including loss of earnings arising from the incapacity to work; loss of income when a field can no longer be used for agricultural purposes; loss of income for a victim's family.
3. Psychological and emotional injuries due to the trauma caused by the death of a family member or the constant threat of landmines.

Antipersonnel mine and UXO victims should get **financial compensation** for the harm suffered. This part of the study focuses on this particular aspect of compensation.

As victims of mine accidents often suffer from permanent disability, they need special provisions in their daily life. The person's deficiencies and limited capacity to allow him/her to participate fully within the society should be compensated. The victims should have:

- the right to an adapted daily environment;
- the right to use normal means of transport and communication;
- the right of access to technical aids and to essential human assistance.
- the concern for the needs and burden of the families and assistants.

This should be implemented through public policy related to disabled people.

According to the type of compensation fund and the kind of damages and injury suffered, compensation could also be claimed collectively instead of individually.

1.1. Physical injuries

Landmine injuries or trauma are all body lesions suffered by an individual caused by the explosion of an antipersonnel mine or UXO. The damage can affect the head, the abdomen, the throat, the back, or the limbs. When victims survive long enough to reach the hospital, they usually suffer from one of the three following types of injury¹¹⁷:

Type 1 (30%): Caused by stepping on a mine buried in the ground. The subsequent lesions result in the amputation of the foot or the leg with serious injuries to the other leg, the genital organs, and the arms. This type of injury is usually the most serious, and is often accompanied by burns.

Type 2 (50%): Caused by splinter mines. Deep wounds from the penetration of metallic splinters causing lesions all over the body, damaging the skin, the organs, and the bones. The multiplicity of deep injuries is life-threatening.

Type 3 (5%): Caused by an explosion during handling by deminers, children, or mine setters, which usually causes the mutilation of the upper limbs, and serious injuries to the face that can result in deafness and blindness.

15% of injuries caused by mine accidents do not enter these categories.

Whatever the type of ordnance, there are often lesions due to the "blast effect": a pathologic process causing lesions in a body exposed to a shock wave during an explosion.

Compensation should at least cover medical expenses and rehabilitation and care over the long term and be assessed on the basis of the following criteria:

- Pre-hospitalisation assistance and care (evaluation, first aid, and transportation);
- Hospital care (medical care, surgery, post-operative care and pain management);
- Rehabilitation (physiotherapy, occupational therapy, prosthetic appliances and technical aids, and psychological support).

The ICBL working group on victim assistance estimated the costs of rehabilitation at 9000 USD per mine accident survivor over their lifetime¹¹⁸. However, it is very difficult to assess the amount of compensation for each type of prejudice suffered. Indeed, according to where the victim lives, the costs of medical expenses differ substantially.

The care and physical rehabilitation of victims also depend on the kind of orthosis and prosthesis offered, the materials used etc.

1.2. Injury to economic interest

Injury to economic interest results in financial loss if:

- the survivor can no longer work because of a physical disabilities or mental trauma;
 - a victim's family is in dire need;
- sence of mines in the area prevents the exercise of professional activities.

Compensation for economic loss is also difficult to assess and should be estimated on a case-by-case basis according to the victim's family circumstances and his/her professional situation (income) before the accident.

Compensation should allow the victim to reintegrate in the professional and social life: professional redeployment, skills and vocational training, and income generating projects.

Funeral expenses for deceased victims should also be taken into account.

The presence of mines in an area may force individuals or communities to relocate. The amount of compensation should cover the economic loss for the individuals and communities and the socio-economic consequences caused by the relocation. In these particular cases, collective compensation may be more appropriate.

1.3. Psychological injury

Compensation for psychological injury is certainly the most difficult to estimate: by "psychological injury" we mean the trauma suffered by the survivors or the victim's family. In the case of survivors, it is worth remembering that social exclusion of the victim due to the social burden of disability can constitute a cause of psychological vulnerability.

A compensation for the direct victims' families should take into account the degree of relationship and the potential witnessing of the accident by a family member. As previously stated, the UNCC considers that the witnessing of an accident by a family member is a factor to be included in the calculation of compensation¹¹⁹.

1.4. A subjective or an objective approach?

The issue of compensation is a complex and wide-ranging one. Sir Kenneth Bloomfield, the Northern Ireland Victims Commissioner, notes in his report following the Omagh bombing, that he has «overall, [...] often come to the conclusion that schemes apparently well-matched to their purpose do not always deliver the goods»¹²⁰.

¹¹⁷ HANDICAP INTERNATIONAL, *Landmine Victim Assistance World Report 2002*, Lyon: HI, 2002, p. 458-459.

¹¹⁸ HANDICAP INTERNATIONAL, *Les mines antipersonnel aujourd'hui! Synthèse du Rapport 1999*, Paris: L'esprit frappeur, 1999, p. 89.

¹¹⁹ See part 2.1.2 of the first part of the study.

¹²⁰ Sir Kenneth BLOOMFIELD, *We will remember them: Report of the Northern Ireland Victims Commissioner*, 1998, para. 5.10.

In December 1987, Professor Desmond Greer of Queen's University Belfast wrote a paper on 'Compensation and support for victims of crime', which included the following recommendation: «*Consideration should be given to the overall effectiveness of the various provisions to ensure that the payment of compensation to the victims of crime - and particularly the victims of terrorist crime - was adequate*»¹²¹. This basic principle must constitute the basis on which any victim compensation scheme is designed.

Where the underlying yardstick is the loss of maintenance to a family, the death of one person may be deemed worth less than that of another, which highlights the issue of whether the test for compensation should be a subjective or an objective one. For example, a distinction is made between compensation for what a successful individual in the prime of his life with realistic expectations of continuing high earnings would receive, and compensatory payments made available in the case of an ailing older man with a long history of unemployment and poor job prospects. As a consequence of adopting the subjective test, the perception may be that one life has been deemed to be worth less than that of another: the compensation is for what has been lost in the material sense, and does not attempt to achieve any social objective.

The contrasting approach, the objective test, is where the awarding of compensation reflects ethical and social justice, and would therefore rule out discrimination, for the benefit is based on equal rights for every casualty, regardless of income at the time of injury. This illustrates the reality that there are different ways of developing a policy for the payment of compensation. The different schemes in operation in Great Britain and in Northern Ireland highlight these two possible approaches to compensation. No scheme will ever be universally acceptable: wherever the line is drawn, some applicants will find somehow themselves disadvantaged¹²².

2. An Applicable Model? National Compensation Funds

2.1. Introduction

Public enforcement of penal law focuses on the offender rather than on the victim. The general phenomenon of the irrelevance of the victim can be traced historically to the shift from private legal actions to public enforcement

schemes.¹²³ For a long time in England for example, the State had no role in enforcing criminal actions; interested parties, usually the victim, would prosecute the offender and collect the resulting fine or award. As the State assumed a more prominent role in enforcing sanctions, the victim progressively disappeared from the prosecution process. Eventually, victims lost both the discretion to bring an action and a pecuniary stake in the outcome of the trial¹²⁴.

The victim has in recent years gradually re-entered the public enforcement forum of penal law.¹²⁵ Previously, victims could only seek reparation from the offender through the initiation of a private tort action. Victims may now be compensated either at the criminal sentencing stage, receiving payments directly from the convicted offender, or through a State victim compensation programme. These two alternatives within the public enforcement forum correspond to the distinction between compensation and reparation. While compensation seeks from another agency recognition of the loss endured, reparation directly addresses the individual or organisation that wronged the victim¹²⁶. In relation to landmine victims, the question of seeking reparation from the perpetrators is not dealt with in this part as it has been discussed in the first part of this study. The analysis will instead focus on the issue of compensation, and the possibility of payment from a State agency for loss and injury suffered by landmine and UXO victims.

This analysis concentrates on existing schemes that compensate victims of terrorism. While much of the literature on the subject focuses on the separate issues of moral reparation and truth and reconciliation, for many, the identity of the perpetrator is not known. The payment of compensatory government Funds to victims of crime is thus the only means by which the inadequacies of the past may be redressed¹²⁷. This chapter will describe the workings of two recent compensation schemes in place for victims of terrorism, the first of which includes Guarantee Funds for Victims of Acts of Terrorism and Other Violations of the Law, a Fund set up in France in 1990¹²⁸ following terrorist attacks in the country. The second scheme is the existing system in Northern Ireland, whereby victims of terrorism have the right to claim compensation from the Secretary of State for injury or death caused by terrorist offences. Both models will be examined with a view of establishing an equitable system to compensate landmine victims. The underlying purpose of compensation schemes must also

¹²¹ Professor Desmond GREER, *Compensation and Support for Victims of Crime*, Fourteenth Report of the Standing Advisory Commission on Human Rights (1987). Emphasis in original. See <http://cain.ulst.ac.uk/issues/violence/victims1.htm>

¹²² *Ibid.*

¹²³ Omri BEN-SHAHAR and Alon HAREL, *Compensation of Victims of Crime: An Economic Analysis*, Mimeo, presented at the American Law and Economics Society Annual Meeting, New York (2000).

¹²⁴ W. McDONALD, *Toward a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13th American Criminal Law Review, 649, (1976).

¹²⁵ Omri BEN-SHAHAR and ALON HAREL, *op.cit.*

¹²⁶ Sandra PEAKE, Director of Wave Trauma Centre, contribution to the report of Sir Kenneth Bloomfield, *Compensation and Reparation*, Northern Ireland Victims Commission (1998).

¹²⁷ Omri BEN-SHAHAR and ALON HAREL, *op.cit.*

¹²⁸ Author's translation for *Fonds de Garantie des Victimes des Actes de Terrorisme et d'autres Infractions* [Hereinafter FGTI]. See *Law of 8 July 1983 Relative to the Creation of a Compensation Commission for Victims of Violations of the Law Established in all County Courts* (Author's translation for *Loi du 8 juillet 1983 relative à la création d'une Commission d'Indemnisation des Victimes d'Infractions auprès de chaque tribunal de Grande Instance*).



be highlighted, for the nature of the scheme will depend on its aim: whether it seeks to compensate fully for loss in the material sense, or whether the awarding of compensation would be a reflection of ethical and social justice.

2.2. Compensation Schemes for the Victims of Terrorism

2.2.1. Guarantee Fund for Victims of Acts of Terrorism and Other Violations of the Law (FGTI)¹²⁹

• Judicial Basis for the FGTI

A compensation Fund for victims of terrorism in France was set up under Article 9 of the **1986 Law relating to the Fight Against Terrorism and Attacks Against the Foundations of the State**¹³⁰. Victims of terrorism are afforded the status of civilian victims of war¹³¹.

Created in 1990, the FGTI regulates the compensation of victims of terrorism, as well as victims of other types of attack, including assault and rape¹³². The compensation regime is rooted in the 1986 Law, and payments are fixed by the FGTI in accordance with the victims. The FGTI is financed by a tax deduction from insurance contracts for goods¹³³; for every contract in 2001, this contribution amounted to 3.35 euros¹³⁴. Financial resources are maximised by the reimbursements received from those responsible for the attacks.

• Applying to the FGTI

The Administrative Council of the FGTI is competent to qualify the act of terrorism.

The FGTI compensates every victim regardless of his/her nationality, for acts of terrorism perpetrated in France after 1 January 1985. For acts of terrorism perpetrated abroad, the FGTI solely compensates victims of French nationality. The State Prosecutor of the French Republic or the relevant embassy and diplomatic representatives are to inform the FGTI of an attack and of the identity of any victims, in which case the FGTI will contact the victims

directly. Those who consider themselves a victim of an act of terrorism may address the FGTI directly. The victim or the next of kin have a time period of ten years from the date of the terrorist act to apply for compensation.

If conditions are met, the FGTI will compensate for the physical injury suffered by a person victim of an attack, or if the victim is deceased, the economic loss incurred by the next of kin, however benefits already paid by the State will be taken into account. Damage to goods is not covered by the FGTI¹³⁵.

• Compensation

The procedure for the payment of compensation is governed by Article 9 of the **1986 Law Relative to the Fight Against Terrorism and Attacks Against the Foundations of the State**¹³⁶.

- The compensation procedure

Payments to victims depend on the injury according to their permanent nature or not. This latter is determined by medical expertise. In both instances, the costs are to be reduced from social welfare bodies. In the case of death, the offer of compensation will be presented to the next of kin.

Compensation will be made for mental trauma, funeral expenses, and economic losses, and will be paid by social welfare bodies.

- Options for the victim

Once the victim receives the offer of compensation, he/she can accept it, discuss it further, or refuse it; in the case of refusal, the amount of compensation paid will then be determined judicially and the FGTI will be subject to the ruling of the tribunal.

- Other rights

Beneficiaries of victims of terrorist acts are exempted from legal succession. Victims of acts of terrorism committed after 1 January 1985 will benefit from the civilian victims of war statute. The rights and advantages that arise from this statute are contained in the **Code of Military Pensions for disability and Victims of War**¹³⁷, including the granting of a pension that cannot be held concurrently with any other, and access to free medical care and equipment.

¹²⁹ The following information is for illustrative purposes. The law governing the FGTI is contained in the insurance code in articles; L 126-1 and L 126-2, L 422-1 to L 422-5 for the legislative, R 422-1 to R 422-10 for the executive, A 422-1 for ministerial orders. The relative articles in the penal code are; 706- 3 to 706- 14, R 50- 1 to R 50- 28. See *Law of 6 July 1990 Relative to the Creation of the Guarantee Funds for Victims of Acts of Terrorism and Other Violations of the Law* responsible for compensating victims of acts of terrorism and victims of other violations (attacks, assault, rape) [hereinafter *Law of 6 July 1990*]. Author's translation for *Loi du 6 juillet 1990 relative à la création du Fonds de Garantie des Victimes des Actes de Terrorisme et d'autres infractions (FGTI) chargé de l'indemnisation des victimes d'actes de terrorisme ainsi que les victimes d'autres infractions (agressions, coups de blessures, viols)*.

¹³⁰ *Law of 9 September 1986 Relative to the Fight Against Terrorism and Attacks Against the Security of the State* (Author's translation for *Loi du 9 septembre 1986, relative à la lutte contre le terrorisme aux atteintes à la sûreté de l'Etat* [hereinafter *Law of 9 September 1986*]).

¹³¹ *Law of 23 January 1990 Granting Civilian Victim of War Status to Victims of Terrorism* (Author's translation for *Loi du 23 janvier 1990 accordant aux victimes des actes de terrorisme le statut de victimes civiles de guerre*).

¹³² *Law of 6 July 1990, op. cit.*

¹³³ *Guarantee Fund for Victims of Acts of Terrorism and Other Violations of the Law (FGTI)*, available at <http://www.fgti.fr>

¹³⁴ This contribution amounted to 22 FRF per contract in 2001. *Learning about the FGTI*, available at <http://www.fgti.fr/connaitre.htm>

¹³⁵ *Conditions for Submitting a case to the Court*, available at <http://www.fgti.fr/condterro.htm>

¹³⁶ *Law of 9 September 1986, op. cit.*

¹³⁷ Author's translation for *Code des pensions militaires d'invalidité et des victimes de guerre*. See MINISTRY OF FORMER COMBATANTS AND VICTIMS OF WAR, *Guide-Barème des invalidités applicable au titre du code des pensions militaires d'invalidité et des victimes de la guerre*, Paris: Imprimerie Nationale, édition de 1956.

Every victim of a terrorist act will become a member of the National Veteran's Office (ONAC), which provides both a disability card if the victim is disabled, and significant help with all administrative and social aspects¹³⁸.

- Proof

In addition to all conditions required and in support of his/her application, the victim has to prove and provide all relevant documents and information¹³⁹.

2.2.2. Northern Ireland

The Criminal Injuries Compensation (Northern Ireland) Order 1988¹⁴⁰, which came into operation on 1 August 1988, provides a right to claim compensation from the Secretary of State for injury or death caused by violent, including terrorist offences in Northern Ireland. The Compensation Agency carries out the Secretary of State's functions in relation to the provision of compensation for criminal injuries under the legislation¹⁴¹.

• When is compensation payable?

Compensation is payable if a person is injured or killed in Northern Ireland as a direct result of either a violent offence or attempting to arrest a suspected offender, or to prevent the commission of an offence.

• Who can apply?

The victim usually makes an application for compensation. An application may also be made by any person responsible for the maintenance of the victim, or any relative of the dead victim for pecuniary loss for example (loss of earnings), or for expenses reasonably incurred as a direct result of the victim's injury or death.

• What compensation will be paid?

Where a person has sustained a criminal injury, compensation may be paid for the following: expenses actually and reasonably incurred as a result of the injury - pecuniary loss resulting from the injury, including loss of earnings arising from incapacity to work, and for pain, suffering, and loss of amenities caused by the injury. In the case of the death of the victim, compensation may be paid for funeral expenses.

There are significant respects in which compensatory arrangements in Northern Ireland differ from those in Great Britain. In brief, compensation from the State for victims of crime in Great Britain is now made by virtue of the **Criminal Injuries Compensation Act 1995**¹⁴² under

a tariff scheme, under which a special tariff is laid down for each kind of personal injury and for death. In Northern Ireland on the other hand, State compensation is governed by common law principles that seek to compensate the particular loss suffered by each individual victim. These principles are subject to interpretation and application by the courts accustomed to assessing the damages payable to ordinary accident victims in the common law context. Academics and other observers note that the Northern Ireland scheme is taken as a whole, generous because awards are not, as they are now in Great Britain, subject to a cap of £500,000. Considering the total amount given to the victims, an estimated £186 millions were paid: £26 millions for the death of victims, £160 millions granted for non lethal arms. In assessing these figures, account must be taken of the fact that much of this compensation was paid a considerable time ago¹⁴³. The Northern Ireland scheme of State compensation is the only European scheme that seeks to provide full compensation to all victims of violent crime, and is understood in civil action as damages involving personal injury and death¹⁴⁴.

As a result, the system in Northern Ireland differs from that in Great Britain in that the former is implemented on a common law basis, and in that full awards can be made without the constraints of a statutory tariff, which fixes the amount of the award according to the category of the victim applying. In essence, the scheme in place in Northern Ireland corresponds to a subjective approach to compensation, while in Great Britain, an objective approach is employed.

2.3. Review of criminal injuries compensation

In response to the problems associated with State victim compensation schemes, a review of measures was proposed in 1998 by the Northern Ireland Victims Commissioner. The Review sought to advise the government on the adequacy of compensation arrangements in Northern Ireland in the light of the experiences of victims of terrorist violence¹⁴⁵. It was also concerned with rectifying any identified shortcomings in a new statutory framework that provided for a system of criminal injury compensation in Northern Ireland. The Review took into account the ways in which other jurisdictions compensate victims of violent crime, and the need for fairness, equity, openness, and affordability. Marion Gibson and Professor Desmond Greer, a leading authority on the issue of victim compensation, conducted the Review. The recommendations of the Review could afford an interesting basis for a scheme to compensate landmine victims.

¹³⁸ *Compensation*, available at <http://www.fgti.fr/indterro.htm>.

¹³⁹ *Information Required*, available at <http://www.fgti.fr/piecterro.htm>

¹⁴⁰ Statutory Instrument 1988 No. 793 (N.I. 4).

¹⁴¹ *The Compensation Agency, Charter Statement*, available at <http://www2.nio.gov.uk/comp98.htm> See also *The Compensation Agency, A Guide to Criminal Injuries Compensation in Northern Ireland*, Northern Ireland Office.

¹⁴² Criminal Injuries Compensation Act 1995 (c. 53).

¹⁴³ Sir Kenneth BLOOMFIELD, *We Will Remember Them, Report of the Northern Ireland Victims Commissioner*, para. 5.6, (1998).

¹⁴⁴ Desmond GREER, *Compensating Crime Victims – A European Survey*, Freiburg: Max-Planck-Institut (1996).

¹⁴⁵ Press Release by Adam Ingram, Minister for Victims, 12 August 1998.



Report of the Review: main recommendations

The Review recommends a merging of the two systems applied in Northern Ireland and in Great Britain, and proposes a hybrid scheme where a new tariff approach is adopted for claims for less serious injuries¹⁴⁶. There should be no payment for legal support in making a claim, according to the Review. Rather, assistance for applicants should be provided by Victim Support, and no deductions should be made from the award with respect to social security benefits or pensions¹⁴⁷.

However, claims resulting from serious injury and death should continue to be dealt with on the existing common law basis, with expenses paid directly to the applicant in successful cases. This means that in such cases, there is no fixed limit to the amount that can be awarded.

The system should incorporate a new fast track and relatively informal review procedure within the Compensation Agency. This would allow people to have differences over their claims resolved without the need to appeal to the courts, and would offer other benefits, including speed, informality, and confidentiality.

The Review also recommends that the scope of the scheme would be expanded to allow compensation to be paid to those who suffer a recognised psychiatric illness as a result of:

1. The death or injury of someone with whom they have a close tie of love and affection whether or not they were present at the scene of the incident;
2. Fear of immediate physical harm;
3. Assisting with rescue efforts at the time of the incident or in its immediate aftermath when these are not part of their professional duties; and
4. Assisting with rescue efforts in the course of their professional duties if they feared that someone with whom they had a close tie of love and affection had been injured or killed in the incident¹⁴⁸.

According to the Review, a spouse, cohabitant, parent, and child of the deceased should be awarded a bereavement payment “[...] to acknowledge the grief and sorrow caused by the death, and the loss of non-pecuniary benefit (i.e. loss of care and guidance). An amount of £10,000 should be paid to a spouse or partner, and £5,000 to a parent or child, subject to an overall limit in each case of £50,000.”¹⁴⁹

Again, the amount of the award should be fixed by statute and should not be at the discretion of the courts.

The Compensation Agency should, according to the Review, be given the authority to reopen a case where as a result of the injury there has been a material change in the victim’s medical condition or in his earning capacity, when compared to the basis on which compensation was originally assessed.

Following the publication of the Review’s findings, the Victims Commissioner stated that “[t]he Review team was not at all persuaded that the wider support of victims yet enjoys an appropriate public expenditure priority. Society, in a troubled community, may need to think less about expensive capital projects and more about the restoration and development of its human capital¹⁵⁰.” The following compensation for landmine victims proposals build on this invaluable development of human capital.

2.4. Application of National Compensation Scheme: Compensation Mechanism to Landmine Victims

A national compensation scheme for antipersonnel mine and UXO victims should enact the measures common to both the FGTI and to the victim compensation regime in Northern Ireland. The requirements regarding the time limit, proof, the right to appeal, and who can apply are broadly similar in Northern Ireland and in France. Both regimes have a fixed time limit between the event and the application for compensation, have strict requirements regarding proof, incorporate a right to appeal any offer of compensation, and operate under a similar definition of a ‘victim.’ The schemes differ with regards to the amount of compensation paid, and the amount may be determined either subjectively or objectively.

If we consider a compensatory scheme concerning landmine victims, referring to the latter, such a scheme should compensate therefore every landmine victim regardless of nationality for landmine accidents on national territory, and should also extend to nationals who are injured abroad. The relevant embassy or diplomatic representative should inform the scheme of the accident and of the identity of the victims, in which case the victims should be contacted directly. Also, the scheme should be subject to a limitation clause, whereby a maximum period would be allocated between the date of the accident and the application for compensation. The scheme should pay

¹⁴⁶ Professor Desmond GREER and Marion GIBSON, *Review of Criminal Injuries Compensation (Northern Ireland)*, (1999), available at <http://www.nio.gov.uk/issues/agreelinks/implemgov/990702b-nio.htm> [hereinafter *Review*]. The Review recommends drawing up a Northern Ireland tariff based on levels of awards in Great Britain, for injuries up to level 10 of the British tariff (awards of up to £5,000 for example, scarring of lower limbs causing serious disfigurement, and dislocated shoulder with continuing disability).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*, Recommendation Number 4, ‘Compensation for Psychiatric Injury.’ The *Review* does not specify whether the Recommendation would be enacted under a tariff scheme or under the common law. The concept of nervous shock was developed by the courts in Great Britain and due to the significant amount of caselaw in the area, it is suggested that a common law approach would be followed in Northern Ireland. Indeed, the test for the four categories of victim found in the *Review* derives from the judgements of Lord Lloyd in *Page v. Smith* [1995] 2 ALL ER 736, and Lord Wilberforce in *McLoughlin v. O’Brien* [1983] 1 AC 410. In *Alcock v. Chief Constable of South Yorkshire Police* [1991] 4 ALL ER 907, the concept of nervous shock was extended to incorporate ‘secondary victims’, including bystanders, who are not participants in the events that give rise to the claims, or may not have even been present.

¹⁴⁹ GREER and GIBSON, *op. cit.*

¹⁵⁰ Sir Kenneth BLOOMFIELD, Press Release, 2 July 1999.

a first instalment, at the latest one month after the request for compensation to aid the victim with initial costs. The scheme should then present the victim in writing with a definitive offer of compensation, at the latest three months after the receipt of proof of loss or injury from the victim. The victim would then be given fifteen days in which to consider the offer, and if he/she accepts, the scheme should pay the remainder of the compensation. If he/she rejects the offer, he/she ought to be able to bring his/her claim to a competent court¹⁵¹.

The scheme should compensate for the physical, psychological, or sensorial injury suffered by the person, or if the person is deceased, the economic loss incurred by the next of kin. Those prevented from pursuing their normal activities as a result of social prejudice or any other human right violation should also be compensated. In the case of injury with no permanent after-effects, the scheme should compensate on the basis of medical certificates submitted, as well as on proof of costs and loss of earnings. In the case of injury with permanent after-effects, the scheme should offer one or more provisional payments. Once the victim's state of health has been stabilised, the scheme should give the victim a detailed breakdown of the proposed payments on the basis of the medical reports, and costs should be deducted from social welfare bodies.

The scheme should be a hybrid one, combining a system of fixed awards for less serious injury with a more flexible approach for more serious injury, which is reflective of the Northern Ireland model. A fixed bereavement award should also be set, which would include a lump sum payment for the spouse and each child, subject to an overall limit¹⁵².

Conclusion

The hypothetical model outlined above illustrates the workings of a hypothetical compensation fund for mines victims; it would provide the necessary support to those who mourn and to those who face the continuing effects of serious injury, both the injured themselves and those who care for them.

Existing victims of terrorism compensation mechanisms are useful in both identifying and developing compensation mechanisms for landmine victims. The simple transposition however, of the victims of terrorism compensation model to one for landmine victims does not address a number of problems, including the lack for example, of national infrastructure capable of providing medical reports and certificates, proof of costs, and loss of earnings. Lack of infrastructure may itself be problematic in countries most affected by landmines and their after-effects. Also, international aid will have to be

solicited in order to supplement national Funds. Indeed, the countries most affected by antipersonnel mines and UXO are often classified among the poorest. Although this type of mechanism has been introduced in certain zones such as in Taiwan where the Ministry of Defence's Compensation Committee for damages caused to civilians awards compensation to civilian mine victims¹⁵³, not all countries are in a position to do so. Regarding this issue of funding, international compensation fund can appear more relevant.

3. An applicable model? the International Oil Pollution Compensation Funds

Although there is at present no specific international fund to compensate victims of antipersonnel mines, there are such funds to compensate victims of another type of pollution: pollution by persistent oil. In 1969, special rules were drawn up at international level to guarantee compensation for loss or damage suffered by victims of oil slicks. Two international Funds were created in 1971, then in 1992, to obtain compensation for the victims, even if the person responsible for the pollution could not be identified. The two Funds, the IOPC (International Oil Pollution Compensation Funds), are based on the principle of no-fault liability. They are financed by the oil industries and run by the Member States. A protocol, not yet entered into force, has been adopted in London on May the 16th 2003, by the diplomatic conference of the IMO (International Maritime Organisation). It aims to institute a third degree of complementary compensation¹⁵⁴.

The comparison with the IOPC seems even more interesting in view of the fact that the oil industries, like the arms industries, are highly strategic sectors for States. The States' interests, even if they are no longer the only producers and users of mines, and the firms' interests are, in both cases, closely linked. In the same way, the non-pecuniary liability for the loss or damage caused by these two types of pollution could be shared by the firms and the producing and importing States, where it is not possible to associate other actors involved in the use of mines who are beyond any control owing to their lack of legal personality in the international context.

Taking this observation as our starting point, could it be possible to create an international compensation fund for victims of antipersonnel mines, funded by the arms industries? In other words, could the IOPC model be used to compensate victims of mines?

To reply to this question, it would seem necessary to take into account for each type of pollution (by antipersonnel mines or fuel oil), the legal and practical context, the different actors involved and the risks and potential advantages they

¹⁵¹ Adapted from *Conditions for Submitting a case to the Court*, FGTI, available at www.fgti.fr/indterro.htm.

¹⁵² Adapted from GREER and GIBSON, *op. cit.*

¹⁵³ In February 2003, a total of 53 mine victims (families and survivors) are said to have received compensation by this means, and 57 requests for compensation are still being processed. Landmine Monitor report 2004, Washington : Human Rights Watch, 2004, p 1239.

¹⁵⁴ See below, "The IOPC's complementary role".



are seeking, as well as the logic underlying the creation of an international compensation fund.

3.1. Presentation of the IOPC: international compensation mechanism to deal with the risk of oil pollution.

Following the *Torrey-Canyon* oil slick problem, the first major example of pollution that affected Brittany in 1967, the international community decided to set up an international compensation mechanism based on the principle of strict liability (no-fault liability) together with a compulsory insurance system.

In international law, the principle of no-fault liability (strict liability or else risk liability) describes rules governing compensation for loss or damage when liability can be evoked in the absence of fault.

The main objective of the new international rules governing compensation for oil pollution is to ensure the “*reasonable and prompt*” settlement of claims for damages owing to pollution. According to the new rules, the no-fault liability is incumbent upon owners of oil tankers, up to a certain limit. When this limit is exceeded, the oil recipients (primarily oil companies) pay the difference, up to a higher limit, through the intermediary of an international Fund to which they contribute. The new rules are therefore based on the established principle of liability shared between the owners of oil tankers and oil interests.

3.1.1. The legal framework: a system of shared liability in an international legal framework

According to the official definition, “*The International Oil Pollution Compensation Funds 1971 and 1992 (IOPC Funds) are two intergovernmental organisations which provide compensation for oil pollution damage resulting from spills of persistent oil from tankers*¹⁵⁵.”

They have been created in the framework of international conventions¹⁵⁶. As the 1971 Convention was terminated on 24th May 2002, and the 1971 Fund has to be liquidated in the coming months, we will limit our analysis to the 1992 Fund.

The **1969 and 1992 Conventions on Civil Liability** govern the liability of ship-owners for oil pollution damage.

They lay down the principle of their strict liability (i.e. their no-fault liability). Consequently, the IOPC’s main function is to offer additional compensation to victims of oil pollution in the Member States, when such victims cannot be totally compensated according to the terms of the Conventions on Civil Liability. Anyone who has suffered pollution damage (including clean-up costs) in a member State, for example individuals, companies, local authorities or States can claim compensation.

• The provisions of the 1992 Civil Liability Convention

The Civil Liability Convention imposes strict liability on the ship-owner for pollution damage caused by the escape or discharge of persistent oil from his/her ship. The owner is thus liable even in the absence of fault on his or her part, except if he/she proves that the damage resulted from an act of war, a grave natural disaster, an act of sabotage committed by a third party or negligence on the part of the public authorities responsible for maintaining lights and other navigational aids.

This provision was designed to provide better compensation for victims, who can bring an action against the person who is in theory the most solvent. If the ship-owner is not responsible for the accident, he/she can then take action against those he/she deems responsible.

A ship-owner can nonetheless limit his/her liability according to the ship’s tonnage¹⁵⁷.

The ship-owner is deprived of the right to limit his/her liability “*only if it is proved that the pollution damage resulted from the ship-owner’s personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result*”¹⁵⁸.

Finally, under the 1992 Convention, claims for compensation can only be made against the official owner of the tanker concerned. The Convention prohibits claims for compensation against the owner’s agents, the pilot, the charterer, the ship’s manager or operator, or against any person carrying out salvage operations or taking preventive measures.

• The IOPC’s complementary role

The IOPC compensates the victims of oil pollution damage when they do not obtain full compensation under the Civil Liability Convention, either because the ship-owner is exempt from liability (see previous item); or because he/she is financially incapable of meeting his/her obligations and his/her insurance is insufficient to satisfy the claims for compensation; or else because the damage exceeds

¹⁵⁵ IOPC, *Annual Report 2002, International Oil Pollution Compensation Funds, Report on the Activities of the International Oil Pollution Compensation Funds in 2002*, London, United Kingdom, (2003), 182 pages, p.14.

¹⁵⁶ The first Fund, called the ‘1971 Fund’, was created in 1978, in the framework of two international Conventions: the 1969 International Convention on Civil Liability for Oil Pollution Damage and the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage. These two Conventions were modified in 1992 by two protocols, which led to the creation of a second compensation Fund, called the ‘1992 Fund’. The modified Conventions, i.e. the 1992 Convention on Civil Liability and the Convention on the Establishment of the 1992 Fund, came into force on 30 May 1986.

¹⁵⁷ The amount of compensation due by an owner is limited to 3 million SDR (Special Drawing Rights. 1 SDR represents about 1.42 euros) for a ship not exceeding 5 000 units of gross tonnage. To this are added 420 SDR for each additional unit of tonnage for ships with a tonnage between 5 000 and 140 000 units of tonnage. For ships with a tonnage equal to or higher than 140 000 units of tonnage, the limit is 59.7 million SDR. So that the owner is constantly able to take on his/her liability, he/she is obliged by the 1992 Convention to be insured by the “Protection and Indemnity Club” or another specialized insurance company.

¹⁵⁸ IOPC, *Annual Report 2002, International Oil Pollution Compensation Funds, Report on the Activities of the International Oil Pollution Compensation Funds in 2002*, London, United Kingdom, (2003), 182 pages, page 16.

the limit of the ship-owner's liability under the Civil Liability Convention.

The Convention does not provide for total compensation for the damage suffered, but for fair and reasonable compensation, because of the amounts of money at stake. It thus sets a maximum amount for each incident.

The compensation paid by the 1971 Fund for a given incident was limited to an overall amount of 60 million SDR, which included the sum paid by the ship-owner. The 1992 Fund was created partly to satisfy the need to raise compensation limits. At present, the maximum amount paid by the 1992 Fund for a given incident is 135 million SDR. This limit has been raised of 50,37% to 203 million SDR (302 million USD) as from 1 November 2003¹⁵⁹.

If the total amount of claims approved by the Fund for a given incident exceeds the total amount of compensation available, then the compensation given to each claimant is reduced proportionally, so as to treat all claimants in the same way (principle of equality of the victims).

This compensation system applies to pollution damage suffered in the waters of the countries parties to the Conventions, wherever the accident occurred, wherever the oil tanker comes from and whoever owns the oil. Any individual, association, firm, public or private body, local authority or State having suffered damage by pollution in a Member State can claim compensation. The costs actually incurred and the damage actually suffered because of oil pollution may give rise to compensation.

• The concept of 'pollution damage'

'Pollution damage' is defined, in the 1992 Convention, as being any loss or damage caused by contamination. As regards damage to the environment, other than the loss of income resulting from the modification of the environment, it is specified that compensation is limited to the cost of "reasonable measures actually taken or to be taken to improve the state of the contaminated environment". Pollution damage also includes the cost of "reasonable" preventive measures, that is measures taken to avoid or minimise pollution damage.

As regards ecological damage, the IOPC statutes are clear: the Fund compensates costs incurred, and not the damage established by a statistical model. Claims for compensation regarding changes to the environment are only accepted "if the claimant has sustained an economic loss that can be quantified in monetary terms". Ecological damage is therefore not taken into account as such. Only "reasonable measures of reinstatement" can be

compensated, and provided that their cost is "reasonable" and proportional to the results "likely to be achieved".

3.1.2. Structure and financing system: a Fund run by the Member States and financed by the oil industries

• A Fund run by Member States' representatives...

The 1992 IOPC is an intergovernmental organisation with a legal personality under international law. The Administrator of the Fund is its legal representative. This has been Måns Jacobsson's function since the creation of the Fund. It is also composed of an Assembly made up of representatives of member states and an executive committee.

The IOPC cooperates with numerous intergovernmental organisations and international non-governmental organisations, as well as bodies created by private interests involved in maritime oil transport (owners of oil tankers, oil companies, specialized insurance companies, etc.).

In April 2004, the 1992 Fund was composed of 85 states members.

This number should increase in the coming months because of the forthcoming liquidation of the 1971 Fund. It should be pointed out that the Member States, though they are from both 'industrialized' countries and 'developing' countries, are all coastal States, and therefore they are all possible victims of an oil slick.

• ... and financed by the oil industries

The IOPC is financed by the annual contributions paid by any person (government authority or company) having received more than 150 000 tons of crude oil or heavy fuel oil in the ports or terminals of a Member State during the calendar year in question, following its maritime transport.

The contributions are calculated by the Secretariat of the Fund on the basis of oil reports drawn up by the States, according to the estimated compensation payments and administrative costs for the coming year, and voted by the Assembly. They are paid directly to the IOPC by the contributors. As the payments made by the 1992 Fund for compensation claims vary considerably from one year to the next, the level of the annual contributions to be paid is also very variable.

The main contributors are the oil companies in industrialized nations. In 1999, 86% of total contributions came from 10 countries. In 2001, 79% came from 9 countries: Japan, Italy, Korean Republic, the Netherlands, France, United Kingdom, Singapore, Spain and Canada.

¹⁵⁹ Moreover, the future protocol intends to multiply by five the compensation ceiling for victims to 1 billion Euro (1.115 billion USD), or 750 million DTS. The approval of the complementary Fund is not obligatory but opened to each state party to the 1992 Fund. The protocol would enter into force three months after having been ratified by at least eight states that have received 450 million hydrocarbon tons submitted to contribution during one civil year. Finally, the Fund would only compensate for damages from pollution within the territory of one of the states parties to the complementary Fund, and that occur after the entry into force of the Protocol. IOPC 92, *Claims Manual*, p. 30.



3.1.3. The procedure

The IOPC's procedure is based on an amiable settlement of the damage sustained by victims. However, if the claimants are not satisfied with the amount they have been granted, they may refer the case to the competent national court where the accident took place so as to obtain fairer compensation. An action must be brought against the defendant within three years of the date of pollution damage, or within six years of the date of the incident having caused the pollution.

Outside this timeframe, claimants lose definitively their right to bring an action.

Claims for compensation must be submitted to the IOPC or to the ship-owner's insurance company, with documentary evidence. The claimants are responsible for quantifying and proving their loss. The Fund cooperates closely with the insurance companies to settle claims, and generally carries out an investigation into the event and an assessment of the damage. The claims' merits from a technical viewpoint are studied by experts appointed by the IOPC.

The general criteria for admissibility of claims are the following¹⁶⁰:

- any expense or loss must actually have been incurred;
- any expense must relate to measures which are deemed reasonable and justifiable;
- there must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill;
- the economic loss must be quantifiable.

Claims for compensation for pure economic loss (i.e. loss of income suffered by people whose property has not been contaminated) are only admissible if they refer to loss or damage caused by contamination: the cause must be pollution, and not the incident itself. Moreover, there must be a "reasonable degree of proximity"¹⁶¹ between the contamination and the loss suffered by the claimant.

Finally, to be admissible, measures aimed at preventing pure economic loss (a publicity campaign for example) must have a "reasonable" cost that is not "disproportionate" to the damage or loss which they intend to mitigate. The measures must be "appropriate" and offer "a reasonable prospect of being successful".

The IOPC thus lays great stress on the concept of "reasonable measure", so as to avoid abuse.

According to its statutes, responses must be adapted and proportionate to the loss.

As regards preventive measures and clean-up operations, for

example, the Claims Manual edited by the IOPC specifies: "The 1992 Fund compensates the cost of reasonable measures taken to combat the oil at sea, to defend sensitive resources and to clean shorelines and coastal installations. The relationship between these costs and the benefits derived or expected, should be reasonable"¹⁶².

• a system that removes liability

In fact the IOPC acts as a mutual risk system, inasmuch as it relieves the operators of vehicles transporting oil of direct liability. These operators contribute in exactly the same way to the Fund, whether they have had any accidents or not, and whatever state their ships are in.

Besides the advantage, for the potential persons responsible for an oil slick, of knowing their legal obligations and exemption from liability in advance, this system is interesting in that the two circles that create the risk (the oil transport industry and the industry that refines and treats the product) suffer the consequences of the pollution. The "polluter pays" principle is thus respected. Moreover, the channelling of liability to the ship-owner has the advantage of encouraging the designated responsible person to take the necessary precautions and to take out the necessary insurance contracts.

Finally, it should be recalled that the IOPC is the product of States, and not an insurance system set up by oil companies. The rules of the game are set by the States. In principle, it is up to them to change the rules so as to make good the imperfections of the system. We should however qualify this remark: the States, which are both taxpayers and tax collectors, have an ambiguous role in the mechanism. Thus, it sometimes happens that far from just making sure that the contributing industries pay levies to the IOPC, the States fight for these industries' interests (which are also indirectly their own).

3.2. Application of model: Compensation Mechanism to Landmine Victims

The IOPC was set up in the framework of a strategy for supervising a thriving trade, the oil trade, to provide protection from the risk of oil slicks, which is an accepted risk though evidently not sought-after.

It now constitutes international regulation governing compensation and intended to provide protection from the risks inherent in the maritime transport of oil, a pacific and legally recognized economic activity.

On the contrary, antipersonnel mines are placed voluntarily by actors who are totally aware of what they are doing and who use risk in their military strategies. The

¹⁶⁰ IOPC 92, *Claims Manual*, op. cit., June 1998, p. 17-18.

¹⁶¹ *Ibid*, p. 25. The criterion of reasonable proximity includes the geographic proximity between a claimant's activity and the contamination, the degree to which a claimant was economically dependent on an affected resource, the extent to which a claimant had alternative sources of supply or business opportunities, and the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the pollution.

¹⁶² *Ibid*, pp 18-19.

causes of mine pollution are thus very different from those of oil pollution. We cannot therefore make an immediate comparison between the IOPC and a possible international compensation Fund for damage by antipersonnel mines. Nonetheless, from this viewpoint the system is rather interesting.

3.2.1. Pollution damage: damage linked to the use of mines

In the framework of the IOPC, the system aimed at compensating for damage caused to the environment.

Anti-personnel mines can also have serious consequences for the environment. Consequently, one could imagine a State whose territory had been mined by another State availing itself of a violation of international environmental law before an international court so as to obtain compensation¹⁶³.

In fact, international environmental law constitutes a major legal base in the framework of the fight against mines. However, though the damage caused by maritime pollution affects mainly the environment and indirectly man via a loss of earnings that may have been occasioned by the damage, mines on the other hand affect man directly. That being the case, using environment law to obtain compensation for victims of mines would amount to leaving aside compensation for the physical harm suffered by victims of mines, without totally excluding it.

In the sphere of mines, environmental law must go hand in hand with human rights and humanitarian law.

3.2.2. The transposition of a system based on no-fault liability

The system of no-fault liability seems very appropriate when dealing with mines. Though accepting the principle of no-fault liability in this domain may seem shocking from a moral point of view, it nonetheless offers the advantage of avoiding situations of conflict (in the search for liability or fault) which would only result in harming the victim even more or reducing his/her chances of obtaining compensation.

The search for liability poses a number of problems:

- In the framework of the IOPC, the actors involved can be clearly identified: ship-owners and oil companies, and possibly States.

In the framework of mines, the actors cannot always be identified. Apart from the States and arms firms, there are actors difficult to identify (such as rebel groups, opposition

governments etc.) and this makes action to obtain damages more difficult.

- The IOPC is based on a system of shared liability¹⁶⁴, on Conventions establishing the civil liability of the owners. The compensation Fund is only used to supplement compensation.

On the other hand, those responsible for accidents caused by mines are not legally responsible as are the ship-owners in the case of an oil slick. There are no legal rules governing the liability of users of mines other than the Ottawa Treaty and, in certain circumstances, the Geneva Conventions and Additional Protocol I¹⁶⁵.

- If the victim cannot take court action against the person having used a mine, he/she would find it difficult to claim compensation from the producer, firstly because it is difficult to prove where a mine has come from (especially when it is handmade) and also because the victim is not often in a situation to be able to do so.

The possible involvement of firms which produce antipersonnel mines and UXO or which used to produce those weapons in the financing of an international compensation fund is even more problematic because the mine industry is made up of manufacturers of components rather than mine manufacturers as such. Moreover, some mine components (powder, lighters, release mechanisms etc.) are not specific to the military industry, they are also used by civil industry. The manufacturer of components' share of political liability is therefore difficult to assess.

- Moreover, the use of anti-personnel mines and their production have only been considered illicit under international law since the signature of the Ottawa treaty, and only as regards the signatory States. Consequently, what international legal basis may be used to claim compensation from a mine producer for the period preceding the treaty, or from a producer belonging to a non-signatory State? One could invoke the strict liability of States, which does not depend on the commission of an illicit act under international law. However, according to the general international law, strict liability is almost never applied at international level¹⁶⁶.

It thus seems difficult to set up a compensation fund for victims of mines, to be used in addition to prior proceedings that establish the offender's liability. On the other hand, we could envisage a compensation fund to be used after exhaustion of domestic remedies (for example to compensate victims of crimes in those countries having established such remedies) or else in addition to compensation already received but considered insufficient.

¹⁶³ See para. 1.5 of the first part of this study.

¹⁶⁴ The risk liability of the ship owners is introduced by the 1992 Civil Liability Convention, which lays down the principle of strict liability for ship owners and creates a system of compulsory liability insurance. Regarding to landmines, one would have to think to a similar convention introducing the liability of mine manufactures.

¹⁶⁵ See first part of this study.

¹⁶⁶ See first part of this study.



3.2.3. *What legal foundation in the absence of international universally accepted rules governing the use of mines?*

As we have seen, the IOPC fits into an elaborate set of international rules governing the oil trade. We should thus determine on what legal foundation a compensation Fund for victims of mines could be set up.

For the moment, the Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (the Ottawa Treaty) postulates a clear unequivocal ban on the production and use of anti-personnel mines.

At first glance, it would seem logical to include a compensation Fund in the framework of the Treaty, especially since the States have committed themselves to providing assistance to victims of mines.

Furthermore, the States Parties are also partly responsible for accidents that take place after they have ratified the Treaty, since they have neglected their duty to take precautions (delimiting mined zones, preventing accidents etc). Indeed, the Member States of the Convention have committed themselves to taking a number of measures to prevent anti-personnel mines from being a continual threat to the civil population. If these measures are not taken and an accident ensues, the State on whose territory the accident takes place could be accused of committing a fault.

Nevertheless, the limits of this postulate are easy to see. Insofar as the mine trade is only illegal for the signatory States of the Ottawa Convention, only these countries would be liable under its dispositions, and this could dissuade other States from joining the Treaty and thus limit the number of victims who have access to the Fund. Establishing such a Fund in the framework of the Ottawa Treaty would exclude the financial contribution of States not parties to the treaty and thus limit the available resources.

If the principle of no-fault liability is accepted in the sphere of mines, would it not be preferable to set up a Fund independent from the Ottawa procedure and based on international solidarity?

3.2.4. *The contribution system or the difficulty of involving the arms industries in a Fund based on solidarity*

• **A Fund created by the States, who join on a voluntary basis**

Would governments be ready to create a compensation Fund for victims of mines based on the IOPC model?

In the case of oil pollution, governments, like the oil companies, are very interested in becoming members of the IOPC since, in the event of a catastrophe, the pressure of public opinion is such that they are obliged to intervene and spend money on repairing the damage caused and on compensating the victims. The IOPC system enables them to have these expenses reimbursed and to satisfy most of the victims' claims for compensation. They are thus able to respond to the pressure of public opinion.

In the case of mine pollution, however, the countries likely to finance a compensation Fund are not affected on their territory by the problem of anti-personnel mines. Consequently, the only advantage for these countries of creating and financing an international compensation Fund is to relieve the pressure of public opinion.

The example of class action and particularly the out of court settlement won by Kenyan victims of mines against the British Government in 2002 enables us to qualify this remark¹⁶⁷. The UK Ministry of Defence agreed to grant compensation to the Kenyan nationals for the damage caused by mines used by the British army during military training and left behind in Kenya. This example constitutes an interesting legal precedent, but it remains a unique case for the moment.

As for the countries most affected, who would benefit greatly from a compensation Fund, they are often in difficult economic situations, and do not have the necessary resources to finance such a Fund.

The States' contribution to the Fund should therefore be made on a voluntary basis in the name of international solidarity.

• **The arms industries' contribution**

The IOPC is of real benefit not only to victims and States but also to ship-owners and oil companies. The ship-owners are better protected in the case of an oil slick since they have limited liability, the amount of compensation is limited and they are able to get insurances.

The IOPC also functions as an insurance system for which the oil industries accept to pay, because it rids them of any liability in the case of an accident. If such a system did not exist, the oil companies could be held responsible for the damage caused by an oil slick and would undergo the risk of having to pay the compensation set by law or by public opinion in the affected country.

First of all, in the case of mines, it must be underlined that it is essentially the States who buy the element responsible for the damage, and not the industries. Furthermore, the industries cannot be asked to finance a Fund because of a risk of pollution during transport. Therefore, in the case of anti-personnel mines it can be argued that the States have a much greater political responsibility than the industries

¹⁶⁷ See part one of the study concerning the right to reparation (2.3.2 Collective claims).

that produce, or have produced, anti-personnel mines under the States' authority. The exception is of course handmade mines, which are made privately. Even so, the mine-producing industries' participation in an international compensation Fund can be justified insofar as these industries have benefited by the trade in anti-personnel mines. This is what the NGOs actively fighting mines express in article 37 of the **Bad Honnef Declaration**¹⁶⁸: «For the provision of additional Funds, the principle that the polluter pays should be considered: companies that have profited from the development, production and sale of mines could pay into a reparation Fund»¹⁶⁹.

It will be noticed that the **Bad Honnef Declaration** refers to industries that used to produce anti-personnel mines. Indeed, as mentioned, mine production and trade in mines are now prohibited by the Ottawa Convention.

The figures available do not relate to recognized trade in mines, but just suspicions of such trade. In the last few years, the Landmine Monitor has found no proof of the import or export of anti-personnel mines by States parties or signatory States, nor by any non-signatory State. It seems that trade in antipersonnel mines is now reduced to a limited amount of illicit trafficking¹⁷⁰.

A possible compensation Fund cannot be financed on the basis of the present transfer of anti-personnel mines. Consequently, we should consider the transfer of mines retrospectively or else take into account the transfer of arms as a whole. Moreover, the latter solution can be justified if we consider the mines problem as part of the larger problem of unexploded munitions and other explosive remnants of war.

The Fund could be provisioned by a tax levied on the arms industries for their sale of arms.

Assuming that a number of States agree to introduce a tax on arms production (or their sale) in order to finance an international compensation Fund, it is very likely that the arms industries would lobby against it. We can imagine a system in which the States are obliged to pay a contribution to the Fund proportional to their production of mines, their available stocks and more generally their arms production, while leaving them to choose the sources that are to finance the contribution.

We are once again in a totally different context to that of the IOPC. The industries that finance this Fund are situated in countries liable to have an oil slick in their waters, and therefore likely to call on the IOPC. In the case of victims of mines, the situation is different. The industries likely to finance an international compensation Fund – that is, by

hypothesis, arms industries situated mostly in western so-called 'developed' countries – are not affected on their territory by the problem of anti-personnel mines.

Consequently, there is no direct advantage for the arms industries of financing a compensation Fund, since victims of mines are mostly citizens in far-off countries who have very limited means of threatening them with court action and cannot bring any public pressure to bear.

Thus, if the 'developed' countries were to envisage making the arms industries finance a Fund in the name of international solidarity, then they would come under pressure from these industries and their lobbies.

The arms industries are made up of organized active and powerful pressure groups.

Among these industries, the percentage of the annual turnover represented by arms sales varies considerably. For example, in 1998, among the 10 main international firms producing arms, the percentage of total sales represented by arms sales ranged from 14% to 77%. Insofar as a number of these industries also make products for the "civil" market, the pressure of public opinion (especially via boycotts) may prove effective.

If an association of victims of mines were to institute legal action against producers of mines in the United States¹⁷¹ and won their case in the American courts, the compensation obtained could be paid into a Fund for victims of mines.

In short, three ways of financing a Fund could be envisaged:

- a contribution from States and others to show their solidarity;
- the payment of a tax on arms sales;
- compensation paid by the arms industries following decisions by the courts.

3.2.5. *The victim's compensation. What definition? And for what compensation?*

Damage caused by mines is in no way comparable to that caused by maritime pollution.

Therefore, the harm suffered is more difficult to quantify than in the case of maritime pollution.

If the Fund was situated outside the Ottawa procedure, it should ideally take into account all direct victims, past, present and future of anti-personnel mines or

¹⁶⁸ In June 1997, experts from all over the world gathered in Bad Honnef, Germany, with the aim of defining the principles to be followed in the action programmes against mines. Following the Conference, a Declaration was adopted by the International Campaign to Ban Landmines.

¹⁶⁹ GERMAN INITIATIVE TO BAN LANDMINES, *Mine Action Programme from a development-oriented point of view ('The Bad Honnef Framework')*, 1999 [1997], p. 9.

¹⁷⁰ We should emphasize however that, for the first time in its history, the Landmine Monitor received proof recently of the transfer of anti-personnel mines between Iran and Afghanistan (see ICBL, *Toward a mine-free world, Landmine Monitor Report 2002*, NY: HRW, August 2002, p. 7-8). Iran had instituted a moratorium on the export of anti-personnel mines in 1997.

¹⁷¹ For additional information on possible remedies in American law, please see the first part of the study.



unexploded ordnances. It should cover both material and economic damage. Depending on funding possibilities and negotiations between States, it could be extended to the indirect victims of mines and UXO, and compensates psychological harm.

As a minimum, the Fund should compensate the direct civil victims of anti-personnel mines, at the present time and in the future. The amount of compensation should be set according to the physical “damage” sustained by the victim and the effects on the victim’s family situation and economic situation.

In the case of communities affected by the presence of mines, collective compensation could be granted.

One can also wonder if there would be compensation for victims of mines who do not belong to the Member States of the Fund. States have some responsibility for the presence of mines on their territory. Opening up the Fund to the victims of States not parties would mean ridding these States of their responsibility for the problem. Nonetheless, the States’ contribution to the Fund should not be made to the detriment of national compensation mechanisms for victims of mines. The Fund should only be used as a last resort. In other terms, as far as possible, and in view of his/her country’s legal system, the victim (or his/her representative) will also have to provide proof that he/she has first exhausted all possible domestic remedies.

Could it be possible to allow only Member State nationals to refer cases to the Fund, whatever the amount of the State’s contribution? Could it be morally acceptable therefore that victims be treated differently according to the State to which they belong?

It would be advisable to ensure that the total amount of compensation claims did not exceed the total amount of available resources, in the same way as the IOPC. To avoid a first come first served situation, the Fund could set periods of eligibility for claims and allocate compensation on a yearly basis.

3.2.6. *The Fund’s structure and how to refer cases to it*

We can imagine the creation of a compensation Fund in the form of an intergovernmental organisation with a legal personality, like the IOPC. The Fund’s administrator would be designated by the Member States.

The Fund, like the IOPC, could have appeal procedures referred to it against decisions regarding compensation.

Nonetheless, to ensure real efficiency it would be advisable to introduce cooperation mechanisms between the Fund and the different actors involved in assisting victims of antipersonnel mines and UXO.

For example, to facilitate access to compensation for everyone, one could imagine a third party referring cases to the Fund or instituting proceedings (providing proof of the link between the victim and mines as well as the information needed to determine the total amount of compensation), an organisation empowered to do so and recognized in this field.

3.2.7. *Analysis of the funding needs*

In the case of the IOPC, the contributions requested of oil companies to provision the Fund in the last four years were of between 40 and 50 million pounds sterling per year, that is about 62 to 78 million dollars. If we base our calculations on the price of 25 dollars per barrel of oil, we can estimate that the total yearly amount of contributions for all ‘contributing’ companies is about 2.5 to 3.1 million barrels, or the equivalent of the daily production of a company such as Total Fina Elf. Under these circumstances, we can understand that the oil companies have accepted the system without complaining. It seems that even if these amounts were no longer sufficient to cover all the damage caused by oil slicks, the IOPC has a certain leeway for raising contributions.

If the amount of compensation for the damage caused by mines were of this order, it is possible that the arms industries would not be opposed to the setting-up of a Fund similar to the IOPC, when faced with the pressure of public opinion. But would it be morally acceptable?

The working group for assistance to victims of the ICBL (International Campaign to Ban Landmines) estimates the costs associated with the rehabilitation of survivors of mine accidents for the whole of their lives at 9 000 dollars per survivor¹⁷². The number of survivors of mines throughout the world is calculated to be more than 300 000. The amount necessary to assist them with rehabilitation would thus be about 2.7 billion dollars¹⁷³. This is a rather rough estimate that does not take into account the fact that a number of victims have already benefited from different forms of assistance. Compensation corresponding to loss of income of victims of mines is not included in this estimate.

Nevertheless, if we compare this with the amount of income from arms sales between 1996 and 2000, which amounts to 102 billion euros¹⁷⁴, we can see that a tax on these sales would be largely sufficient to provision the Fund.

According to the Landmine Monitor 2003, 11 700 new victims of mines and UXO were recorded during 2002. Although this figure is probably lower than the real figure (there are an estimated 15 000 to 20 000 new victims every year), it nonetheless enables us to calculate the number of claims that the Fund might have to manage every year.

¹⁷² HANDICAP INTERNATIONAL, *Anti-personnel mines today! Synthesis of the 1999 Report*, Paris: L’esprit frappeur, (1999), p.89.

¹⁷³ This estimate is based, inter alia, on the fact that amputated adults need new artificial limbs and orthopaedic equipment every three to five years, and children, every six months. Providing a survivor of a mine accident with an artificial limb costs between 100 and 3 000 dollars.

¹⁷⁴ Figures provided by the SIPRI in 2001 (Stockholm International Peace Research Institute).

The total amount of compensation over one year could thus be around 105 300 000 dollars (just for rehabilitation). In 2002, arms sales throughout the world amounted to more than 16 billion euros (about 14.5 billion dollars). So contribution needs would be about 0.65% of income from arms sales.

At the meeting of the G8 in May 2003, the Heads of State mentioned the possibility of introducing a tax on arms sales for the benefit of a world fund against hunger. This is a very positive initiative, but using these funds to benefit victims of mines would offer the advantage of confronting the arms producing industries with their responsibilities and of applying the principle that the polluter pays.

The IOPC is an interesting model as regards compensation. The nature of the activity in question is fundamentally different to that of mines, and the model can therefore not be transposed immediately. Nonetheless, the application of the polluter pays principle is very relevant in these two domains.

The importance of the needs in term of compensation constitute a significant limit to the applicability of a model based on the IOPC. Therefore, it is interesting to study an other model which would focus on assistance to landmines victims rather than compensation.

This can be the case of a model offered by the United Nations Voluntary Fund for Victims of Torture.

4. An applicable model? the United Nations voluntary Funds for victims of torture

We underlined before that responsibility and means are two major points in establishing a compensation fund. It is a long time process to make the idea of a victim's right to reparation and compensation admitted. As the question of reparation raises a lot of problems, other models of victim assistance could give solutions. The United Nations Voluntary Fund for Victims of Torture is a model worth studying in this purpose.

In 1981, the United Nations General Assembly passed a resolution establishing the United Nations Voluntary Fund for Victims of Torture, which aims to provide humanitarian assistance to victims of torture and their families¹⁷⁵.

The objective of this study is to analyse how relevant it would be to transpose this model to the mines sector.

The comparison with the Fund for torture victims looks to be a particularly interesting one as in both cases we are dealing with civilians who, in violation of humanitarian law and human rights, have suffered physical, psychological and socio-economic harm, which often remains unpunished. In both cases, the use of torture and the use of landmines can form part of a strategy for creating a climate of terror amongst the civilian population.

On the basis of this observation, is it feasible to create an international Fund for the victims of landmines along the same lines as the Fund for victims of torture? What are the advantages and disadvantages of such a model when applied to the sector of antipersonnel mines?

To answer these questions, for each of these types of harms (antipersonnel mines / UXO and torture), one need to take into account the legal and practical context, the different stakeholders involved, their objectives and the reasoning behind the creation of an international compensation Fund.

4.1. The United Nations Voluntary Fund for Victims of Torture: a model for landmines victims?

Article 1 of the **United Nations Convention against torture**, adopted by the General Assembly in 1984 and in force since 1987, defines torture as an act carried out by a public official or at his instigation or with his consent:

"...by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind."

This definition helps to identify victims of torture in international law. However the voluntary Fund on their behalf was established prior to the convention against torture.

4.1.1. Mandate and admissibility

The Fund was established by General Assembly resolution 36/151 of 16th December 1981 to receive voluntary contributions from Governments, non-governmental organisations and individuals for distribution to non-governmental organisations providing humanitarian assistance to victims of torture and their families.

Applications for grants should aim at providing medical, psychological, social, economic, legal, humanitarian or other forms of assistance to victims of torture and members of their families. Subject to availability of funds, a limited number of grants could also be given for the training of professionals or for the organisations of conferences and seminars with a special focus on the treatment of victims of torture. The amount of the grant requested cannot exceed one third of the annual budget of the programme submitted.

Only non-governmental organisations can apply for grants from the Fund. Applications from Governments, national liberation movements or political parties are not admissible.

Consequently, although this Fund is for victims of torture, the victims themselves are not at the centre of the Fund's

¹⁷⁵ UNITED NATIONS GENERAL ASSEMBLY, *Un voluntary fund for victims of torture*, A/RES/36/151, 16 December, 1981.



operational procedures. An individual victim cannot obtain assistance from the Fund, if he/she is not represented by an NGO.

As regard to the selection criteria, the staff of the project should have experience in direct assistance to victims of torture and the programme should be functioning. Projects aiming at campaigning against torture, preventing torture or providing financial assistance to other projects are not admissible. No new application for a grant can be considered until satisfactory narrative and financial reports on the use of previous grants are received.

One of the Fund's criteria for awarding grants is the provision of information on the victim's history and the type of assistance he/she receives.

- "The personal history of the victim:
In what context the victim was tortured;
The type of torture suffered;
The type of torturer involved;
The type of psychological and physical after-effects suffered.
- The assistance provided under the project:
How the victim came into contact with, or was referred to, the organisation;
What type of assistance was provided to the victim under the project;
What type of staff member carried out the assistance;
Where was the assistance provided.
- The results:
What results have been achieved through the assistance provided.
- Future assistance:
Will the victim continue to be assisted under this project;
What kind of assistance will be provided to the victim under this project;
For how long will the assistance be provided;
What results are expected¹⁷⁶.

4.1.2. Operating procedure

During its annual session in May, the Board reviews the narrative and financial reports on the use of previous grants, adopts recommendations on applications for new grants, hears project leaders, meets with donors, consults with the Special Rapporteur on Torture and the Committee against Torture and adopts other relevant recommendations to the Secretary-General on the activities of the Fund. This latter will report once a year both to the General assembly and to the Commission on Human rights on the activities of the Fund.

4.1.3. The Fund's activities

About 200 applications for funding for a total amount of

more than 12 million United States dollars were received for consideration by the Board of Trustees at its 21st session (13-27 May 2002). The High Commissioner for Human Rights, on behalf of the Secretary-General, and on the basis of the recommendations made by the Board, allocated approximately 7 million dollars in new grants for 2002-2003 to 169 projects submitted by non-governmental organisations from about 60 countries.

From 1997 to 2001, the trend on priorities for assistance confirmed that focus was being placed on psychological assistance (from 61 to 82 %), medical assistance (from 58 to 79 %), social assistance (from 46 to 69 %), legal assistance (from 13 to 51 %) and economic assistance (from 0 to 20 %), highlighting a sharp increase in multi-disciplinary projects (involving several types of assistance) and the growing need for legal assistance, essentially due to the number of victims who are now undertaking proceedings to put an end to their torturers' impunity and obtain justice¹⁷⁷.

The 22nd session of the Board of trustees took place from 12th to 28th May 2003.

By now, some contributions have been paid that would be taken into account during the 23rd session: 202 365 \$ contributions already paid and 82 606 \$ pledges.

The United States delegation has emphasised its government's support for the Fund, which, in 2002, took the form of a voluntary contribution of 5 million dollars.

It has declared that its government is in favour of the Fund's work and was hoping soon to be in a position to support it as it has done in the past.

4.2. Application to landmines victims

4.2.1. Victims of Mines and Victims of torture

Torture is a very political act in that often the victim is chosen intentionally because of his or her political or religious convictions or ethnic origins. The act of torture is used to achieve a result: obtaining information, intimidating an individual or a third party, a punishment.

For mine victims, the situation is different. Landmine casualties occur indiscriminately. People are not targeted as individuals; if they are targeted, it is as members of a community.

Nonetheless, victims of torture and victims of mines are all victims of a violation of their most fundamental rights, the right to life and the right to health.

They are faced with the same type of needs, medical and psychological care and sometimes socio-economic assistance, although methods for providing assistance may differ, as the type of trauma suffered is not comparable in the two cases. Nevertheless, a person having suffered the amputation of a limb at the hands of his or her torturers will receive the same type of treatment and assistance as a mine victim amputee. In the event of a lack of suitable structures, the assistance they need can in both cases be provided by non-governmental bodies.

¹⁷⁶ http://www.ohchr.org/french/about/funds/torture/apply_fr.htm

¹⁷⁷ See UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, *United Nations Voluntary Fund for victims of torture*, NY: United Nations, 18 January 2001, E/CN.4/2001/59, 9 p.

After analysing the criteria given earlier for selecting and identifying victims, we can see that such criteria could easily be applied to other types of victim and particularly to victims of anti-personnel mines. Thus, the form and methods of the Fund for victims of torture could easily be transposed to victims of mines.

Similarly, many NGOs or local associations are involved in providing assistance to victims of mines. We could easily imagine a similar Fund being set up in the sector of mines to finance the activities of these organisations. However, inasmuch as this type of Fund is not based on the idea of indemnifying or individual compensation, one needs to analyse whether the application of this model in the mines sector is really appropriate.

4.2.2. *What place for the victim?*

The voluntary Fund for victims of torture is not a jurisdictional body aiming to obtain reparation for torture victims, which would mean establishing responsibility. It seems difficult to talk about complete compensation in this area as the victims are not the direct beneficiaries of the grants awarded by the Fund, but are indirect beneficiaries through the intermediary of an NGO. It is however a type of compensation.

In many mine-polluted countries, there are programmes of assistance to mine victims that are run either by the states directly, or by national or international NGOs. The victims remain dependant on these structures and on the type of assistance they receive from them. Their place in the decision-making structure is not central, and their only room for decision about the aid they wish to receive is limited to the assistance programmes accessible to them.

If we take the Fund for victims of torture as a model, it seems that only 30% of the total cost of the project can be financed by the Fund. It is therefore down to the organisation to find the additional funding. Thus, not only do the victims not have direct access to the funding, but also the assistance they may receive depends on the ability of the organisation representing them to find further funding.

Furthermore, the assistance that can be brought to victims is not enough in itself to make them feel that they have received complete reparation. For this, victims or their families would need to have also direct and individual access to the Fund to obtain compensation in case they have not been able to obtain reparation via a legal case. The intention here is not to invalidate the principle of assistance by claiming that the means available for victims of mines via NGOs are sufficient and that creating a Fund for this purpose would be superfluous, but rather to admit that these people can claim to receive compensation or indemnities personally in order to have free choice over how they attempt to reorganise their lives.

The model provided by the voluntary Fund for victims of torture does not offer this possibility. It is true that in the

case of victims of torture, legal assistance represents a first stage that may result in obtaining reparation before a jurisdictional body. For victims of mines, means of recourse against this type of harm are difficult to use as the responsible party is rarely identified. Consequently, granting legal aid in the current legal framework may not be sufficient.

4.2.3. *The Fund's legal foundation: an independent Fund*

As the Fund is not linked to the Convention against torture, contributions are not compulsory, nor are there any relation between the ratification of this convention and contributions to the Fund.

Consequently, one can easily imagine a Fund for victims of mines being set up along similar lines, in other words independent from the convention prohibiting the use, stockpiling, production and transfer of anti-personnel mines and on their destruction (Mine Ban Treaty), which would also mean being able to extend assistance to victims of explosive remnants of war.

There is a double advantage to such a system: on the one hand, as there is no obligation to contribute attached to signing the treaty, there is no danger of this dissuading potential signatories. On the other hand, the States which have not signed can contribute to the Fund, which means there are no restrictions on the source of the voluntary contributions.

Including such a Fund within the UN system is also a guarantee of its independence, impartiality and transparency. Their presence in many developing countries means that the United Nations would rapidly be able to identify the NGOs working in the field of assistance to mine victims and monitor the quality of the programmes funded. We can easily imagine that a Fund for victims of mines could be created within the United Nations, in the same way as for the victims of torture. However, we could also argue that the lack of dynamism and flexibility and the administrative red tape of the UN bodies could be an obstacle to the efficacy of such a Fund.

4.2.4. *Voluntary contributions: a risk of a shift in funding towards the voluntary Fund without any significant global increase*

At the moment, the funding of mines victims assistance projects comes from various different sources: UN agencies, institutional (State) funding bodies, private foundations, NGOs using their own capital.

States could see the creation of a voluntary Fund for the victims of mines as a way of continuing to finance this type of project without having to carry out the monitoring and control. The risk would therefore be to see this state funding simply transferred to the newly created Fund without the global amount of funding for mine victims increasing. However, current trends show that States have



more of a tendency to prefer bilateral aid, in other words, aid over which they retain control and visibility¹⁷⁸.

There could also be a certain reticence about creating a Fund that would deprive them of all control over how the funding is used. The risk then would be to have both a powerless Fund and parallel, uncoordinated bilateral initiatives.

Only the states could answer these questions since they are the most involved in funding programmes of assistance to mine victims.

On the basis of all this, we could ask whether setting up such a system is a significant step forward in terms of the rights of mine victims or offers any real advantages other than that of creating a system for monitoring the funding of assistance to mine victims, a possibility that does not exist at present¹⁷⁹.

One advantage would be to centralise the contributions from private individuals or foundations concerned by this cause. However, the example given by the Fund for victims of torture outlines that of the 551 548 dollars worth of contributions allocated to the Fund, only 400 dollars come from private individuals, and the rest comes from States.

This Fund would therefore continue to be dependent on the solidarity of the states. Inasmuch as it excludes any idea of compensation or reparation, it would be difficult to apply the «polluter-pays» principle, which would mean state and non-state actors involved in the production and use of anti-personnel mines having to contribute to the Fund.

It is very likely that the creation of a Fund for the victims of mines modelled on the Fund for the victims of torture would not suffice to cover real needs in terms of assistance. Indeed, the number of mine victims in the world is estimated at more than 300 000 and the number of new victims each year at 15 to 20 000 (not counting the families of victims)¹⁸⁰. If the Fund were only destined for new victims of mines (the most minimalist hypothesis) and we estimate the number of victims at 15 000, and if the Fund received the same amount of contributions as the Fund for victims of torture, 7 million dollars, then the amount allocated per victim would be 466 Dollars. This amount does not take into consideration the operating costs of the organisation responsible for providing aid to the victim.

This study of possibilities for creating a compensation/indemnity Fund for victims of mines based on similar international Funds, is essentially an attempt to make some significant progress in the area of rights for mine victims. One of the ways of doing this is to provide victims of mines with an individual and personal method for obtaining reparation or compensation. Rights for mine victims also means allowing them free choice in the way they manage the situations they are faced with. The United Nations Voluntary Fund is therefore not an ideal

model for promoting the rights of mine victims as it makes a third party of the victims.

However, the problem of accidents due to landmines has consequences in public health terms that are much better covered at a collective level. Consequently, a balance should be found between the needs of the person that are linked to his or her life choices and that require individual procedure and care-management and his or her needs as part of a health issue that has to be dealt with on a broader scale than that of the individual.

Not differentiating the victim from the group means denying his or her individual status and ensuing rights. However, considering each individual case without taking the collective aspect into account could lead to both inequalities and an increase in expenditure.

5. Conclusion

What provisions should be envisaged for compensating mine victims : national measures, international funds ? In the spirit of the Ottawa process, assistance to landmine victims should be anchored in options taken on a national level. This is reiterated in the action plan adopted in Nairobi in December 2004.

If, however, insufficient funds were not raised at national level, a model of a fund based on international cooperation and guaranteeing the right to compensation for victims could emerge. The above comparative study sketches the outlines of this. This Fund should be an intergovernmental organisation covering the whole world and its philosophy should be based on that of the Ottawa Treaty.

Such a Fund should not only cover injuries due to landmines, but also those due to UXO, which have the same effects as landmines. The Fund's operating procedures, described below, could also result in an improvement in services to disabled people generally: whilst acknowledging the specificity of the situation of landmine victims, the development of initiatives that could at the same time benefit other persons with disabilities should not be excluded.

An international compensation fund should make both individual and collective compensation possible.

It is therefore possible to envisage a combined system of claim. In other words, claims for compensation to the Fund would be open to individuals, or groups of persons and also to national or international organisations for victim assistance, whose activities and projects focus on landmine victims and their families. It is true that the Fund would then be faced with a major obstacle: the risk of double compensation. Depending on the character of the prejudice, individual or collective, people having already received compensation via funds allocated to assistance organisations would not be entitled to claim for individual compensation; the aim of such an international Fund being

¹⁷⁸ In a recent report, questions about the functioning and financing of the fund were raised. See UNITED NATIONS, COMMISSION ON HUMAN RIGHTS, *United Nations Voluntary Fund for Victims of Torture, Report of the Secretary General, Addendum*, NY: United Nations, E/CN.4/2004/53/Add.1, 22 March 2004, 6 p.

¹⁷⁹ Via the mines observatory, member NGOs of the ICBL carry out monitoring that contributes towards developing the data collected by the United Nations, but which is still incomplete.

¹⁸⁰ ICBL, *Toward a mine-free world, Landmine Monitor Report 2003, op. cit.*, p. 38-42.

to compensate as many victims as possible. Thus, the Fund should be given real powers of control over methods for allocating funds.

In order not to intervene in the duties of the States, **the Fund should have a subsidiary competence.** Indeed, member States should be obliged to establish their own national compensation mechanisms¹⁸¹. The Compensation Fund should intervene as a last resort, after all regional and domestic remedies have been exhausted. This should encourage victims to first attempt to claim before courts or commissions at regional or national level. These courts and commissions should thus be empowered to provide reparation / compensation for landmine victims.

A compensation fund should take into account the different types of prejudice from which landmine victims suffer.

Demands from UXO victims should also be admissible to the Fund. Ideally, compensation should also be admissible for direct and indirect victims of physical, economic or psychological prejudices, suffering permanent and non-permanent after-effects.

Firstly, compensation for **physical injuries** would seem to be indisputable. It should be calculated on the basis of the cost of the victim's medical care. Indeed, some people suffering from permanent injury require medical treatment over the long term, including a prosthesis and frequent replacements. However, the Fund should deduct all social security benefits and/or pensions already received from the amount awarded.

Secondly, compensation should take into account **economic prejudice.** For example, compensation for the loss of financial resources of a victim of landmines or UXO with dependent children and forced to cease professional activity, should be calculated according to two criteria: prior income and the number of dependent children at the time in question. Moreover, deterioration of habitation or assets should be considered as economic loss suffered by victims. Compensation for victims of landmines and UXO should take into account **damage due to the deterioration of the environment.** Indeed, people can be seriously affected from living in a contaminated area. Their standard of living deteriorates and the environment in which they live may be polluted because of the presence/explosion of landmines/UXO.

As regards economic prejudice suffered by a child victim, compensation should take into account specific needs for accompaniment and for his/her individual life project. A certain degree of subjectivity in the evaluation of the economic prejudice may be unavoidable.

Thirdly, the compensation fund should take into account **psychological injury**, suffered both by direct and indirect victims.

The funds collected should be shared among those victims who have made an admissible claim and allocated in accordance with the level of personal injury suffered. The funds should be allocated on an annual basis in order to ensure that they are shared fairly among all the victims making a claim to the Fund during a given period. The funds collected would also be distributed to organisations for assistance, when the prejudice is collective.

Given the enormous cost of satisfying the needs, the Fund's financial resources need to be wide-spread; this means participation from as many and varied actors as possible.

Landmine producers could be made to contribute to the fund through pressure from the courts (or credible threats of such). If producers believe there is any chance a court would even hear a case brought by a landmine victim against a producer, they might consider making a donation to the fund as part of a settlement with the victims (which would mean no legal costs, no order to compensate from the court and no disturbance to the lucrative business of making and selling weapons). It would therefore be a business decision motivated by financial imperatives rather than a moral obligation.

Secondly, an international Compensation Fund for landmine victims should be **financed by States in the name of international solidarity**, partly by means of voluntary state contributions and partly by means of obligatory contributions from States Parties. They may consider allocating part of their armaments/defence budget or levying taxes on arms companies to be paid directly into the Compensation Fund.

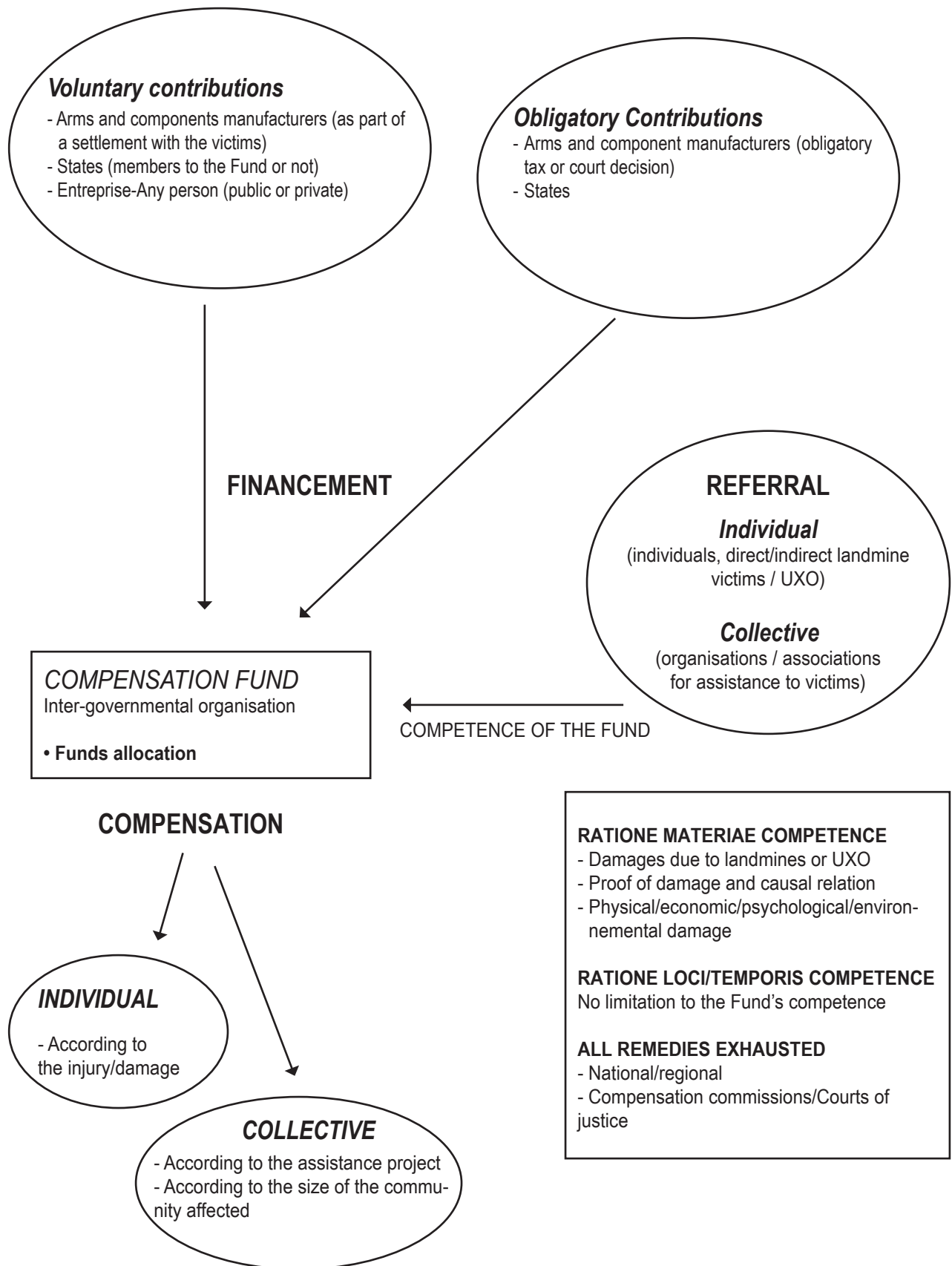
Finally, **civil society**, aware of the necessity to provide compensation to victims, could contribute to the Fund. Thus it would be open to voluntary contributions from a variety of sources provided that these sources are consistent with the spirit of the fund and the Mine Ban Treaty¹⁸².

Thus, any private person involved in the fight against the use of landmines could make voluntary contributions to the Fund.

¹⁸¹ As recommended by the Commission on Human Rights in principle 17 of its "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, (24th October 2003), doc. E/CN/2004/57.

¹⁸² Contributions to the ICC trust fund are regulated according to a similar rule: "The Board shall refuse such voluntary contributions ... that are not consistent with the goals and the activities of the Trust Fund [ICC-ASP/1/Res.6 Annex, para. 9]."

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What rights for mine victims?

**Reparation, compensation:
from legal analysis to political perspectives.**

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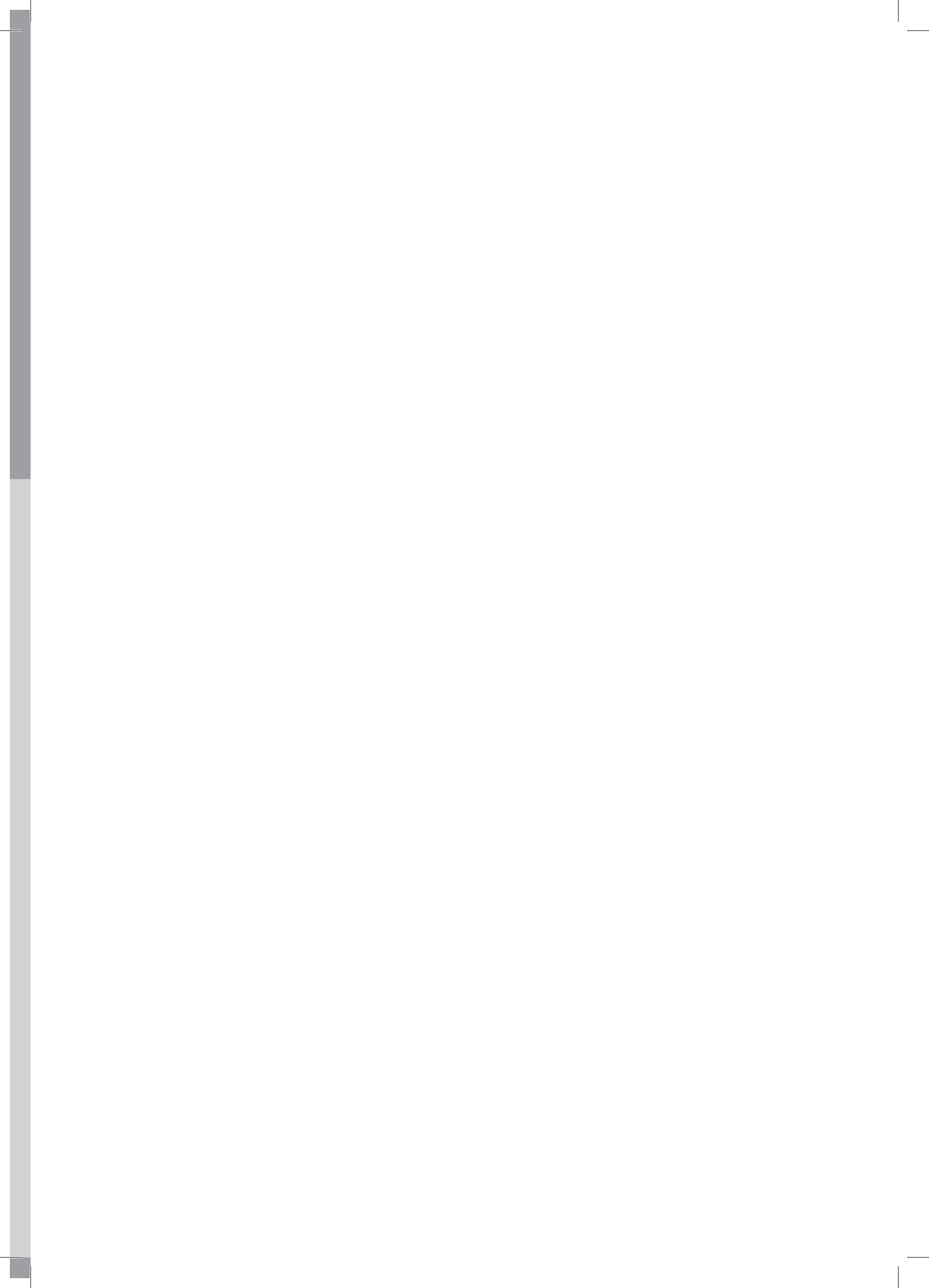
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