The contractualization of environmental protection in international law: exploring legal and governance solutions for post-conflict reconstruction in Azerbaijan

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Abstract

Within the context of the thirty-year long conflict between Armenia and Azerbaijan, numerous environmental damages have been committed by the conflicting parties and by private companies operating under their sovereignty in the formerly occupied territories of Azerbaijan. By providing an overview of the wrongful activities having caused severe harm to the natural environment of Azerbaijan and covering a period from the First to the Second Karabakh war, this paper aims to explore legal and governance solutions for the post-conflict reconstruction of the damaged areas as a means to achieve reconciliation through environmental accountability. Specifically, the ultimate objective of this paper lays in the proposal of a contractual approach to environmental protection, namely the incorporation of environmental protection clauses within contracts concluded between government agencies and foreign corporations. More precisely, the contractualization approach is intended to be applied both to corporate activities and during the reconstruction of the conflict-affected areas of Azerbaijan, especially in the field of mineral resource extraction, reconstruction of infrastructure and transportation lines and foreign investments. This legal solution would eventually overcome the drawbacks of international law in the field of corporate environmental accountability and characterize as governance approach to prevent future damage to the natural environment on the part of private companies operating in the territories of Azerbaijan. Ultimately, the successful application of the contractualization approach in Azerbaijan could spur the employment of the same approach to other regions of the world equally affected by corporate environmental damages during and after armed conflicts.

Keywords

contractualization; environmental protection; South Caucasus; post-conflict reconstruction, private companies.

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Introduction

In the academic literature on environmental damage committed during armed conflicts and post-war recovery, little space is dedicated to the thirty-year conflict in South Caucasus which opposed Armenia and Azerbaijan from the beginning of the 90s to September 2023. Against this background, this paper aims at providing a legal analysis of the numerous environmental damages that have been committed by the conflicting parties and especially by private companies operating under their sovereignty in the formerly occupied territories of Azerbaijan covering a period from the First to the Second Karabakh war. Albeit being utterly conscious of the controversial and sensitive nature of the issue, the underlying scope of the present work is that of exploring legal and governance solutions for the post-conflict recovery of the damaged areas as a means to achieve reconciliation between Armenia and Azerbaijan through environmental accountability. More precisely, due to the involvement of private companies in the perpetration of environmental harm during the period of occupation of Karabakh, the ultimate objective of this paper lays in the contribution to the ongoing research through the proposal of a contractual approach to environmental protection. This governance solution is centered upon the incorporation of environmental protection clauses within contracts concluded between government agencies and foreign corporations operating abroad through affiliates and subsidiaries. In the specific analyzed case, the contractualization approach is intended to be applied both to corporate activities and during the reconstruction of the conflict-affected areas of Azerbaijan, especially in the field of mineral resource extraction, reconstruction of infrastructure and transportation lines and foreign investments. The potential of the proposed governance solution includes the eventual possibility to overcome the evident drawbacks of international law in the field of corporate environmental accountability, as well as the development of a governance approach that will arguably be capable of preventing future damage to the natural environment on the part of private companies operating in the territories of Azerbaijan. Ultimately, in case of future positive outcomes, the successful application of the contractualization approach in Azerbaijan could spur the replication of the same approach in other war-affected regions of the world which have been affected by corporate environmental damages during and after armed conflicts.

For this purpose, this article will be developed as follows. The first section will be dedicated to a reflection on the research methodology that lays at the basis of this work. Markedly, specific attention will be placed on the sources of multiple nature that have been employed to assess environmental damages in formerly occupied areas. Similarly, as far as the contractualization approach is concerned, a brief mentioning of the legal literature on the matter will be provided. Secondly, the main body of the article will open with an in-depth analysis of the environmental damages that have been considered, namely the alleged loss of biodiversity consequent to deforestation; the pollution of water and the use of water resources for political purposes; and the illegal exploitation of mineral resources of Karabakh by private companies. In addition to that, the second paragraph will examine the possibility of reconciliation between Armenia and Azerbaijan from a legal perspective and through environmental accountability. Remarkably, a focus on the international legal framework regulating both environmental damage during armed conflict and the accountability of private companies will be provided. Eventually, the third paragraph will explore the contractualization of environmental protection as a governance solution for post-conflict recovery in South Caucasus, with a specific emphasis on the possible concrete implications for the relations between foreign corporations and government authorities allowing foreign investments in Azerbaijan in order to prevent further and future damage to the natural environment. Specifically, this paper will try to demonstrate how legal impediments concerning corporate environmental accountability could be partially tackled by adopting the approach of contractualization, which could configurate as an efficient bottom-up governance measure to ensure the respect of the environment during corporate activities and the sustainable reconstruction of Karabakh.

Research methodology and sources

Before entering into the main body of the article, a brief note on the methodology employed for the research is required. Alongside the recognition of the material difficulties in assessing the precise magnitude of (and the responsibilities for) environmental damage in formerlyoccupied Karabakh, all the available sources on the issue have been utilized for the drafting of the present work, which is part of a wider research of the author on harm to the environment during armed conflicts. Markedly, concerns for irreversible biodiversity damages in formerly-occupied territories and adverse impacts on numerous species led both international organizations and civil society to demand investigation yet in the early 2000s. In particular, on September 7, 2006 the United Nations General Assembly adopted Resolution 60/285 on the *Situation in the occupied territories of Azerbaijan* expressing serious apprehension due to fires and intentional arsons, which have been responsible of the infliction of widespread environmental damage.[i] On the basis of the UN General Assembly Resolution, an environmental assessment mission led by the Organization for Security and Cooperation in Europe (OSCE) was conducted from 2 to 13 October 2006 in the affected territories of Karabakh, concluding that there has been significant impact on people, the economy and the environment due to the extension of arsons. Furthermore, in the Annex to a letter dated 20 December 2006 from the Permanent Representative of Belgium to the United Nations, through which the OSCE report of the environmental assessment mission in Karabakh was transmitted, the exceptional severity of the fires exacerbated by drought and adverse environmental conditions has been assessed.[ii] Along these lines, subsequent Resolutions of the United Nations referred to the OSCE final report. For example, General Assembly Resolution 62/243 of 25 April 2008 clearly mentioned the assessment mission to further reaffirm "*continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognized borders*", thereby including also the fire-affected territories of occupied Karabakh.[iii] What is more, official reports provided by governmental agencies of the Republic of Azerbaijan and the Republic of Armenia have been employed in the research. Similarly, with a view to guarantee the impartiality of the assessment, independent research from Armenian media outlets (especially *Hetq* and *Civilnet*) demanding investigation for environmental damage committed during occupation has been considered as well. Alongside sources from interested governments, international organizations and civil society, evidence of the scale and the severity of the environmental damages has been provided by Azercosmos, the Space Agency of the Republic of Azerbaijan. Remarkably, the 2019 Report *Illegal activities in the territories of Azerbaijan under Armenia's occupation: evidence from satellite imagery*[iv] and its updated version of 2023[v] proved the existence of extensive damaged areas and allowed a comparative analysis of satellite images collected in different time periods to assess the evolution of the harm to the environment in occupied territories.

Moving toward the contractualization approach, this paper will attempt to provide a brief tough comprehensive illustration of the utilization of the contractual instrument as a means to guarantee environmental protection on the basis of previous scholarly investigation on the matter. Notably, a concise and non-exhaustive list of legal sources could not omit the academic research of Vogel (2010), Peterkova Mitkidis (2014), McCall-Smith and Ruhmkorf (2018), Affolder (2013) and Beckers (2019), which at present time represent the main contributions on the topic.[vi]

1. Environmental damage in formerly occupied territories of Azerbaijan

1.1.Biodiversity loss and deforestation

Widespread environmental damage has primarily affected forests and their biodiverse resources in the occupied territories of Karabakh during and after the end of hostilities between Armenia and Azerbaijan. In that respect, concerns about the adverse impacts of deforestation and the potential loss of biodiversity in the region led to the publication in 2004 of a

joint report of the Organisation for Security and Cooperation in Europe (OSCE), the UN Development Programme (UNDP) and the UN Environment Programme (UNEP) entitled *Environment and security: transforming risks into cooperation – The case of Southern Caucasus,* in which the long-term impacts of the clearing of forestlands, overuse of pasture and irrational use of land in Karabakh were indicated as major challenges for the environment and the security of Azerbaijan.[vii] Along these lines, a detailed report prepared by expers from the Ministry of Foreign Affairs of Azerbaijan in 2016 on illegal economic and other activities in the occupied territories extensively provided information on deforestation activities carried out by Armenia in a forest area of approximately 247,352 hectares.[viii] Notably, the report notes that around 13,197 hectares of protected, rare species of forest including platan, nut-trees, oaks and other valuable species of trees under special protection are present in the Bashitchay National Reserve in occupied Zangilan district. However, evidence showed that a great number of rare trees are subkect to cutting for timber, which is subsequently exported out of the occupied territories for furniture, barrel and rifle production. As a consequence, numerous species of trees which result to be endemic in that territory are pushed on the brink of disappearance.[ix] Despite the difficulties in estimating the resulting economic and environmental damages, Armenian sources as well confirmed the increase of illegal cutting of trees in the occupied territories.[x] Accordingly, 45,359 m^3 of timber was cut in 2010, while that volume increased to 96,237 in 2013.[xi] Focusing on Armenian data, in 2008 the Customs Department and the Statistical Office of Armenia reported that the volume of wood exported from the country has risen sharply over the previous years. Interestingly, it is noteworthy to remark that during the Soviet era Armenia figured as an importing and not as an exporting State.[xii] What is more, the Statistical Committee of the Republic of Armenia CEICDATA itself showed an increasing in exports of wood, articles of wood and wood charcoal in the period 2008 – 2017.[xiii] Therefore, it appears reasonable to assume that the exported woods were not only derived from Armenian forests, but also from occupied areas of Azerbaijan. This presumption is in all likelihood confirmed by satellite images collected by Azercosmos, through which a comparison of the possibly affected forest areas has been possible. Hence, from the observation of imagery gathered by Azerbaijan's satellite operators a clear environmental degradation in the occupied territories and an alarming rate of deforestation especially in the area populated with endangered species was observed.[xiv] More precisely, forest cutting for the construction of a water canal near the Sarsang Water Reservoir in the occupied part of the Tatar district was documented between 2016 and 2018. Similarly, deforestation was caused by mining activities near the Chardagly village in the same Tatar district, causing visible and significant damage to the local ecosystem.[xv]

1.2.Pollution of water resources

Most of the rivers flowing through Azerbaijan originate either in its Karabakh region or in Armenia.[xvi] Therefore, the country is in an extremely vulnerable position as all its territories are located downstream on these rivers, making Azerbaijan heavily dependent on the inflow of water from neighboring Armenia. Unlike Azerbaijan, Armenia is not party to the UNECE *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* adopted in 1992 in Helsinki, which plays a fundamental role as a mechanism for strengthening international cooperation and achieving environmentally sound management and protection of transboundary surface and ground waters.[xvii] As a consequence of occupation, Azerbaijan was deprived of the opportunity to cooperate with Armenia in the joint management of water resources. Consequently, examples of anthropogenic harm abound in this perspective. An illustrative case of environmental harm relates to the critical ecological conditions of the Okhchuchay River. The level of pollution appears to be of fundamental importance for Azerbaijan, as it flows into the Araz River, the second largest river in the South Caucasus. From there, it becomes a tributary of the Kura River, the water from which is employed for the irrigation of the farming lands of Azerbaijan. Results from the testing of water samples from the Okhchuchay River

retrieved from January to March 2021 revealed high contents of heavy metals, including copper, molybdenum, manganese, and chromium.[xviii] In light of the presence of several mining areas in the region, there is reason to believe that the dumping of production waste into the Okhchuchay river without any preliminary treatment has been undertaken by some of the large mining enterprises headquartered in Armenia and operating in its southern region.[xix] Therefore, Azerbaijan has tried to raise the question of transboundary environmental damage committed by Armenia at the international level. On January 18, 2023, Azerbaijan commenced the first known inter-state arbitration under the Council of Europe's *Convention on the Conservation of European Wildlife and Natural Habitats* (Bern Convention), adopted in 1979, the aim of which is to ensure the conservation of wild flora and fauna species and their habitats. Azerbaijan's interstate lawsuit is based on the alleged violation by Armenia of its legal obligations under the Convention. Moreover, full reparations for the environmental harm perpetrated in the formerly occupied territories is demanded. Before reaching the arbitration panel, however, a standing committee composed of all the contracting parties will have to use its best endeavors to facilitate an amicable settlement of the dispute, as envisaged by Article 18 of the Convention. Only in case of the failure of this can a formal arbitration process be launched before a tribunal. Nonetheless, since this procedure has never previously been activated, any prediction concerning the development of the lawsuit and the kind of compensation states will be able to request does not yet appear to be feasible.

1.3.Corporate illegal exploitation of mineral resources

The exploitation of natural resources involves hazardous mining activities conducted by Armenian and foreign companies in the formerly occupied territories of Azerbaijan. Of particular importance is the issue of the gold and copper mining operations that were perpetrated during occupation at the Gizilbulag and Damirli deposits located in the Karabakh region and materially carried out by Base Metals, an Armenian company with an office in Khankendi city, but part of the Vallex Group, a holding company registered in Switzerland.[xx] The deposits concerned are located on an area of more than 850 hectares of land where protected species and forests are present. For the purposes of the construction of the mine, about 82 hectares of forests were felled in the period 2012–2015. [xxi] At the end of 2022, the Azerbaijani authorities detected and recorded the illegal transportation of Azerbaijan's minerals to Armenia via the Lachin road, which led Azerbaijani authorities to express adesire to monitor the deposits located in the part of the Karabakh region controlled by the Russian peacekeeping contingent. Nonetheless, in spite of an agreement reached with the commanders of the Russian peacekeepers in Khojaly town on December 7, 2022, Azerbaijani specialists were unable to gain access to the deposits due to the lack of suitable conditions for the monitoring process. This situation gave rise, on December 12, 2022, to widespread environmental protests on the Lachin–Khankendi road, where activists and representatives of non-governmental organizations demanded the cessation of the illegal exploitation of Azerbaijan's natural and mineral resources. Further evidence of Armenia's harmful environmental conduct and failure to fulfil its duty to prevent environmentally hazardous activities perpetrated by corporate bodies operating under its jurisdiction has been collected by the Azerbaijani space agency Azercosmos. A report published in August 2023 detailed the activities of 24 mines located in Armenia and in the formerly occupied territories of Azerbaijan, observed by the agency's SPOT6 and AZERSKY 7 satellites in 2017 and 2023, and comparisons of the surrounding areas' environmental conditions have been conducted.[xxii]

2. Reconciliation through environmental accountability: a legal perspective

2.1.Environmental protection during armed conflict in international law

The possibility of achieving reconciliation between Armenia and Azerbaijan through accountability for the damage to the environment committed in the period between the First and the Second Karabakh war necessarily passes through the legal analysis of the issue of environmental protection during armed conflict in international law.

In a context of armed conflict, environmental degradation can take different forms, namely the destruction of the territory due to the movement of troops; the employment of weapons and resources leading to water and soil contamination; and deforestation. Therefore, the question of which legal provisions should be considered in armed conflicts for the protection of the natural environment arises.[xxiii] In this regard, international humanitarian law (IHL) – formerly known as the "law of war" – applies after the outbreak of an armed conflict and it supplements the rules of international law applicable in times of peace. As a consequence, a focus on this specific body of law appears to be of fundamental importance for the present research, as it applies also to the thirty-year conflict between Armenia and Azerbaijan. Remarkably, both countries are bound by IHL and in particular by the Geneva Conventions of 1949, as well as by customary international law. Armenia is furthermore part of the Additional Protocol to the Geneva Conventions (AP I) of 1977, whose provisions are applicable also to the environment in accordance with the International Committee of the Red Cross (ICRC) Study on Customary Rules of International Humanitarian Law.[xxiv]

For several decades, the law of armed conflict placed little if no attention to environmental impacts arising from war. This held true either if the damage to the environment was intentional, with the aim of gaining a specific military advantage, or caused by the hostilities in an indirect way and as collateral damage. Despite concerns for the scorched earth tactics employed by the Nazi army during the Second World War, it was only during the Seventies that the law of war started to address the protection of the environment as well. This paradigm shift came as a result of the peak of public attention on warfare environmental implications as a result of the destruction of forests and the utilization of napalm on mangroves on the part of the US Army during the 1955-1975 war in Vietnam. Similarly, oil spills, marine ecosystem damages and extensive environmental harm resulted from the 1980-1988 Iran-Iraq conflict, which led the Security Council of the United Nations to denounce violations of international humanitarian law on the part of the belligerents in Resolution 540 of 31 October 1983. More recently, environmental damages resulting from conflicts in Former Yugoslavia, Kosovo and East Timor contributed to the re-opening of the legal debate on the effectiveness of the implementation of international legal provisions. Nonetheless, a further watershed in the attempt to hold States responsible for environmental harm during armed conflicts was marked by the 1990-1991 Gulf War. More precisely, the intentional destruction by the retreating Iraqi army of over 600 oil wells in Kuwait culminated in Iraq's accountability for damages to the environment and a subsequent compensation of up to $85 billion.[xxv]

In the case of international armed conflicts, international humanitarian law is specifically designed to deal with the conduct of warfare and protection of certain groups of persons not participating or no longer participating in the hostilities. Within this framework, the protection of the environment can configure as either direct or indirect, to the extent that it can be considered a civilian object.[xxvi] In most cases, however, it has to be acknowledged that environmental damage occurring as a result of hostilities is a collateral damage.

With a more in-depth examination of *ius in bello* treaty law provisions for environmental protection, article 35(3) and article 55 of Additional Protocol I to the Geneva Conventions of 12 August 1949 provide direct protection of the environment in times of armed conflict. As a matter of fact, for the first time these provisions expressly prohibited the environment being a specific military target and conceived it as being inherently valuable beyond the mere provision of benefit for human beings.[xxvii] Notably, article 55 imposes due diligence obligations on State parties, which are required to undertake an environmental impact assessment prior to the launch of military operations on an ongoing basis and both in offensive and defensive operations.[xxviii] What is more, the same article compels belligerents to protect the natural

environment against widespread, long-term and severe damage in order to protect civilians. However, the threshold for the consideration of an environmental damage committed in contravention to article 55(4) have not been defined in Protocol I, nor has a court examined the issue. Notwithstanding, the scholarly community agrees on the fact that the provision sets an exceptionally high threshold due to the cumulative requirement of the damage to the natural environment of being simultaneously widespread, long-term and severe.[xxix] Furthermore, article 23(g) of the 1907 *Hague Regulations Respecting the Laws and Customs of War on Land* prohibits acts that "*destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war*".[xxx] Despite having been drafted without specific consideration of the environment, the reference to human property in article 23(g) potentially protects natural resources pertaining to the State, as in the case of oil facilities and refineries which may become military targets of a war.[xxxi] The 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare further provides a valuable framework for environmental protection during armed conflicts. As a matter of fact, in the wake of the devastating implications of poisonous gases employed during the First World War, the Protocol recognized the hazardous consequences of chemical weapons also on natural ecosystems. More recently, few years after the end of the Second World War, States codified the rules and customs of warfare specifically tackling the issue of wartime environmental protection in art. 53 and 147 of the 1949 Geneva IV Convention relative to the Protection of Civilian Persons in Time of War. Notably, the abovementioned articles envisage the unlawful and wanton destruction and appropriation of property in the absence of military necessity as a breach of the Convention. Eventually, article 1 of the Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 10 December 1976 (ENMOD) prohibits the contracting parties from engaging in "*military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party*".[xxxii] 'Environmental modification techniques' have been conceived in article 2 as "*any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere or of outer space*". [xxxiii] Notably, the main objective of ENMOD Convention lied within the cessation of the use of weapons causing catastrophic environmental damage as cloud-seeding to produce rainfall or floods or causing the explosion of a nuclear device in the oceans to provoke a tsunami against the enemy's territory.[xxxiv] Nevertheless, it has to be remarked that ENMOD Convention does not prohibit the application of weather manipulation techniques *per se,* as a small window has been left open for those environmental modification techniques which do not reach the threshold of "*widespread, long-lasting or severe*". In the commentary to the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 the International Committee of the Red Cross (ICRC) has noted that the objective of these legal instruments does not only appear to be the mere protection of the natural environment as such against the use of weapons, but also the natural environment itself, taking into account the inevitable overflow effect inherent in these incidents and the resulting transnational aspect of this problem.[xxxv] Among other differences, however, whereas the provisions enshrined in AP I only apply to international armed conflict, the prohibitions deriving from ENMOD Convention apply in both times of peace and war. Similarly, notwithstanding the similar phrasing on environmental protection and the threshold of damage, the protection offered by the two instruments is dissimilar, as according to ENMOD Convention it is sufficient for a State's behavior to meet alternatively one of the three criteria for its conduct to be considered in contravention of the Convention. Conversely, as stated above, the three criteria in AP I are jointly considered as cumulative.[xxxvi]

In addition to treaty provisions, the environment is further protected in times of war by a number of customary rules of international law. Once again, the International Committee of the Red Cross confirmed that the relevant principles on the

conduct of hostilities equally apply to the environment, even extending the scope of application of the original rules included in Additional Protocol I. Indeed, on the basis of the fact that the environment could easily be affected by hostilities, Rule 43 of the *Study on Customary Law* affirms that no part of the natural environment can be attacked, unless it is a military objective. Therefore, the civilian nature of the environment appears to be confirmed.[xxxvii] The protection of the environment is furthermore enhanced through the reference to the principles of military necessity and proportionality. According to the principle of necessity, to be lawful, weapons and tactics involving the use of force must be reasonably necessary to the attainment of their military objective.[xxxviii] As a result, actions intended at destroying or seizing the enemy's property which are not imperatively demanded by the necessities of war appear to be outlawed. Despite not being directly mentioned, the environment seems to be included in the abovementioned concept of "property", thereby being protected only in an indirect way. This is confirmed by the jurisprudence of the Nuremberg Tribunals, in which judges employed the principle of necessity in order to charge former Nazi Officials with destruction of enemy property.[xxxix] In this regard, Rule 45 of the aforementioned ICRC *Study on Customary Law* confirms that the provisions enshrined in article 35 of Additional Protocol I have customary nature.[xl] Besides, under the principle of discrimination, attacks targeting environmentally meaningful areas as national parks and forests are to be considered contrary to this principle.[xli] Accordingly, all forms of deliberate ecological damage as the poisoning of water supplies or the destruction of agricultural land would appear to fall within the scope of application of the present prohibition.[xlii] Eventually, it is reasonable to affirm that the principle of precaution under article 57 of Additional Protocol I is equally applicable to armed attacks against the environment. Specifically, it entails duties on belligerents to take all the necessary measures to distinguish between civilian and military objectives and to avoid attacks which could potentially cause excessive collateral damage. According to the principle, in fact, a duty of due diligence in all phases of the attack is placed upon the parties to a conflict. In this sense, the ICRC *Study on Customary Law* attempted to frame the application of the mentioned precautionary duties in line with the approach which is usually adopted in international environmental law. Comprehensively, the ICRC formulation represents an attempt to apply the precautionary principle obligations of international environmental law to the duty to take precautions in armed conflicts as envisaged by international humanitarian law.[xliii]

To conclude on the general framework of international humanitarian law providing for the protection of the environment during armed hostilities, it is possible to affirm that the activities allegedly committed in the formerly occupied territories of Azerbaijan result to be in contravention to a great number of treaty law and customary provisions described in this section. The intensive exploitation of mineral resources and the opening of new mines by the occupier, the environmental damages caused by economic activities, and the extensive exploitation of the occupied territory represent a case in point on the matter, as these result to be contrary to both conventional and customary international law.

2.2.Legal accountability of private companies: an overview

Alongside environmental protection in armed conflict as envisaged by international humanitarian law and general international law provisions, the present sub-section will focus on the possibility of holding corporations accountable under the current framework of international law for severe damages to the environment generated from the performance of their activities and committed either from the subsidiaries and affiliates, or under the direction of a parent company, which in most cases is incorporated under the domestic law of a Western country.

At present, the negative impacts on ecosystems induced by private companies' *business as usual* practices and the general impunity of such detrimental practices make the presence of a widespread and homogeneous regulatory framework for corporate environmental harmful activities urgent. For that purpose, the necessity of such regulation has been debated by

the international community for more than 40 years, and – more recently – also within the context of international environmental law. Nonetheless, a binding framework has not yet developed in international law, and therefore no obligations to protect the environment are directly imposed upon corporations.[xliv] Conversely, there exists only multi-stakeholder and voluntary initiatives aimed at enhancing a more transparent and participatory attitude of business entities, which include both non-binding codes of conduct and soft law instruments. On this matter, it is noteworthy to mention that major impediments to the development of a binding framework for an effective oversight of business sector actors environmental conduct exist, including the structural obstacles inherent to multinationals' organizational arrangements, the limitations of international law in terms of corporate personality and the hindrances to the attribution of the responsibility either to home or to host States. More precisely, the dualism between economic unity and legal plurality is considered to be at the basis of the absence of a single regulatory law governing the activities of multinationals. As a matter of facts, the enterprise is considered to be *transnational* in the sense that even though a single economic plan exists, it is however implemented by a group of foreign-incorporated subsidiaries. Indeed, in spite of the fact that MNCs are created as legal entities under the domestic law of a particular State, such companies usually outsource their production processes in more than one country, and especially in developing countries, where the costs of labor and the environmental legislation are generally more advantageous. In this regard, the multinational enterprise does not include an individual company, but it consists of multiple subsidiaries and affiliates integrated with the parent company either in a hierarchical form through the acquisition of shares and forms of ownership of companies previously established in foreign countries (so called *Host States),* or through medium- and long-run contracts aimed at maximizing profits and shareholders' earnings.[xlv] As mentioned, the problem of the legal personality of multinational companies under international law represents one of the major challenges to the development of a proper regime in which global companies are proactively engaged in long-term environmental protection. The legal status of private companies still remains particularly controversial and in an embryonic phase of development.[xlvi] Interestingly, a first traditional approach does not consider business sector actors as subjects of public international law, which exclusively concerns rights and duties of States and International Organizations.[xlvii] According to this view, corporations operate under the sovereignty of the State in which their activities are located, and they have no power to sue other actors to court, being the latter only available for States and – on ancillary basis – International Organizations.[xlviii] On the other hand, multinational corporations are rather described as *objects*, whose responsibility could only be examined either in the host State or in the country of origin. Hence, the majority of the supporters of this first traditional view remain of the opinion that even in the case in which private companies figure among the final recipients of international rules directly addressed to them, the interest of international law to regulate the transnational activities of multinational corporations is generally only indirect, as the mediation of domestic law is still required.[xlix] Eventually, in order to recognize the undeniable relevance of corporations in international relations, a further opposed trend within the legal scholarship acknowledges the possibility of granting private entities a limited international legal personality.[l] In particular, the peculiar role of multinational companies in international law which may justify their position as *subjects* derives from the fact that not only are corporations able to enter into contracts with other private enterprises, but also with States and International Organizations, as in the case of the agreements between the seven largest US and British oil companies (the so-called "*Seven Sisters*") and OPEC governments, which were concluded at the beginning of the 1970s in Tripoli and Teheran. However, since the current state of the debate is still going in the direction of denying a full international legal personality to MNCs, it can be argued that as far as human rights and environmental protection are considered, a legal responsibility directly imposed on corporations does not yet exists; in particular, corporations can only be held responsible for violations of human and environmental rights indirectly and as a breach of domestic law.[li]

On the basis of the previously mentioned alleged absence of corporate personality, the regulation of the conduct of businesses enterprises is left to the action of States, which – in principle – are able to enact legislation and adjudicate over multinational companies with a relative degree of freedom. Notwithstanding, difficulties arise when it comes to identify which State is required under international law to guarantee the protection of the environment in the presence of transnational activities carried out by business enterprises. As a matter of fact, due to corporations' juridical plurality vis-à-vis economic unity and the tendency to relocate the production process, it is necessary to assess whether the State which is internationally required to manage the control of MNCs is exclusively the host State (limited to the activities performed in its territory), or whether it is possible to backtrack some obligations to home States, by virtue of the control exercised by parent companies on the overall activities of multinational corporations.

Both home and host State regulation of multinational companies present a wide range of difficulties, which hinder the development of an adequate response to the need of supervise and prosecute the environmental irresponsible behaviour of multinational enterprises operating abroad. In light of this, it seems appropriate to conclude that national legal solutions to hold private corporations accountable for environmental damages largely appear unsatisfactory. Because of the abovementioned impediments in granting corporate environmental accountability, a brief scrutiny of soft law and voluntary alternatives appears to be relevant. Namely, the question as to whether corporate codes of conduct of different origin can effectively influence the decision-making process and more in general global enterprises' conduct with respect to the environment. Markedly, the approach of corporate social responsibility (CSR) – namely the concept of voluntarily integrating social and environmental considerations both in corporate operations and in the relations with stakeholders[lii] - has started to develop, with a view to contribute to the socially and environmentally-sound conduct of business enterprises. Nonetheless, corporate social responsibility can take different forms according to the perspective adopted in the analysis of the issue: on the one hand, there exist voluntary codes of conduct originating at the inter-governmental, regional and governmental level. This refers to the so-called *corporate social responsibility from above,* and includes, *inter alia,* the UN Global Compact, the UN Norms on the Responsibility of TNCs and other Business Enterprises with Regard to Human Rights, the OECD Guidelines for Multinational Enterprises, and ultimately the Performance Standards of the World Bank's International Finance Corporation. On the other hand, *corporate social responsibility from below* shifts the focus on various initiatives directly proposed at the business community and firm level. In both cases, however, difficulties with the provision of independent compliance verification and monitoring systems represent one of the principal drawbacks for the correct functioning and efficiency of voluntary and soft-law initiatives at intergovernmental and firm level. Most importantly, not only is the presence of oversight mechanisms fundamental to ensure the effective functioning of accountability initiatives, but in certain cases it also delineates a system in which it is possible to raise complaints.

3. Governance solutions for post-conflict recovery: the contractualization approach

3.1. The contractualization of environmental protection

In light of the difficulties in holding corporations accountable for damages to the environment under the current framework of international law described in the previous section, this part of the research will elaborate on the possibility to adopt a contractual approach to be applicable to corporate actors for the guarantee of environmental protection. The scope of this section is to propose the contractualization of environmental protection as a central strategy for the post-

conflict recovery of Karabakh as a means to support the reconstruction of the area while simultaneously improving and accelerating the recovery of the natural environment.

In the wake of major hindrances of the corporate social responsibility doctrine in terms of effectiveness of environmental protection, the possibility of ensuring an adequate level of protection of the natural environment by multinational companies has emerged among public and private international law scholars. Namely, the contractualization approach involves the conversion of social and environmental responsibility standards into legal obligations through their incorporation into contractual clauses. Consequently, their observation would be characterized as mandatory for the parties, who would eventually be allowed to invoke the termination of the contract in the event of the violation of these clauses by one of the (two or more) contracting parties.[liii] The practice of contractualization of environmental protection standards and the incorporation of international environmental law principles into contracts concluded by and with multinational companies occupies a still poorly defined space among the traditional system based on national sovereignty - which does not recognize multinational companies as subjects of international law - and a new governance approach to global economic activities. The latter, on the contrary, acknowledges the need to no longer consider private and transnational companies as mere passive recipients of the regulation of individual governments, but rather attempts to involve them in the production of legislation by virtue of their political-economic weight on an equal footing with States.[liv] Therefore, with the use of the contractual instrument it would be possible to bridge the gap between the absence of a binding international framework and the presence of mere voluntary and soft law initiatives for corporate social responsibility, imposing environmental protection obligations on affiliate companies and to the subsidiaries operating along the production and supply chain.[lv] In this regard, having the form of a binding legislative instrument, the contract is potentially able to leverage the behavior of the contracting parties. If, in fact, a multinational company imposes on its suppliers an objective of ecosystem protection through the incorporation of its own code of conduct or of a principle of international environmental law into contractual clauses, it can produce a positive change without the need to reach an international agreement and face a long and costly negotiation process. By adopting a bottom-up approach as an alternative to top-down initiatives of inter-governmental and regional origin, contractualisation could in fact give rise to a new binding regulatory framework between the parties, elevating one of the oldest legal instruments – the contract – to a means of prosecuting new public purposes.[lvi] For international environmental law scholars, the examination of contracts concluded by multinational companies appears to be a fertile ground for the analysis of the dynamic processes of implementation of international environmental protection standards. With reference to *Sustainability Contractual Clauses* (SCC) and the environmental rules included in contracts providing for investments relating to projects with potential implications for the health of the ecosystems involved, these perform the important function of limiting the operations sponsored by foreign investors and actually implemented by multinationals. At the same time, they provide the regulatory framework within which these actors can ensure environmental protection while carrying out their activities. While not operating in isolation from national and international law, contracts therefore perform an important governance function for regulating economic activities that may be potentially harmful to the environment. However, the relevance of investment contracts could be hindered by the difficulties associated with the confidentiality of contractual agreements and their implementation, as well as by the impossibility of providing an adequate response to environmentally harmful behavior perpetrated by multinational companies.[lvii] Similarly, concrete cases of termination of a contract due to the violation of contractual clauses incorporating the CSR are limited. At the same time, if a multinational company decides to start a legal dispute for non-compliance with the contractual obligations in the field of environmental protection, third parties – whether they are individuals who are victims of corporate misconduct, NGOs or local communities whose natural habitat has been subjected to environmental degradation – would not be part of the process, nor would there be any

compensation from the business entity itself.[lviii] Therefore, it has been recognized that although the private regulation of transnational companies and the use of contracts have produced significant advances in the responsible conduct of the business community, this practice should not be considered as a substitute for a more effective exercise of state authority both domestically and internationally.[lix] In this perspective, the long-term impact of the contractual approach will depend on the extent to which the environmental protection standards adopted by companies and the mechanisms to hold companies accountable for their illegal harmful environmental conduct are integrated into a regulatory framework of State origin and within regulatory policies both at the level of individual countries and in the context of international law.[lx] Furthermore, the question of the so-called "hybridization" of the governance system of transnational companies remains open. Indeed, through contractualization an interaction between public and private international law and contract law, as well as the non-binding standards adopted at inter-governmental, regional and voluntary initiatives originating in the private regulation of the same companies would occur. In particular, questions arise about the effectiveness of the contractual instrument as a means offering adequate environmental protection and about the validity of the traditional conception of private law as a tool for the regulation of relations between individual persons and legal entities, without any public function or pursuit of objectives for the benefit of the society as a whole.[lxi] From a contract law perspective, the reference to international codes of conduct and environmental protection principles raises fundamental issues relating to the method of incorporation, the drafting of contractual terms relating to corporate social responsibility, implementation and enforcement. Specifically, contracts assume the power to give binding effect to voluntary corporate environmental responsibility instruments only if three criteria are met: CSR clauses must be effectively incorporated into the contract; they must be drafted in a binding manner; the wording of the provisions must be clear and unambiguous.[lxii]

At present, two successful examples of adoption of the contractualization of environmental protection approach can be identified in international law. Specifically, contracts for the exploration and exploitation of mineral resources on international seabed are the most relevant case in point on the matter. Part XI and Annex III of the United Nations Convention on the Law of the Sea (UNCLOS)[lxiii] in fact provide for the possibility for natural and legal persons having the nationality of States parties or effectively controlled by them to explore and exploit polymetallic nodules and sulphureous resources on international seabed following the conclusion of specific contracts with the International Seabed Authority (ISA) for a duration of 15 years (renewable for another 5). Any potential breach of contractual obligations may be raised before the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS). The ISA plays a peculiar role in the organization and control of operations involving mineral resources, in order to preserve the marine environment and, simultaneously, the occurrence of environmental disasters deriving from the international exploitation of the seabed, which pursuant to UNCLOS are to be considered common heritage of humankind.[lxiv] Among the contractual clauses stipulated with the ISA, specific environmental protection principles are included. Hence, the contracting States and private companies are legally bound to comply with the precautionary principle enshrined in the Rio Declaration, and to adopt all necessary measures to prevent, reduce or mitigate the risk of environmental damage during exploration and extraction activities. Furthermore, the contracting parties are required to undertake the drafting of a report on the progress of the activities, on the employed technologies and finally on the environmental impacts of their operations.

Contracts concluded by multinational companies within the World Bank system and in particular with the International Finance Corporation (IFC) are a further example of the incorporation of environmental protection standards into contractual clauses. With the aim of promoting the advancement of the private sector in developing countries in a broader perspective of poverty eradication, the IFC is one of the largest development institutions operating both in the field of investment with enterprises, and in providing technical assistance to companies and governments in emerging countries. Contrary to the general functioning of the World Bank, the financial benefits derive exclusively from the investment

projects of the IFC.[lxv] As a matter of fact, with a revision of the Performance Standards adopted in 2006 and the subsequent approval of an updated version in 2012, the granting and subsequent disbursement of guaranteed financial resources to multinational companies for the implementation of investment projects in developing countries is subject to compliance with 8 principles of environmental protection. These include, among others, the assessment and management of risks and social impacts; resource efficiency and pollution prevention; the conservation of biodiversity; sustainable management of natural resources.[lxvi] The eventual violation of the aforementioned rules during the implementation of an investment project could therefore lead to the interruption or termination of the loan. In this sense, the commitment of companies to comply with the environmental standards of the IFC is ascertained in a two-stage process and, since 1997, through an additional compliance mechanism – the Compliance Advisor/Ombudsman (CAO) – established with the goal of providing affected communities and individuals with the opportunity to have allegations related to the application of environmental standards reviewed by an independent monitoring body.

3.2.Possible implications on post-conflict governance

In light of the environmental damage committed by corporations in the formerly occupied territories of Azerbaijan, the contractual approach to environmental protection could result in a successful governance approach for the reconstruction and reintegration of the Karabakh region and other territories of Azerbaijan in a post-conflict stage. Indeed, the contractualization of environmental protection could be characterized as a means to both overcome the above-described shortcomings of international law in offering a response to environmental damage committed by corporations, and to prevent the occurrence of future environmental harm within national borders. For this reason, including environmental standards, codes of conduct, and international environmental law principles within contractual clauses in the post-conflict recovery phase would possibly form one of the steps to successfully rehabilitate the ecosystem of the environmentally damaged territories. Ultimately, the successful application of the contractualization approach in Azerbaijan could spur the employment of the same approach to other regions of the world equally affected by corporate environmental damages during and after armed conflicts.

With this in mind, some possible concrete applications of the contractualization of environmental protection approach are provided. Most importantly, it should be borne in mind that the contractualization of environmental protection is presented only as a preventive approach to corporate environmental damage, and it does not address the wrongful acts committed or the responsibility of damage perpetrators during the period of occupation. Hence, it should be considered as a framing approach that could guide Azerbaijan's relations with multinational companies operating within its borders in the future.

3.2.1. Exploitation of mineral resources

The contractualization of environmental protection in the field of exploitation of natural and mineral resources in the liberated territories may prove fundamental. The contractualization approach could be applied to private companies based in Azerbaijan and, subsequently, to foreign companies willing to acquire shares in such companies for the performance of mining and mineral extraction activities in the liberated territories. When contracts are granted to such companies by the State for the exploitation of such resources, specific environmental clauses should be included in the contract. These clauses could take different forms. For example, they may include international environmental law principles, or indicate international standards or codes of conduct developed at the inter-governmental level. Similarly, reference to an external code of conduct can be made, as well as mention of environmental principles in the general conditions of the contract.

Notably, for the contractual clause to be valid and to acquire binding force between the parties, the form, the level of specificity, the accuracy, and the linguistic clarity should be precisely formulated so as to expressly show the intention of the parties to be bound by these clauses.

3.2.2. *Reconstruction of infrastructure and transportation lines*

The same approach of contractualization may be adopted for the reconstruction of infrastructure and transportation lines connecting to the liberated territories (including railway connections, airports, and roads), This holds true for the whole spectrum of infrastructure needed in the liberated territories, including in the fields of energy distribution and water management, which appear to be particularly sensitive issues for Azerbaijan. Specific, accurate, and unambiguous environmental clauses may be included in contracts granted by the state to national and foreign companies willing to contribute to the reconstruction phase of the liberated territories. This would, in fact, allow the government to provide oversight and ensure that licensed companies abide by national legislation and international principles of environmental protection during the whole phase of infrastructure reconstruction.

3.2.3. *Foreign investment*

The area of foreign investment may prove to be a further flourishing field in which the contractualization of environmental protection could be applied. On the model of the International Finance Corporation approach, the government of Azerbaijan could exploit the growing attention towards sustainability and environmental protection by linking the attraction of foreign investment to the protection of the environment. In this sense, investment agreements involving foreign corporations or foreign states willing to invest in the liberated territories may contain specific clauses such as the obligation to conduct an environmental impact assessment, and the consideration of the precautionary principle and the principle of prevention before the implementation of reconstruction projects. The government of Azerbaijan would therefore be able to integrate environmental protection objectives with other public policy and economic objectives.

Conclusion

The present research study aimed at investigating the wide variety of activities that have been responsible for harm to the natural environment of Azerbaijan in a period including the First and Second Karabakh wars, with a special focus on environmental damage committed by corporations. The wrongful activities considered in this paper include biodiversity loss due to deforestation, water pollution and corporate illegal exploitation mineral resources. With a view to explore legal and governance solutions for the post-conflict recovery of the damaged areas as a means to achieve reconciliation between Armenia and Azerbaijan through environmental accountability, this article further examined the current framework of international law as regards environmental protection during armed conflict and corporate environmental accountability. In this latter case, numerous impediments deriving from corporations' organizational arrangements, and from difficulties in the identification of the state having jurisdiction to rule on cases of environmental harm involving foreign companies contribute to the relevant shortcomings of international law in guaranteeing the accountability of multinational corporations for damage to the environment. For the abovementioned reasons, the ultimate objective of this paper laid in the contribution to the ongoing research through the proposal of a contractual approach to environmental protection during the post-war recovery and reconstruction of formerly occupied territories of Azerbaijan as a potential

means of ensuring the prevention of environmental harm and of overcoming the difficulties of international law in this field. Moreover, even though not providing an answer to corporate wrongful doings, the contractual approach could possibly configure as a governance solution guiding the future relations of Azerbaijan with multinational corporations operating in its territory. Eventually, the successful application of contractualization in Azerbaijan could spur the employment of the same approach in other regions of the world similarly affected by corporate environmental damage during and after armed conflicts.

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