

Legal Aspects of the Land Release Process

This article explores areas of liability in mine action operations. It defines the concept of residual risk after completion of survey and clearance efforts and presents methods of assigning responsibility for it. The author offers further legal considerations in mine action, including the extent to which contractors are liable for their equipment, employees and the cleared land both during and after operations as well as the process by which national mine action standards are incorporated into the legal liability of all concerned actors.

by Pehr Lodhammar [Geneva International Centre for Humanitarian Demining]



A mine action liability workshop in Colombia addresses some of the legal aspects of the land release process.

Photo courtesy of Deywis Ayire Casas-Prensa/PAICMA.

Although liability has concerned mine action for a number of years, only recently has the Geneva International Centre for Humanitarian Demining made a concerted effort to better understand it. The issue is very important, as it has in some cases delayed states from efficiently addressing mined areas and from meeting obligations under Article 5 of the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction* (Anti-personnel Mine Ban Convention or APMBC).¹

Before survey and clearance, in the case of public land, the government normally bears the responsibility for the hazardous area and any accidents or incidents that occur. During survey and clearance, the responsibility usually falls on the organization carrying out the operation.²

What remains undefined is who is responsible when the operator has completed survey and clearance, and the area is handed over to the end user. Who is responsible if an accident leading to loss of life or damage of property occurs, or if a mine or explosive remnant of war is found on released land? How much of the land should be re-cleared, and who should carry out the task? Who will pay for the cost of re-clearance?

Handing back released or cancelled land from the operator to the government, end user or community is an aspect of mine action liability requiring

special attention. This is because, even after land is cleared or released, a residual risk always remains—a fact that the States Parties to the APMBC, in adopting a voluntary “declaration of completion,” realistically express. An explosive item may be moved into the cleared area after its handover, flooding may cause a mine’s migration, or an ERW may rest beneath the required clearance depth.

Over-clearance

The possibility of residual risk should not, however, be a reason or excuse for over-clearance—unjustified follow-up clearance behind demining machines—or the insistence of national mine action authorities on extensive external quality control. A recent GICHD study based on five countries in 2010 showed that a total of 7.05 million sq m (3 sq mi) of land

was sampled at a cost of US\$7.59 million, and only four mines/critical nonconformities were found.³ This research indicates that although the cost of external quality control is considerable, the added confidence that the land is free from explosive hazards post-clearance is negligible.

However, GICHD mechanical demining experts often witness follow-on clearance being carried out behind well-proven and tested demining machines. This is despite no audible or visual detonations, or any other evidence of mines during the mechanical intervention. Why is this? Is this for reasons of liability rather than achieving high quality clearance?

If mine action standards are detailed, and national standards are followed during clearance and based on a well-implemented tasking system with a quality management system in place, the operator is not liable following the handover of released areas. Individual occurrences can always be viewed on a case-by-case basis, if evidence shows the operator is negligent. In general, the government should assume responsibility for the released areas and should have standards for victim compensation and for how to deal with residual risk.

Mine Action Standards

The International Mine Action Standards are guidelines for the safe and efficient management of mine action operations, as well as a framework for the development of national mine action standards and standard operating procedures.⁴ IMAS have no legal standing, except where a national authority has adopted them as binding instruments, or where one or more of the standards is specified in a contract or other legal instrument.

National mine action programs should be based on IMAS and adapted to fit each country's existing hazards, conditions, climate and terrain. NMAS must also align to existing regulations, standards and legislation. Examples of such existing legislation include but are not limited to

- Labor law
- Public procurement law
- Rules for handling and storage of explosives
- Regulations governing building permits and land use
- Rules for handling information
- Protection of the environment

National standards should be developed through a consultative process, where all stakeholders in the country are involved and agree on what is possible and desirable. As part of this process, agreement on terminology and interpretation of

wording is important. For example, what is "all reasonable effort" in the context of land release? This might be interpreted differently, depending on the operator.

Establishing what kind of status NMAS will be given is also important. Will they be adopted under national legislation with legal status, or will they remain a set of unlegislated standards? Will a specific mine action law be written in which NMAS are referenced? This should be defined clearly.

Based on GICHD studies, the general recommendations are as follows:

- There must be clear standards and procedures for handing over land cleared or released through Technical or Non-technical Survey.
- The exact point in time when liability transfers from the organization conducting the survey and clearance to the government should be specified.
- All documentation from involved parties must be included in NMAS, such as
 - » The handover certificate
 - » Maps of areas surveyed, including cleared areas and areas cancelled or released through Non-technical Survey and Technical Survey
 - » Methods used and clearance depth
 - » Documentation explaining the reasons why areas were cancelled without technical intervention and the basis for these decisions
 - » Evidence indicating the agreement of local authorities, land users and any others involved in the decision to release specified land uncleared
 - » Copies of internal and external quality assurance reports
 - » Documentation of any quality control measures undertaken

Ensuring that the entire process is documented and that documentation is safeguarded is critical. All technical aspects of a demining operation should be recorded, and it is crucial that any decisions leading to all or part of the land being deemed safe from explosive hazards through survey activities be carefully documented. To correctly do this difficult task

- National standards must describe how to deal with any residual risk.
- National standards must outline how and for how long documentation is stored (this should be aligned with national legislation for handling and storage of information and treaty reporting requirements).

... even after land is cleared or released, a residual risk always remains.



Mechanical demining as part of the land release process.
Photo courtesy of the author.

- The government should take responsibility for all areas deemed safe through clearance and survey once these areas are handed over.

Practical and Cost-effective Ways of Dealing with Residual Risk Liability

A well-functioning quality management system provides transparency, third-party objectivity and a minimum level of quality in handing land back to the local population. If applied correctly, it also reduces the residual risk and clarifies liability issues.

Following the completion and handover of land, only some of the possibilities

are practical and cost-effective. These include

- **Strict liability of the state.** This seems to be the easiest and most cost-effective option, where the state takes responsibility for any claims and/or costs arising from any missed items causing residual risk. The state would also be in a better position than land owners or victims to pursue a claim against the operator, should there be any evidence of possible negligence.
- **Shared liability between the state and the operator.** The state takes the responsibility, but shares it

with the operator, who, in turn, has insurance to cover the associated risks. This liability insurance is likely to be expensive.

- **The operator remains liable for a limited period, following task completion.** This can be for a period between one and five years. However, research indicates there may be some difficulties in obtaining insurance coverage beyond three years. This insurance is also likely to be expensive.
- **The quality assurance contractor assumes the responsibility for the cleared land through insurance**

coverage, when both clearance and QA are contracted. This could be an option during seismic surveys, as a part of oil and gas exploration for example, where the land is handed over to the state only at a later stage, and the QA contractor carries the responsibility until such time.

Further Legal Questions

Today, demining work is mainly carried out through contracts. There are three main parties whose interests are fundamental behind any contract: the contracting agency, the contractor and the community. Typically, contracts will be prepared by a contracting agency seeking specialist contractors to conduct demining work. The main aims of a contract are to

- Ensure the organization responsible for day-to-day events is accountable for the consequences of their activities
- Protect the contracting agency from any claims or financial losses which may arise out of such activities

In addition to imposing responsibilities on the contractor, the contract will normally incorporate minimum levels of insurance to be provided in support of such responsibilities. However, the contract also should consider how the actual procurement action will be undertaken and what rules and legislation govern this activity. In most countries, public procurement law is obligatory, despite having been developed for civil engineering or similar work and not explicitly for demining. In some countries, specific mine action laws were de-

veloped and adapted to incorporate the particular requirements of mine action. In all cases, existing laws must be considered and followed.

GICHD also recommends that issues regarding land rights, including third-party liability, be included in the tendering process and, if possible, in the contracting process. Other recommendations are

- Statements of work in contracts should clearly include land rights considerations and actions required, as well as reporting mandates.
- Decisions about using survey and clearance assets should take into consideration the expected future use of the land.

Another important legal consideration that accreditation standards should clearly articulate is **insurance**. It is important to carefully review coverage and exclusions under insurance policies, particularly regarding the period of coverage, replacement of damaged or stolen demining machines and other equipment, and employer and third-party risk and liability. Questions to ask include:

- What are the required levels of insurance coverage?
- Does the policy purchased actually provide the coverage perceived and required?
- Should professional indemnity insurance for operators be required?

Many additional legal considerations should be taken into account. What are the national authority's current mandates and responsibilities, and how were they given to the authority? Was the authority formed through a de-

cree, and what does this include? Where and how does the authority fit into existing governmental structures? How can we be sure there is no duplication of efforts or ambiguity regarding the various governmental bodies and their respective responsibilities and roles?

GICHD is committed to carrying out further studies and developing findings and recommendations on the legal issues affecting mine action. ©

See endnotes page 64



Pehr Lodhammar is the mechanical advisor with the Geneva International Centre for Humanitarian Demining. He joined GICHD in February 2008. He works with mechanical mine clearance projects and training and research regarding contracting, liabilities and insurance in mine action. Before joining GICHD, Lodhammar was a project manager at the United Nations Office for Project Services, supporting the Iraqi Kurdistan Mine Action Agency with procurement, mine action training and construction of demining machines. Prior to 1999, he was a military engineering officer specializing in explosive ordnance disposal for 10 years.

Pehr Lodhammar
Mechanical Project Officer
Geneva International Centre
for Humanitarian Demining
PO Box 1300
Geneve 1, CH-1211 / Switzerland
Tel: +41 22 906 8341
Fax: +41 22 906 1690
Email: p.lodhammar@gichd.org
Website: <http://gichd.org>

A well-functioning quality management system provides transparency, third party objectivity and a minimum level of quality in handing land back to the local population.

1. "Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mine and on Their Destruction," 18 September 1997. <http://bit.ly/eQzxdn>. Accessed 10 September 2012.
2. In this context, the term responsibility includes full responsibility for the survey and clearance operation, which is to be conducted with accredited assets and in accordance with approved standard operating procedures, based on national standards. This liability means operators require sufficient insurance coverage for accidents, third party injuries, plant machinery and other significant risks, according to national standards and existing legislation. See Final Report of 30 November, 4 December 2009 Second Review Conference of the States Parties to the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, Part II: Review of the Operation and Status of the Convention 2005-2009, paragraph 62.
3. A Review of External Post-clearance Inspection in Mine Action, *GICHD*, March 2012.
4. "A Guide to International Mine Action Standards." *Geneva International Centre for Humanitarian Demining* (2009). <http://bit.ly/lavHez>. Accessed 17 September 2012.