

**Prospects for a Civil Liability Compensation Scheme for Oil Pollution
Damage in Libya as a Transitional State**

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Abstract

This research introduces Libya's current situation as a state since 2011, initially through the conceptual framework of post-conflict, transitional and failed states. It also analyses the Libyan modern history's key developments to clarify its effects on the Libyan situation. Furthermore, it highlights the post-2011 period, including the successive governments' priorities and the central institutions' role.

This study then argues that the existing fault-based liability regime in terms of oil pollution applied in the Libyan courts cannot secure compensation for oil pollution damage. Thereby, the study examines the application of strict liability in Libya's oil pollution cases during the transitional period, which helps avoid the foreign cause, such as the act of a third party. It sheds light on the practical implementation of a new strict liability compensation scheme in Libya through capacity developments regarding legal, judicial, environmental institutions and capacity building in this regard.

This research proposes a new compensation scheme based on the International Oil Tanker Pollution Compensation Scheme model to activate the Libyan legal system regarding civil liability for oil pollution damage. The research utilises an approach to analyse the current legal framework and selected oil pollution cases to present its implementation weaknesses. This approach considers the influences of the historical factors, the characteristics of the Libyan state after the revolution of 2011, the impacts of the current transitional period on the cases of oil pollution damage, and the role played by the National Oil Corporation and the national environmental administrative institutions in this regard.

The research proposed adopting a compensation regime based on strict liability instead of the current fault-based rule regarding oil pollution cases. This proposal also respects the conditions of the current Libyan transitional period. The study puts forward policy recommendations for Libyan legislators to bring about a more efficient and effective system regarding civil liability for oil pollution damage. Developing this new approach for civil liability for oil pollution damage may serve as an example for the broader context of legal development regarding the civil liability regime in Libya and potentially serve as a model for similar transitional countries regarding civil liability compensation schemes for oil pollution damage.

Abbreviations

- CDA Constitutional Drafting Assembly
- CLC-69 1969 International Civil Liability Conventions on Oil Pollution Damage
- CLC-92 1992 International Civil Liability Conventions on Oil Pollution Damage
- CLCs International Civil Liability Conventions for Oil Pollution Damage
- CLfOPD Civil Liability for Oil Pollution Damage
- EGA Environmental General Authority
- EEZ Exclusive Economic Zone
- EPSAs Exploration and Production Sharing Agreement
- GNA Government of National Accord
- GNC General National Congress
- GPC General People's Congress
- GPCs General People's Committees
- GWA General Water Authority
- HoR House of Representatives
- ICD Interim Constitutional Declaration
- IMO International Maritime Organisation
- IOTPCS International Oil Tanker Pollution Compensation Scheme
- IOPC-1971 1971 International Oil Pollution Compensation Fund on Oil Pollution Damage
- IOPC-1992 1992 International Oil Pollution Compensation Fund on Oil Pollution Damage
- ISIS Islamic State in Iraq and Syria
- LCB Libyan Central Bank
- Lipetco Libyan General Petroleum Company
- LNA Libyan National Army
- LPA Libyan Political Agreement
- MENA Middle East North Africa Countries
- MoA Ministry of Agriculture
- MoH Ministry of Health
- NATO North Atlantic Treaty Organisation

-
- NNPC Nigerian National Petroleum Corporation
 - NOC National Oil Corporation
 - NPWJ No Peace without Justice
 - NTC National Transitional Council
 - OPEC Organisation of Petroleum Exporting Countries
 - PCO Project Coordination Office
 - RCC Revolution Command Council
 - SJC Supreme Judicial Council
 - UCDP Uppsala Conflict Data Program
 - UNCLOS United Nations Convention on the Law of the Sea
 - UNDP United Nations Development Program
 - UNEP United Nations Environmental Program
 - UNODC United Nations Office on Drugs and Crime
 - UNSMIL United Nations Support Mission in Libya

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1 Introduction to the Thesis

Since the 1960s, there has been a growing interest in environmental protection, mainly damages done to Libya's natural environment.¹ In this regard, civil liability for oil pollution damage is one of the fundamental issues under study.² Accordingly, it considers that civil law should offer redress to oil pollution victims. As necessities, the current applicable civil liability regimes might be addressed and propose supplanting them with a compensation scheme based on strict liability rules.³

The problem of oil pollution damage is particularly acute in fragile countries such as Libya post-2011 war.⁴ The post-conflict situation in Libya described a stage when civil war came to an end in October 2011, and a state has an opportunity to establish peace. Post-conflict is a process in which warfare is absent, but it is not precisely a presence of peace.⁵ In comparison, a transition concept is often related to the political aspect of the state's reformation and installing a new regime.⁶ In the Libyan context, the political transition could define as the interval between the demise of Qaddafi's political authority and the installation of a new political regime. It is a procedure where new principles are being formed during an interregnum regulated by a temporary administration after the 2012 election.

¹ Nassr Ahmed and Fathi Mousa, 'Corporate Environmental Disclosure in Libya: A little improvement' (2011) 6 *World Journal Entrepreneurship, Management and Sustainable Development* 149; Frederick Anderson, Daniel Mandelker and Dan Tarlock, *Environmental Protection: Law and Policy* (Aspen Publishers 1990) 5.

² Florentina M. Toma, 'Civil Liability for Oil Pollution Damage' (Ecological University 2007) [http://www.ugb.ro/etc/etc2008no2/s68%20\(1\).pdf](http://www.ugb.ro/etc/etc2008no2/s68%20(1).pdf) accessed 12/06/2016; also see, Michael Mason, 'Civil liability for oil pollution damage: examining the evolving scope for environmental compensation in the international regime' (2003) 27(1) *Mar Policy* 1; and Michael Faure, *Civil liability and financial security for offshore oil and gas activities* (Cambridge University Press 2016).

³ Christian Bienemann, 'Civil liability for environmental pollution: different regimes and different perspectives' (PhD Thesis, University of Aberdeen 1996) 1.

⁴ Aneaka Kellay, 'Pollution Politics: Power, Accountability and Toxic Remnants of War' (21/10/2015) <http://www.toxicremnantsofwar.info/wp-content/uploads/2014/06/TRW_Pollution_Politics_Report.pdf 16> accessed 25/10/2017.

⁵ Lakhdar Brahimi, 'State Building in Crisis and Post-conflict Countries, at the 7th Global Forum on Reinventing Government Building Trust in Government 26-29 June 2007' (2007) 6 <www.unpan1.up.org> accessed 02/04/2016.

⁶ Yossi Shain, Linz J. Juan and Berat Lynn, *Between States: Interim Governments in Democratic Transitions* (Cambridge University Press 1995).

However, states, during transition, may fail when they are not capable or no longer willing to carry out their duties or bear responsibilities for their citizens.⁷ As a result, the failure to deliver its essential services leads a state to become a failed state, or in some cases become a collapsed state, which is an extreme version of a failed state where there is an entire vacuum of power.

Since 2011, Libya has faced environmental issues caused by adverse pollution events, especially in the oil sector, occurring after the 2011 civil war,⁸ and its impacts were neglected.⁹ Moreover, under the present transition period, environmental matters are often not included in Libyan lawmakers' political priorities.

Therefore, this research explores the concepts of post-conflict, transitional and failed states for possible application to Libya to discuss the National Oil Corporation (NOC)¹⁰ role and its relationship with the successive governments after 2011.¹¹ This research will address liability for oil pollution damage within Libya today as a transitional state. The reasons behind this are; there are risks that victims of oil pollution damage cannot obtain total compensation based on the rules of the current fault-based civil liability regime that applies in Libyan courts. Presently, there are no civil liability compensation schemes in terms of oil pollution damage included in the existing Libyan system, nor practice by the NOC of paying out compensation on a strict liability basis.

Libya is one of the world's major oil-exporting countries.¹² Since the discovery of oil in the 1950s, it has become highly dependent on oil and gas industries.¹³ These industrial activities are ranging from exploration to production. Although they have different impacts on the environment based on their nature and type of contamination,¹⁴ their effects are currently

⁷ Donald W. Potter, 'State responsibility, sovereignty, and failed states' (Referred paper presented to the Australian Political Studies Association Conference, University of Adelaide 2004) 3-4.

⁸ Doug Weir, 'Watching the world burn: Islamic State attacks against Libya's oil industry' (online Jan 8, 2016) <<http://www.toxicremnantsowar.info/watching-the-world-burn-islamic-state-attacks-against-libyas-oil-industry/>> accessed 11/04/2016.

⁹ Kellay (n 4) 41.

¹⁰ NOC is a state-owned company and the first party to all oil exploration and production agreements according to Law NO.24 of 1970 establishing the National Oil Corporation (NOC) (Amended by the law No.31 of 1971) Available online<<https://noc.ly/index.php/en/about-us-2>>accessed 08/11/2016.

¹¹ See chapter 3 section 3.4.3 below.

¹² Gas Exporting Countries Forum (GECF), 'Country profile: Libya'. [Online] <<https://www.gecf.org/countries/libya>>accessed 25/10/2017.

¹³ Judith Gurney, *Libya - the political economy of oil* (Oxford University Press, United Kingdom 1996) 15.

¹⁴ Sabah Nait, 'ENPI-SEIS project, Country Report-Libya' European Environment Agency (Denmark March 2015) 1 629 [online] <<http://www.enpi-seis.pbe.eea.europa.eu/accessed>> 7 accessed 12/07/2016.

ignored.¹⁵ The environmental problems have not yet been addressed comprehensively in Libya.

Furthermore, in recent years, since the end of Qaddafi's regime and the onset of civil war in 2011,¹⁶ Libya has faced severe environmental challenges associated with the oil pollution incident.¹⁷ These oil pollution incidents have affected environment, the properties, and livelihoods of Libyan citizens.

Whilst victims of oil pollution damage should have a right to be compensated. It is not generally possible for them to obtain compensation. First, this is because of the weaknesses of the existing Libyan legal framework of civil liability for oil pollution damage (CLfOPD) and environmental institutions. In theory, since enacted Law No.105 of 1958,¹⁸ there have been many laws concerning Libya's oil pollution.¹⁹ Still, this regulatory framework has been ineffective even before 2011. The existing governmental/public environmental institutions also remain non-functional to support victims due to their inadequate authority, personnel, and resources.

The second reason is that the impact of the post-2011 period on cases of oil pollution damage. Since NOC is the first party to all Oil Exploration and Production Agreements in Libya, most oil pollution events are initially attributable to this company. However, since recent oil pollution events resulted from the attacks from third parties such as ISIS,²⁰ the NOC could exclude the causal link between pollution damage and its operations. This exclusion will be through the external, third-party actor's existence, which contributed to oil pollution damage during periods when oil installations were not under its control.²¹

Therefore, the discrete problems that this research has addressed are the limitation of the legal framework of CLfOPD in Libya. It also addresses the question of the impacts of the

¹⁵ Doug Weir, 'Environmental Mechanics: Re-Imagining Post-conflict Environmental Assistance' (online 06/11/2015) <www.toxicremnants.org/war/info/category/blog> 8, accessed 30/04/2016.

¹⁶ Rosan Smits and others, *Revolution and its discontents: state, factions and violence in the new Libya* (Citeseer 2013) 22.

¹⁷ Weir (n 8) 9.

¹⁸ This law is the first law was established on 28 November 1958 in regard of Libyan Maritime law and has amended by the law No. 25 of 1976. Available online <<http://itcadet.gov.ly/wp-content/uploads/2016/01/>> accessed 12/01/2017

¹⁹ Such these laws: The Libyan Maritime Law No. 105 of 1958, Law No. 81 of 1971 regarding seaports, Law No. 8 of 1973 with respect to the prevention of oil pollution to sea waters and law No. 7 of 1982 with regard to environmental protection. For more information see Waniss Otman and Erling Karlberg, *The Libyan economy: economic diversification and international repositioning* (Spring Science & Business Media 2007) 353.

²⁰ BBC Worldwide Monitoring, 'Libyan oil authority says Islamic State attacked two oil tanks near Sirte' BBC Monitoring Middle East - Political Supplied by BBC Worldwide Monitoring (23 February 2016).

²¹ NOC, 'Oil Installations Guards Obstruct an Attempt to Discharge Ras Lanuf Tanks' (NOC, 14 January 2016) <<http://noc.ly/index.php/en/new-4/1294-oil-installations-guards-obstruct-an-attempt-to-discharge-ras-lanuf-tanks>> accessed 30/01/2016.

current nature of the Libyan state, whether post-conflict, transitional, or a failed state, on the legal framework of CLfOPD.

It is important to note that this research covers the political events in the pre-and post-2011 period until January 2020. It also examines the cases that have been decided during this period. Any event that happened after the selected time will not be included and discussed in this study.

Although this thesis's backstop date is January 2020, some essential Libyan status updates are worth highlighting. In January 2021, the Libyan Political Dialogue Forum (LPDF), which has started in Tunisia in November 2020 between the political parties in western and eastern Libya, has resulted in signing on the agreement in Geneva under the auspices of the United Nations Support Mission for Libya (UNSMIL)²² under Security resolutions 2542/2020 and 2510/2020.²³ This agreement establishes a new Presidency Council and an effective and unified Government of National Unity to pave the way for ending the transitional period through free, transparent and parliamentary elections. On 10/03/2021, the HoR has voted on the confidence of a new unified interim Libyan government. Libya now has a genuine opportunity to move forward towards unity, stability, prosperity, and reconciliation and fully restore its sovereignty.²⁴

Regarding the selected cases, there are two types of oil pollution cases. Since they have raised different legal or quasi-legal ordering issues, they could be termed "standard" and "political violence" types of oil pollution. The standard type of oil pollution occurs because of regular oil industrial activities such as exploration and production. The kind of oil pollution called political violence refers to the recent oil pollution events resulting from the civil war or the attacks from third parties such as ISIS. These two different pollutions events require different legal solutions. While the no-fault based system would deal with regular oil

²² The United Nations Support Mission for Libya (UNSMIL) is an integrated special political mission established on 16 September 2011 by UN Security Council Resolution 2009 (2011) at the request of the Libyan authorities to support the country's new transitional authorities in their post-conflict efforts. for more information see UNSMIL, 'UN Mandate 12, Resolution 2009 (2011) adopted by the Security Council at its 6620th meeting, on 16 September 2011' (online) <<https://unsmil.unmissions.org/sites/default/files/SRES2009.pdf>> accessed 18/10/2017.

²³ UNSMIL, 'Resolution 2510 (2020) Adopted by the Security Council at its 8722nd meeting, on 12 February 2020' (online) <https://unsmil.unmissions.org/sites/default/files/s_res_25102020_e_2.pdf> accessed on 15/03/2021. See also Resolution 2542 (2020) Adopted by the Security Council at its 8758th meeting, on 15 September 2020' (online) <https://unsmil.unmissions.org/sites/default/files/s_res_25422020_e.pdf> accessed on 15/03/2021.

²⁴ UNSMIL, 'UNSMIL statement on the approval by the house of representatives of a new interim unified government' (online) <<https://unsmil.unmissions.org/unsmil-statement-approval-house-representatives-new-interim-unified-government>> accessed on 15/03/2021.

pollution. In contrast, a specific response is required to oil pollution that follows political violence.

This research will focus on the standard oil pollution events and analyse the cases raised before courts to claim compensation for this type of oil pollution. The oil pollution events that occur because of political violence will not be included in this research. It raises issues that are not dealt with through the strict liability regime, which are beyond this study, and the selected model of IOTPCS would regard them outside the compensation scheme.

This thesis concerns the types of a claimant who suffered from regular oil pollution resulting from oil operations regarding the thesis's scope. It also addressed oil spills that resulted from pipelines, upstream activities, and processing activities that occurred on land.

Evaluating Libya's current situation could lead to an understanding of the Libyan political and judicial systems functions during this period and why the previous legislation introduced before 2011 is still applied today. Accordingly, the state's status is relevant to this research for identifying politicians' and law policymakers' priorities during uncertain times. It also determines why such environmental matters are ignored during a transitional period. The state's status is also relevant in understanding why the previous legislation, such as CLfOPD, still exists and applies in these times and considerate the impacts of the state's standing on the oil pollution cases.

Furthermore, they are synthesising the domestic legislation and the claim documents of oil pollution cases related to CLfOPD to highlight the Libyan legal framework's limitations for CLfOPD and the influence of the Libyan state's present status on these cases. They also help understand the extent to which existing legislation can apply by courts to compensate victims of oil pollution and the challenges involved due to the Libyan state's characterisation as a nation in transition.

The International Oil Tanker Pollution Compensation Scheme (IOTPCS) has been chosen as a model to establish a no-fault civil liability scheme with compulsory insurance for oil pollution damage in Libya.²⁵ IOTPCS was selected due to the shortcoming of the Libyan CLfOPD and to ensure that victims of oil pollution damage during the present-day Libyan transitional state receive compensation.²⁶ The reason is that this scheme would likely guarantee adequate compensation for oil pollution damage through application strict liability

²⁵ IOPC Funds, 'The International Regime for Compensation for Oil Pollution Damage' (providing compensation for oil pollution damage resulting from spills of persistent oil from tankers) <<https://www.iopcfunds.org/fileadmin/>> accessed 13/06/2016.

²⁶ Libya is a member of the Organisation of the Petroleum Exporting Countries (OPEC), and has just accepted the first International Civil Liability Convention which was established in 1969 (CLC).

(subject to (upper) compensation limits) which is advantageous to oil pollution victims. Accordingly, synthesising the International Conventions of IOTPCS helps understand the application of strict civil liability regimes and other relevant elements related to the subject under the study.

Therefore, the purpose of this research is to identify and establish the extent to which Libyan regulations engage with the liability concept for oil pollution damage in comparison with international civil liability compensation schemes in the field of environmental protection. In this case, this research will use the IOTPCS as a model to establish a civil compensation scheme for oil pollution damage in Libya.

Recognition of the transitional status in Libya due to the civil war in 2011 allows the following hypothesis to be developed within the specific Libyan context:

The prospect of a strict liability compensation scheme could be run by the Libyan oil industry, providing compensation directly to individual victims and funding for remedial measures for environmental damage. It could also act to bypass or avoid the otherwise uncertain governmental authority exercised by the competing Libyan factions in this transitional phase of Libya's modern history.

1.1 Background of the Research

The literature review covers the following aspects of the study: a historical introduction to Libya and background to the current transitional situation; legal framework of civil liability for oil pollution damage including environmental, petroleum and civil laws; a legal framework of the International Oil Pollution Compensation Scheme.

1.1.1 The Current Nature of the Libyan State

Part one of the thesis is: The current nature of Libya: Post-conflict, Transitional or Failed state? This part could be considered the study's foundation, which starts with establishing the conceptual framework of the post-conflict, transitional and failed states (chapter two) to apply this framework on the Libyan status to identify its current nature (chapter three).²⁷ The

²⁷ Mark Duffield, 'Post-modern Conflict: Warlords, Post-adjustment States and Private Protection' (1998) 1 *Civil Wars* 65.; Brahim (n 5); Larry Diamond, 'Promoting Democracy In Post-Conflict And Failed States, Lessons And Challenges' (2006) 2 *Taiwan Journal of Democracy* <<http://www.tfd.org.tw/export/sites/tfd/files/publication/journal/dj0202/05.pdf>> 93 accessed 13/04/2017; Potter (n 7); Rolf Schwarz, 'Post-conflict peacebuilding: the challenges of security, welfare and representation' (2005) 36(4) *Secure Dialogue* 429. 431; DW Brinkerhoff, 'Special Issue - Rebuilding Governance in Failed States and Post-Conflict Societies - Guest Editor's Preface' (2005) 25 *Public Administration and Development* 1.

latter explains why Libya is considered a state in transition using the different states' conceptual framework discussed below in chapter 2. Therefore, tracing the characteristics of the transitional states²⁸ reveals that most of these countries are in a transition to democracy; however, they may face several difficulties through this transitional process, such as those related to constitution, referendum and security matters, as most of them were under a dictatorial regime.²⁹

Further, they have entered a political grey zone in which there are a few characteristics of democratic political life, including constrained political space for independent civil society and opposition parties. Additionally, regular elections and democratic constitutions and the elections in these countries are often free and fair.³⁰ Be that as it may, the foundation of standard, accurate polls will give a new government equitable legitimacy and encourage a more extended term development of majority rule support and accountability. Also, their judiciary systems are often somewhat independent. Moreover, their judiciary systems are often relatively separate.

Further, some crucial deficits may influence transitional countries throughout the transition progress somewhere in the assumed democratisation sequence, and this usually accrues at the start of the consolidation phase.³¹ These severe democratic deficits can be factors such as a poor representation of residents' inclinations, low degrees of political participation beyond voting, frequent abuse of the law by government authorities, elections of uncertain legitimacy, shallow degrees of open trust in state institutions, and steadily poor institutional execution by the state.³² Overall, the state experiencing significant reform remains mainly frail. The economic approach is regularly misguided and executed, and financial performance is often weak. Social and political changes are similarly tenuous, and successive governments are powerless to make progress on most serious issues confronting the state, from crime and corruption to education, health and public welfare generally.³³

The analysis of the literature of post-conflict, transitional and failed states shows that the features mentioned earlier, and conditions of the transitional state are suitable to describe

²⁸ Thomas Carothers, 'The end of the transition paradigm' (2002) 13(1) *Journal of democracy* 5.17

²⁹ Yahia H Zoubir and Erzsébet N Rózsa, 'The End of the Libyan Dictatorship: The Uncertain Transition' (2012) 33 *Third World Quarterly* 1267. 1271

³⁰ Carothers (n 28) 10.

³¹ Marina Rafti, *A Perilous Path to Democracy: Political Transition and Authoritarian Consolidation in Rwanda* (Institute of Development Policy and Management, University of Antwerp, 2008) 8.

³² Carothers (n 28) 11.

³³ Rafti (n 31) 10.

Libya in its present-day as a transitional state.³⁴ Further, the application of this analysis of literature to Libya shows that Libya's current nature has met most of the characteristics and conditions of the transitional states, as analysed and discussed below.³⁵

In February 2011, the Libyan revolution began, and in October in the same year, Qaddafi was captured and killed by rebels. This process was complicated, and Libya faced several challenges. At the beginning of the conflict and protests against Qaddafi, the National Transitional Council (NTC) was formed by the opposition to Qaddafi on 26 February 2011. On 16 September 2011, the NTC was recognised by the United Nations as the legal representative of Libya, replacing the Qaddafi government.³⁶

The NTC was considered to be like the parliament of Libya, who were Lawmakers. Besides, they aimed to steer Libya during the interim period and guide the country to free elections and establish a constitution.³⁷ Dirk Vandewalle took a closer look at what Libya has achieved during 2012 drew an optimistic picture about its future. The NTC's ability to organise national elections and its willingness to hand over power to an elected national congress in August indicated that Libya had started to construct meaningful political institutions. Ultimately, the elections promised to boost the public's confidence in their current leaders, providing the new government with popular legitimacy, which its predecessor lacked.³⁸

Even though Libya's oil and gas substructure suffered losses during the conflict, the sector escaped initial fears of the enormous scope of obliteration. Oil production in the country had returned to pre-conflict levels by the end of 2012.³⁹ During the post-conflict period, Libya

³⁴Peter Bartu, 'Libya's Political Transition: The Challenges of Mediation' (International Peace Institute: New York, December 2014) <https://www.ipinst.org/wp-content/uploads/publications/ipi_e_pub_mediation_libya.pdf> accessed 20/02/2018; Zoubir and Rozsa (n 29); Jon B. Alterman, 'Seeing Through the Fog: Libya and Transition' (2012) 32 (1) SAIS Review of International Affairs 147.

³⁵ See chapter 3 below.

³⁶ UNSMIL (n 22).

³⁷ Libya's Constitution of 2011. Article (17) 'The National Transitional Council shall be the highest authority of the Libyan state and assume the supreme functions of sovereignty, including legislation and determination of general policy of the State. It shall be the sole legitimate representative of the Libyan people which draws its legitimacy from the revolution of February 17th. It shall be the guarantor of national unity, the security of the national territory, the definition of values and morals and their dissemination, the safety of the citizens and residents, the ratification of international treaties and the establishment of the basis of the civil constitutional and democratic state'. For more information see Libya's Constitution of 2011, [Available online] <https://www.constituteproject.org/constitution/Libya_2011.pdf> 5 accessed on 03/10/2017.

³⁸ Dirk Vandewalle, 'After Qaddafi: the surprising success of the New Libya' (2012) 91 (9) Foreign Affairs 8.

³⁹ Blake McClintock and Peter Bell, 'Australia's mining interests within Nigeria and Libya: Policies, corruption and conflict' (2013) 41(3) International Journal of Law, Crime and Justice 247. 251

was near achieving its goal as a re-constituted State. It succeeded in most aspects of political, economic and social life.

In July 2012, Libyan people voted in 200 members to create the General National Congress (GNC), following which the GNC selected the members of the executive government in charge of issuing legislation, enacting laws and choosing a constitutive body, which was called the Constitutional Drafting Assembly (CDA).⁴⁰ After the election of 2012, Libya started its transitional political period. Success also continued in terms of the fact that the political regime has witnessed many more changes, and the GNC has shown its ability to deliver good services to Libyans.⁴¹

However, this positive transitional progress has faced several challenges since the end of 2013. The enacting of the Isolation Law⁴² was considered the turning point in the transitional political progress due to its influence on some major actors in Libya.

In February 2014, retired general Khalifa Haftar, who was an officer from Qaddafi's army, in an attempt to delegitimise the GNC, read a statement on Libyan TV announcing a coup led by him and a few officers who were previously Qaddafi's loyal.⁴³ However, this coup had no result and could not change the situation in the Libyan political sense. In May 2014, Haftar announced the launch of "Operation Dignity", which justified this operation by fighting terrorist groups in Benghazi city in eastern Libya.⁴⁴ Since that date, Haftar has continued this campaign, given his goal of controlling all over Libya. On 4 April 2019, Haftar attacked Tripoli -The Capital of Libya- to eliminate Tripoli's legitimate government.⁴⁵

In June 2014, a House of Representatives (HoR) was elected to replace the GNC. However, the GNC declined to hand over power, citing that the elections were invalid and raising the

⁴⁰Article (30) of the Libyan constitution 2011.

[Online]<https://www.constituteproject.org/constitution/Libya_2011.pdf> accessed on 03/10/2017.

⁴¹ Imad El-Anis and Ashraf Hamed, 'Libya after the civil war: regime change and democratisation' (2013) 3(2) Journal of Conflict Transformation and Security 174-193.189

⁴² Law NO.13 of 2013 regarding the Political Isolation Law was approved in May 2013 by the GNC. This law bans figures holding high-ranking positions under the Qaddafi's regime from public life for 10 years. [available online] <<http://security-legislation.ly/ar/node/31772>> accessed 03/10/2017.

⁴³ Stephen Snyder, 'Libyan warlord took a twisted path to Tripoli' (10 April 2019) PRI <<https://www.pri.org>> accessed 21/03/2020.

⁴⁴ RFI, 'The true face of Libya's Khalifa Haftar' (09 April 2019) <<http://www.rfi.rf>> accessed 21/03/2020.

⁴⁵ Snyder (n 43).

Supreme Court issue. On 6 November 2014, the Supreme Court ruled in effect that the basis on which the June 2014 HoR election was held was unconstitutional.⁴⁶

Consequently, Libya's political scene has become much more complex and fragmented, with two parliaments and two governments consecutively, one in Tripoli (western Libya) and the other in Tobruk (eastern Libya).⁴⁷

Furthermore, Libya is still under United Nations Resolution No. 1970 of 2011 and all the subsequent resolutions on Libya. To support Libyan decision-makers in Libya's current political standoff, the UN Security Council has established the UNSMIL under resolution No. 2009 of 2011 on 16 September 2011.⁴⁸ The progressing endeavours of the UNSMIL and the Special Representative of the Secretary-General has accelerated a Libyan-led political solution to the increasing difficulties confronting the state and underlining the importance of the agreement, following the principles of national ownership, on immediate next steps towards completing Libya's political transition, including the formation of a Government of National Accord (GNA).

In December 2015, the Libyan Political Agreement was signed in Skhirat to resolve the political conflict between rival parliaments with their associated governments. This agreement created a Presidency Council, a rump executive that took office in Tripoli in March 2016, and an advisory High State Council of ex-GNC members. The HoR continued as the single parliament, which will approve the unified government.⁴⁹

The GNA government was formed by consensus amongst most members of the HoR and the GNC; however, the chairmen and other members of HoR rejected this government.⁵⁰ However, the unified government has not been approved yet, and as a result, the institutional setup is incomplete.⁵¹

⁴⁶ Supreme Court of Libya, case 17/2014, 6 November 2014.

⁴⁷ Jean-Louis Romanet Perroux, 'Libya's Untold Story: Civil Society Amid Chaos' (2015) 93 *Crown Centre for Middle East Studies* 1.

⁴⁸ UNSMIL (n 22).

⁴⁹ International Crisis Group, 'The Libyan Political Agreement: Time for a Reset' *Middle East and North Africa Report N°170/ 04 November 2016*. [Online] <<https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/the-libyan-political-agreement-time-for-a-reset>> 3 accessed 20/03/2017.

⁵⁰ Heba Saleh, 'North Africa, Hopes dashed after Tubruq rejects unity plan for Libya' *Financial Times* (London, 26 January 2016).

⁵¹ International Crisis Group, 'Libya: No Political Deal Yet' *Commentary by Claudia Gazzini/Middle East and North Africa Report 11 May 2017*. [Online] <<https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/Libya-no-political-deal-yet>> 4 accessed 02/10/2017.

In 2016, ISIS announced the establishment of the Islamic State in North Africa, based in Sirte.⁵² This situation led the forces of GNA to attack and fight ISIS and thus eliminated them at the end of the same year.⁵³ During that time, ISIS had attacked the oil instruments in an attempt to seize them, the oil installations had been affected, and consequently, there were oil pollution events because of these attacks.⁵⁴ ISIS's presence in Libya has had negative impacts on the political sense, and their attacks on oil installations have caused damages to oil pollution to some Libyan citizens.

The UNSMIL, through various times, held multiple meetings between the conflicting Libyan parties to reach a political solution to the current Libyan crisis. Accordingly, several conferences were held in Geneva, Palermo1, Abu Dhabi, Palermo2, the last of Berlin.⁵⁵

In April 2019, Haftar launched a military campaign supported by some countries (Egypt, Saudi Arabia, Emirates, and France) to seize the Capital to extend its control over the entire Libyan region.⁵⁶

The NOC, the Libyan Central Bank (LCB) and Environmental General Authority (EGA) are considered the country's most critical institutions. They are located in western Libya, in Tripoli. The HoR in Tobruk has little control over the government structure. In essence, the ministries, government agencies, and the NOC, LCB and EGA recognised Libya's transitional framework as one state. Nevertheless, the HoR has attempted to seize control of the existing institutions, but they tried to create parallel institutions in eastern Libya when these attempts failed.⁵⁷ Even though there are now similar institutions on the ground east of Libya, these institutions are non-operational because there are no diverted oil payments into these newly created institutions. Additionally, the parallel LCB and NOC of eastern Libya have little or no infrastructure to manage their businesses.⁵⁸

1.1.2 Libyan Legal Framework on Civil Liability for Oil Pollution Damage (CLfOPD)

⁵² Wilson Center, 'Timeline: The Rise, Spread and Fall of the Islamic State' (28 October 2019, Middle East Program) <http://www.wilsoncenter.org>> accessed 21/12/2019.

⁵³ Ibid.

⁵⁴ BBC Worldwide Monitoring (n 20).

⁵⁵ Irene Costantini, 'Solution in Libya: Elections, Mediation and a Victor's Peace' (2019) XXVI Middle East Policy Council 4.

⁵⁶ Ibid.

⁵⁷ Mattia Toaldo, 'Crisis and New Agenda of Arab States: The Free Fall of the Libyan State' (2015) 4 (1) IEMed. Mediterranean Yearbook Med. 4

⁵⁸ Ibid. 5

Part two of this thesis is focused on the set of issues arising from oil pollution damage within the civil law system of Libya. Before discussing an essential piece of literature related to civil liability for oil pollution damage rules set out in Libyan legislation, an analytical framework was founded to raise and consider several potential issues related to different civil liability regimes. This framework has measured and tested the Libyan legislation governing civil liability for oil pollution damage during the Libyan transitional phase. These points are whether the application of civil liability is on a fault-based or, no-fault, possibly strict liability, basis, or even somewhere in-between these two poles. In this context, the relevant International Oil Tanker Pollution Compensation (IOTPC) regime will be introduced and examined as a suitable model for introduction as a new regime within the Libyan civil system. To what extent can a strict liability regime mitigate the impacts of the transitional situation of Libya? And to what time will this type of rule introduce an effective remedy that would guarantee sufficient compensation to victims of oil pollution damage in the transitional Libyan state?

These significant issues have included the test used to analyse the Libyan legislation governing CLfOPD to identify the currently applicable fault-based regime's strengths and shortcomings and the proposed no-fault rule. Therefore, this test measures the necessary criterion for a strict and fault-based liability regime which could be listed as a requirement of fault, a requirement of damage conditions, a requirement for establishing a causal relationship, and prompt and efficient administration of claims.

This test is being conducted based on a comparison of different liability regimes. The advantages and disadvantages of particular liability regimes have been analysed. Their impact is set into context with practical considerations (e.g., litigation problems) and recent developments (e.g., introducing compulsory insurance or joint compensation schemes). The Libyan legislation has been tested according to the criteria for civil liability listed above and by analysing the legal cases related to oil pollution.

These oil pollution cases were obtained from the Libyan courts and the NOC and then translated officially from Arabic to English. The analysis of these case law examples explains the practical way the Libyan legislation is being applied in the domestic courts and reveals the Libyan legislation's strengths and weaknesses. These cases show how civil liability for oil pollution is being interpreted and applied in Libya, both pre-civil war and now during this transitional state phase. They highlight any changes to the application of

these rules during these periods. The documents have been analysed to determine whether the current legal framework of CLfOPD was, and still is, being applied in the Libyan courts to compensate the victims of oil pollution successfully.

Although there is a limited number of cases of CLfOPD brought before the Libyan courts, decisions taken by courts at the national level are helpful for law interpretation as evidence of how Libyan law is interpreted and applied in this area. These decisions are also valuable for assessing the practical gaps in the existing provisions of the Civil Code governing CLfOPD before and during the transitional period. Furthermore, the test criteria being conducted to analyse the Libyan legislation will be outlined below, including the relevant Libyan law.

The Libyan Civil Code, enacted in 1954, is the foundation for all other Libyan legislation. It also serves as the basis for all civil and commercial engagements.⁵⁹ Furthermore, following the CLfOPD, there is various relevant legislation concerning issues relating to oil pollution. Law No. 25 of 1955⁶⁰ was the first petroleum law enacted in Libya. This law regulates the oil industry in Libya.⁶¹ It provided for the legal basis for the oil industry and precipitated a period of rapid growth in exploration activities. However, civil liability for oil pollution is unregulated by this law, and the oil and gas regulatory framework at present remains unchanged from what was in force under the old regime.⁶²

As previously seen, since Law No. 105 of 1958 was promulgated, until the establishment of law No.15 of 2003⁶³ and its Regulation No. 448 of 2009,⁶⁴ there have been various piecemeal amendments to different specific areas, including oil industry pollution, within the legal, environmental framework.

⁵⁹ This law was enacted 1954 and published in Official Gazette on 13 February 1954.

⁶⁰ This law was enacted on 21 April 1955, along with two schedules, was published in the Official Gazette on 19 June 1955 in regard of Libyan petroleum law and it has been amended several times and the last amendment was in 2012.

⁶¹ Open Oil, 'Libya Oil Almanac, An Open Oil Reference Guide' (online) <www.openoil.net/wp/wp-content/uploads/2012/08/Libya> 18 accessed 11/02/2016.

⁶² Means Associates, 'Libya- local content in law' <www.menas.co.uk/localcontent/home.aspx?country=73&tab=law> accessed 24/02/2017.

⁶³ This law is established on 13 June 2003 on the protection and improvement of the environment and was published in the Libyan Legislation Code on 16 August 2003. Available online <<http://www.industry.gov.ly/files1/kordi%20%20%281%29.pdf>> accessed 29/10/2017.

⁶⁴ General People's Committee Decision No. 448 of 2009 issuing the technical guidelines of law No. 15 of 2003 concerning the protection and improvement of the environment. Further, in Libya, it used to establish law and its regulation (technical guidelines), the law includes basic rules, however, its regulation includes the same rules but with more details and or explanation. [Online] <<http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDDetails?MasterID=1503047>> accessed 29/10/2017.

Nevertheless, Libya proved unable to develop its laws and solve the country's fundamental problem of insufficient environmental legislation during that period. That is why the existing applicable law is being investigated to reform the environmental law by recommending changes to bridge the gaps.⁶⁵

Significantly, in the context of limitations of existing environmental legislation, the review of the Libyan environmental legislation and practices, especially Law No.15 of 2003 and its regulation, show that these laws have not focused on CLfOPD. In other words, civil liability rules have not been addressed in these laws, and there is little or no detail included in their provisions on this point. Although in articles 23 and 64, the word compensation has been mentioned, there is no further detail about other aspects of civil liability. That means the conceptual framework of CLfOPD has not been spelt out clearly in law No.15 of 2003. In this case, fault-based regimes included in the Libyan Civil Code must be followed and applied in the courts in oil pollution cases. Nevertheless, the elements of civil liability – fault, damage and causation relation – should be proven based on article No. 166 of the Civil Code: "That who, by fault, causes to another a damage by a wrongful act, shall be obliged to compensate it".⁶⁶

However, the oil pollution cases' initial analysis reveals that the Libyan court is heavily dependent on the fault-based regime to establish the CLfOPD. This regime is probably not very effective in securing compensation to most injured persons, particularly with the transitional period's impacts. The NOC could escape its liability since the elements of the fault-based civil liability- fault, damage and the causal relationship have not proven.

Furthermore, there are various institutions concerning different aspects of environmental protection in the environmental, institutional framework. However, in practical terms, several limitations and obstacles mitigate against the enforcement of this framework. In reality, various institutions were established following environmental protection in Libya. The Environmental General Authority (EGA), created by resolution No. 263 of 1999,⁶⁷ is considered the institutions. In practice, there is a lack of coordination between these institutions.⁶⁸ They are leading to inconsistencies and confusion regarding their duties. Thus,

⁶⁵ Nait (n 14).

⁶⁶ Article 166 of Civil Code 1954 (n 59).

⁶⁷ General People's Committee Decision No. 263 of 1999 establishing the Environmental General Authority <<http://site.eastlaws.com/GeneralSearch/Home/ArticlesTDetails?MasterID=149017>>accessed 25/10/2017

⁶⁸ UNDP, 'Strengthening Environmental General Authority's Capacity for Sound Environmental Management' [2012] (online)<www.ly.undp.org/content/Libya/en/home/>12 accessed 25/11/2016.

this situation has somewhat weakened the enforcement of the relevant environmental laws in Libya.⁶⁹

Overall, the Libyan legal framework on CLfOPD has been affected by the dysfunctional environmental legal system and significant law shortcomings. There is no effective mechanism for reconciling new legislation with previously existing statutes due to adopting new decrees and piecemeal amendments to existing regulations without repealing earlier legislation. Therefore, to fill in the current gaps and weaknesses of the legal framework of CLfOPD, this research will take advantage of using the IOTPCS as a proposal for a new civil liability compensation scheme in Libya.

1.1.3 International Oil Tanker Pollution Compensation Scheme

Part three is a proposal for a new civil liability compensation scheme based on the International Oil Tanker Pollution Compensation Scheme model and how this would respond to the defects discovered in Part One and Part Two.

Justification for choosing IOTPCS is provided to underpin the methodological, analytical framework which has been utilised previously. According to the study's criteria, this convention is selected, which related to; environmental protection, the provision of civil liability for oil pollution damage, a no-fault strict liability regime, and would suit the transitional Libyan state character.

In this regard, the IOTPCS might be the most relevant and appropriate international legal framework for liability as a compensation scheme that provides compensation for loss or damage occurring from oil pollution incidents. The international liability and compensation regime are based on the Civil Liability Convention International Oil Pollution Compensation (CLC-IOPC) Fund regimes.⁷⁰ The CLC 1969 and 1971 Fund conventions were amended, leading to the CLC 1992 and 2003 Supplementary Fund Protocol adoption.⁷¹ These three instruments all apply to contamination damage brought about by spills of persistent oil from

⁶⁹ Ibid 23

⁷⁰ Jennifer Lavelle and Regina Asaritis, 'Liability and Compensation for Ship-source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers' (United Nations Conference on Trade and Development)" [online]

<<http://unctad.org/en/PublicationsLibrary/dtl/tlb2011en.pdf>> 1, accessed 12/05/2017.

⁷¹ Ibid 8

tankers in the territory (including the territorial sea) and the exclusive economic zone (EEZ) or equivalent area of a state party to the respective treaty instrument.

Further, these conventions establish civil liability against ship owners for oil pollution damage. Accordingly, the CLC 1992 governs ship owners' civil liability for oil pollution damage by laying down the strict liability principle for ship owners and creating a compulsory insurance system. The 1992 Fund convention provides compensation for victims who do not obtain total compensation under the CLC 1992.⁷² Furthermore, the international oil pollution compensation Supplementary Fund 2003 provides additional payment beyond the amount available under the civil liability and fund conventions.⁷³

Due to the limitations of the Libyan legal framework of CLfOPD, particularly during the transitional period, the IOTPCS⁷⁴ has been chosen as an international model to establish a similar, no-fault civil liability scheme. This scheme will come with compulsory insurance for oil pollution damage in Libya based on the above criteria.⁷⁵

The international regimes have been measured by the continuous developments of conventions governing the CLfOPD by assessing the effectiveness of the current enforcement of IOTPCS. This measure could include the promptness/efficiency of administration of claims, transparency of claims and adequacy of compensation, as detailed below.

The conventions were enacted to ensure sufficient compensation for victims of oil pollution damage caused by escape or release from ships conveying oil in bulk as load. The convention planned for setting up uniform international standards and methods for determining liability for oil pollution damage. They, therefore, clearly provide for the basis of liability to be strict liability. The strict liability rule is beneficial to applicants in oil pollution occurrences, as one does not have to prove fault on the part of the shipowner. Furthermore, responsibility for oil pollution damage is directed to the shipowner. The conventions provide for the individual liable for compensating victims of oil pollution damage. Besides, the shipowner must maintain compulsory insurance to ensure compensation in case of oil pollution

⁷² IOPC Funds, 'Liability and Compensation for Oil Pollution Damage: Texts of the 1992 Civil Liability Convention, the 1992 Fund Convention and the Supplementary Fund Protocol' (2011 Edition, online) <www.iopcfunds.org/fileadmin/> accessed 01/11/2016.

⁷³ Ibid 11, see also David M. Ong, 'Regulating environmental responsibility for the multinational oil industry: continuing challenges for international law' (2015) 11 (2) *International Journal of Law in Context*, 153, 158.

⁷⁴ IOPC Funds (n 25).

⁷⁵ Libya is a member of the Organisation of the Petroleum Exporting Countries (OPEC), and has just accepted the first International Civil Liability Convention which was established in 1969 (CLC).

damage.⁷⁶

There are set measures for a claim to meet all requirements for compensation. Since compensating oil pollution victims promptly is of paramount importance to the CLCs, they may make provisional payments before a final agreement can be reached.

Additionally, to make it easier for claimants, a principle of the system of claims to the IOPC Fund is to remain out of court; be that as it may, recourse to the courts is not restricted. The speed with which applications are agreed and paid relies for the most part upon how long it takes for claimants to provide the necessary information and whether a settlement can be mutually decided following the appraisal of the case submitted. Thus, claimants are advised to follow the Claims Manual criteria as intently as could reasonably be expected. Claims are evaluated by norms set up by the administrations of member states. These criteria, which also apply to claims against the Supplementary Fund, are set out in the 1992 Fund's Claims Manual, a helpful guide on the best way to introduce compensation claims.⁷⁷

Since the establishment of the 1992 Fund and the preceding 1971 Fund, they have been involved in 150 incidents of varying sizes worldwide, having paid some millions in compensation.⁷⁸ The conventions have been successful in providing benefit to victims of oil pollution damage. Statistics show millions in monetary compensation have been offered to such victims following the available funds at the appropriate time.⁷⁹

As previously pointed out, analysing the oil pollution cases identifies the Libyan legislation's limitation because it adopts the fault-based civil liability regime. It has also led to identifying future reforms recommended in the final chapters to develop related Libyan legislation. In this regard, taking into account the Nigerian experience (Ogoniland Delta) in cooperating with the UNEP,⁸⁰ this research takes advantage of UNEP's recommendations in the field of environmental law. This strategy includes the clean-up and environmental bodies' reforms to suggest recommendations related to capacity developments in establishing a new civil

⁷⁶Tumaini S. Gurumo and Lixin Han, 'The Role and Challenge of International Oil Pollution Liability Legislation in the Protection of Marine Environment' (2012) 3 International Journal of Environmental Science and Development (183) <http://www.ijesd.org/show-36-445-1.html> > 185 accessed 13/07/2017.

⁷⁷IOPC Funds, 'International Oil Pollution Compensation Funds- Annual Report 2016' [2017] <http://www.iopcfunds.org/uploads/tx_iopcpublications/Final_IOPC_Funds_Annual_Review_2016_ENGLISH.pdf> 13 accessed 12/12/2017.

⁷⁸ Ibid. 4

⁷⁹ £600 million paid by the IOPC Funds in compensation since 1978 (£331 millions of which was in respect of the 1971 fund) for more information see *ibid.*16-17

⁸⁰ UNEP, 'Environmental Assessment of Ogoniland' (online 2011) <<http://www.unep.org/nigeria> >8 accessed 02/07/2019.

liability compensation scheme for oil pollution damage.⁸¹ The analysis of oil pollution cases is underpinned by analysing the elements of the international regime of IOTPC and highlighting its fruitful successive developments. Thus, this research recommends establishing a no-fault civil liability regime with a compulsory insurance and compensation scheme for Libyan legislation related to the oil industry to ensure total compensation is provided to oil pollution victims in the Libyan transitional phase.

1.2 Aim of the Research

This research aims to examine whether the principles of a strict liability regime could be applied to oil pollution damage in the transitional Libyan state, based on the example of the International Oil Tanker Pollution Compensation Scheme (IOTPCS).

1.3 Objectives of the Research

The research objectives are to:

- Identify how the current Libyan situation (post-conflict, transitional or failed state) affects the existing civil liability regime's operation and the relationship between the NOC and the successive Libyan governments after the 2011-revolution.
- Analyse Libyan civil liability regulations, environmental protection and petroleum laws.
- Highlight the nature and conditions under which these civil liability rules currently apply and the elements of Libyan civil liability rules included in the Civil Code and applicable in Libyan courts.
- Analyse the challenges that victims of oil industry pollution face in courts.
- Identify possible elements from the International Civil Liability and Fund Conventions to alleviate the Libyan context's legal and practical issues.
- Critically discuss the IOTPCS to identify its extent, which can be used as a future Libyan environmental compensation legislation model.

⁸¹ Federal Ministry of Environment, 'Hydrocarbon Pollution Remediation Project (HYPRP)' <<http://www.hyprep.gov.ng>> accessed 29/12/2019.

1.4 Research Questions

This study answers a series of research questions formulated as following:

- 1- Under which concept (post-conflict, transitional or failed state) could we classify Libya after the 2011 revolution?
- 2- In the oil industry context, how does the NOC deal with the successive governments?
- 3- In the Libyan state's current situation, who is legally responsible for environmental damage caused by oil pollution? And what are the challenges encountered by victims of oil industry pollution when they resort to the courts?
- 4- To what extent do the current Libyan legal framework of civil liability for oil pollution damage (CLfOPD) cover oil pollution cases?
- 5- Considering Libya's current situation, how would a compensation scheme based on strict liability be implemented into the Libyan civil law system?

1.5 Methodology

This thesis is mainly doctrinal-based research that utilises primary and secondary sources of law. However, the thesis deals with some non-doctrinal material, including the Libyan state's history, revolutionary moment, and descent into civil war, the theories around failed states, transitional states, and literature of post-conflict state as a form of state. These materials are not doctrinal, so it is worth noting that this thesis attempts something called 'international relations and doctrine'. Although this thesis has a doctrinal element, it is not wholly doctrinal in intent or content.

A legal doctrinal study is currently the method required and expected by legislators, lawyers and other traditional interest groups in law.⁸² Relevant legislation, case law, policy reports, research studies, and official reports/treaties such as government reports,⁸³ treaties and protocols related to or on the subject under investigation have been critically analysed. The doctrinal research method provides an integrated explanation of the interconnected rules governing a specific law area, and it analyses the relationship between regulations. Additionally, measurements of difficulty have been identified, and future reforms are also

⁸² Christopher Roper, 'Australian Law Schools: A Discipline for the Commonwealth Tertiary Education Commission' (1987) 5 J. Prof. Legal Educ 201.

⁸³ IOPC Funds, 'International Oil Pollution Compensation Funds, Annual Report 2015' (London 2016) <http://www.iopcfunds.org/uploads/tx_iopecpublications/IOPC_Funds_Annual_Review_2015> 14 accessed 13/06/2016.

being recommended.⁸⁴ The research is also reform-oriented because it intensively evaluates current legal rules' adequacy and seeks to recommend changes to those currently considered inadequate or partly adequate rules, meaning there is room for improvement.⁸⁵

For this doctrinal study, several resources are being used. Firstly, a detailed textual analysis of the legal rules themselves is conducted. Libyan law and international law are contained in the relevant legislation and the case law relating to it. For Libyan law, the legal rules are solely contained in the legislation. Libya does not recognise case law as fundamental law but rather as an application and interpretation of the law. This situation does not make case law irrelevant or unimportant; it is just a matter of attaching the correct level of authority to the source.

For primary sources, a detailed textual analysis of relevant legal rules themselves has been conducted. For Libya, this is the applicable regime of CLfOPD within the Libyan civil law system, including environmental law, petroleum law, and the Civil Code and cases relating to the pre-2011 Qaddafi regime and post-2011 transitional period to present-day Libya. For international laws, they are contained in international conventions relating to CLfOPD, particularly the IOTPCS.

Secondary sources consist of academic texts, journal articles, official reports, contemporary online sources, case comments, and industry-specific commentary. These resources are used to research Libyan and International law and policy relating to this study's subject.

Accordingly, the primary and secondary sources are considered as playing a pivotal role in assessing Libya's current nature after the 2011 revolution and the conceptual framework of post-conflict, transitional and failed states, which have been examined at the outset to provide a foundation for the thesis. Consequently, this facilitates the conceptual background to underpin the awareness of the current legal and regulatory framework of CLfOPD in Libya. The detailed textual analysis of Libyan civil liability rules included in the Civil Code and applicable in Libyan courts are conducted in chapter 7. These rules have been analysed to underline the nature and conditions under which these civil liability rules currently apply. Thus, it helps identify the issues related to applicable civil liability rules and challenges that victim of oil industry pollution face in courts pre-and post-2011. This analysis is followed by the detailed textual analysis of International Civil Liability and Fund Conventions for oil

⁸⁴ Roper (n 82) 201.

⁸⁵ Ibid.

pollution damage. This analysis is conducted to identify possible elements applied in the Libyan context to alleviate the legal and practical issues within the applicable Libyan law. The research utilises existing publicly accessible documented sources consisting of relevant Libyan legislations (pre-2011), which are still applied, and treaties and protocols related to environmental protection concerning oil pollution damage within a civil law system.⁸⁶

Sources of case studies are documentation and archival records. These cases have been chosen based on specific criteria to be a suitable sample for the analysis in this research. The documents on these selected cases are publicly accessible and obtained from Libyan courts and the NOC; then, they have been unofficially translated from Arabic to English.

The purpose of evaluating the selected oil pollution cases is to determine the type of civil liability regime being applied in the Libyan courts to compensate victims of oil pollution damage. The selected cases examined in this study are lawsuits raised to claim compensation for damages resulting from oil pollution before Libyan courts pre-and post-2011. This study involves the standard oil pollution cases and excludes the political violence oil pollution cases. These cases are suggested to be appropriate to the issue tackled in the study and chosen accordingly.

Also, claim documents of oil pollution damage from Libyan courts and relevant legal documents from the NOC have been obtained and analysed as a credible source of information. The analysis of these documents emerges the Libyan position on civil liability for oil pollution damage. In doing so, this research uses various techniques in the critical analysis of these sources, such as deductive and inductive reasoning methods where appropriate.⁸⁷

All these cases were collected from the courts located in the western region of Libya. This situation is because the courts in the eastern part have not fully operational since 2011. Moreover, the researcher does not have access to this area and, significantly, the central institutions' headquarters, such as NOC, located in the western Libyan region. In terms of timeline for these selected case law, the conducted research covered cases are dated pre-2011 to January 2020.

1.6 Original Contribution to Knowledge

⁸⁶ IOPC Funds, 'Libya, Legislation/ Treaty Matters, Convention status' (International Oil Pollution Compensation Funds) <<http://www.iopcfunds.org>> accessed 15/06/2016.

⁸⁷ See chapter 7 section 7.1 below.

There is evidence showing that the legal protection for oil pollution damage in Libya is weak. The civil liability mechanism is insufficient to cover most incidences of oil pollution damage.⁸⁸ There have not been sufficient academic studies conducted to date in Libya dealing with civil liability for oil pollution damage within the Libyan civil law system covering both the pre-2011 conflict or post-2011 transitional situation in Libya.

Although some academic analysis seeks to understand environmental protection within a transitional state,⁸⁹ these studies have not linked national civil liability to environmental pollution damage with the state's transitional situation. Thus, this study is motivated by this lack of sufficient research, as it considers problems related to CLfOPD in Libya, which has not been critically studied yet. Moreover, it analyses IOTPCS and compares it to the Libyan civil liability system to use it as a model for proposing a similar pollution compensation scheme in Libya. An efficient and appropriately enacted civil liability compensation scheme is meant to solve such issues in a transition period such as Libya after 2011 in a consistent way applying modern legal rules. As a result, this can meet the transitional justice of such victims of oil pollution suffered during the transitional period and are compensated, but that has lately not been the Libyan lawmaker's priority.

This study also addresses domestic Libyan environmental administrative institutions' strengths and weaknesses, which will help address present limitations and suggest reforms for existing environmental bodies. This research will also make a unique contribution by analysing the oil pollution cases that ruled in Qaddafi's era and post-2011. It will particularly help show the differences between the pre-and post-2011 oil pollution cases according to their decisions, highlighting the impacts of Libya's current transition period on these cases' decisions.

Although there is a limited number of cases of CLfOPD brought before the Libyan courts. Decisions taken by judicial bodies at the national level help law interpretation or evidence of Libyan law and assess the practical gaps in the existing Civil Code provision governing CLfOPD, pre and during the transitional period.

At the domestic level, this research is one of the earliest academic studies to analyse the legal and regulatory framework of CLfOPD in Libya, taking into account Libya's current status. The research also has the potential to shed light on the modern civil liability mechanisms

⁸⁸ Dan Stigall, 'Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring' (2014) 28 *Emory Int'l L. Rev.* 283. 292

⁸⁹ Norman Lee and Clive George, *Environmental Assessment in Developing and Transitional Countries; Principles, Methods and Practice* (John Wiley & Sons 2000).

necessary for a civil liability compensation scheme for oil pollution damage, which Libya should implement in its present-day as a state in transition. Moreover, this thesis would contribute to existing knowledge since no in-depth study was conducted on Libya's legal and institutional environmental protection. Therefore, this thesis will propose the Libyan lawmakers' solutions to implement an efficient and modern civil liability compensation scheme system and an adequate one for Libya's transition situation.

Further, at the national and international level, other oil states, which may be considered transitional states similar to Libya, could use this research's recommendations as guidance to create a new framework for a civil liability compensation scheme for oil pollution damage.

1.7 Outline of the Thesis

This research analyses the current legal and Libyan regulatory framework of civil liability for oil pollution damage and examining law cases concerning oil pollution damage brought before the Libyan courts. This study seeks to determine the limitations of the CLfOPD and suggest the needed reforms. In doing so, this thesis is divided into three parts consisting of eight chapters with introductory and final conclusion chapters. The description of the research structure has been set out below:

The introductory chapter introduces the thesis. It sets out an overview of the research problem's background, the research methodology, the aim, objectives of the research, the research questions, and the contribution to the thesis's knowledge and structure.

Part one: The current nature of the Libyan state: post-conflict, transitional or failed state? This part begins with the conceptual framework for analysing the existing literature following concepts of the post-conflict, transitional and failed states and distinguishing the differences between each other. The historical political developments of Libya are discussed to investigate the current nature of Libya as a state. This part consists of two chapters (2 & 3). Chapter 2 identifies the post-conflict, transitional, and failed states' concepts by analysing their characteristics and conditions and providing the most common definitions of these concepts. After that, it might be necessary to contextualise the modern state's nature in both institutional and functional terms to explore these states' conceptual framework. Consequently, by contextualising the current state's character and critically discussing current states' core functions, namely, security, welfare, representation, and sovereignty, the differences between failure and state collapse may become apparent. The differences between the concepts of post-conflict, transitional and failed state will be distinguished as well.

In identifying the Libyan state's current nature in Chapter 3, the conceptual framework discussed in the previous chapter 2 is then applied to Libya as a case study. Chapter 3 analyses the key developments in modern Libyan state history. The focus is on the Qaddafi era (1969-2011) and the conflict period from 2011 until writing. Analysing the Libyan state's current nature leads to understanding its characteristics during a current phase. Mainly, how the political and judicial systems function in Libya and the relationship between Libyan institutions (Central Bank & National Oil Corporation) and successive governments, especially when there are more than one government existing in Libya at the same time. After that, they identify the Libyan state's current nature, leading to understanding how the Libyan political and judicial systems function during the transition in Libya and why the previous legislation established in the Qaddafi era is still being applied in recent date of Libya.

Part Two of this thesis, entitled: 'Environmental protection for oil pollution damage within the civil law system of Libya', consists of four chapters (4, 5, 6 &7). The Libyan environmental protection for oil pollution damage within the civil law system is reviewed by analysing the relative Libyan legislation as primary resources. The legal framework of civil liability for oil pollution damage, including environmental law, petroleum law, and civil liability rules in the Libyan Civil Code, has been analysed. In the same context, the claim documents concerning civil liability for oil pollution damage are analysed. This analysis investigates the challenge that may face the victims of oil pollution damage when they claim their compensation in the Libyan court during the Qaddafi era, the period of conflict and the transition after 2011. These documents were obtained from Libyan Courts and National Oil Corporation. These documents explain in detail the limitations of the legal framework for the civil liability for oil pollution damage and the influence of the conflict and the transition situation on the claims of compensation for oil pollution damage.

Part Three, entitled: 'A proposal for a new civil liability compensation scheme based on the model of the International Oil Tanker Pollution Compensation Scheme' and how this would respond to the defects discussed in Part One and Part Two of this thesis.

This part consists of two chapters (8 & 9). Chapter 8 analyses the convention of the IOTPCS to use it as a proposal for a new civil liability compensation scheme in Libya. This convention is firstly analysed as a primary source. However, the literature studied this convention is then considered a secondary source for this thesis. Finally, Chapter 9 includes the recommendations for capacity developments for establishing the new civil liability compensation scheme for oil pollution damage. Chapter 10 contains the final

recommendations and conclusion, provides a reflection of the three parts of this thesis and provides recommendations for Libyan policymakers.

Part 1. The Current Nature of the Libyan State: Post-Conflict, Transitional or Failed State?

Introduction to part One

This part begins with the conceptual framework for analysing the concepts of the post-conflict, transitional and failed states and distinguishing the differences and similarities between them. This part also discusses the developments in Libya's political history to investigate Libya's current nature. First, the conceptual framework identifies the critical internal factors influencing the state formation process and those political variables external to state-formation, which also need to be integrated into this analysis. Thus, the thesis then builds a hypothesis on state formation impediments in post-conflict, transitional and failed states. Therefore, this conceptual framework is analysed and applied, and then the hypothesis is tested using the case of Libya.

This part has been divided into two chapters; the first chapter is 'Exploring the concepts of post-conflict, transitional and failed states for possible application to Libya'. This chapter establishes the post-conflict, transitional and failed states' conceptual framework and then analyses their characteristics and conditions to distinguish the differences between them for possible application on Libya's current nature. The second chapter is 'The geographical and historical background to the Libyan present state: post-conflict, transitional or failed state?' This chapter discusses the current Libyan status as a post-conflict, transitional or failed state by applying the conceptual framework that has been discussed in chapter one to Libya as a case study. Discussion of Libya's geographical and historical background is helpful to understand its current nature, whether as a post-conflict, transitional or failed state. As the current political context remains fluid, understanding the new Libyan political regime is fraught with difficulty and uncertainty: which factors from Libyan history – old and recent – are still relevant, and what are new? And how are these factors affecting the current progress of Libya's transition from the Qaddafi years/regime? Identifying the Libyan state's existing nature and providing its main characteristics highlights the politicians' priorities. It also determines why some significant matters (e.g., issues related to environment protection) appear to have dropped out from the politicians' interests and preferences during different Libyan transition stages after 2011. It also explains why some previous legislation and regulations, including the environmental law framework, a regulatory regime governed under a civil law legal system established in Qaddafi's era (and in some instances before Qaddafi), still currently applies.

Although my research mainly focuses on the civil liability for oil pollution damage, it also investigates the Libyan state's current nature to identify its impacts on the legal framework of CLfOPD.

2. Exploration of the Concepts of Post-Conflict, Transitional and Failed States for Possible Application to Libya

2.1 Introduction

The concepts of post-conflict, transitional and failed states are often used to describe the type of fragile states where there is no stable political environment exist. These terms overlap in their meanings, and it seems to be difficult in some instances to differentiate them in their use to describe unstable states.⁹⁰ Therefore, this chapter aims to explore the conceptual framework of the post-conflict, transitional and failed states. It identifies these concepts' meanings first and then describes the modern state's nature in institutional and functional terms. Differentiation between these concepts is undertaken, including the distinctions between the state's collapse and operational failure. Given this thesis's purpose, identifying these distinctions would help recognise the Libyan state's current nature. The conceptual framework will then be applied to Libya's current status in chapter 3 below.

2.2 The Conceptual Framework of the Post-conflict, Transitional and Failed States

The concepts of a post-conflict, transitional and failed state describe the state formation in its different uncertain phases. However, these concepts seem to be controversial concepts due to the overlap between them. They have a convergence of their meanings and descriptions in some instances. Although these concepts may share some similar characteristics, such as insecurity and unstable environments,⁹¹ in some instances, it may be challenging to differentiate between them, relying on their distinctive features and conditions.

Before identifying the concepts of a post-conflict, transitional and a failed state, it is crucial first to define a state, a conflict, and the impacts of war on the formation or continuation of a state. This identification is to present a full understanding of the target concepts and generate their conceptual framework. Another reason is that armed conflict has been considered an important one among several reasons that may influence the state stability and

⁹⁰ Christopher E. Millar, *A Glossary of Terms and Concepts in Peace and Conflict Studies* (2nd edn, University for Peace 2005).

⁹¹ Potter (n 7) 3.

reformation, leading it to become a post-conflict, transitional or even failed state.⁹² This situation could be additionally referred to as the purpose of this study to identify the current Libyan status resulting from the armed conflict in 2011. It is important to emphasise that since Libya witnessed the civil war in 2011,⁹³ this chapter's focus is on identifying the uncertain situations resulting from internal state conflict.

Therefore, the following sections identify the post-conflict, transitional, and failed states' concepts by providing the most common definitions of these concepts and analysing their characteristics and conditions. To explore the conceptual framework of post-conflict, transitional and failed states, the modern states⁹⁴ in both institutional and functional terms will be identified. By critically discussing the nature of the modern states and the core functions, security, welfare, representation and sovereignty,⁹⁵ the meaning of failure and state collapse becomes understandable. The final section distinguishes the differences between the concepts of post-conflict, transitional and failed states.⁹⁶

2.2.1 The Concept of State

The Montevideo Convention 1933 establishes the statehood definition of a state under international law. It stipulates that “the state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) a government; and (d) a capacity to enter into relations with the other states.”⁹⁷ The convention lays down the accepted criteria for statehood as all states were equal sovereign units consisting of a permanent population, defined territorial boundaries, a government, and an ability to enter into agreements with other states.⁹⁸

⁹² Monty Marshall, Gurr Robert and Harff Barbara, 'Political Instability Task Force: Internal Wars and Failures of Governance, 1955-2006' (2001) <<http://globalpolicy.gmu.edu/pitf/pitfcode.htm>> 5 accessed 22/02/2016; Duffield (n 27) 66.

⁹³ M.Cherif Bassiouni, *Libya: from Repression to Revolution: a record of armed conflict and international law violations 2011-2013* (1st edn, Martinus Nijhoff, Leiden & Boston 2013). 123

⁹⁴ Christopher Pierson, *The modern state* (3rd edn, Routledge, New York 2011). 28

⁹⁵ Schwarz (n 27) 433.

⁹⁶ Ibid 430.

⁹⁷ Article 1 of Montevideo Convention on rights and duties of the states. The convention signed on 26 December 1933, entered into force on 26 December 1934. (Online) <<https://www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml>> accessed 23/02/2020.

⁹⁸ Encyclopaedia Britannica, 'Montevideo Convention international agreement [1933]' <<https://www.britannica.com/event/Montevideo-Convention>> accessed 26/03/2021.

The state concept can be defined as "Groups of people who have acquired international recognition as an independent country and have a population, a common language, and a defined and distinct territory".⁹⁹

In the same regard, Farley defined a state as a "sovereign state which has three absolute prerogatives: independence, equality and unanimity. Independence means a state is completely free to organise any system of government, proclaim an official religion of its choice, and structure its economy as it sees fit".¹⁰⁰ Further, the state is responsible for delivering essential services and security to its citizens and ensure human rights protection.¹⁰¹

A state could also be defined as "an internationally recognised sovereign government controlling a specified territory, or a non-recognised government whose sovereignty is not disputed by another internationally recognised sovereign government previously controlling the same territory."¹⁰²

Notably, the Montevideo Convention summarises the states' rights by stipulating that "the state's political existence is independent of recognition by the other states. Even before recognition, the state has the right to define its integrity and independence, provide for its conservation and prosperity, and consequently organise itself as it sees fit, legislate upon its interests, administer its services, and define the jurisdiction and competence of its courts. According to international law, the exercise of these rights has no other limitation than the exercise of the rights of other states."¹⁰³

In summary, the state could be defined as a sovereign state with a legitimate government controlling a specified territory and is recognised internally and internationally and can protect its citizens' human rights and deliver essential services and security.

2.2.2 Definition of Armed Conflict

According to the UNEP, an 'armed conflict' is a dispute involving armed force between two or more parties. According to international humanitarian law, there are two distinctive armed

⁹⁹ Duhaime's Law Dictionary, (Online) < <http://www.duhaime.org/LegalDictionary/S/State.aspx> > accessed 12/04/2017.

¹⁰⁰ Lawrence T. Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Westview Press; London, Eng.: Mansell Pub. 1986). 5

¹⁰¹ Millar (n 90) 35.

¹⁰² Nils P. Gleditsch and others, 'Armed conflict 1946-2001: A new dataset' (2002) 39(5) J Peace Res. 615

¹⁰³ Article 3 of 1931 Montevideo Convention (n 97).

conflicts: global armed conflict and non-international armed conflict.¹⁰⁴ Since this study is about Libya, the focus is on the definition of non-international armed conflict, which is demonstrated in detail in chapter three.¹⁰⁵ In this regard, a civil war has been defined as a non-international armed conflict in which a war occurs between factions, organised groups or regions of the same country.¹⁰⁶ In another UNEP report, the conflict has been explained as "a dispute or incompatibility caused by actual or perceived opposition of needs, values and interests. In political terms, conflict refers to wars or other struggles that involve the use of force."¹⁰⁷

¹⁰⁸ Regarding terms and concepts of peace and conflict, the war concept is defined as "a mutually recognised, hostile exchange of actions among two or more parties (such as between or within nation-states) conducted by conventional military forces, paramilitary forces, or guerrillas to achieve respective policy objectives."¹⁰⁹ Moreover, the concept of conflict can be defined as clashing or engaging in a fight, a confrontation between one or more parties aspiring towards incompatible or competitive means or ends. Some of these different conflicts are countrywide, for example, Iraq, Rwanda and Libya, whereas others such as Sudan are localised in specific parts of a country.

The Uppsala Conflict Data Project explains armed conflict as a contested incompatibility that concerns government or territory or both. The use of armed force between two parties results in at least 25 battle-related deaths.¹¹⁰ Of these two parties, at least one is the government of a state.¹¹¹

In 1949-2001, there were 225 armed conflicts,¹¹² and recently this number has increased. After 2011, for example, Arab uprisings arose in Arabic countries such as Syria, Yemen and Libya. These conflicts could be construed as revolutionary wars, episodes of violent conflict between governments and politically organised groups (political challengers) seeking to

¹⁰⁴ UNEP, 'protecting the environment during armed conflict, an inventory and analysis of international law' (UNEP, November 2009) <http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf> accessed 01/07/2016.

¹⁰⁵ See chapter 3 section 3.3.5 below.

¹⁰⁶ Ibid.

¹⁰⁷ UNEP, 'From Conflict to Peacebuilding the Role of Natural Resources and the Environment' (UNEP, February 2009) <https://www.unep.org/pdf/pcdmb_policy_01.pdf> accessed 13/06/2016.

¹⁰⁸ Millar (n 90) 22.

¹⁰⁹ Ibid 79.

¹¹⁰ The Uppsala Conflict Data Program (UCDP) is a data collection program on organized violence, based at Uppsala University in Sweden. The UCDP began recording information on ongoing violent conflicts in the 1980s. UCDP, about UCDP (online) <<http://www.pcr.uu.se>> accessed 07/03/2020.

¹¹¹ See the definition of statehood by the Montevideo Convention above in section 2.2.1.

¹¹² Nils P. Gleditsch and others (n 102). 615

overthrow the central government, replace its leaders, or seize power in one region. Conflicts here most likely include substantial use of violence by one or both parties.¹¹³

However, states during and after armed conflicts likely face challenges related to a lack of the resources crucial to sustaining the primary governance institutions. The provision of public services to their residents is most likely affected by armed conflict and civil wars.¹¹⁴ It is important to note that most recent conflicts are internal or intra-state conflicts; in other words, most political crises that may lead to armed conflicts occur within rather than between states.¹¹⁵

The International community has become increasingly concerned with the rise in continuously internal conflicts. In this regard, Peter Wallensteen identifies three general forms of conflict: interstate, internal, and state-formation conflicts. Interstate conflicts are disputes between nation-states or violations of the state system of alliances.¹¹⁶ These conflicts contribute to the expanding nature, sophistication, and, at times, legitimisation of interventionist policies.¹¹⁷ Examples of internal and state-formation conflicts include civil and ethnic wars, anti-colonial struggles, secessionist and autonomous movements, territorial conflicts, and government control battles. Recently, attention has focused on 'global conflicts', where non-state actors combat international and regional organisations.¹¹⁸ Such groups are ISIS in Iraq, Libya, Syria and Alhoti in Yemen.

It is recognised that the period after the end of the conflict is complex and context-determined and could be divided into different stages; emergency and stabilisation (0-11 months post-conflict); transition and recovery (12-47 months after the cessation of war); peace and development (4-10 years).¹¹⁹

Therefore, it opens the door for the peace stage to start when the war or conflict comes to an end. However, the state might describe a post-conflict, transitional, or even a failed state as discussed in the following sections.

¹¹³ Mony G. Marshall and others, 'PITF- State Failure Problem Set: International Wars and Failures of Governance, 1955-2014' political instability (formerly, state failure) Task Force (PITF) 6 May 2015 [online] <<https://www.revolvy.com>> 5 accessed 25/05/2016.

¹¹⁴ Christopher S. Chivvis and Jeffrey Martini, *Libya After Qaddafi: Lessons and Implications for the Future* (1st edn Rand Corporation 2014). 53

¹¹⁵ Duffield (n 27) 66.

¹¹⁶ Peter Wallensteen, *Understanding Conflict Resolution* (3rd edn, London, Sage Publications 2002). 15

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Sophie Witter, 'Health Financing in Fragile and Post-Conflict States: What Do We Know and What Are the Gaps?' (2012) 75 *Social Science & Medicine* <<http://www.sciencedirect.com/science/article/pii/S0277953612006752>> 2371 accessed 10/04/2017.

2.2.3 Definition of a Post-Conflict State

Post-conflict could be defined as a process in which warfare is absent, but it is not precisely a presence of peace.¹²⁰ However, a post-conflict situation may not be identified easily because this process is different based on the kind of war. Internationally, post-conflict – defined as a negotiated cessation of hostilities –and peace talks followed by a peace treaty mark possible 'end' to conflict. Internally, this situation may be challenging to apply due to the state's continuing hostilities even after the peace agreement was signed and the conflict parties agreed to establish peace.¹²¹

In other words, in post-conflict situations, not only has the violence been reduced and conflict become less violent, but also the features of peace may become more recognised in this period.¹²² In this context, Larry Diamond defined the post-conflict states as the states which emerge, or in some cases are trying to appear, from a period of external or, more commonly, civil war; such states are Lebanon, Nicaragua and Liberia.¹²³ However, a post-conflict state has been described as a country or area where conflict ceases and has become active and post-conflict government is recognised by a political transformation.¹²⁴ Moreover, Sophie Witter has classified post-conflict states as fragile states.¹²⁵ Therefore, a post-conflict situation can describe a state after the end of the conflict, for example, Libya, after the killing of Qaddafi in October 2011.¹²⁶

2.2.4 Features of Post-Conflict States

It is essential to realise that the post-conflict states' characteristics are likely affected by the elements of the conflict itself. Such features: a kind of war,¹²⁷ duration of the war,¹²⁸ a geographical location of the state, international intervention, and the state's economic

¹²⁰ Brahim (n 5) 3.

¹²¹ Graham Brown, Arnim Langer and Frances Stewart, 'A Typology of Post-Conflict Environments' (September 2011) 1 Centre for Research on Peace and Development (CRPD) <<https://lirias.kuleuven.be/handle/123456789/330374>> 4 accessed 29/02/2016.

¹²² Shary Charlotte, Henriette Pattipeilohy and Hanafi Rais, 'Typology and Causes of Post Conflict Violence in Aceh (2005-2012)' (2015) 3 Journal of Global Peace and Conflict <<https://dx.doi.org/10.15640/jgpc.v3n1a3>> accessed 13/04/2017

¹²³ Diamond (n 27) 94.

¹²⁴ Witter (n 119) 2370.

¹²⁵ Ibid 2371, see also Patrick Tom, *Liberal Peace and Post-Conflict Peace building in Africa* (1st edn, Palgrave Macmillan 2017). 23

¹²⁶ See chapter 3 section 3.3.4 below.

¹²⁷ International or intra-state war, such wars happened in Arabic countries in 2011.

¹²⁸ For example, the civil war in Libya in 2011 lasted nine months, whereas ongoing war which also started in 2011 in Syria is still continuing today.

system.¹²⁹ These factors can determine the state's features after the end of the conflict and significantly influence the post-conflict and transitional stages of state transformation to meet a stable state's conditions.

In this context, starting with the post-conflict state, which as defined above, is a country when conflict ceases to be active; in such a situation, the war becomes less violent, more or less manifest or latent, but rarely stops all.¹³⁰ Despite this fact, practical experience with various post-conflict situations in different parts of the world shows that crimes and privatised violence record high levels. Domestic politics' polarisation has been increased during these periods.¹³¹ According to Winter, about 40% of countries collapse back into conflict, particularly developing countries, most likely to relapse into fighting again.¹³²

Also, the post-conflict state is characterised by weakened state authority and capacity. This weakness influences other aspects of the reformation of the state. However, several potential obstacles may face a state during this period, making post-conflict policy-making more or less severe in different countries. Such obstacles that affect the post-conflict environment's security situation are capacity, inclusivity, form or degree of the government, and available international resources.¹³³ In this regard, even though the post-conflict states in most cases have a new government after the overthrow of the previous government and its leaders, the new one may deal with the problems in respect of legitimacy to become recognised by the internal and international community.

As mentioned previously, the critical dilemma that appears in the post-conflict state is related to lack of security, which leads to the collapse of the systems and institutions within the state that assist in establishing a stable society function.¹³⁴ Due to the lack of security, the government cannot deliver its citizens' most core functions. There is a notable lack of capacity to manage the country's resources, protect its people's rights, and provide essential services.¹³⁵

Indicating to what exactly finishing up from the pre-discussion on post-conflict states above and relating it to Libya's current circumstance, Libya could be described as a post-conflict

¹²⁹ Brown, Langer and Stewart (n 121) 6.

¹³⁰ Roy Licklider, 'The consequences of Negotiated Settlements in Civil Wars, 1945-1993' (2015) 89 (3) *American Political Science Review*.

¹³¹ Diamond (n 27) 95.

¹³² Witter (n 119) 2370.

¹³³ Brown, Langer and Stewart (n 121) 4.

¹³⁴ Brahimi (n 5) 3.

¹³⁵ Witter (n 119) 2371.

state when the conflict arrived at the end on 20 October 2011 till the primary election occurred in July 2012. Consequently, Libya, during this stage, was characterised by weakened state authority and capacity. This shortcoming impacts different parts of the transformation of Libya's statehood in its transitional phase, as investigated later in chapter 3.¹³⁶ However, since 2014, Libya has witnessed various types of violence on the ground over Libyan territory for different reasons. It seems that the violence around the revolutionary events has not stopped but merely paused. This situation would explain the loss of the state's control over violence, the military action on the ground, and the failure of control over territory.

Overall, the post-conflict concept could be described as a state in which war likely comes to an end, and it has an opportunity to establish peace, with several obstacles which may face the state during this progress. This situation might be due to the influences of war on the state's formation, which weakens its functions and institutions. Thus, many post-conflict states are described as fragile states because they do not have an effective, legitimate government that can deliver core services and basic security to its citizens. However, in some instances, when active conflict ceases, there is a political transformation to a recognised post-conflict government. This government deals with issues that arise during this time to pass through the transitional phase, when the state may become more stable, as illustrated in the following sections.

2.2.5 Definition of a Transitional State

The transition concept is often related to the political aspect of the state's reformation and establishing a new regime.¹³⁷ In this context, the political transition could be defined as the interval between one political power's demise and a new (emergent) political authority. It is a process where new rules related to the constitutional system are shaped during an interregnum managed by a provisional regime.¹³⁸ The setting up of the new government is presumed to follow a political path; the breakdown of the authoritarian regime, the emergence of the democratic opposition, negotiations between the relevant social and

¹³⁶ See chapter 3 section 3.4 below.

¹³⁷ John S. Dryzek, 'Democratization as deliberative capacity building' (2009) 42(11) *Comparative political studies* 1379.10

¹³⁸ Shain, Juan and Lynn (n 6).

political actors, the enactment of a new constitution, followed by elections and the establishment of a new democratic structure.¹³⁹

Transitional political change usually refers to removing one government from power, replacing it with another, and changing political structure and function regimes.¹⁴⁰ Such regimes are the range of institutions, infrastructure, actors, procedures, values, ideas and languages.¹⁴¹

There are several reasons for a country to transit between regimes; however, war could be considered a fundamental reason for establishing a transitional state. When the war comes to an end, a state enters a post-conflict stage, and after that, a condition likely becomes a transitional state when it starts to transition from a previous regime to a new one. There are other reasons for a country to transit between authorities. These reasons include secession part of a state to create a unique shape, such as the Soviet Union, or a changing state's form, to adjust the republic's political system into a mass, such as Libya 1977¹⁴² and Arab Spring 2011.¹⁴³ Furthermore, the most notable one mentioned is the transition from conflict to peace, whether internal or external war, because of the chaos that permeated all sectors in the country after the end of the war.

However, it appears that the outcomes of a political transition depend on structural factors and external factors, and these factors may affect the transition process and influence the choices and decisions of the political actors, which, in the end, could affect the state transformation.¹⁴⁴ Such factors are; the economic situation, the history, the institutional legacies, the ethnic characteristics of the population and the socio-cultural dimension.¹⁴⁵

According to UNEP, in the transitional period, the state usually has weak governance institutions and experiences, leading to an institutional vacuum.¹⁴⁶

2.2.6 Features of Transitional States

Regardless of the way that transitional states share standard features, these features may differ from country to country because their specific requirements have impacted the state's transformation. According to UNEP, low-income countries have faced difficulties more than

¹³⁹ Ibid 9.

¹⁴⁰ El-Anis and Hamed (n 41) 177.

¹⁴¹ Stephen Krasner, *International Regimes* (Cornell University Press 1983). 21

¹⁴² Hafizullah Emadi, 'Libya: The Road to Regime Change' (2012) 14 (2) *Global Dialogue*. 128

¹⁴³ Lisa Anderson, 'Demystifying the Arab spring: Parsing the Differences between Tunisia, Egypt and Libya' (2011) 90(3) *Foreign Affairs* 2.

¹⁴⁴ Rafti (n 31) 10.

¹⁴⁵ Diamond (n 27) 73.

¹⁴⁶ UNEP (n 104) 19.

others¹⁴⁷, and the countries with natural resources also face different challenges.¹⁴⁸ After the war, states seem to be non-functional states because of the government's weakness during a chaotic conflict period.¹⁴⁹ Moreover, a transitional period is a complex process and may take different periods; some states take a short time, such as Sri Lanka, while others may take a long time, such as Northern Ireland.¹⁵⁰

Furthermore, although the state during the transition period is characterised by establishing a new regime, in some instances, the old regime may remain and influence the new one.

As aforementioned above, it seems that most transitional states attempt to transit from an authoritarian regime to democracy.¹⁵¹ Accordingly, there are three phases on the path to establish and build a democracy in the transitional forms; opening, breakthrough and consolidation.¹⁵² In the first phase, the political transition starts and coincides with a reformist move. The next phase is the breakthrough stage, which is recognised as establishing a new government that coincides with the previous regime's collapse, conducts national elections, and enacts a new constitution. The last phase is consolidation, in which the new government is shaped and materialises through the implementation of state reforms, the holding of periodic elections and the promising of civil society.¹⁵³

Based on these stages, the transition period in many aspects could be considered a temporary phase that may lead either to democracy or, in some instances, a return to the pre-transitory state, or even lead the state to become a failed state. However, recent cases such as the Arab Uprising in Libya, Syria and Yemen, show that there has been neither a democratic transition nor a return to authoritarian pre-transitory politics.¹⁵⁴

Thus, transitions from authoritarian rule to democracy can have a variety of outcomes. There are several general factors and key actors that affect the success or failure of political transitions. The general factors include the type of regime before the political change, the characteristics of the new leader of the transitional government, and the influence of

¹⁴⁷ Brown, Langer and Stewart (n 121) 4.

¹⁴⁸ UNEP (n 104) 21.

¹⁴⁹ Cerwyn Moore, *Contemporary Violence: postmodern war in Kosovo and Chechnya* (Oxford University Press 2010)

¹⁵⁰ Brown, Langer and Stewart (n 121) 4.

¹⁵¹ Carothers (n 28) 6.

¹⁵² Ingrid Nifosi, 'A New Conceptual Framework for Political Transition: A Case-study on Rwanda' (1994) 20 *Resume*. 73

¹⁵³ *Ibid*.

¹⁵⁴ Joshua Stacher, 'Fragmenting states, new regimes: militarized state violence and transition in the Middle East' (2015) 22(2) *Democratization* 259. 260

information and communication technology.¹⁵⁵ Moreover, the key actors who can significantly impact the success or failure of transition processes are military, non-state actors, political parties, elections, and international actors.¹⁵⁶

Libya could be presently described as a state transitioning towards democracy based on the three phases in the pre-mentioned transition paradigm. After the end of the 2011-revolution, Libya coincides with a reformist move in the next stage.¹⁵⁷ On 3 August 2011, under pressure from the Libyan public and the international community, the NTC adopted the Interim Constitutional Declaration (ICD) as a roadmap for the transition. This roadmap consisted of articles on the Libyan state, the interim government, freedoms, civil rights and an independent judiciary.¹⁵⁸

In July 2012, the national election was conducted in Libya, which the GNC elected and recognised by the Libyans coincided with the previous regime collapse. The GNC established a constitution committee to enact a new constitution for Libya. This step was coupled with establishing NTC's committees to review some crucial laws that could be considered under the reformulation view.

Yet from 2012 to 2014, rough stability existed, and successive power-sharing governments were able to shape the transition to several impressive accomplishments.¹⁵⁹ Libya adopted many of the best practices of the international peacebuilding consensus. It is quickly restarting economic activity, holding early elections, democratizing its political institutions, freeing the media. It also cultivates civil society and develops (though not fully implementing) demobilisation, post-conflict justice, and national reconciliation mechanisms.¹⁶⁰

However, Libya has faced some problems that impeded its transition to democracy. The old government and its legacy cast a long shadow on the transitional period.¹⁶¹ These points have been demonstrated profoundly in chapter 3.¹⁶²

¹⁵⁵ Anna Louise Strachan, 'Factors affecting success or failure of political transitions' (Helpdesk Report 29 November 2017) (Online) <<https://assets.publishing.service.gov.uk/media/5a7040e2ed915d265c511f60/250-Factors-affecting-success-or-failure-of-political-transitions.pdf>> 2 access 02/09/2021.

¹⁵⁶ Ibid 4.

¹⁵⁷ Democracy Reporting International, 'At a Glance: Libya's Transformation 2011-2018, An Interactive Overview' <<http://www.democracy-reporting.org>> accessed 12/07/2020.

¹⁵⁸ Ibid.

¹⁵⁹ George F. Willcoxon, 'Contention, violence and stalemate in Post-War Libya' (2016) 22 (1) Mediterranean Politics 91-114. 91

¹⁶⁰ Ibid. 91

¹⁶¹ Mieczyslaw P. Boduszynski and Duncan Pickard, 'Libya Starts from Scratch' (2013) 24 (4) Journal of Democracy 86. 86 6

¹⁶² For more information see chapter 3 section 3.4 below.

Qaddafi's dictatorship rules profoundly influence the transitional political process in Libya. The 40 years of his regime have a deep root in the reformation of the Libyan state. Qaddafi's regime was overthrown by a 2011- revolution that ends in violence. This situation challenges the leaders of the transition process. Moreover, the prospects for building democracies depend highly on the new leader's performance during the transition period. Libya currently has lacked in a figure leader who has the self-confidence needed to take complex, decisive, and timely decisions with conviction during this transition period.

It is essential to highlight the role and impact of the key actors on the transition of the Libyan state named military, political parties, non-state actors, elections, and international actors. In Libya, there was no military in meaning words- Qaddafi had deliberately marginalised and weakened the army- instead, there were security brigades to protect him and his regime. Thus, Qaddafi used these brigades during the 2011-revolution against the protesters. In contrast, there were brigades established by the opposition supported by NATO to fight Qaddafi's forces. These brigades represent a real challenge to the government in imposing its control over the entire Libyan territory. Add to this the Dignity Operation leading by General Haftar in eastern Libya.

Other key actors that may affect the transition period are the political parties and elections. In Libya, there is a lack of experience with organising political parties and holding elections because no political parties existed during Qaddafi's regime.

The transition to democracy has three stages: initial mobilisation to oust the old regime, holding free elections, and delivering public services and public goods.¹⁶³ It seems that Libya has met these three stages since 2011, overthrowing Qaddafi's regime in 2011, holding the free elections in July 2012, and delivering the essential services and goods to Libyan citizens by the successive governments. However, the transition process has encountered several challenges during the past ten years. The intervention of the international actors and the non-state actors impeded the Libyan transitional period. The lack of international agreement on the situation in Libya confused the Libyan political scene. In addition, NATO intervention in 2011 without the precise plan for post-2011 to support Libya increased the chance for chaos instead of stability. The international support for non-state actors also led Libya to return to the conflict several times. Since 2014, Libya has been split between factions based in the capital Tripoli, in the west, and in the city of Beneghazi, in the east.

¹⁶³ Strachen (n 155) 5.

Significantly, although Libya in the present day is facing several challenges in the transitional period, it is likely not falling back to the pre-transitional state in which the third election plans to take place in Libya on 24 December 2021.¹⁶⁴

2.2.7 Definition of a Failed State

As mentioned earlier, the state passes through the transitional stage, and sometimes it cannot reach this stage successfully, so it may fail at the end of the path to peace. The state in this situation is called a failed state. States are much more varied in their capacity and capability to deliver core functions to their citizen.

Even though there are several definitions of a failed state, academic researchers tend to describe failed states than define them. In this regard, Potter considered a state a failed state when it has a weak government, which loses its ability to deliver the fundamental political, economic, social, and other crucial requirements to its citizens.¹⁶⁵ He linked the failure of the state to its sovereignty failure of responsibilities towards its citizens. Similarly, Barma linked a state failure with the significant functions of the modern state. He reported that a state fails when it becomes unable to impose its sovereignty on its citizens and territory and loses its capacity to protect its national boundaries.¹⁶⁶

Nation-states fail because they are convulsed by internal violence and can no longer deliver positive political goods to their inhabitants. Their governments lose legitimacy, and the very nature of the particular nation-state itself becomes illegitimate in the eyes and the hearts of a growing plurality of its citizens.

The state's prime function is to provide that political good of security—to prevent cross-border invasions and infiltrations, and any loss of territory; to eliminate domestic threats to or attacks upon the national order and social structure; to prevent crime and any related dangers to domestic human security, and to enable citizens to resolve their disputes with the state and with their fellow inhabitants without recourse to arms or other forms of physical

¹⁶⁴ Resolution No.33 of 2021 regarding the regulation for updating the voter register attached to the decision of the IHEC council,(online) < www.hnec.ly> accessed 02/09/2021.

¹⁶⁵ Potter (n 7) 4.

¹⁶⁶ Schwarz (n 27) 431.

coercion. The delivery of a range of other desirable political goods becomes possible when a reasonable security measure has been sustained.

2.2.8 Features of Failed States

In recent years, there has been a notable rise in the number of political problems, which may increase the number of countries described as failed or collapsed states.¹⁶⁷ Further, the central common characteristics of the failed states are; having a weak government or, in some cases having more than one non-functional government; losing control over the borders of the country; decreasing levels of GDP per capita; increasing corruption levels; declining levels of life expectancy due to a weak health system and a rise in violence and extreme poverty; rising crime levels; limitation in the educational system.¹⁶⁸

The other characteristics of the failed state are that governments in this stage are usually described as weak governments that could not enforce the laws even though they may have the possibility of imposing some bans.¹⁶⁹ As a result of this weakness of the government authorities, the state has witnessed unofficial forms. These local forms have spontaneously offered personal protection to the government and legal and illegal enterprises.¹⁷⁰

Moreover, Rolf argued that a state becomes failed in functional terms when it fails to provide three essential functions: welfare, representation, and security. He described the failed state as the state that has become unable to maintain its core functions or continue to provide its operations.¹⁷¹ Accordingly, the term 'failed state' refers not only to the state's inability to deliver essential services and security to its citizens but also to its unwillingness to meet such responsibilities.¹⁷²

The reasons for the failure of states are critical due to their effects on the state reformation. It is essential to realise that the political conflict or the political division could be considered a fundamental reason for the state failure. That is because state authority is divided between two or more governments, resulting from the governance institutions' weakness and in some instances leads the country to return to conflict again. In conclusion, the governments lose their authority to control all the territory of the country. This situation could be illustrated in Somalia's case, the most famous example of a failed state in modern history.

¹⁶⁷ Marshall, Robert and Barbara (n 92).

¹⁶⁸ Potter (n 7) 3.

¹⁶⁹ Sandra F. Joireman, *where there is no government: Enforcing property rights in common law Africa* (Oxford University Press 2011). 34

¹⁷⁰ Ibid 35.

¹⁷¹ Schwarz (n 27) 430.

¹⁷² Millar (n 90) 34.

In addition to this reason, other reasons can lead to a failed condition, such as corruption, civil war, state and international intervention history. However, in many cases, a state does not fall solely for one reason, but it fails because of multiple reasons, when many factors combine, leading to a state's failure.¹⁷³

As mentioned earlier, a 'failed' state can be defined as a state with a weak government that loses its authority to control its country and becomes unable or unwilling to deliver essential services to its citizens. However, few countries could be recently described as failed states.¹⁷⁴

As a result, the failure to deliver these essential services leads a state to become a failed state, or in some cases become a collapsed state, which is a rare and extreme version of a failed state where there is a total vacuum of authority.¹⁷⁵ Political goods are obtained through private or ad hoc means. Security is equated with the rule of the strong. A collapsed state exhibits a vacuum of authority.¹⁷⁶ In this context, the collapsed state refers to "a situation where national structures or institutions that are meant to implement its responsibilities have disappeared, dissolved or lost their ability to act".¹⁷⁷

According to what concludes from the pre-discussion on failed states above and relating it to Libya's current situation, Libya, by all accounts, is not a failed state in this stage. Regardless of how there are a failure and disappointment in certain parts of the administration's (GNA) performs, especially after the Dignity Operation of Haftar. However, the GNA can still deliver most essential services to Libyan citizens and show its authority in controlling most of Libya's territory, as discussed later in detail in the following chapter.¹⁷⁸

2.3 Review the Concepts of Post-conflict, Transitional and Failed States and its Relationship with the Case under the Study

Although the concepts of post-conflict, transitional and failed states share similar characteristics and conditions, in some cases, it may be difficult to distinguish between them— post-conflict and transitional states in particular. The evaluation of these concepts appears that there are some differences between each other. These concepts could be

¹⁷³ Charles T. Call, 'The fallacy of the 'Failed State'' (2008) 29(8) Third World Quarterly 1491.

¹⁷⁴ William Zartman, *Collapsed States: the disintegration and restoration of legitimate authority* (1st edn, Lynne Rienner Publishers.Inc 1995). 1

¹⁷⁵ Potter (n 7) 4.

¹⁷⁶ Robert I. Rotberg, *Failed states, collapsed states, weak states: Causes and indicators. State failure and state weakness in a time of terror* (2003).

¹⁷⁷ Millar (n 90) 34.

¹⁷⁸ See chapter 3 section 3.4 below.

described as stages when the country passes throughout its path to peace when the war may end.

The state which has been affected by conflict has become a post-conflict state and then a transitional state. Finally, some transitional states meet the stable states' conditions, whereas others fail to meet these conditions and become a failed state or even a collapsed state. As mentioned above, it is notable that not all of the transitional forms affected by conflict were post-conflict states before because some of them are described as transitional states due to changing their political system and replacing the old regime with new power.

The most important distinction among these states is the degree of effectiveness of the government.¹⁷⁹ In other words, the main characteristics which could be used to distinguish between the concepts of post-conflict, transitional and failed states are the legitimacy and effectiveness of the government. During these periods, the government's decree and power influence some issues such as security and welfare. When the government is unable or unwilling to take on its responsibilities or deliver essential services, such as security, to its citizens, it will lose part or even all of its authority to control its territory. As a result, other problems, such as violence and corruption, will spread within this country. Also, non-governmental actors may appear to fill the government's void or lack of government authority, negatively impacting the function and institution and becoming more non-functional and ineffective.

In this regard, when the post-conflict state has a new government after the overthrow of the previous government and its leaders, this new government may need to deal with the problems in respect of legitimacy to become recognised by the internal society and international community. As mentioned previously, the critical dilemma that appears in the post-conflict state is related to a lack of security, which leads to the weakness of the systems and institutions within the state that assist in establishing a stable society's functions.¹⁸⁰ Due to the lack of security, the government cannot deliver its citizens' most core functions. There is a notable lack of its capacity to manage the country's resources, protect its people's rights, and deliver essential services to them.¹⁸¹

In government, even though the state in the transitional period also has weak governance, institutions and experience; thus, this may lead to an institutional vacuum.¹⁸² This

¹⁷⁹ Diamond (n 27) 95.

¹⁸⁰ Brahimi (n 5) 3.

¹⁸¹ Witter (n 119) 2371.

¹⁸² UNEP (n 104) 19.

government is more recognised by the international and internal community, which will support this government to work on the ground and enable it to function effectively.¹⁸³ That means even though the governments in both periods of post-conflict and transition are usually fragile due to the lack of security and political experience, the government in most cases of the transitional period is more functional, more recognised and more legitimate.

On the contrary, a failed state has a weak government or even a non-functional government that loses its ability to deliver the necessary political, economic, social, and other crucial requirements to its citizens.¹⁸⁴ The government can lose its authority to control the country's territory and, as a result, becomes unrecognised by the international and internal community.

To sum up, the post-conflict, transitional and failed state terms are used to describe the state during different phases after the end of the conflict. The importance of the distinction between these concepts is that it will help illustrate the governments' functions, the institutions, the politicians' priorities. It also determines why some significant matters (e.g., issues related to environment protection) appear to have dropped out from the politicians' interests and preferences during different these stages. It also explains why some previous legislation and regulations, including the environmental law framework, a regulatory regime governed under a civil law legal system is still currently applies.

2.4 Conclusion

Chapter Two identified and discussed the characteristics and conditions of post-conflict, transitional and failed states. It starts with the state and armed conflict definitions to introduce the target concepts to understand and identify these states fully.

Although post-conflict concepts, transitional states seem to be about different stages of leaving conflicts, and failed states are about total collapse. However, these concepts could be convergent in meaning, and sometimes it could be challenging to differentiate between them to describe the state's status. By analysing these concepts' conceptual framework, these could be seen as the consecutive stages, and the form in each stage has different features and conditions. It seems that other concepts may have a close meaning in these concepts, such as state collapse and failure of functional states.

¹⁸³ Stacher (n 154) 262.

¹⁸⁴ Potter (n 7) 4.

However, the main point that could be used to distinguish between the post-conflict, transitional and failed states is their government's degree of legitimacy.¹⁸⁵ In these periods, there is a newly established government. A new one has replaced the old regime. Hence, the governments of these states are likely powerless and ineffective functional governments. Additionally, the weakest and most ineffective one is the failed state's government, which could be described as a non-functional government. The post-conflict government is also more powerless but is not at the same level as the failed state because it may have some power to control its country and deliver essential services and goods to its citizens.

Further, even though the governments of the transitional state are also weak, and in many cases, face several problems related to legitimacy and security, they are likely more practical and functional and more recognised by the international and internal community. States fail when they are no longer willing or able to carry out their functions or bear responsibilities for their citizens. In contrast, a collapsed state refers to a situation where national structures or institutions meant to implement their responsibilities have disappeared, dissolved or lost their ability to act.

¹⁸⁵ Peter G. Stillman, 'The concept of legitimacy' (1974) 7(1) *Polity* 32.

3 The Geographical and Historical Background to the Present State of the Libyan State: Post-Conflict, Transitional or Failed State?

3.1 Introduction

In light of the conceptual framework of post-conflict, transitional and failed state concepts, which have been discussed in the previous chapter, this chapter discusses Libya's geographical and historical background to classify its current nature in which, post-conflict, transitional or failed state. As the current context remains fluid, understanding the new Libyan political regime is featured by difficulty and uncertainty: which factors from Libyan history – old and recent – are still relevant, and what are new? And how these factors affect the current Libyan transitional progress.

Identifying the current nature of Libya in its present-day and providing its main characteristics leads to highlight the priorities of the politicians during different stages of the Libyan state after 2011. It determines whether the matters related to environmental protection, especially compensation for oil pollution, are included in their interests during that time. It also explains why some old laws and regulations established in Qaddafi's era, and some instances before, still apply currently.

This chapter introduces Libya geography and region to identify its identity. Then the key developments in its modern history have been provided to determine their influences on the current Libyan state. Finally, the current nature of Libya as a state being detailed, the characteristics of Libyan state during a post-conflict and transitional period in particular.

3.2 An Introduction to Libya

3.2.1 The Geography of Libya

Libya is located in North Africa and has an area of approximately 1.759.540 km². It is bounded on the north by the Mediterranean Sea, east by Egypt, on the west by Tunisia and Algeria, and the south by Niger, Chad, and Sudan. Libya ranks fourth in geographical size among Africa and the 15th among the countries of the world.¹⁸⁶

Although the desert predominates in Libya, the country's characteristics vary because the Libyan coastline measures about 1970 km from the Tunisian border to Egypt. The

¹⁸⁶ Ronald Bruce St John, *Historical dictionary of Libya* (Rowman & Littlefield 2014).1

Mediterranean coast and the Sahara Desert are the country's most prominent natural features.¹⁸⁷

Libya's strategic location has played an essential role in its historical and modern developments. Moreover, this location has also given Libya important strategic location links between European and African countries and Arabic countries. Additionally, Libya has been divided into three historical regions: Tripolitania in the northwest, Cyrenaica in the east and Fezzan in the southwest.¹⁸⁸

Even though Libya is ranked the fourth largest country in Africa, its population is roughly small, is estimated at 6.778.000 in 2019.¹⁸⁹ More than two-thirds of this population live in the coastal strip next to the Mediterranean Sea. Most Libyan people live in the two central cities: Tripoli in the far west and Benghazi in the east.¹⁹⁰ Most of them are Arab and Berber, with other ethnic groups, including a few thousand Tuareg and Tebu living in Southern Libya.¹⁹¹

3.2.2 Libya's Regional Identity

Libya is considered one of the Middle East and North Africa (MENA) countries. As part of the MENA cluster, Libya's regional identity has been characterised by the main standard features of African and Arabic countries.¹⁹² Accordingly, Libya was historically divided into three separate regions, namely, Tripolitania, Cyrenaica and Fezzan.¹⁹³

Even though the Libyan population contains multiple origins; Arab, Berber, Tuareg, and Tebu, Libya would be described as an Arabic country because of the tremendous impact of the Arabs. They had grafted both their religion [Islam], language [Arabic] and their culture onto indigenous Libyan people.¹⁹⁴ The Libyan society, likewise, most of the MENA cluster could be described as a tribal society. Tribes play a crucial role in competing with the state administration and establish parallel structures of governance.¹⁹⁵ The political and military

¹⁸⁷ Otman and Karlberg (n 19) 2.

¹⁸⁸ St John (n 186) 2.

¹⁸⁹ UN data, 'Country profile: Libya' <<http://www.data.un.org/CountryProfile.aspx?crName=libya>> accessed 08/03/2019.

¹⁹⁰ Ibid.

¹⁹¹ Otman and Karlberg (n 19) 3.

¹⁹² St John (n 186) 2.

¹⁹³ Ibid 3.

¹⁹⁴ Otman and Karlberg (n 19) 3.

¹⁹⁵ Christine N. Myers, 'Tribalism and Democratic Transition in Libya: Lessons from Iraq' (2013) 7 (01) Global Tides 5. 1

activity has been influenced by the deep-rooted tribalism, which affected the regime changes and the stability of a new Libyan transitional state,¹⁹⁶ as discussed in this chapter.¹⁹⁷

3.2.3 The Legislative and Judicial System

The legal system in Libya is based on the Civil Law System. However, as Islam is the primary religion in Libya, Islamic law (Sharia) remains the first source of laws and influences the drafting of laws in several ways. Accordingly, the 1954 Civil Code considers the primary source for civil transactions covering real and personal rights and obligations.¹⁹⁸ This Code deals with contracts and unlawful acts, including specific performance, evidence, assessment of damages and contractual relationships between contract parties, etc.¹⁹⁹ Additionally, other laws deal with other matters such as the commercial Code of 1953, criminal Code of 1972 and environmental law No.15 of 2003.

Regarding the Judicial System, the Supreme Council for the Judicial Authority deems the administrative authority of the judiciary, which deals with issues related to appointment, transfer, and discipline within all the judicial sectors over the country. The judicial system consists of a Four-tiered hierarchy: The Summary Courts, Courts of First Instance, Courts of Appeal, and Supreme Court.²⁰⁰

Summary courts composed of just one judge are located in small towns and hear misdemeanour cases of lesser value. Their decisions could be appealed to the Courts of the First Instance. The latter deals with all civil, commercial and criminal issues and compose of chambers of three judges. The decisions of these courts may be appealed to the Courts of Appeal. These Courts also consist chambers of three judges in which their verdicts may be appealed to the Supreme Court. There are five chambers in the Supreme Court: civil and commercial, criminal, administrative, constitutional, and Sharia.²⁰¹

3.3 Key Developments in Modern Libyan History

The key developments which may play a role in the Libyan state formation in the past and may impact its future are demonstrated. It starts with a history of Libya with different

¹⁹⁶ Ibid 5.

¹⁹⁷ See section 3.4 below.

¹⁹⁸ John L. S. Simpkins, 'Libya's Legal System and Legal Research' (GlobaLex, December/2010) <<http://www.nyulawglobal.org/globalex/Libya1.html>> accessed 05/02/2019.

¹⁹⁹ Libyan Civil Code of 1954 (n 59).

²⁰⁰ Otman and Karlberg (n 19).

²⁰¹ Ibid.

colonialism, followed by the independence of Libya in the monarchy era. The discovery of oil in Libya, which is considered the critical turning point in Libya's modern history, has been discussed. The period of the Qaddafi regime from 1969 to 2011 is illustrated. Finally, it evaluates the revolution of 2011. Discussion of these developments is vital since most current problems have deep roots dating back to modern history.

3.3.1 From Occupation to Independence

Italy occupied Libya from 1911 to 1943. During that time, the Libyan resistance against the Italian colony was strong, which lasted two decades. However, Italy dealt severely with them by jailing and executing most of them²⁰². Under these circumstances, the Libyan resistance finally became weaker and ended when the most effective Libyan resistance leader (Umar Al-Mukhtar) had been captured in 1931. By 1932, the authorities of Italy declared an official end to the war begun in 1911 and then considered Libya an integral part of the Italian state²⁰³. While World War I had allowed for the Italian seizure of Libya, World War II led the Italian colony of Libya to its end²⁰⁴ but left Libya in British and French hands. By that time, Great Britain occupied Tripolitania and Cyrenaica, while France occupied Fezzan. After that, the Soviet Union and the United States interfere in Libya, and they eventually signed the 1947 Treaty of Peace with Italy.²⁰⁵ Finally, in November 1949, the UN General Assembly declared a November 1949 resolution of independence of Libya which it attained on 24 December 1951 as the United Kingdom of Libya under the rule of Muhammad Idris al-Sanusi.²⁰⁶

The early independence years thus came to be characterised by a combination of weak institutions, political and economic exclusion of colonial collaborators, and a weak national identity. However, the situation in Libya changed with the discovery of oil in 1959. Later in 1963, the three provinces of Cyrenaica, Tripolitania and Fezzan were replaced by ten administrative units to change the United Kingdom of Libya to become a unitary state named the Kingdom of Libya. The new state struggled to survive under the daunting challenges that were dependent on foreign aid.²⁰⁷

²⁰² Saskia Van Genugten, *Libya in Western Foreign Policies, 1911-2011* (Springer 2016). 26

²⁰³ St John (n 186) 6.

²⁰⁴ Dirk Vandewalle, *A history of modern Libya* (Cambridge University Press 2012). 4

²⁰⁵ Open Oil (n 61) 14.

²⁰⁶ St John (n 186) iii.

²⁰⁷ Ibid 40.

Although, centralisation of the administration through the unitary state with oil wealth could lead Libyans closer together. However, Cyrenaican elites were unwilling to share the oil wealth fairly with the citizens in Tripolitania and Fezzan provinces. The king's entourage and its ability to redistribute the wealth were strengthened by centralisation in a way that was beneficial for those in charge.²⁰⁸ These historical factors have had a significant impact on the formation of the Libyan state in the post-transitional period, as demonstrated later in this chapter.²⁰⁹

In 1961, Libya became an oil exporter with the completion of a 167 km pipeline linking essential oil fields in the interior to the Mediterranean Sea. Additionally, Libya became one of the crucial countries among the oil-producing countries because of its large oil reserves and proximity to European markets.²¹⁰

The following decade witnessed dramatic increases in both production and revenues, and due to this increase, foreign investors were highly interested in this emerging resource. Thus, around 20 oil companies were active over a total of 65 per cent of Libya's land surface by 1960.²¹¹ As a result, Libya had 437 producing wells, and petroleum made up 98.7 per cent of the country's exports.²¹²

In the earlier years of independence, the first step was accomplished by a legislative act, the Mineral Law of 1953.²¹³ This law stipulated that the Libyan state was the owner of all minerals, including hydrocarbons, in the subsoil and laid down the conditions under which companies could obtain permits to carry out survey work for petroleum resources in requested areas. Following that, in 1955, the Libyan Petroleum Law²¹⁴ was enacted on 21 April, with the final text published in the Official Gazette of 19 June 1955.²¹⁵

²⁰⁸ Genugten (n 202) 72.

²⁰⁹ See section 3.4.1 below.

²¹⁰ Gurney (n 13) 15.

²¹¹ Genugten (n 202) 70.

²¹² International Bank for Reconstruction and Development, the Economic Development of Libya. (The Johns Hopkins Press, Baltimore 18, Md, 1960)
<<http://documents.worldbank.org/curated/en/573751468757209997/pdf/multi-page.pdf>> accessed 24/09/2017

²¹³ The Mineral Law of 1953 was published in the Official Gazette of 18 September of that year.

²¹⁴ Libya's petroleum law No.25 of 1955 was the law of Libya which authorised the allocation of land to individual oil prospectors, and the drilling of oil wells. It followed the Minerals Law of 1953, which established a system for obtaining permits to survey (but not drill) for petroleum. This law was enacted on 21 April 1955, along with two schedules, was published in the Official Gazette on 19 June 1955 in regard of Libyan petroleum law and it has been amended several times and the last amendment was in 2012.

²¹⁵ St John (n 186) 150.

In 1962, Libya joined the Petroleum Exporting Countries (OPEC) Organization and started implementing measures to decrease the oil companies' sway.²¹⁶ Under these circumstances, the government of the Libyan Kingdom felt that it had been able to lay down conditions under which oil companies could embark on an exploration of oil in its territory. For this reason, the Libyan Petroleum Law was amended in 1962, and the government improved the Libyan Petroleum Law of 1955 at that time to lay down the framework for the subsequent development of the Libyan oil industry.²¹⁷

Accordingly, the Libyan government, with the view of increasing its control over the petroleum industry, announced in April 1968 the establishment of the Libyan General Petroleum Company, known as LIPETCO.²¹⁸ This company entered into new partnerships with international oil companies on terms more beneficial to Libya, and later the NOC replaced the LIPETCO, as detailed in chapter 5.²¹⁹

However, even though the petroleum legislative framework has been amended several times, the essential legislative structure has remained unchanged to the present day, as discussed later in chapter 5.²²⁰

The Kingdom of Libya continued until the bloodless coup on 1 September 1969 when the Libyan monarchy was overthrown by the RCC, led by Colonel Muammar al-Qaddafi.²²¹

3.3.2 Qaddafi Era 1969- 2011

King Idris I was overthrown in a coup led by colonel Muammar al-Qaddafi on 1 September 1969, and since that date, the country started a new chapter in its history. Qaddafi and the RCC had redirected the domestic and foreign policies of the old regime. The RCC replaced the 1951 constitution with a constitutional proclamation, and it renamed itself the highest authority in Libya.²²² Although this constitutional proclamation was described as a temporary constitution that would remain until the so-called nationalist democratic revolution was completed, the 1969 constitutional proclamation was never replaced until 2011.

²¹⁶ Organisation of the Petroleum Exporting Countries, 'Libya: Libya facts and figures' [Online] <http://www.opec.org/opec_web/en/about_us/166.htm> accessed 12/10/17.

²¹⁷ Gurney (n 13) 33.

²¹⁸ Ibid 11.

²¹⁹ See chapter 5 section 5.4 below.

²²⁰ See chapter 5 section 5.5 below.

²²¹ St John (n 186) liv, lv.

²²² Article (18/1) The Revolutionary Command Council is the supreme authority in the Libyan Arab Republic.

Additionally, the RCC has practised both executive and legislative functions, together with the power to take whatever measures it deemed necessary to protect the new regime.²²³ In terms of foreign affairs, the proclamation gave the RCC the power to declare war, accept and ratify treaties and control the armed forces.²²⁴

The earlier years following the 1969 coup could be divided into three recognisable political stages: the first stage was 1969-1970: a new political and organisational model was sought to overcome the shortcoming of the preceding monarchy. The second stage was 1971-1975: the Arab Socialist Union was established as the sole political party, based on the Nasserite Constitutional model. The third stage was at the end of 1975: the Nasserite model was replaced with an officially sanctioned vertically organised system of direct democracy governed by GPCs.²²⁵ The original task of these committees was to establish the political system, but over the years, members had increasingly controlled the system and precluded the political opposition.

The ideological basis of Qaddafi's regime was his Green Book, touted as an alternative to both communism and capitalism, and he named his new system a Jamahiriya (State of the masses). In the view of Qaddafi, he gave the tenets of his strain of Arab nationalism a theoretical underpinning in what came to be known as the Third Universal Theory. In this theory, Qaddafi condemned both economic models as monopolistic, the former a state monopoly of ownership and the latter a monopoly of ownership by capitalists and companies.²²⁶

At the beginning of the Qaddafi era, the Nasserite constitutional model was adopted by Qaddafi.²²⁷ At that time, Qaddafi had been influenced by the Nasserite theory. As a result, he tried to establish unity with other Arabic countries between 1970 till 1977. However, these unities did not exist for long because of a short war against Egypt in 1977.²²⁸

²²³ Article (18/2, 3) The Revolutionary Command Council shall carry out the functions of national sovereignty, promulgate laws, and define the general policy of the State in the name of the people. As such, the Revolutionary Command Council shall make all decisions it deems necessary for the protection of the revolution and the regime, in the form of constitutional declarations, laws, orders or decisions. Any measure taken by the Revolutionary Command Council shall not be contested before any entity.

²²⁴ Article (23) The Revolutionary Command Council shall be in charge of declaring war and concluding and ratifying treaties unless it authorizes the Cabinet to conclude and ratify same.

²²⁵ Open Oil (n 61) 15.

²²⁶ St John (n 186) lvi.

²²⁷ Leader Gamal Abdul Nasser from Egypt who was an Arabic political model for many Arabic leaders through the 1950s and 1960s.

²²⁸ Alison Pargeter, *Libya: The rise and fall of Qaddafi* (Yale University Press 2012).

In 1977, Qaddafi decided to change the political system in Libya to the Jamahiriya system, which was named Libya as "the Socialist People's Libyan Arabic Jamahiriya".²²⁹ In theory, the ideological basis of the new political system was a direct democracy in which the people govern themselves without the apparatuses of a modern state. In other words, the political system evolved into a unitary state governed by the combination of the GPCs and General People's Congress (GPC).²³⁰

The primary function of these committees was to establish a new political system to control Libya based on the basic rules set by Qaddafi in his Green Book. According to Qaddafi opinion, this book contains three parts that provide the solutions for political, economic, and social problems. However, the petroleum sector, the army, the country's budget, foreign policy, and the police were outside the terms of reference of the GPC.²³¹

Theoretically, the Committee and Congress system stipulated in Qaddafi's theory ruled Libya during that time, and he appointed himself as a leader of the revolution. According to his theory, Qaddafi himself would never be head of state; instead, he was called himself a revolution leader, o Brother Leader. That means Qaddafi's claimed to be outside of the decision-making process, serving without an official position as counsellor and guide to the Libyan people, according to Qaddafi view.²³²

The GPC appointed the GPCs, which functioned as a Cabinet.²³³ The agenda for meetings of the GPC is jointly determined by the GPCs and the Basic People's Congresses and issues raised by the GPCs. The GPC ultimately approved laws. These laws were then issued as Executive Resolutions, the implementing regulations by the GPCs, signed by either the Prime Minister or the Secretary (Minister) of the sector concerned.²³⁴

This method of issuing laws by non-specialists made these laws inconsistent and ambiguous. For example, giving a new law without stipulating the cancellation of the law that precedes it. Or such in cases of issuing law without issuing its executive regulation or issuing them after an extended period, as happened in environmental law No.15, which was issued in

²²⁹ Emadi (n 142) 128-142; see also Lillian Craig Harris, *Libya: Qadhafi's revolution and the modern state* (Westview Press 1986).

²³⁰ Ibid 130.

²³¹ Vandewalle (n 204).

²³² St John (n 186) lvii-lviii.

²³³ Otman and Karlberg (n 19) 66.

²³⁴ The basic Secretariats (Ministries) were: Agriculture & Animal & Water Resources; Culture & Information; Economy, Trade, & Investment; General Education; Finance; Foreign Liaison & International Cooperation; Health & Environment; Higher Education; Industry, Electricity & Mines; Justice; Planning; Public Security; Social Affairs; Telecommunications & Transport; Tourism; Workforce, Training & Employment; and Youth & Sports.

2003, whereas its executive regulation was issued in 2009, as discussed in detail in chapter 4.²³⁵

The system of the Jamahiriya was a sort of rhetorical system. For four decades, this system was obscured and full of repressive rules, irony and was entirely dependent on Qaddafi as a person.²³⁶ Consequently, Qaddafi took all the critical decisions in Libya and surrounded himself by extraordinary people from his family, members of loyalist tribes, or the entourage of fellow revolutionary. Accordingly, he deliberately weakened the regular armed forces and replayed it with armed brigades loyal to him.

Therefore, the substantial control of the Qaddafi era was also because of its overlapping security system, which he established forty years ago. The main parts of Qaddafi's security system were the Intelligence Bureau of the Leader, the revolutionary committees, the Military Secret Service, the Jamahiriya Security Organization, and the Purification Committees.²³⁷ Additionally, Qaddafi created an extraordinary court called (the People's Court),²³⁸ which had a specific staff composed of members of the Revolutionary Committees. These courts were outside of the standard judicial system of Libya.²³⁹

Interestingly, Qaddafi arbitrated the national army to be suspicious and a potential threat to the regime, and he never allocated security errands to the ordinary armed forces. Through a carefully adjusted system of rotations and advancements, the army was deliberately kept powerless, ill-equipped, and de-politicised.²⁴⁰

Instead of this, as mentioned previously, Qaddafi and his sons surrounded themselves by loyal security forces under the patronage of Qaddafi's tribe, and they supported them with money and weapons to protect the regime under any situation. Thus, when the conflict erupted in 2011, the structural weakness of the regular army, which had been created by a lack of leadership, morale, cohesion, and effectiveness, became apparent.²⁴¹

In the context of the Libyan economic system, as part of his Third Universal Theory, Qaddafi had abolished all private commerce, retail, and trade, companies in the oil and gas sector, in

²³⁵ See chapter 4 section 4.2.3 below.

²³⁶ Alia Brahim, 'Libya's Revolution' (2011) 16(4) *The Journal of North African Studies* 605-624.

²³⁷ *Ibid* 610.

²³⁸ This court established by the law No.5 of 1988 regarding the establishment of People's Court. Article 1 stipulated that (A court called the People's Court shall be established under the provisions of this law, aimed at promoting freedom and justice for the oppressed, preventing injustice and injustice, consolidating justice and security, and asserting the authority of the people in the Great Socialist People's Libyan Arab Jamahiriya) [available Online]< <http://www.aladel.gov.ly/home/?p=1290>> accessed 29/09/2017.

²³⁹ Pargeter (n 228).

²⁴⁰ Smits and others (n 16) 12.

²⁴¹ *Ibid* 12.

particular. As a result of depending entirely on the oil revenues during the 42 years, Libya post-2011 faced severe problems inherited from the Qaddafi era. Such problems small and inefficient production sector, a lack of foreign investment and high unemployment.²⁴²

According to the second part of the Green Book, all companies should be owned by the state. As a result, all private companies had closed in Libya at the end of the 1970s. At that time, private ownership and retail trade were prohibited, the free press was also banned, and the civil service and military leadership were subverted. Consequently, this led Libyan people to rely entirely on a state to provide everything for them; this system had isolated Libya from the outside.

Additionally, as state companies took over the role of the private sector, and in the absence of any effective public-sector bureaucracy, this situation had left the country in the hands of thousands of loyal to Qaddafi. Most Libyans opted for a job in the bloated public sector, even though the more significant part was not qualified, and pay rates were low and consistently paid late. In contrast, everyone else depended on the state for a living. Practically every family relied upon the state for almost every part of life, eminently lodging and food.

Furthermore, under the Qaddafi regime, most of the laws and regulations of Libya were illogical.²⁴³ The irrational legal system led to other problems in the economic system. On the one hand, this system depended entirely on the oil sector in Libya, and on the other hand, the non-oil sector was neglected in the Qaddafi era. Addition to these problems, Libya during the Qaddafi' period was considered one of the most corrupt countries. In this regard, Libya was ranked a high number in the Corruption Perceptions List, which was 146 out of 187 countries to Transparency International in 2010. Regarding the Heritage Foundation's Economic Freedom in 2011, Libya was ranked 173 out of 179 countries.²⁴⁴

During the 1980s, the relationships between Libya and other countries, particularly with the West, faced many difficulties that isolated Libya's economic and diplomatic systems. The isolation of Libya was because of Qaddafi behaviour which used Libya's money to support many terrorist activities outside Libya rather than to spend it on Libya and making it more

²⁴² Peter Seeberg, 'EU Strategic Interests in Post-Qadhafi Libya: Perspectives for Cooperation' (2014) 21(1) Middle East Policy 122.

²⁴³ Chivvis and Martini (n 114) 61.

²⁴⁴ Edward Randall, 'After Qadhafi: Development and Democratization in Libya' (2015) 69(2) The Middle East Journal 199; and Open Oil (n 61) 15.

modern and prosperous. These activities, the bombing of a Berlin disco in 1986, the Lockerbie bombing of 1988, and his support to other terrorist groups worldwide.²⁴⁵

Hence, the sanctions era was established in Libya due to the illegal activities of Qaddafi. After the bombing of the Berlin disco, the United States in April 1986 attacked Libya by the American military, and economic sanctions were also imposed on Libya at that time. In 1992, the UN decided to impose a heavy international sanctions regime on Libya. These sanctions continued until the 2000s when Qaddafi agreed to hand over all developing weapons of Mass Destruction to Western countries.²⁴⁶ Even though an extended sanctions era finished in 2003, its implications had deeply isolated the Libyan people from the outside world. They had potential impacts on the transitional period after Qaddafi's regime was overthrown, as illustrates later in this chapter.

Libya was long isolated by Qaddafi's erratic foreign policy from other countries, leaving him isolated from other regional governments. Within Libya, the domestic policies under Qaddafi's regime were also increasingly seen as arbitrary and repressive. Instead of being used wealth to take care of Libyan's basic economic needs, this regime had benefitted just Qaddafi, his family, and his minions, which increasingly came to be seen as corruptive.²⁴⁷

Overall, Libya was ruled by Qaddafi from 1969 till 2011. During this long period, Libya faced several political and economic problems internally and internationally. As a result of these issues, Libyans were deeply affected by these sanctions on the Libyan economic and social systems. Thus, the dictatorial regime of Qaddafi, with its political and economic implications on the Libyan people, has led eventually to the 2011 revolution in Libya. Still, undoubtedly, this potential history is considered a heavy legacy from Qaddafi's era, which has affected Libya in its present-day, as discussed further later.²⁴⁸

Based on Country Data Report, most of the aggregate governance indicators about Libya were ranked lower percentages than other countries. The lower values indicate worse governance scores, particularly in the years between 1996- 2011.²⁴⁹

²⁴⁵ Stephen D. Collins, 'Dissuading state support of terrorism: Strikes or sanctions (An analysis of dissuasion measures employed against Libya)' (2004) 27(1) *Studies in Conflict & Terrorism*. 5

²⁴⁶ Open Oil (n 61) 15.

²⁴⁷ Jonathan M. Winer, 'Origins of the Libyan Conflict and Options for its Resolution' (May 2019) <<http://www.mei.edu>> 6 accessed 21/03/2020.

²⁴⁸ See section 3.3.5 below.

²⁴⁹ Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, 'The Worldwide Governance Indicators: methodology and analytical issues' (2011) 3(02) *Hague Journal on the Rule of Law* 220. This report was conducted by the Worldwide Governance Indicators, that is targeted six aggregate governance indicators for over 200 countries and territories including Libya, over the period 1996- 2014, covering; i) Voice and Accountability, ii) Political Stability and Absence of Violence/Terrorism, iii) Government Effectiveness, iv) Regulatory Quality, v) Rule and Law, and vi) Control of Corruption.

That means the Libyan government in the Qaddafi era failed most of its essential responsibilities towards the Libyan people. In this sense, under Qaddafi's regime, Libya may not meet the criteria required for the modern state. As discussed in chapter two of the characteristics of the failed state, Libya, in the Qaddafi's era, was characterised by the standard conditions of the failed state.²⁵⁰

Its failure to deliver effective services and goods to Libyans due to enabling or unwilling of the government to do so and other indicators such as no constitution, ineffective government, a subverted civil service, and the lack of social and governmental cohesion, all of these signs could be actual evidence of considering Libya as a failed state under Qaddafi's regime.²⁵¹

Because of these circumstances, with the shadows of the Arab Spring revolutions in Tunisia and Egypt, the victim's families of the 1996 Abu Salim massacre²⁵² sparked the revolution in the city of Benghazi. From there, it spread quickly to the rest of the Libyan cities, which are discussed as follows.

3.3.3 Arabic Uprising in Libya (Libyan Revolution 2011)

In February 2011, the Arabic Spring arrived in Libya after the overthrow of the leaders of Tunisia and Egypt. But contrary to what happened there, the situation in Libya was utterly different because Qaddafi had invoked war against the peaceful demonstrators.²⁵³ His choice had led Libyan people to fight Qaddafi's forces to gain their dream of freedom. In Egypt and Tunisia, the army played a crucial role by protecting the civilian protesters. At the same time, there were no existing regular army forces in Libya due to the deliberate structural weakness generated by Qaddafi. Accordingly, the revolution tended to bloody civil war.²⁵⁴

However, to protect the civilian population in Libya, the UN established the Security Council Resolutions, UNSC Res. 1970 (2011) and UNSC Res.1973 (2011), leading to the international intervention under a UN, NATO, and Arab League umbrella.²⁵⁵ These UNSC resolutions allowed the NATO military to attack Qaddafi's forces to protect Libya's

²⁵⁰ See chapter 2 section 2.2.7 above.

²⁵¹ Winer (n 247) 5.

²⁵² In June 1996 at Abu Salim Prison in Tripoli, around 1270 prisoners were slaughtered and buried on the spot, before their bodies were exhumed and then ground into dust to leave no trace of what had happened. For more information see HRW, 'Libya: June 1996 Killings at Abu Salim Prison' (27 June 2006) <<http://www.hrw.org>> accessed 21/03/2020.

²⁵³ Anderson (n 143) 2.

²⁵⁴ Toaldo (n 57) 43.

²⁵⁵ United Nations, Security Council, 'resolution 1970 (2011) of 26 February 2011 and resolution 1973 (2011) of 17 March 2011' <<http://www.unsmil.unmissions.org>> accessed 13/03/2017.

population in March 2011. Supported by the US and the NATO no-fly zone,²⁵⁶ rebel forces on the battlefield in Libya were able to fight against Qaddafi's forces. In August 2011, the capital city, Tripoli, fell to the rebels. On 20 October in the same year, Qaddafi was killed by rebels in Sirte city, his birth town.²⁵⁷

On 26 February 2011, the NTC was formed by the opposition of Qaddafi on 26 February 2011.²⁵⁸ NTC convened as the parliament of Libya with the aim of steering Libya during the interim period and guiding the country to free elections and the establishment of a constitution.²⁵⁹ The NTC was established to contact the outside world to provide the revolution with a political face. The NTC was asked to manage the opposition from the inside to lead the country from a transition to a free democratic state.

The three quasi-administrative bodies; NTC, which is led by Mustafa Abdul Jalil, a Crisis Team led by Mahmoud Jibril, and a Military Council led by General Abdul Fatah Younis, continued to control Libya until the election of 2012. Dirk Vandewalle stated that a closer look at what Libya has achieved during 2012 given an optimistic picture about its future.²⁶⁰ The NTC's ability to organise national elections and its willingness to hand over power to an elected national congress in August indicated that Libya has started to construct meaningful political institutions. Even though the elections may not have been perfect in every respect, they were still met with the widespread approval of approximately 27,000 local and international observers.²⁶¹ Notably, the elections were considered a boost to the public's confidence in their current leaders, giving the new government the legitimacy of its predecessor.²⁶²

At that time, Libya became a more integrated country with a national government able to act effectively in some ways. The new Libyan authorities expanded their authority over most of

²⁵⁶ No Fly Zone was established by Article 6 of Resolution 1973 (2011) which states that "Decides to establish a ban on all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians"

²⁵⁷ Seeberg (n 242) 122.

²⁵⁸ See chapter 1 section 1.1.1.

²⁵⁹ Libya's Constitution of 2011. Article (17) 'The National Transitional Council shall be the highest authority of the Libyan state and assume the supreme functions of sovereignty, including legislation and determination of general policy of the State. It shall be the sole legitimate representative of the Libyan people which draws its legitimacy from the revolution of February 17th. It shall be the guarantor of national unity, the security of the national territory, the definition of values and morals and their dissemination, the safety of the citizens and residents, the ratification of international treaties and the establishment of the basis of the civil constitutional and democratic state'. [Available online]

<https://www.constituteproject.org/constitution/Libya_2011.pdf> 5 accessed 03/10/2017.

²⁶⁰ Vandewalle (n 38) 14.

²⁶¹ Ibid 11.

²⁶² Ibid 11.

the country and attempted to extend their control to all militias trying to destabilise the country. Thus, schools, universities, hospitals, and retail businesses reopened again.²⁶³

The new government has begun to reorganise the bureaucracy, which continued to operate even as it struggles to move beyond the mess left by Qaddafi. Political parties started to appear on the political scene after being banned for 40 years under the Qaddafi regime in 1972.²⁶⁴

Courts have started to function more independently.²⁶⁵ In the meantime, several new civil society communities and media channels in different cities have sprung up. Libya's residents are currently asserting and exercising their privileges to sort out and express themselves.²⁶⁶ In addition to this, although Libya's oil and gas infrastructure suffered losses during the war, the sector escaped initial fears of large-scale destruction. Oil production in the country had returned to pre-war levels by the end of 2012.²⁶⁷

In July 2012, the parliamentary election took place in Libya for the first time in modern Libyan history.²⁶⁸ In this election, the Libyan people had voted 200 members to create the GNC; following that, the GNC selected the members of the executive government in charge of issuing legislation, enacting laws and setting a constitutive body called Constitutional Drafting Assembly (CDA).²⁶⁹ However, the determination of the CDA was deferred until February 2014. It was at last defaced by the moderately low turnout and viciousness that kept voters in certain territories from choosing delegates.

Although, long time has passed since establishing this committee and the commencement of its work, the final version of the constitution is not issued yet.²⁷⁰ Importantly, this delay led the CDA to delay formulating a draft of the constitution of new Libya. Two drafts were issued; however, the parliament of Tobruk refused to ratify these drafts in preparation for

²⁶³ Ibid 11.

²⁶⁴ Winer (n 247) 5.

²⁶⁵ See chapter 7 section 7.6.3 below.

²⁶⁶ Vandewalle (n 38) 8.

²⁶⁷ McClintock and Bell (n 39) 251.

²⁶⁸ Vandewalle (n 38) 8.

²⁶⁹ Article (30) of the Libyan constitution 2011: The General National Congress shall do the following within a period not exceeding thirty days since its first meeting: 1....2. Choose a constitutive body for the formulation of a draft constitution called the committee for the elaboration of the constitution which shall present a draft constitution to the Congress within a period not exceeding sixty days following its first meeting. The draft constitution shall be approved by the National General Congress and be submitted to a yes-or-no referendum within thirty days following its adoption by Congress. If the Libyan people approve the constitution by a two-thirds-majority of voters, the committee shall certify the text as the constitution of the country, and it shall be promulgated by the Congress.

²⁷⁰ Guma El-Gamaty, 'Libya Crisis: Libya's road to peace: Constitution first, then elections' (2018) Middle East Eye <<http://www.middleeasteye.net>> accessed 21/03/2020.

submitting them to the Libyans for a referendum. In some cases, members of this committee were threatened to include specific texts that serve some people in the constitution.²⁷¹ Under these circumstances, the transitional progress of Libya has been driven to become more complex, as discusses later in this chapter.²⁷²

One of the significant noting events which Libya has witnessed at that period was the enactment of the Political Isolation Law,²⁷³ which bans former Qaddafi government officials from public and political life.²⁷⁴ This law was a potential turning point, and there are many

²⁷¹ Ibid.

²⁷² See section 3.3.5 below.

²⁷³ Law NO.13 of 2013 regarding the Political Isolation Law was approved in May 2013 by the General National Council. This law bans figures holding high-ranking positions under the Qaddafi's regime from public life for 10 years

²⁷⁴Article (1) of Law NO.13 of 2013 stipulates that:

The criteria for holding public office in the application of this law shall mean the conditions and conditions to be met and their obligation to hold public office and office

Of its provisions from 1 September 1969 until the date of the declaration of the liberation of the country on 23 October 2011. The following categories are included:

First category / Anyone who took over from the date of 1 September 1969 until the date of the declaration of the liberation of the country on 23 October 2011 any of the following functions or tasks:

Membership of what was called the Revolutionary Command Council in the coup of September 1969 or the membership of what was called the organization of unitary officers Free or the membership of what was called the Association of comrades' leader.

Coordinators of the popular social leadership at the level of the people or at the state level.

The Secretary of the General People's Congress, his Assistant Secretary, a member of his General Secretariat, or the Secretary of the Municipal or People's Congress.

Heads or secretaries of organs, bodies, institutions, interests or councils of the Council of Ministers or the Revolutionary Command Council or the so-called General People's Committee or the General People's Congress.

Any person who has assumed the post of Prime Minister or Secretary of the General People's Committee or an Assistant Secretary, Minister or Secretary of the General People's Committee for the Specific Sector, Assistant Secretary or General Secretary of the General People's Committee or the General People's Committee for Quality

Or he was secretary of the People's Committee of the People's Assembly or the Secretary of a popular committee of sectors in the popular.

Any person who has served as an ambassador or secretary of a public office or a permanent representative of Libya to an international or regional body or organization with all its powers, an existing business or a consul general.

Any person who held the post of dean of the university or Secretary of the People's Committee of the University or an agent of the dean of the university or an assistant secretary or a writer-general of the University.

Any person who has assumed the post of head of the Internal Security Service, external security, military intelligence or the security battalions or was the director of one of its departments or the head of one of the security squares or the head of one of the political offices in the security or military agencies.

The presidents of the student associations inside or outside the general union of the Libyan students

Anyone who has taken a leading position in institutions related to the Muammar Qaddafi family or who has been a partner in any business with them.

A member of the revolutionary liaison office or a coordinator of revolutionary revolutionaries or a member of the revolutionary task force, revolutionary convoys, courts or special prosecutors or members of so-called revolutionary nuns, as well as the heads and members of the Revolutionary Guards, Senior departments and branches and all who participated in the management of revolutionary forums.

Any person who held the post of Director General, Director or Researcher at any of the centres of what was called the Green Book Research and Studies and the Green Runners or was a leader in a media organization.

debates around it. That is because of the broader rejection by several Politian who were in the current political scenes in Libya at that time. For instance, this law applies to the retired General Khalifa Haftar²⁷⁵. (who later disrupts the Libyan transitional process as discussed below). For this reason, the Isolation Law is considered a critical point that turned the transitional period in Libya become more troubled than before.²⁷⁶

The situation turned to violence again because the conflict in Libya is primarily about control of oil and wealth as of political power and territory. Since that time, the political clashes among stakeholders began to appear clearly in the Libyan political scene with the insecurity system and widespread weapons around the country.

Furthermore, in the absence of a cohesive state and effective armed force and police, the petroleum facilities had been exposed to attacks and stoppages. Ibrahim Jadran, the command of Petroleum Facilities Guard, blocked the export of oil throughout the more essential ports in Libya: Sidra, Zuwetina, Brega, and RasLanuf. They were located in the eastern country in July 2013,²⁷⁷ and Zintan Brigades had shut down some oil installations in southwestern Libya.²⁷⁸

Each of the members of the Armed Forces of Libya is a commander of the Libyan Armed Forces or a commander of a military body, institution or military.

Everyone who belongs to foreign organizations threatens the stability and security of the country and the unity of the Libyan territory and violence takes its approach.

The second category / Political and administrative isolation of this category relates to conduct leading to the corruption of the political and economic life in the country during the period referred to in the previous article as shown in the following patterns of behaviour:

Civilians who cooperate with the security services of Muammar Qaddafi's regime and whose cooperation resulted in violation of a human right.

Anyone who reiterates his glorification of Qaddafi or his regime or his invitation to the Green Book, whether in the various media or by speaking directly to the public.

Anyone who took a hostile attitude to the February 17 Revolution or incitement, agreement or assistance.

Anyone who has committed or contributed in any way to the killing, imprisonment or torture of Libyan citizens at home or abroad for the benefit of the former regime.

Any person who committed acts of seizure or damage to public or private property during the previous period of political reasons.

Any person involved in the looting of the Libyan people's wealth or enriched at his expense or obtain the wealth or benefits or balances at home or abroad without right.

Anyone who has had a scientific, artistic, intellectual, religious, cultural or social activity or production with the aim of glorifying Muammar Qaddafi or his regime or promoting what was called the reform project (Libya Tomorrow).

Anyone who used the religious discourse to support or legitimize Qaddafi's rule or his actions or consider the revolution of February 17 as a departure from the obedience of the ruler and so clear. [Online]

<<http://www.security-legislation.ly/ar/node/31772>> accessed 03/10/2017.

²⁷⁵ Florence Gaub, 'A Libyan recipe for disaster' (2014) 56 (1) *Survival* 101.

²⁷⁶ Toaldo (n 57) 37.

²⁷⁷ Irene Costantini, 'Conflict dynamics in post-2011 Libya: a political economy perspective' (2016) 16(5) *Conflict, Security & Development* 405. 414

²⁷⁸ Charles Villa-Vicencio, Erik Doxtader and Ebrahim Moosa, *The African Renaissance and the Afro-Arab Spring: A Season of Rebirth* (Georgetown University Press 2015).

In theory, the justification of the Jadran move was a response to corruption at the port, the lack of a metering system to measure oil loaded onto tankers, notably. However, in reality, by doing so, Jadran supported a federalist movement that calls for independence from the eastern province (Cyrenaica) from other parts of Libya. They determined to control the petroleum facilities and sell crude oil outside official channels to support this movement.²⁷⁹ As a result of a series of shutdowns and stoppages in oil ports and fields, after the mid of 2013, the Libyan oil production had reached an entire standstill.²⁸⁰

Under these circumstances, the Tripoli GNC authorised an order to launch the military to retake Sidra and other ports from Jadran under the operation called Libya Sunrise. As a result, the situation in Libya had turned to establish a civil war in the summer of 2014.²⁸¹ Before that, on 14 February 2014, retired General Khalifa Haftar, who had been an officer from Qaddafi's army,²⁸² attempted to delegitimise the GNC, read a statement on Libyan TV announcing a coup led by him and few officers from Qaddafi's army. It is crucial noting that Haftar went back from the US to Libya in 2011 when the Arab Spring started, and since that time, he has tried to be a figure number in the Libyan political scene.²⁸³

Haftar repeated an Egyptian army scenario by doing so, but contrary to what happened in Egypt, this coup had no result and could not change the ground. This failure led Haftar to alter his plan and announce the launch of "Operation Dignity" in May 2014, which included officers of Qaddafi's army, the federalists' movement of Cyrenaica and Zintan Brigades. They justified this operation by fighting terrorist groups in Benghazi city in eastern Libya,²⁸⁴ but with his campaign, which in theory launched to fight the terrorist groups in Libya and tackle the insecurity situation that led Libya to become more stable.

In reality, the goal of Haftar was control of the whole of Libya by the militia again. Essentially, Haftar controls eastern Libya and enforces his view on the HoR in Tobruk by

²⁷⁹ The first serious attempt came when the North Korea-flagged tanker Morning Glory left Sidra on 11 March 2014 with 230,000 barrels of crude oil and faced little resistance from the practically non-existent Libyan navy. On 16 March, U.S. Navy Seals took over the vessel and escorted it from international waters off Cyprus to government controlled Zawiya, in western Libya. This signalled that the U.S. would not tolerate attempts to sell Libyan crude independent of the government. On 19 March, the UN Security Council, at U.S. urging, underscored this in Resolution 2146, which formally banned the sale of Libyan crude outside government channels. For more information see "Misrata revolutionaries chasing the tanker", Misrata Channel, 14 March 2014, available at <http://www.youtube.com/watch?v=BxB44Kii6lQ>.

²⁸⁰ International Crisis Group, 'The Prize: Fighting for Libya's Wealth'. Middle East and North Africa Report N°165/ 03 December 2015 <<https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/prize-fighting-libya-s-energy-wealth>> 13 accessed 20/02/2017.

²⁸¹ Perroux (n 47).

²⁸² Snyder (n 43) 1.

²⁸³ RFI (n 44).

²⁸⁴ Toaldo (n 57) 39.

rejecting the Unity Government, as discussed below.²⁸⁵ For this reason, Haftar may consider a problematic figure in the transitional political process in Libya currently. Consequently, the political crisis in Libya became more complicated, and the plan of the transitional process had stopped at that point. Notably, some reports pointed that the Dignity Operation was responsible for the human losses and committed war crimes in Benghazi in eastern Libya²⁸⁶ and currently in western Libya, including airports and field hospitals attacks.²⁸⁷

In June 2014, the second election in Libya took place to vote for the new parliament based on the Libyan political roadmap. However, before this, when the election preparations for a new legislature are ongoing, the political interests represented by Haftar and the Zintani brigades calculate that suspending the GNC by force and handing executive authority to an unelected emergency body. The reason for doing so is providing the opportunity to cancel the Political Isolation Law in which Haftar himself and the leader of Zintan's brigades fall under the law's criteria.²⁸⁸ According to these events, the electoral commission announced that the election would be held in June 2014. However, a military campaign led by Haftar supporting by forces alliance to suspend the GNC by force led the transitional progress in Libya to be under the risk of splitting the country's institutions, which may lead Libya to become a field state.

From that point forward, Libya has had two parliaments (the GNC based in Tripoli and the HoR operating from Tobruk), each with its government (led, respectively, by Prime Minister Omar al-Hasi and Prime Minister Abdullah al-Thinni) and supported by its militias. In June 2014, a House of Representatives (HoR) was elected to replace the GNC. On 4 August 2014, at least 22 of the new parliament's 188 members started a boycott, while other members decided to gather the HoR in the eastern town of Tobruk, instead of in Benghazi as previously declared, without a proper handover from the GNC.²⁸⁹ The boycotters disparaged the Tobruk meeting as illicit, as did GNC components which took advantage to claim that theirs was as yet the legitimate parliament.²⁹⁰ The HoR and Thinni join international

²⁸⁵ See section 3.3.5 below.

²⁸⁶ Adulkader Assad, 'Human Rights Watch: Haftar's forces guilty of war crimes in Benghazi' (The Libya Observer 22 March 2017) < <https://www.libyaobserver.ly/news/human-rights-watch-haftars-forces-guilty-war-crimes-benghazi> > accessed 15/10/2017

²⁸⁷ Amnesty International, 'Libya: Civilians caught in the crossfire as militias battle for Tripoli' (Amnesty International, 22 October 2019) < www.amnesty.org > accessed 20/03/2020.

²⁸⁸ Wolfram Lacher, 'Libya's Transition: Towards Collapse' (Social Science Open Access Repository, 2014) < <http://www.ssoar.info/ssoar/handle/document/39209> > 2 accessed 31/10/2017.

²⁸⁹ International Crisis Group (n 280) 14.

²⁹⁰ Ibid 17.

recognition based on the election, but the GNC stated that the HoR lost that status by going to Tobruk.

However, the GNC declined to hand over power, citing that the elections were invalid and raised the issue to the Supreme Court. On 6 November 2014, the Supreme Court ruled in effect that the basis on which the June 2014 HoR election was held was unconstitutional,²⁹¹ opening a constitutional crisis. HoR opponents had raised a lawsuit to the Supreme Court to rule on the new parliament's legality. Although, expected to decide whether the decision to convene in Tobruk and HoR decrees were constitutional. Still, it went much further, annulling the 11 March 2014 amendment to the 2012 Constitutional Declaration (the interim constitution) that had set in motion the June election, with all this entails.²⁹²

At the end of the same year, the Chamber of the Libyan Supreme Court ruled the invalidity of the election of the Parliament proceedings. Thus, the House of Representatives in Tobruk has been delegitimised by the verdict of the Supreme Court. This verdict was recognised neither by HoR nor the international community, including the UNSMIL.²⁹³ The representatives of the parliament refused to withdraw from the Libyan political scene.²⁹⁴ Consequently, the political scene in Libya has become much more complex, and the situation on the ground became more fragmented, with two Parliaments and two governments existing at the same time, one in Tripoli in western Libya and the other in Tobruk in eastern Libya.²⁹⁵ Furthermore, as Libya is still under resolution No.1970 of 2011 and its subsequent resolutions on Libya of the United Nations, the UN Security Council has established the UNSMIL.²⁹⁶ The UNSMIL was established under the resolution NO.2009 of 2011 on 16 September 2011²⁹⁷ to support the Libyan decision-makers in the current political standoff in Libya.

²⁹¹ The Judgement of the supreme Court of Libya No.17/2014 which was issued on 06/11/2014.

²⁹² International Crisis Group, 'Libya: Getting Geneva Right' (Middle East and North Africa Report N°157/ 26 February 2015) <<https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/libya-getting-geneva-right>> 3 accessed 20/02/2017.

²⁹³ Ibid 15.

²⁹⁴ Candice Moore, 'Four years after the fall of Gaddafi: The role of the international community in stabilising a fractured Libya' (2015) 2015(1) conflict trends 50.

²⁹⁵ Perroux (n 47).

²⁹⁶ The UN Special Envoys for Libya were: the first one was Ian Martin, the second was Tarek Mitri, the third one was Bernard Leon, the fourth one was Martin Kobler and the current one is Ghassan Salame.

²⁹⁷ UN Mandate 12. Decides to establish a United Nations Support Mission in Libya (UNSMIL), under the leadership of a Special Representative of the Secretary General for an initial period of three months, and decides further that the mandate of UNSMIL shall be to assist and support Libyan national efforts to: (a) restore public security and order and promote the rule of law; (b) undertake inclusive political dialogue, promote national reconciliation, and embark upon the constitution-making and electoral process; (c) extend state authority, including through strengthening emerging accountable institutions and the restoration of

The ongoing efforts of the UNSMIL and the Special Representative of the Secretary-General has facilitated a Libyan-led political solution to the increasing challenges facing the country and underlining the importance of the agreement, following the principles of national ownership, on immediate next steps towards completing Libya's political transition, including the formation of the GNA.²⁹⁸

In doing so, UNMSIL calls on all relevant Libyan political parties to engage in an inclusive Libyan-led political dialogue to help restore stability and to forge a consensus around the next steps in Libya's transition.²⁹⁹ The negotiations were conducted firstly inside Libya in Ghadams city and overseas in Geneva and Skhirat in Morocco. These negotiations continued until 2015, when GNC and HoR signed the Libyan Political Agreement in Skhirat in Morocco.³⁰⁰

In December 2015, the Libyan Political Agreement was signed in Skhirat to resolve the political conflict between rival parliaments with their associated governments, the GNC and its government in Tripoli, and the House of HoR, its government in Tobruk. This agreement created a Presidency Council, a rump executive that took office in Tripoli in March 2016, and an advisory High State Council of ex-GNC members. The HoR continued as the sole parliament that will approve the unity government.³⁰¹

However, the vital question arising was whether the unity government would deal with the current significant political and economic crisis in Libya? Further, what could be done internationally to build on the UN talks about Libya and strengthen existing instruments to contain the ongoing political conflict between two parliaments?

These questions are essential because, although the new government is formed by consensus amongst most of the members of the HoR and the GNC, the new government has been

public services; (d) promote and protect human rights, particularly for those belonging to vulnerable groups, and support transitional justice; (e) take the immediate steps required to initiate economic recovery; and (f) coordinate support that may be requested from other multilateral and bilateral actors as appropriate. For more information see United Nations, Security council, 'Resolution 2009 (2011) Adopted by the Security Council at its 6620th meeting, on 16 September 2011' (Online)

<<https://unsmil.unmissions.org/sites/default/files/SRES2009.pdf>> accessed 18/10/2017

²⁹⁸ United Nations, Security Council, 'Resolution 2238 (2015)' Adopted by the Security Council on 22 December 2015. Article 1 states that Welcomes the signature on 17 December 2015 of the Libyan Political Agreement of Skhirat, Morocco to form a Government of National Accord consisting of the Presidency Council and Cabinet supported by the other institutions of state including the House of Representatives and State Council; 2. Welcomes the formation of the Presidency Council and calls upon it to work expeditiously within the 30 days stated in the Libyan Political Agreement to form a Government of National Accord, and to finalise interim security arrangements necessary for stabilising Libya, and in this regard calls upon Member States to respond urgently to requests from it for assistance;

²⁹⁹ International Crisis Group (n 49) 7.

³⁰⁰ United Nations (n 297).

³⁰¹ International Crisis Group (n 49) 7.

rejected by the chairmen and other members of HoR.³⁰² However, the unity government has not been approved yet, and as a result, the institutional setup is incomplete. It is still far even having a new framework agreement's basic term to references, as demonstrated later in the next section.

Nevertheless, there are currently two Parliaments with their two governments in Libya: one in Tripoli, the UN-supported Turkey and Qatar, and the other government, which is located in Tobruk supported by Egypt, EAU, Saudi Arabia, France and Russia. This situation has created a significant political and security vacuum in the country. It has also contributed to the spread of corruption and extremist groups in different Libyan territories, such as ISIS.³⁰³ The absence of a legitimate national government gives them leeway to advance their agenda. ISIS, for example, has made use of the fragile situation in Libya and seized Sirte, the city located in the middle of northern Libya, in 2015.³⁰⁴

In May 2016, in an attempt to spread into Libyan territory, ISIS tended towards the west and attacked the Brigades of the government of NGA. However, in November of the same year, Brigades which included rebels who had fought Qaddafi's forces in 2011, came from several western and southern cities. Most of them from Misurata city - with the support of the USA military, were able to achieve their goal of victory and eliminate ISIS.³⁰⁵

In the efforts of the UNSMIL, it put a roadmap for Libya consisting of 3 stages. The first stage is to amend the LPA; the second stage is to convene a national conference involving all political players; the third is to hold a referendum on the constitution and then hold parliamentary and presidential elections to end Libya's transitional phase, finally.³⁰⁶

Within the framework of the efforts of the UNSMIL, it held the inclusive conference in Ghadams city on 10/04/2019 to implement its plan. Unfortunately, on 04/04/2019, Haftar announced the start of his military campaign to control Tripoli by force, ignoring the conference held using a significant military force supported by some countries such as UAE, Egypt and France.³⁰⁷

³⁰² Saleh (n 50).

³⁰³ Omar Ashour, 'Between ISIS and a failed state: The saga of Libyan Islamists' (2015) <http://www.brookings.edu/~media/Research/Files/Reports/2015/07/rethinking-political-islam/Libya_Ashour-FINALE.pdf> accessed 12/06/2016.

³⁰⁴ Ibid.

³⁰⁵ Lachlan Wilson and Jason Pack, 'The Islamic State's Revitalization in Libya and its Post-2016 War of Attrition' (2019) 12 Combating Terrorism Centre 3.

³⁰⁶ UNSMIL, 'Step by step, UN action plan for successful transition takes hold in Libya' (11 June 2018) <<http://www.unsmil.org>> accessed 21/03/2020.

³⁰⁷ Winer (n 247) 21.

The tragic results of this campaign of direct targeting of civilians in and around Tripoli, the UNSMIL with Germany organised a conference held in Berlin in January 2020. They aimed first to sign an immediate ceasefire, establish a permanent ceasefire, and launch a complete plan to end the ongoing conflict.³⁰⁸ However, Haftar refused to sign this agreement, as he had previously declined to sign the ceasefire in Moscow,³⁰⁹ despite the signature of the NAG's delegation. Before the Berlin conference, Haftar -using tribes loyal to him in eastern Libya- decided to close the oil ports in the area under his control,³¹⁰ which led to the decline of the outcome of the oil sector with what the economic sector suffers from previous existing financial problems.³¹¹

3.4 Review of the Current Nature of the State of Libya Concerning its Post-Conflict, Transitional or Failed status?

With the 2011 uprisings and the fall of the Qaddafi regime, Libya has experienced a radical transformation of its political system, with significant social and economic changes in state and society. As the current context remains fluid, understanding the new Libyan political regime is fraught with difficulty and uncertainty: which factors from Libyan history – old and recent – are still relevant, and what is new? And how these factors affect the current Libyan transitional stage. In this section, the political situation in Libya during the transitional period has been evaluated as follows.

3.4.1 The Characteristics of the Libyan State after 2011 Revolution

Because of Libya's long-standing historical problems inherited from the Qaddafi era or even before, the Libyan state has faced difficulties in post-conflict politics and regime change challenges.³¹² The determination of these deeper-rooted historical factors dating back to 42 years of the Qaddafi regime, or in some instances, further again in Libyan history, assess the determination of the current nature of the Libyan state. However, the characteristics of the new Libyan state after overthrow of Qaddafi's regime are:

³⁰⁸ The Inkerman Group, 'Libya Monthly Risk Review' (January 2020) <<http://www.ibbc.org.uk>> accessed 21/03/2020.

³⁰⁹ Middle East Monitor, 'Why Haftar refused to sign the Moscow ceasefire document' (16 January 2020) <<http://www.middleeastmonitor.com>> accessed 21/03/2020.

³¹⁰ Stratfor, 'In Libya, Hifter Plays the Oil Card' (22 January 2020, worldview) <<http://www.worldview.stratfor.com>> accessed 21/03/2020.

³¹¹ NOC, 'NOC declares force majeure after LNA blockades oil exports from Brega, Ras Lanuf, Hariga, Zueitina and Sidra ports' (18 January 2020) <<http://www.noc.ly>> accessed 21/03/2020.

³¹² Mattia Toaldo, 'Decentralising authoritarianism? The international intervention, the new 'revolutionaries' and the involution of post-Qadhafi Libya' (2016) 27(1) *Small Wars & Insurgencies* 39-58.

Statehood with a unitary position and a comprehensive political settlement remains to be built. The Libyan Post-colonial state had been an "accidental state", and Qaddafi made "institutionalised statelessness" Qaddafi's regime worked through the informal framework of a small group of individuals and depended on oil-financed patronage and repression to guarantee calm. The revolution brought down this regime and now faces the errand of state-building.

Post-2011 revolution, Libya lacks a unified, stable, and comprehensive state. Qaddafi had intentionally debilitated the state and any social establishments that could have been a stabiliser to the intensity of his system. He had regulated government through informal principles by a small elite, employing both oil-supported support and repression.

Because of a history of the strong effect of tribalism on the political and military activity in Libya, as discussed above,³¹³ the social and political dynamic currently is fragmented based on different interests, identities, and loyalties.³¹⁴ These have been seen as collective, multiple or in some instances competing. Thus, fragmented constituencies could be seen in a formal elite institution such as the GNC of 2012 and HoR and informal institutions and Libyan society in general.³¹⁵

There are chronic tensions around the perceived leverage between the central three provinces and the regional, national, and local power levels. Local dynamics and actors command politics, with a secure connection between tribes and regions or cities. While a few peripheries are empowered, the centre is feeble. This situation is inherited from a long-standing Libyan history of localism and regionalism, for instance, in Cyrenaica province in eastern Libya.

The new national Libyan leaders have turned to patronage to guarantee political stability. To compensate for their precarious hold on power, they have utilised resources from the petroleum sector and offered government arrangements to all fundamental parties. Allocation of oil money is also a critical player in the uncertain period.

Be that as it may, the political framework is not generally receptive to aspirations and complaints from revolutionaries, including reconciliation and justice. Moreover, several armed groups, such as federalists and brigades from the northwest city Zintan, are estranged

³¹³ See section 3.2.2 above.

³¹⁴ Myers (n 195) 5.

³¹⁵ Emilie Combaz, 'Political economy of Libya after the Qadhafi regime' (2014, GSDRC) <<http://www.gsdrc.org>> accessed 12/02/2017.

from national decisions. The tensions between post and pre-revolution actors are a critical alliance of political and economic opposition.

Furthermore, security is inadequate. National security forces have minimal authenticity and reach. A variety of various progressive armed groups, factional militias and jihadist groups have had their place. Focal rulers have essentially subcontracted security and conflict-resolution functions to some national notables and armed groups, making particular security arrangements.

The characterising highlight of the Libyan economy remains oil and its heritage of rentier state:³¹⁶ an imbalanced economic structure, where about no sector besides the energy sector is well developed; a great extent wasteful state working for patronage; and poor financial governance administration such as opacity, corruption, and absence of regulation and accountability guideline.

Rather than focusing on rebuilding infrastructure or creating a functioning bureaucracy, the two parliaments led the political process to attend to their members' needs.³¹⁷ They were and are still thus unable to appeal over the heads of the militias directly to the Libyan people. Because throughout the post-2011 period, which was too weak to launch infrastructure projects, create jobs, establish functioning institutions, or even establish sufficient demobilisation or vocational training programs to get militiamen prepared for civilian employment.

However, the international community has supported Libya following legitimate international commitments, especially those of women and people belonging to vulnerable groups, such as children, minorities and migrants. This support includes assisting the Libyan specialists in reforming and building transparent and accountable justice and disciplinary frameworks. It also contains supporting the development and implementation of a comprehensive transitional justice strategy.

The UNSMIL Human Rights, Transitional Justice and Rule of Law Division³¹⁸ were engaging the Ministry of Justice to support the resumption of the court system. They are working with the Libyan National High Judicial Institute to distinguish capacity reforming needs within the Libyan judiciary. Together with the United Nations Office on Drugs and

³¹⁶ Ibid.

³¹⁷ Jason Pack, *The 2011 Libyan uprisings and the struggle for the post-Qadhafi future* (Springer 2013). 8

³¹⁸ Transitional Justice and Rule of Law Division was established within the United Nations Support Mission in Libya (UNSMIL) pursuant to UN Security Council Resolution 2040 (2012). For more information see OHCHR in Libya (online) <<http://www.ohchr.org>> accessed 13/06/2019.

Crime (UNODC), they review several Libyan laws to prompt how these can be harmonised with international instruments.³¹⁹

Further, in consultation with relevant Libyan entities, these international organisations build up a capacity improvement program for public defenders, legal policy, and military prosecutors. In close consultation with the Supreme Judicial Council, these organisations have been attempting to offer support to the national panel set up to examine the status of the judiciary and submit recommendations on judicial reform,³²⁰ as discussed later in chapter 9.³²¹

In conclusion, applying the conceptual framework of post-conflict, transitional and failed states, which is discussed deeply in chapter 2, on the characteristics above of the new Libyan state after 2011, it seems that classifying the current nature of the Libyan state within these concepts is a difficult task. Libya after 2011-war passed different stages; from 23 October 2011 till the first election of July 2012; during this time, Libya became a post-conflict state. From the previous discussion of post-conflict states, based on the definition of post-conflict, which is a process in which warfare is absent, but it is not precisely a presence of peace.³²² This is what happened in Libya after the killing of Qaddafi on 20 October 2011. Additionally, the post-conflict state is characterised by weakened state authority and capacity, as in Libya. Even though Libya since 2011 turns in conflict several times, about 40% of countries collapse back into war, particularly developing countries, which are most likely to relapse into fighting again.³²³ Libya has some traits of a post-conflict state, e.g. when conflict ceases to be active. Additionally, the conflict becomes less violent, more or less manifest or latent, but rarely stops.³²⁴

Since the election of July 2012, Libya passed from post-conflict to the transitional stage. Transition is likely defined as the reformation of the state and establishing a new regime.³²⁵ Libya started its transformation from the mass state of Qaddafi's administration to installing a new one through the election of its government and committee of the constitution in 2012.

³¹⁹ United Nations and Human Rights: office of high commissioner, 'OHCHR and NHRIs' (online) <<http://www.ohchr.org>> accessed 13/06/2019.

³²⁰ Office of the High Commissioner for Human Rights: Middle East and North Africa Region, 'OHCHR in Libya' (2016) <<http://www.ohchr.org/EN/Countries/MENARRegion/Pages/LYProgramme.aspx>> accessed 09/10/2017.

³²¹ See chapter 9 section 9.6.1 below.

³²² Brahimi (n 5) 3.

³²³ Witter (n 119) 2370.

³²⁴ See chapter 2 section 2.5 above.

³²⁵ Shain, Juan and Lynn (n 6).

Since Qaddafi left Libya without institutions, an army and a constitution, Libya would start from scratch in building institutions and issuing the constitution.

The post-war phase began with several common peacebuilding and recovery strategies taken off the table. There would be no international peacekeeping operation, no 'paced' transition and no negotiated ceasefire, peace treaty or formal power-sharing agreement. No single rebel faction could claim a nation-wide mandate to govern in late 2011; consequently, two other peace-building policies were essentially predetermined. First, early national elections were probably inevitable, though not the exact timing, electoral rules, or sequencing of national and local polls. Second, governance would proceed with an informal power-sharing approach, even if post-war elections resulted in a large parliamentary majority for any one group.³²⁶

A description of uncertainty and instability features this period. As discussed above, like other transitional states, Libya lacks stability and faces some problems related to a vacuum of security. At the beginning of the transitional period post-2012 election, the GNC with its government showing its ability to deliver good services to Libyans. There were potential changes in Libya's political regime with the emergence of party politics, civil rights, freedom of speech, holding free elections in 2012 and 2014, and raising governmental accountability. However, the Dignity operation impeded this transitional process, which has been led by Haftar since 2014.³²⁷ This leads to the lack of security in Libya. Because of these circumstances, the government faces difficulties in delivering most core services to its citizens. There is a notable lack in its capacity to manage the country's resources, protect the rights of its people and deliver essential services to them.³²⁸ Libya, thus, needs to establish functional institutions during this transitional period.

Qaddafi's dictatorship rules profoundly influence the transitional political process in Libya. The 40 years of his regime have a deep root in the reformation of the Libyan state. Qaddafi's regime was overthrown by a 2011-revolution that ends in violence. This situation challenges the leaders of the transition process. Moreover, the prospects for building democracies depend highly on the new leader's performance during the transition period. Libya currently

³²⁶ Willcoxon (n 159). 95

³²⁷ See section 3.3.3 above.

³²⁸ Witter (n 119) 2371.

has lacked in a figure leader who has the self-confidence needed to take complex, decisive, and timely decisions with conviction during this transition period.

It is essential to highlight the role and impact of the key actors on the transition of the Libyan state named military, political parties, non-state actors, elections, and international actors. In Libya, there was no military in meaning words- Qaddafi had deliberately marginalised and weakened the army- instead, there were security brigades to protect him and his regime. Thus, Qaddafi used these brigades during the 2011-revolution against the protesters. In contrast, there were brigades established by the opposition supported by NATO to fight Qaddafi's forces. These brigades represent a real challenge to the government in imposing its control over the entire Libyan territory. Add to this the Dignity Operation leading by General Haftar in eastern Libya.

Other key actors that may affect the transition period are the political parties and elections. In Libya, there is a lack of experience with organising political parties and holding elections because no political parties existed during Qaddafi's regime.

The transition to democracy has three stages: initial mobilisation to oust the old regime, holding free elections, and delivering public services and public goods.³²⁹ It seems that Libya has met these three stages since 2011, overthrowing Qaddafi's regime in 2011, holding the free elections in July 2012, and delivering the essential services and goods to Libyan citizens by the successive governments. However, the transition process has encountered several challenges during the past ten years. The intervention of the international actors and the non-state actors impeded the Libyan transitional period. The lack of international agreement on the situation in Libya confused the Libyan political scene. In addition, NATO intervention in 2011 without the precise plan for post-2011 to support Libya increased the chance for chaos instead of stability. The international support for non-state actors also led Libya to return to the conflict several times. Since 2014, Libya has been split between factions based in the capital Tripoli, in the west, and in the city of Beneghazi, in the east.

Significantly, although Libya in the present day is facing several challenges in the transitional period, it is likely not falling back to the pre-transitional state in which the third election plans to take place in Libya on 24 December 2021.³³⁰

In summary, referring to what has been reviewed about the characteristics of Libya and comparing them to what was discussed about the post-conflict, transitional and failed

³²⁹ Strachen (n 155) 5.

³³⁰ Resolution No.33 of 2021 regarding the regulation for updating the voter register attached to the decision of the IHEC council,(online) < www.hnec.ly > accessed 02/09/2021.

states,³³¹ Libya is definitely not a failed state in this stage at least. However, Haftar might still cause it to fail in future. Furthermore, Libya passed the post-conflict phase and became a transitional state since the first election in July 2012. Currently, Libya could be described as a transitional state as it intersects with it in most of its characteristics, as discussed above.

3.4.2 How does the Libyan Political System Function?

In October 2011, when the civil war resulted in a rebel victory, the conflict served to remove Qaddafi's regime from power and replace it with a new one. This is a significant political change. However, other relevant modifications should be considered.

There is a range of institutions, infrastructure, actors, procedures, values, ideas, and channels of public-private communication that make up the political landscape. However, these elements of political structure and function may directly impact the nature of politics. Thus, when considering a transition from one political condition to another, it is necessary to examine if these elements have changed. In the case of Libya, an authoritarian regime being removed and replaced by a new one in which Libya passed the first election in its modern history, for example, it would be assumed that there is a significant change in all of the above aspects of politics.³³²

Notwithstanding the instability brought about by the continued presence of armed militias, it has been claimed the post-2011 successive governments were unable and/or unwilling to deactivated, incorporate or demobilise the groups. These regional and ideological militias have challenged the effectiveness of these governments, and consequently, they attempted to replace both the council's authority. This was proved in June 2014, where fighters from Dignity Operation and Dawn Libya engaged in gunfire within the capital city of Tripoli.

With the powerlessness of the GNC in preventing these conflicts, Libya is confronted with the risk of a further decrease in security. Further to the sustained presence of armed militias within Libya, the fall of Colonel Qaddafi has permitted past strains and regional divisions to emerge. Thus, Libya may face the challenge of a lack of national and international trust in its capacity to maintain law and order and deliver good governance performance to the Libyans.

³³¹ See chapter 2 above.

³³² El-Anis and Hamed (n 41) 181.

The most serious and potentially example of the impact of the historical factors on the current Libyan state is the announcement of an independent region in Cyrenaica in eastern Libya, which has the country's two largest oil fields that contain 80% of Libya's oil. It is contended that if the region accomplishes self-rule, the whole country's oil industry will be considerably affected with confusion over existing oil agreements and disruptions in production and exports as a possible consequence.³³³

Also, the Libyan political establishment still has several links with the Qaddafi regime. Consequently, with their administration's governments, the Libyan Parliaments face genuine difficulties in building national authenticity and adjusting pluralism and democracy while preventing a further degeneration into conflict. They are burdened by the legacy of mental and physical repression, human rights abuses and civil war – all of which have compounded into a situation that remains described by uncertainty and illegitimacy.³³⁴

They are also confronted with several groups in Libya to prevent the NGA from extending its authority to their estates and domains, a shortcoming compounded by the absence of political structure and functioning institutions. Even though the NGA is perceived by a large portion of the international community as the country's legitimate government, it has been difficult for any government in Libya to enforce its political will and implement a transitional governance program due to the lack of security and authority. This has prompted extensive criticism, requires its disintegration, and, like this, a postponement in the transitional phase.³³⁵ Add to that, some countries deal with the parallel government in Tobruk as well as with Haftar. This has led to a disturbance of confidence in the legitimate government NGA in Tripoli as the only legitimate authority representing the Libyan people.

Today, Libya exists in a state of uncertainty and vulnerability, with its entire administration structure, vote-based system, and politics being re-established from the ground up. Without stable forms of government, investment agreements, and static enactment, investment ventures within Libya will resume being exposed to critical risks.³³⁶

The most significant fact is that it will likely take years for the character of Libya's transition to become clear and recognisable. This is true of many transitional states. The real example

³³³ Emanuela Paoletti, 'Libya: roots of a civil conflict' (2011) 16 *Mediterranean Politics* 313. 314

³³⁴ Office of the High Commissioner for Human Right (n 316).

³³⁵ Christopher M. Blanchard, 'Libya: Transition and US policy' (Congressional Research Service, 2016)

<<https://www.crsreports.congress.gov>> 4 accessed 12/03/2017.

³³⁶ *Ibid* 5.

of this situation is slow-rolling revolutions in Cuba under Castro and Egypt under Abdel Nasser.³³⁷

Regardless of the gradualness of these administrations to reveal their actual essence, they had a favourable position that made the procedure clearer than the one we are probably going to find in Libya. In each of these cases, the movements that took control had charming figures who led the government and the state toward a new regime.³³⁸

No charming figure seems to be in the leadership in Libya, and currently, none appear to be on the horizon. Apparently, the "charisma vacuum" is a part of the heritage of Qaddafi. The government formed individuals' professional advancement to make authentic leadership inconceivable, except the leader himself, Qaddafi. Learning patterns of leadership and adapting forms of followership that are more beneficial than those that existed under Qaddafi is probably to extend this period of vulnerability much more.³³⁹

Unfortunately, because of the characteristics above of the current Libyan state, notable indicators of mismanagement and corruption have contributed to a further drain on the country's finances. The estimation shows an increase in the state's budget every year to cover the funds of subsidies on imported goods and deliver services to Libyan citizens.³⁴⁰ However, in reality, the government contracts were paid out without delivery of services or goods or, in some instances, delivery in much smaller quantities than stipulated.³⁴¹ With more than three years of low oil production, the foreign-currency reserves have been depleted and pushed up prices for imports and caused liquidity shortages.³⁴² As a result, the ordinary Libyan has suffered heavily from this economic downturn.

In the last report on 10 October 2017,³⁴³ the World Bank Group states that the deep political strife in Libya has had a significant negative impact on the economy and hence on the labour market. The overall unemployment rate in Libya increased from 13.5% in 2010 to 19.0 per cent as of 2012 and has changed little since then. Youth unemployment stands at approximately 48%, and female unemployment at 25%. The vast majority (85%) of Libya's

³³⁷ Alterman (n 34) 148.

³³⁸ Ibid.

³³⁹ Ibid. 149

³⁴⁰ International Crisis Group (n 280) 4.

³⁴¹ Ibid 4.

³⁴² International Crisis Group (n 51) 4.

³⁴³ For more information see WORLD BANK GROUP, WORLD BANK MIDDLE EAST AND NORTH AFRICA REGION MENA ECONOMIC MONITOR, October 2017, 'Refugee Crisis in MENA Meeting the Development Challenge' <<https://www.openknowledge.worldbank.org/handle/10986/28395>> accessed 16/10/2017.

labour force in the public sector is employed, a high rate even by regional standards. The rate for women is even higher, at 93%.³⁴⁴

In the same regard, a previous report published by the World Bank Group in April 2017³⁴⁵ reports that some Libyans work outside the government and the public sector has not been able to provide jobs for new entrants in the labour market. Libya has recorded high joblessness rates for as far back as two decades. The official unemployment rate remained at 13.5 per cent in 2010, with youth unemployment assessed at twofold the rate. Oil incomes (the government's lifeline) have fallen pointedly to only a fifth of their pre-revolution levels, while spending has stayed high. The share of the public wage bill in GDP is about 53 per cent in 2016. Investments have been lacking for continuing adequate public provision of health, education, electricity, water, and sanitation services. Being highly reliant on hydrocarbon exports and food imports, Libya's balance of payments and fiscal suffered in 2016. Foreign reserves have remained the primary source of financing of the budget deficit.³⁴⁶

There is the widespread international consensus that the LPA, despite its imperfections, is the main suitable framework at the moment in Libya, and its breakdown would leave an institutional and legitimate vacuum in the country.³⁴⁷ Throughout such transitions, while the international community will remain interested in helping Libya under the political transitional period for some time, the period of uncertainty and change is likely to endure long time. Irrespective of the success or failure of Libya's transition, its probable duration is likely to exceed current expectations.

It is crucial noting that the priority concerns of the successive governments in the post-2011 period have been restricted to matters related to political affairs. It appears that the interest of these governments, supported by the UNSMIL, is focused on the fundamental issues relating to the formation of a new government and end the transition period. This explains the application of the previous legislations currently and the lack of amendments to most of them, particularly concerning laws on the environment and compensation for damages resulting from environmental pollution in general and oil pollution in particular.

³⁴⁴ Ibid.

³⁴⁵ WORLD BANK GROUP, WORLD BANK MIDDLE EAST AND NORTH AFRICA REGION MENA ECONOMIC MONITOR, April 2017, 'Refugee Crisis in MENA Meeting the Development Challenge' <<https://www.openknowledge.worldbank.org/handle/10986/28395>> accessed 16/10/2017.

³⁴⁶ For more information see *ibid.*

³⁴⁷ International Crisis Group, 'Restoring UN Leadership of Libya's Peace Process' (Middle East and North Africa/ 18 September 2017) <<https://www.crisisgroup.org/middle-east-north-africa/north-africa/libya/restoring-un-leadership-libyas-peace-process>> 4 accessed 02/10/2017.

However, it is worth indicating that during the years of 2012, 2013, when the situation in Libya was more stable, the Libyan state reviewed some laws, including the environmental law, in preparation for amending them.³⁴⁸ It also contacted the UNDP and requested assistance in assessing the environment, particularly regarding weapons and developing solutions and recommendations for overcoming it.³⁴⁹ Unfortunately, this assessment has not been conducted because of the war in Libya since 2014. The campaign launched by Haftar and its consequent stopping of the democratic transition process in Libya.

Importantly, because of deeper-rooted historical factors, some problems challenge the transitional government during the transitional period. Thus, the formation of the new Libyan state deeply has affected by these factors. Consequently, all these elements have complicated the transition by deepening the vacuum left after the regime change.

3.4.3 The Relationship between the Primary Libyan Institutions (Central Bank & National Oil Corporation) and Successive Governments

The NOC and the LCB are considered the most critical institutions in the country. They are located in western Libya in Tripoli. The HoR in Tobruk, located far away in eastern Libya, has little control over the government structure: the ministries, the government agencies, and above all, the NOC and LCB. The central two institutions are respectively in charge of contracts with oil companies and the receipt of oil payments. The LCB of Libya then uses the oil revenues to pay salaries and subsidies for all civil servants for all Libyan people, including the members of both parliaments with their two governments.

The endeavours of the two governments to hold onto control of the Libyan LCB, the NOC, and state-owned investment vehicles have been futile because of Western emphasis on a negotiated solution and a denial to recognise newly appointed officials or bank accounts. Since spring 2015, some of the clashing parties have come under pressure from war networks, and acceleration has offered a chance to negotiate local ceasefire agreements and tentative reconciliation initiatives in western and southern Libya. This dynamic has been essential for the advancement of UN-mediated negotiations.³⁵⁰

³⁴⁸ Nait (n 14) 12.

³⁴⁹ UNDP (n 68) and Weir (n 15) 13.

³⁵⁰ Wolfram Lacher, 'Supporting stabilization in Libya: the challenges of finalizing and implementing the Skhirat agreement' (Open Access Repository, 2015) <<http://www.ssoar.info>> 1 accessed 12/07/2018.

Nevertheless, the HoR, with its government, has made several attempts to seize control of the existing LCB and NOC institutions. Still, when these attempts had failed, they tried to create parallel institutions in eastern Libya. Even though there are now parallel LCB and NOC on the ground in the east of Libya, these institutions are out of work because there is no diversion of oil payments into these newly created institutions. Additionally, the parallel LCB and NOC of eastern Libya have only a minimal infrastructure to manage the business inside them.

The key Libyan government institution, the LCB and the NOC recognised the authority of the GNA's Prime Minister Fayeze al Sarraj and the GNA Presidency Council. In any case, some GNC figures in Tobruk and groups that were loyal to Haftar continued to refuse the GNA's authority.³⁵¹

With the formation of two contending governments GNA and HoR, the oil economy sustained to present the most dominant uniting and dividing driver in Libya functioning through the few yet operating country institutions. The competition between governments in Tripoli and Tobruk has increased pressure on the debilitated institutions of the state, for example, the NOC and LCB.³⁵²

According to Bernardino Leon, the UN Special Envoy for Libya, the independence of Libya's economic institutions is considered the primary goal of the UNSMIL.³⁵³ This mission aims to protect the sources of Libya's money from being controlled by any of the warring factions to guarantee that these ideal the national wealth to address the essential needs of the Libyans and contribute to an arranged political solution.³⁵⁴

In the same regard, Salame, the last UN Special Envoy for Libya, shed light on the challenge facing Libya's economic process. They include mending the gap between rival branches of fundamental financial institutions such as the LCB of Libya and NOC and guaranteeing they function effectively; improving the quality of governmental performance, including relations between the LCB and the government; settling the liquidity crisis challenged by Libyan banks, and confronting uncontrolled economic predation. A portion of this will require outside financial expertise and guidance, regardless of whether from states or international economic institutions, and more collaboration and a joint effort by concerned actors.³⁵⁵

³⁵¹ Blanchard (n 329) 6.

³⁵² Ibid 7.

³⁵³ UNSMIL, 'Security Council Press Statement on Libya' (10 October 2015) <<http://www.unsmil.org>> accessed 21/03/2020.

³⁵⁴ Ibid.

³⁵⁵ International Crisis Group (n 280) 4.

Endeavouring to maintain their non-partisanship, the NOC and the LCB utilised the need of the two governments to approach the national financial budget and plan to continue oil production in the east of Libya and therefore keep oil incomes streaming into a depleted public sector. Simultaneously, the appropriation of oil incomes through the LCB has kept alive the various security units before 2014 while trusting that a political settlement will be reached. Incomprehensibly, to safeguard the Libyan state's left, oil incomes have been directed from state institutions to a significant number of those groups compromising the transition.³⁵⁶

3.5 Conclusion

As noted above, Libya is a petro-state located in North Africa;³⁵⁷ it gained its independence in 1951 under the UN regime. In modern history, Libya had just been ruled by two leaders; King Idris I 1951-1969 and Qaddafi 1969-2011. However, after the 42 years of Qaddafi's regime, in February 2011, the Libyan revolution began. In October of the same year, Qaddafi was captured and killed by the rebels who led the rebellion against him. After that, Libya passed into the post-conflict period to the transitional period based on its political roadmap. However, this process has been impeded, and Libya faced several challenges throughout this period.

In an attempt to classify Libya into the concepts of a post-conflict, transitional or failed state, this chapter discussed the current nature of Libya as a state after the revolution in 2011. In doing so, the geographical and historical background and the critical events in the Libyan modern history have been discussed. This was to identify how they could influence the formation of a new Libya and affect its future throughout the transitional progress. The characteristics of the post-conflict, transitional and failed state discussed in chapter two of this thesis have been applied to Libya and identify some facts about it.

In a post-conflict period at the end of 2011 and the beginning of 2012, Libya achieved its goal and succeeded in most aspects of political, economic and social life. Also, at the beginning of the transitional period post-2012 election, the success had continued. The political regime has witnessed more changes, and the GNC with its government showing its ability to deliver good services to Libyans. The potential changes in Libya's political regime with the emergence of party politics, civil rights, freedom of speech, holding free elections,

³⁵⁶ Costantini (n 277) 415.

³⁵⁷ See section 3.3.1 above.

and raising governmental accountability. There were also significant changes following international relations in which Libya become more recognised, more open with key actors in the international community.³⁵⁸

The enacting of the Isolation Law may consider the turning point in the transitional political progress due to its influence on some major actors in Libya. However, this positive transitional progress faced several challenges when the transitional political plan was disrupted by internal actors supported by international actors³⁵⁹ since the end of 2013. Moreover, the Dignity Operation led by Haftar affected Libya's political crisis deeply. Furthermore, the most crucial factor is the political conflict between two existing parliaments with their governments in Tripoli and Tobruk.

Under these circumstances, the current struggles mark the end of a broadly recognised transitional framework in Libya as one state. Those supported by their allies armed groups that divided Libya into two parallel institutions may put Libya under the risk of division. This crisis between two parliaments could be avoided if the verdict of the Supreme Court in November 2014, in effect, that the basis on which the June 2014 elections were held was unconstitutional, was accepted by the two political bodies and by the international actors. In the same regard, the verdict would be an opportunity for UNSMIL to chart a path out of the crisis.

The absence of social and legislative attachment in Libya would hamper any imminent transition to democracy. Libya should initially re-establish security and present peace missing for a considerable length of time under Qaddafi's system. As daunting as that task may seem, further challenges lie on the horizon: restoring trust across tribes and provinces; recreating policy management; fortifying civil society through political parties, open media, and non-governmental associations. Libya's times of international seclusion have left the generation likely to assume leadership in a new Libya ineffectively educated and unequipped to deal with the country. The challenge for Libya is vexing than those facing other countries which witnessed the Arabic Uprising, Tunisia and Egypt. Libya confronts the complexity not only of democratisation but also of state formation. It will need to build a coherent national identity and policy implementation out of Qaddafi's regime muddles.

The efforts of the UNSMIL to achieve its goal towards Libya to end the transitional period to lead Libya towards democracy and stability necessitates a political solution dealing with

³⁵⁸ El-Anis and Hamed (n 41) 189.

³⁵⁹ While the GNC was closer to Turkey and Qatar, the HoR is supported by Saudi Arabia, Egypt and United Arab Emirates. For more information see International Crisis Group (n 280) 9.

the fragmented and deeply frustrating Libya. In other words, any solution in Libya by international actors should consider that there are no effective efforts to deal with Libya's crisis without working with all local actors or non-state actors within Libya.

There are potential factors that have a profound impact on the formation of the Libyan state after 2011. Some of these factors have historical roots, such as those inherited from Qaddafi's era and in some instances before, while others are emerging. These factors can be summarised as follows.

Libya's historical status as a state consisting of three regions has had a shadow over the current stage regarding demands by some parties to secede. The influence of the tribal factor on the Libyan political scene affected the formation of governments and impacted the elections held in 2012, 2014. An example of this is supporting Haftar in the eastern region by the tribes, including obstructing the formation of a unified government and demanding secession (the federal separatist movement).

This tribal structure could lead to the government's failure or cause its formation due to their support for certain individuals who may not have the required expertise, which, in turn, led to the governments' failure to perform their work due to lack of experience.

Also, the ill-considered NATO intervention in Libya harmed the post-Qaddafi regime. Other countries are interfering in the political scene in Libya and seeking to continue the conflict to take advantage of the resulting chaos, such as these countries the UAE, Egypt and France. This interference led to the victory of one side over another, primarily known as the 'counter-revolution, striving actively to return Libya to the military rule under Haftar. The lack of sincerity and impartiality of the UN representatives in Libya, and the bias of some of them to one party, led to its failure to complete its mission of helping Libya to end its transitional phase and bring it to a permanent democratic government. Based on the Libyan state's characteristics after 2011, Libya could be described as a transitional state.

Part 2. The Libyan Civil Law System for Environmental Protection from Oil Pollution Damage

Introduction to Part Two

Since the 1960s, the interest in environmental protection has been grown, particularly for the harm resulting from the different sources of pollution,³⁶⁰ such as various oil spills, whether on production platforms such as Deepwater Horizon, or conflict such in Kuwait and Libya. However, there is a lack of accountability mechanism for the pollution damage to the environment and people's lives, particularly in fragile countries such as Libya.³⁶¹ As discussed in the previous chapter, Libya in its present-day is considered a state in transition.³⁶² It has faced several environmental issues resulting from pollution events, especially in the oil sector, occurring because of the normal petroleum activities or oil pollution incidents resulting from the conflict after the 2011- revolution.³⁶³ In this regard, there is a risk that victims of oil pollution damage cannot obtain adequate compensation due to the lack of accountability mechanism relating to the existing civil liability law system in Libya.

It is worth noting that the legal system in Libya, as is mentioned in part one, is the civil law system.³⁶⁴ Based on this fact, the Civil Code considers a spine of this system, while other laws such as environmental law and petroleum law are considered part of this system.³⁶⁵ The Civil Code provides the background rules, supplemented by substantive rules specific to other domains, e.g., environment. Therefore, the rules included within the environmental laws, for example, should be applied to the oil pollution cases as the determined rules. However, when there are no stipulated rules in these laws, the judge should apply the rules specified in the Civil Code to such cases as the general rules.

Accordingly, this part presents a critical overview of the civil liability regimes for oil pollution damage within the Libyan environmental law and petroleum law as specific

³⁶⁰ Nassr Saleh Ahmed, 'Corporate Environmental Disclosure in Libya: Evidence and Environmental Determinism Theory' (PhD thesis, Napier University 2004). 1

³⁶¹ Kellay (n 4).

³⁶² See chapter 3 section 3.4 above.

³⁶³ Weir (n 8) 9 & BBC Worldwide Monitoring (n 20).

³⁶⁴ See chapter 3 section 3.2.3 above.

³⁶⁵ Otman and Karlberg (n 19) 353.

relative laws, and then within the Libyan Civil Code. After that, the claim documents of oil pollution damage -collected from the Libyan courts and NOC- are analysed.

This part is organised into four chapters; chapter four is civil liability regimes in the context of environmental protection laws in Libya. Chapter five is civil liability regimes in the context of petroleum laws in Libya. Chapter six is civil liability regimes in the context of the Libyan Civil Code. It identifies and discusses the rules of the civil liability regimes in general. Chapter seven is civil liability regimes in the context of oil pollution cases in Libya. In this chapter, the finding of the previous chapters is used to discuss the claim documents of oil pollution damage collected from the Libyan courts and the NOC.

4 Civil Liability Regimes in the Context of Environmental Protection Laws in Libya

4.1 Introduction

This chapter aims to review the key developments of Libyan environmental law, with emphasis on civil liability relating to oil pollution damage. The focus is on the events that relate to the purpose of this thesis, i.e., the determination of civil liability rules regarding oil pollution damage that was established in the past and are still applied in the current Libyan transitional situation.

It is essential to realise that this thesis does not aim to provide an extensive overview and in-depth discussion and analysis of all developments of Libyan environmental laws, as this is not relevant to the focus of the thesis. However, this chapter focuses on the primary Libyan environmental laws that deal with environmental liability for oil pollution damage and the environmental institutions that are believed to be particularly relevant for discussing the basis of civil liability within the Libyan environmental law.

4.2 Libyan Environmental Legislation

Environmental protection has been regulated in Libya since 1958. A series of laws and decrees were established dealing with issues related to the environment, risks of environmental pollution, and the imposition of severe administrative penalties for violation of the provisions of such laws.³⁶⁶ On this point, although there have been several laws concerning environmental protection since law No. 105 of 1958 was established.³⁶⁷ However, two laws are considered as the primary laws regarding environmental protection in Libya. The first one is law No.15 of 2003 on the protection and improvement of the environment and its implementation issued by the resolution of the General People's Committee No.448, which was established in 2009.³⁶⁸

³⁶⁶ Ibid 354.

³⁶⁷ This law No.105 is the first law was enacted in regard of Libyan Maritime law on 28 November 1958, and the final text was published in the Official Gazette on 19 February 1959.

³⁶⁸ This law was enacted on 13 June 2003 on the protection and improvement of the environment, and the final text published in the Libyan Legislation Code No.4 Year 3 on 16 August 2003. Further, its accompanying executive regulations issued by the Resolution of the General Committee No. 448 of 2009 on 09 October 2009 and published in the Libyan Legislation Code No. 1 year 10 on 25/01/2010. This piece of environmental legislation issued the technical guidelines of law No.15 of 2003, which includes 86 articles.

The other one is law No.7 of 1982 concerning environmental protection, with its accompanying executive regulation issued by the resolution of the General People's Committee No.386 of 1998.³⁶⁹ It is worth noting that this chapter focuses on law No.15 of 2003 and its regulations because it has replaced law No.7 of 1982, and it is presently under-enforcement and applied in Libya.

4.2.1 Law No.15 of 2003 on the Protection and Improvement of the Environment

Law No.15 of 2003 concerns environmental issues to protect, prevent, and improve the environment. This law, along with its regulation, contains eleven chapters, including 165 articles focusing on pollution, sea and marine wealth, water resources, food, sanitation, environment, soil, vegetation, and wildlife. Given the crucial importance of applicable and enforceable law No.15 of 2003, it might be necessary to summarise its important chapters before discussing the point of civil liability for oil pollution damage which is the focus of this thesis.

Chapter 1 contains nine articles that outline the general provisions of this law regarding its objectives and aims: protecting and improving the environment.³⁷⁰ Starting with article 1, which provides concise definitions for most terms, meanings and situations related to such environmental concepts, this law introduces these concepts, which will be the subject of the focus of its articles.

However, since this law concerns environmental issues, it starts by explaining the concept of an environment which is defined as "the surroundings in which human and all organisms live, including air, soil, and food, whether in the place of residence or work or practising activity or other places."³⁷¹ It defines environmental safety as "the control of all environmental factors affecting, directly or indirectly, the physical, psychological and social

These articles deal with the issues which concern the protection and improvement of the environment, and they explain the articles of law No.15 of 2003 to enforce them and make them more practical.

³⁶⁹ This law was enacted on 2 January 1982 with regard to environmental safety, and the final text published in the official Gazette No. 6 year 21 on 6 July 1982. Further, its accompanying executive regulations issued by the Resolution of the General People's Committee No. 386 of 1998 on 7 December 1998 and published in the Official Gazette No. 4 year 37 on 13/03/1999.

³⁷⁰ Article 2 states that: This law aims to achieve monitoring on the environment in order to protect and improve it by considering it as a surrounding which the human with all of creatures are living in it, including water, earth, and food from contamination along with to find reasonable methods to measures the pollution towards maintaining the environmental balancing of the nature circles and prevention of contamination and the various damages resulted out of it by fighting and minimizing them, and improving life circumstances and setting up plans and practical programs for that goal. This law also aims at achieving sustainable development, benefiting from natural resources and exploiting them for optimal exploitation.

³⁷¹ Article 1/a of law No.15 of 2003.

safety of humans."³⁷² Then defines environmental pollution as "the occurrence giving rise to risks to human health or environmental safety, as a result of pollution of air, seawater, water sources or soil; imbalances to living organisms, including noise, vibration and bad odours, or any other pollutants resulting from the activities of a natural or corporate person."³⁷³

Most of the articles of this law concern oil issues, which might be due to the Libyan economy mainly depends on the oil industry. Furthermore, it provides a regulatory framework concerning certain aspects of oil use. For instance, oil is defined as "crude oil, fuel oil, heavy diesel oil, lubrication oil, and other oil by-products."³⁷⁴ Oil waste defines as "oil exhaust of all types, forms and properties, and the vessels, tankers and floating carriers: floating marine units in general according to the description indicated in the Libyan legislation and international agreements being in force."³⁷⁵

Regarding the environmental institution, this article defines the Competent authority as "the entity responsible for following up the affairs of environmental protection and improvement."³⁷⁶ The supervisory authority is defined as "the entity to which the competent authority is affiliated and supervised."³⁷⁷ The competent authority here is the EGA, as has been discussed later.³⁷⁸ In this context, this law pointed out several functions for the competent authorities (EGA) related to planning and supervising environmental and environmental pollution³⁷⁹issues. On the other hand, this law provides their rights, including their names and fees received for their consulting services given to others.³⁸⁰

Moreover, articles 3, 4 & 5 focus on coordinating the parties mentioned above relating to environmental issues and oil pollution.³⁸¹

³⁷² Article 1/b of law No.15 of 2003.

³⁷³ Article 1/c of law No.15 of 2003.

³⁷⁴ Article 1/e of law No.15 of 2003.

³⁷⁵ Article 1/f of law No.15 of 2003.

³⁷⁶ Article 1/m of law No.15 of 2003.

³⁷⁷ Article 1/n of law No.15 of 2003.

³⁷⁸ See section 4.4 below.

³⁷⁹ Article 6 of law No.15 of 2003.

³⁸⁰ Articles 7, 8 and 9 of law No.15 of 2003.

³⁸¹ Article 3 states that all public people committees, individuals, organisations, corporations, companies and public departments, whether national or foreign, must make every effort to contribute to pollution control and observance of the relevant instructions.

Article 4 reports that the parties which are mentioned in the previous article, when they are doing any activities which may result in any contamination of the environment, must observe and follow all conditions and measures stated in this law, or in other laws related to environmental affairs. They must also notify the concerned parties about any accidents which occur as a result of practising any activities which may lead to environmental pollution. They must also provide the equipment and necessary apparatus to control and prevent contamination.

Article 5 stipulates that public authorities must take into account the ways and means necessary to maintain environmental balance when planning for urban development.

Additionally, while chapter 2 contains articles from 10 to 17 dealing with the protection of the air atmosphere, chapter 3 includes articles from 18 to 38 dealing with the safety of the sea and marine wealth. Chapter 4 contains articles from 39 to 47 concerning the protection of water sources, whereas chapter 5 includes articles from 48 to 50 dealing with the security of food products.

In chapter 6, the healthy environment is provided in article 51, whereas Chapter 7 deals with the protection from joint diseases. Chapter 8 includes three articles concerning the protection of the earth and plantations, and the safety of the living land has been provided in Chapter 9.

Chapter 10 deals with biological safety, while Chapter 11 provides the penalties for violation of the provisions of the law, without prejudice to any more severe penalties defined in the Penal Code or any other relevant laws. It enacts various penalties such as imprisonment, fines, and confiscation in certain cases, and the final provisions of law No. 15 are stated in chapter 12.

The above sections provide a synopsis of law No.15 of 2003. However, since this research deals with the civil liability rules related to oil pollution damage, this chapter determines to what extent environmental laws focus on civil liability for oil pollution damage in Libya.

4.2.2 Review Policy and Legislative Framework of Oil Pollution Damage in Law No. 15 of 2003 and its Regularity Implementation No. 448 of 2009

Articles concerning oil and oil pollution in law No.15 have been stipulated in chapter four and chapter three of its regulatory implementation No. 448 of 2009, which are about protecting seas and marine wealth. These provisions are only related to oil spills at sea.

These articles provide several provisions on preventing oil pollution by prohibiting some activities in ports and territorial waters. These prohibitions apply to tankers and vessels of all nationalities in Libyan waters.³⁸² On the other hand, the law stipulates several exclusions to the previous provisions.

Article 22 prohibits some actions related to the oil industry due to their negative impact on the environment, such as spilling an oil mixture or ballasts in ports and territorial waters.³⁸³

³⁸² Article 22/2 of law No.15 of 2003 states the ban applies is applied to all ships and carriers of all nationalities.

³⁸³ Article 22/1 of law No.15 of 2003 stats that It is prohibited to throw oil or oil mixture or washing tanks, or discharge heavy and light oils, or bottom water or ballast in the ports or territorial waters of Libya.

However, it excludes some oil-related activities because they are necessary for life-saving purposes or unavoidable or essential for military purposes. In other words, this law tries to balance these fundamental exclusions, which may occur in oil pollution, the protection of the environment, and the rights of mentioned parties for compensation.³⁸⁴

Furthermore, articles (24, 25 and 26) states specific duties for Libyan and international pilots and captains concerning oil pollution in sea waters.³⁸⁵ These three articles deal with the responsibilities of Libyan and international pilots and captains concerning the prevention of oil pollution to sea waters, such as keep oil logs and reporting for any accidents which may cause any pollution by oil immediately. That means the law states some provisions, including essential duties for users of Libyan ports, to prevent the sea waters from oil pollution. These articles reflect the extent to which law is concerned with avoiding oil pollution to the sea. In contrast, other articles (27, 28 and 29) state some duties relate to preparing ports to receive oil, including a resolution issued by the competent authorities.³⁸⁶

³⁸⁴ Article 22/2 of law No.15 of 2003 states that the following conditions shall be excluded from the prohibition stipulated in the previous article:

1. Throwing oil or oil mixtures of tanker or vessel in order to ensure its safety and save souls.
2. Leakage of oil or oil mixture due to damage or leakage is unavoidable, provided that precautions have been taken to prevent or minimize leakage after damage has occurred.
3. If the oil is in a case of emanating as a result of charging process and could not be possible to get rid of the emanating only by throwing oil in the sea, provided that all the necessary precautions to prevent or reduce it has been taken.
4. Warships and auxiliary warships.

For the appropriate procedures that ensure the existence of specifications equivalent to the provisions of this law a decision of the competent authorities shall be issued.

In all cases referred to in paragraphs 1, 2 and 3 of this article, the competent authorities shall be notified of pollution control no later than twenty-four hours after the occurrence of the incident, stating their reasons and estimating the quantity, location and direction of the oil whenever possible, keeping the rights of the hurt entities to ask for indemnities for damage caused by environmental pollution.

³⁸⁵ Article 24 states that every Libyan national pilot must keep oil logs in the way which is indicated in the article nine of oil pollution treaty and article four of the law No.8 of 1973 with respect to the prevention of oil pollution to sea waters.

Article 25 reports that all captains of vessels carrying the Libyan flag, Libyan Arab Airlines pilots and personnel, must immediately report accidents which cause or may cause water pollution by oils or burned fuel, in addition to accidents which create a floating cover of oil or fuel on the sea.

Article 26 stipulates that in the same regard, all the captains of the vessels, immediately on arrival at Libyan ports, must submit to the port authorities a report of every oil or oil mixture spill in Libyan territorial waters.

³⁸⁶ Article 27 states that the ports to be prepared for the reception of the petroleum wastes and others from the ships that are going to the port shall be determined by a decision of the competent authorities. This decision shall also specify the necessary arrangements for the disposal of these wastes and the terms and conditions prescribed for carrying out these arrangements.

Article 28 states that the competent authorities that manage the petroleum ports for shipping of crude oil should equip these ports with suitable facilities for receiving and treating waste, oil mixtures and ballast water to be disposed of. They should also establish contingency units to combat oil pollution in all ports as well as other offshore installations located on shores that use oil for their operating or as raw material.

Even though these articles might be necessary for the environmental institution, which has been addressed later³⁸⁷ because they stipulated some central duties to them regarding the protection of sea waters from oil pollution, however, these articles are not clear because there is some confusion about identifying the competent authorities.

The concept of competent authorities is mentioned several times in these articles without clarifying these authorities particularly. For instance, article No.27 explains competent authorities as to the party that establishes the resolution to set out some duties relating to preparing ports to receive oil, without clarifying who they are. This is a defect in the law as it can directly indicate what competent authorities mean to avoid any confusion in its articles. The notion of a competent authority is essential to the regulatory framework and obligations thereunder, though not seemingly to any civil compensation.

Regarding the crimes that may be committed to violating the provision of law No.15 of 2003, article 31 addresses these points.³⁸⁸ This article, in some ways, also is related to the environmental institutions, or to be more specific, the police offices that assist the competent authorities regarding the crimes committed to violating the provisions to protect the sea waters from oil pollution. Further, there is confusion in these articles regarding the duties of environmental institutions because there is an overlap in the tasks assigned to the competent authorities.³⁸⁹

What conclusion can be drawn from the articles that have been mentioned above?

It seems that several articles are stipulating in law No.15 of 2003, along with its guidelines, protecting the environment from oil pollution. This regulatory framework has focused on oil

Article 29 reports that every ship bearing the nationality of Libya should be furnished with apparatus or appliances to isolate oil from water, so that the percentage of oil to water coming out from any apparatus does not exceed one hundred parts per million. Ships should also be of sufficient power and capability for the ship's cargo and the operation; the apparatus should prove that it can pass any mixture intended to be discharged into the sea from any tanker, whether to the depots or the machines. The mixture passed from the apparatus would be the last draining operation before going out to sea immediately.

³⁸⁷ See section 4.4 below.

³⁸⁸ Article 31 states that the judicial control officers of the crimes committed in violation of the provisions of this law shall have the right to inspect the ships and their oil separation equipment. They shall have the right to inspect the oil register on the national or foreign vessels as the case may be. They shall inform the competent authority of the crimes, which are in violation of the provisions of this law and the other decisions issued pursuant thereto. They have to attach a copy of the minutes, records, reports or extracts containing the actions recorded in the oil records and to notify the ship master of the of the subject of the violation.

Ship masters and riggers, ship-users or those responsible for maritime installations shall provide the judicial control officers responsible for the implementation of this Law with the necessary assistance to carry out their mission.

³⁸⁹ Ibid.

pollution in seawater; however, the legal framework of civil liability for oil pollution damage is not spelt out in law No. 15 of 2003.

There are significant problems in issuing Libyan legislation—the delay in establishing the regulatory implementation of laws and the confusion in some concepts. For example, law No.15 was published in 2003, while its regulation was established in 2009. As the latter includes the details of this law, delaying its establishment confuses its application in the cases of oil pollution damage. It is also not clear enough to avoid confusion between some concepts presented in their articles; consequently, this confusion has adverse effects on the enforcement of environmental laws.³⁹⁰

Furthermore, this is a review of the legal framework of oil pollution in the current enforceable law No.15 of 2003. The following section turns to the vital point of this chapter reviewing the regularity framework of civil liability for oil pollution damage in this law.

4.2.3 Review Policy and Legislative Framework of Civil Liability for Oil Pollution Damage in Law No. 15 of 2003 and its Regularity Implementation No. 448 of 2009

Law No.15 of 2003, along with its regulatory implementation No. 448 of 2009, is considered an essential law relating to environmental protection in Libya. However, the regulatory framework of oil pollution damage in this law, as mentioned earlier, is not spelt out and not clear enough to avoid confusion between their articles.³⁹¹ However, in this section, the policy and legislative framework of civil liability for oil pollution damage in law No. 15 of 2003 and its regulation is analysed to discuss whether this law, which is under the enforcement and practice currently, has focused on civil liability for oil pollution damage or not? Or does this law include in its articles any details of provisions regarding civil liability for oil pollution damage in particular?

Before that, the civil liability for environmental damage could be described in the ambit of the environmental civil law, which combines various rules of liabilities; civil liability rules, criminal liability rules and administrative liability. This is described to deliver the desired environmental benefits, which should involve the deterrence of environmental hazards and

³⁹⁰ The establishment of the law usually stipulates the main points. In contrast, its regulatory implementation provides more details about these points, particularly under its enforcement and applicability. For more information see chapter 3 section 3.4 above.

³⁹¹ See section 4.2.2 above.

the repair of environmental damage where such harm has occurred.³⁹² That means the regulatory system has specific criminal and administrative penalties and that the civil law remains available for compensation.

The civil liability for environmental damage is intended to pay compensation for causing harm to the natural, for instance, polluted air and polluted water resources by oil. With this intention, in terms of civil liability for oil pollution damage, the law under review has mentioned the word 'compensation', which might be an accurate indication of civil liability rules, only twice among all its articles. The first mention is in the last clause of article.23 of this law.³⁹³

According to article 23, there are no details about the method or the progress of the claim. However, the critical question that needs to be asked is whether the victims of oil pollution damage have to raise a lawsuit against a polluter or whether they will be compensated without any need to raise a lawsuit. In other words, article 23 states that there are some exclusions to the prohibitions of the prevention of oil pollution damage provisions. However, while the last sentence of this article has stipulated that 'the concerned authorities have a right to sue for compensation for any damages' which may occur from environmental pollution, the identification of these authorities may become problematic. The difficulty of identifying the plaintiff might have to be faced, particularly in determining who may be an appropriate plaintiff to sue for compensation.

Moreover, in the same context of civil liability for pollution damage, another article that mentioned compensation word is article 64 of law No.15 of 2003.³⁹⁴ It is essential to

³⁹² Brian Jones and Neil Parpaworth, *Environmental Liabilities* (1st edn. Shaw & Sons Limited 2004) 3.

³⁹³ Article 23 of law No.15 of 2003 states that the following conditions shall be excluded from the prohibition stipulated in the previous article:

1. Throwing oil or oil mixtures of tanker or vessel in order to ensure its safety and save Soules.
2. Leakage of oil or oil mixture due to damage or leakage is unavoidable, provided that precautions have been taken to prevent or minimize leakage after damage has occurred.
3. If the oil is in a case of emanating as a result of charging process and could not be possible to get rid of the emanating only by throwing oil in the sea, provided that all the necessary precautions to prevent or reduce it has been taken.
4. Warships and auxiliary warships.

For the appropriate procedures that ensure the existence of specifications equivalent to the provisions of this law a decision of the competent authorities shall be issued.

In all cases referred to in paragraphs 1, 2 and 3 of this article, the competent authorities shall be notified of pollution control no later than twenty-four hours after the occurrence of the incident, stating their reasons and estimating the quantity, location and direction of the oil whenever possible, keeping the rights of the mentioned parties to ask for compensations for damage caused by environmental pollution.

³⁹⁴ Article No.64 of 2003 states that without prejudice to any more severe penalties defined in the Penal Code or any other laws, sanctions contained in the following articles applied to anyone who violates the provisions of the articles mentioned later with the conditions and rules contained therein, while retaining the injured party the right to claim compensation.

underline that article 64 has connected civil liability with criminal liability for environmental damage.

Although, article 64 may indicate a point related to civil liability rules, which is the relationship between civil liability and criminal liability for pollution damage. However, this article does not spell out the relationship between these liabilities. In other words, whether there is a condition for the injured party to claim compensation that establishes a criminal liability due to the crime committed against the environment and approve that the party suffered from this crime. This article assumes that there is a connection between environmental crimes and claims for compensation. In other words, it seems that this article requires for the establishment of civil liability for oil pollution damage that there is a criminal liability recognised before the acceptance of civil liability. Or this article preserves both general criminal and civil liability and the penalties set out in the specific environmental legislation in which a criminal offence is not required.

Another critical point concerning civil compensation is that civil liability rules ordinarily confer upon individuals a right to claim for compensation the harm done to themselves or their property. However, this may be difficult because of the characteristics of the oil pollution damages, which sometimes may not be described as a crime resulting from legal activities. In these situations, the question raises here, these situations, i.e., how the injured party who suffered from these legal activities can claim compensation for damages in the presence of such conditions? According to the context of this, how about the damages resulted to the natural environment, but not precisely harm the individuals directly, to what extent living in a clean environment be considered among most fundamental rights of the individual which they can claim compensation for harm to the unowned environment?

In the same regard, article 41 of the Resolution No.448 of 2009³⁹⁵ reports that ‘anyone who may cause pollution shall carry out the removal at his own expense and pay compensation for the environmental losses and damage resulting from there, following the rules, regulations and estimates set by the EGA in particular’. This article stipulated in the context focusing on a polluter of the environment, who might become liable for compensation of material damage and removing this damage.

³⁹⁵ Article 41 of the resolution of the GPC No.448 of 2009 states that in any case, the culprit of causing a pollution must carry out the removal at his own expense with the payment of compensation for losses and environmental damage arising there from in accordance with the principles, controls and estimates set by the concerned authority in particular.’

Article No.64 stipulated the prohibition of provisions related to the oil industry due to a negative impact on the environment, such as oil spillage or ballasts in ports and territorial waters. However, this article excludes some activities related to oil because these activities are necessary for life-saving purposes, or they might be unavoidable or essential for military purposes.

Accordingly, there is a relationship between the public interest in controlling polluting events and environmental degradation and private compensation for the suffered oil pollution damage. Importantly, vindicating public environmental interest could be seen not only through private compensation but also through defining the role of environmental public interest litigation in Libya.

In this regard, existing law fails to remediate the disastrous ecological damage caused by pollution. One of these limitations lies in civil law. While personal injury and property damage sustained from pollution typically support a fault-based cause of action, no one has the standing to sue under civil law for ecological injuries suffered by the general public for the lack of a “direct interest.”

Environmental laws also fall short of providing an effective statutory remedy. Although environmental laws generally impose administrative sanctions (e.g., fines) for polluters’ noncompliance with regulatory requirements, they do not explicitly empower public authorities to seek restoration or compensation for ecological damage as a consequence of pollution. The only exception is provided in article No.23 of law No.15 of 2003, which expressly authorizes competent authorities to seek compensation when damage by pollution to the marine protected areas has caused significant losses to the State. Given these obstacles to recovering damages for ecological injuries under the existing legal framework, this law should be proposed to create a public interest litigation system, which would afford to stand to certain parties such as (EGA) to bring a tort.

Overall, this section has reviewed the policy and legislative framework of civil liability for oil pollution damage in law No.15 of 2003. In the three mentioned articles, the civil liability rules for oil pollution damage have not been mentioned directly in the Libyan environmental laws. In other words, there are no details about the rules of civil liability for pollution damage. However, these articles gesture towards compensation for pollution damage in general and oil pollution damage in particular. However, the precise relationship between the rules is crucial. The reviewing of articles 23 and 64 is that the civil code rules remain in the background as the operative rules for any civil liability.

Interestingly, although the legislature has linked civil liability to criminal liability for oil pollution damage concerning penalties for pollution in the form of requirements to engage in therapeutic actions. However, it is not clear if it assumes that civil liability for pollution damage exists, but before that, the criminal liability of a polluter might exist as well. Or it just preserves both general criminal and civil liability in addition to the penalties set out in the specific environmental legislation in which a criminal offence is not required.

According to this logic, it may be felt appropriate for the legal system to offer details about the civil liability for oil pollution damage, including at least the scope of the mechanism for civil claims for pollution damage. It is important to search if there is a provision in the relevant petroleum law to apply them³⁹⁶ in such cases. However, in cases of there is no related article regulating oil pollution cases, the general civil liability rules in the Civil Code might be involved in these cases.³⁹⁷

4.3 Environmental Institutional Framework

There are various governmental institutions in Libya regarding environmental protection, such these institutions; Environment General Authority (EGA), General Water Authority (GWA), Ministry of Health (MoH) and Ministry of Agriculture (MoA). These are some examples of the environmental institutions that were established due to the growing interest in environmental protection, taking into account protecting the environment from different sources of pollution, improving the environment, and preserving the natural resources in Libya. In this regard, Libya has been considered among the first Arab country to establish the environmental institution and legislative framework concerning environmental protection.³⁹⁸ However, these laws were not well implemented in Libya over the past years, remaining under the expectation. This might be due to the weakness in enforcing the environmental law, lack of equipment and incoordination among environmental institutions.³⁹⁹

In the following section, the existing environmental institution in Libya EGA is discussed in relevant detail with this thesis.

³⁹⁶ See chapter 5 below.

³⁹⁷ See chapter 6 section 6.4 below.

³⁹⁸ Nait (n 14) 6.

³⁹⁹ Mahamed Aljelani Masoud, 'The Environmental Performance of the Libyan Oil Industry' (2012) International journal of environment and water 154.

4.3.1 Environmental General Authority (EGA)

The EGA is the central environmental authority in Libya established by the Resolution No.263 of 1999. According to this resolution, the EGA has replaced the Technical Centre for Environmental Protection established by law No.7 of 1982,⁴⁰⁰ as mentioned earlier in this chapter.⁴⁰¹

The EGA is considered the leading party for development projects related to environmental protection; it has been called 'Concerned Party' according to law No.15 of 2003. With this attention, this law has listed the primary function of EGA under the 19 main headings of this law.⁴⁰² Accordingly, the EGA has the power to register all chemical substances that may cause environmental pollution, which has been defined in a resolution of the PCA.⁴⁰³ The EGA can give opinions and approvals for future projects dealing with the impacts of environmental pollution in consideration of environmental agreements and plans in the future. In this context, the EGA is the advisory body regarding environmental affairs concerning the natural resources to protect the environment from different sources of pollution. Consequently, EGA might be an influential party for the implementation, management and monitoring of the domestic environmental programme in Libya and at the regional and international levels.⁴⁰⁴

Given the crucial importance of the EGA concerning environmental protection at the national level, the EGA is responsible for formulating an integrated and federal environmental policy for sustainable development and integrated planning. In addition to this, EGA acts to develop strategies, standards and priorities for environmental protection and natural resource conservation. Furthermore, given its importance at the regional levels, the EGA collaborated with research Centres and other national and international institutions to enhance the studies and research on the environment within Libya to protect and conserve its ecological resources.

It also collaborates with international groups to lessen and remove the causes of pollution in coordination with the national authorities concerned. Accordingly, it should follow up of

⁴⁰⁰ Article 7 stipulates that 'Establishing the Technical Centre for Environmental Protection and its functions as follows: suggesting plans and programmes concerning environment in Libya and supervising on their application and enforcement''.

⁴⁰¹ See section 4.3.1 above.

⁴⁰² See Article 6 of law No.15 of 2003 to protect and improvement the environment.

⁴⁰³ Otman and Karlberg (n 19) 358.

⁴⁰⁴ UNDP (n 68) 30.

conventions, treaties and global developments in the field of environment, coordination with the national committees and the competent authorities to implement the relevant obligations to those conventions.

Other duties of the EGA are that awareness campaigns using different ways to increase public awareness for the environment and the rules and guidance to protect it from various sources of pollution. It is also responsible for assessing the environment to prepare reports and assessments about the situation in Libya.⁴⁰⁵ However, EGA has branch offices regarding environmental protection; there are eight branches exist in the major municipalities in the Libyan cities. These entities are considered the first to foster environmental progress that deals with municipalities priorities, particularly sources of pollution such as waste disposal, plastics and landfill. The EGA branch offices coordinate with other offices concerning issues related to the environment, such as health branch offices in municipalities.⁴⁰⁶

Overall, the primary duties of the EGA comprised planning of environmental policy, preparing a national strategy and action plan with concerned bodies, monitoring and controlling pollution in different areas of Libya, as well as sponsoring applied scientific research and projects.

Although the EGA in this view may appear the competent institution in respect of environmental protection, however, this is just in theory because there are significant issues related to environmental institutions in Libya in different terms. There is a lack of coordination and cooperation among various concerned agencies; national, regional, and international institutions.⁴⁰⁷

There is also a lack of a financial mechanism to support the implementation of the environmental legislation and a lack of environmental remediation facilities. Add to this; the EGA staff has no practical experience to deal with issues in the environment.⁴⁰⁸

Furthermore, in terms of a regulatory framework, the EGA is facing some limitations. The EGA's role is complicated by a confusing legal and regulatory framework because, as mentioned previously,⁴⁰⁹ the critical issue in the legal system is that new decrees and

⁴⁰⁵ Article 6 of law No.15 of 2003 and for more information see also Nait (n 14).

⁴⁰⁶ Rebort J. Goodland, 'Libya: The Urgent Transition to Environmental Sustainability' (The Environmental General Authority, Libya 2013) <http://www.goodlandreport.com/Libya%20Final_10_2013.pdf> 129 accessed 04/05/2017.

⁴⁰⁷ Ibid 132.

⁴⁰⁸ Wikileaks, 'Oil and Gas related pollution in Libya' the Telegraph (London, 16/6/2008) <<http://www.telegraph.co.uk/news/wikileaks-files/libya-wikileaks/8294826/>> accessed 07/07/2017.

⁴⁰⁹ See chapter 3 section 3.4 above.

amendments to existing laws are often adopted without repealing earlier legislation. There is no effective mechanism for reconciling new legislation with previously existing statutes. There is also a lack of national capacity to implement laws concerning environmental protection.

Despite the importance of the EGA in Libya regarding environmental protection, its role in the oil pollution cases is weak and unnoticeable, and the Libyan courts have not witnessed any case raised by the EGA.

Moreover, the transitional situation of Libya post-2011 may affect the enforcement of the relative legislation and on the capacity of the environmental institutions in Libya, particularly the lack of security and the weakness of the government in respect of legitimacy and power.

Recently, resolution No.263 of 1999 is being studied to review the duties of EGA and emphasise its responsibilities to develop them. The importance of EGA duties, such as disseminating information and data relevant to environmental issues, makes them available to the public. Another critical point in this regard is assistance in developing sustainable environmental indicators and trends by emphasising scientific environmental research. The EGA could play a crucial role in promoting research in this field. It may also promote innovative technologies and eco-friendly products.⁴¹⁰

Additionally, there was a plan seek by the UNDP to drove a project following the improvement of EGA in Libya. The project is titled "Strengthening Environmental General Authority's Capacity for Sound Environment Management."⁴¹¹ Since the EGA needs reform to meet the international standard, the purpose of this project was to assist the Libyan government in tackling environmental issues by developing the EGA's capacity at the technical and management levels.⁴¹² The duration of this project was between 2012-2014.⁴¹³ However, this project has not yet been achieved; this might be due to the current uncertain period in Libya, which creates risks that may affect the achievements of the project's expected outputs.⁴¹⁴ These risks are related to the characteristics of this transitional period. For instance, there is a notable presence of armed groups in Libya, which create an atmosphere of insecurity in infrastructure that may affect the ground. Moreover, the

⁴¹⁰ Ibid 5.

⁴¹¹ UNDP (n 68) 1.

⁴¹² See chapter 9 section 9.6.2 below.

⁴¹³ UNDP (n 68) 6.

⁴¹⁴ See chapter 9 section 9.6.3 below.

transitional government is weak and low in capacity, mainly when more than one government exists in Libya at the same time.⁴¹⁵

4.4 Conclusion

Since 1958, several laws and decrees concerning environmental issues, especially issues related to the oil industry, have been established in Libya. Nevertheless, during that period, Libya proved unable to develop its laws and failed to solve its fundamental problem of insufficient environmental legislation. That is why the existing applicable law is being studied to strengthen it by adding new articles to fill the gaps and straighten the weaknesses, making this law more comprehensive and fostering sustainable development and meeting the international environmental sustainability measures.⁴¹⁶

Significantly, in the context of limitations of existing environmental legislation, the review of law No.15 of 2003 and its regulation shows that this law has not focused on civil liability for oil pollution damage. Civil liability rules have not been addressed in this law, and there are no details in its articles about this point. The word 'compensation' has been mentioned in few articles but without more information about other aspects of civil liability. That means the conceptual framework of civil liability for oil pollution damage has not been spelt out in law No.15 of 2003.

It is worth noting that this law has focused on the issues related to oil pollution; however, despite this fact, this focus is only on the matters relating to oil pollution regarding sea waters. This limits these legislations and makes them insufficient to cover other issues related to oil pollution. Although Libya is among the first Arab countries to establish environmental institutions and legislative frameworks that related measures for environmental protection; however, in practical terms, several limitations and obstacles face the enforcement of this framework.

Regarding the environmental institutional framework, even though several institutions are established for environmental protection, and the EGA is mainly one of these institutions, there is a lack of coordination among these agencies. There is some confusion regarding the environmental institutions' duties because there is some inconsistency between the parties' responsibilities mentioned in these laws. Thus, this situation has also weakened the

⁴¹⁵ See chapter 3 section 3.4.1 above.

⁴¹⁶ Nait (n 14).

enforcement of the relevant environmental regulations in Libya. The legislative framework must be more transparent in identifying roles and responsibilities for each institution to solve this problem. There also needs to be strong coordination between these institutions to work together and contribute to elaborating environmental information in its different format and reports to national and international organisations on various environmental aspects.⁴¹⁷

To conclude, the environmental regularity framework has been affected by a cumbersome legal system and significant shortcomings. There is no effective mechanism for reconciling new legislation with existing statutes due to adopting new decrees and amendments to existing laws without repealing earlier legislation. Also, a lack of environmental remediation facilities leads to patchy enforcement of the environmental regulatory framework.

This chapter has given an overview of the Libyan environmental protection legislative framework, with attention to the relevant policy and legislative framework in the context of civil liability for oil pollution damage. It is clear that, even though environmental protection has been regulated in Libya for many decades, it has not yet become a comprehensive legal and regulatory framework. In the context of civil liability for pollution damage, this is not illustrated even by the last law, No. 15 of 2003 and its regulation No. 448 of 2009, which are currently in force and practice.

In the context of the environmental, institutional framework, the existing laws show a lack of cooperation between the EGA, which is considered the leading institution regarding environmental protection, and other institutions concerning environmental issues in Libya. This lack of coordination between them influences the enforcement of environmental laws. There is also a lack of environmental awareness about the risk of environmental issues such as pollution. Additionally, there is a lack of financial mechanisms to support the plans and programmes for improving and protecting the environment. Under the present circumstances, the lack of Libyan environmental legislation concerning civil liability for oil pollution damage will seriously affect the rights of a victim of oil pollution damage to claim compensation.

To sum up, civil liability rules underlying the previous and existing Libyan environmental laws have been reviewed and briefly evaluated in this chapter. Moreover, an overview of the regimes related to civil liability for oil pollution damage, including Libyan Petroleum laws, will be identified in the next chapter.

⁴¹⁷ See chapter 9 section 9.6 below.

5.Civil Liability Rules in the Context of Petroleum Laws & Institutions in Libya

5.1 Introduction

In the previous chapter, the civil liability rules included in the context of environmental laws have been discussed and evaluated to assess the legal framework of CLfOPD included in the Libyan civil system. For the same purpose, this chapter aims to discuss and examine the relevant Libyan petroleum laws to identify whether this legislation consists of any rules governing CLfOPD. This chapter pursues the crucial developments of the Libyan petroleum law and the petroleum institutions, emphasising civil liability rules relating to oil pollution damage. This chapter examines the role of oil companies based on the laws of their establishment, due to their importance in oil pollution cases, particularly during the post-2011 period.

5.2 The Libyan Petroleum Law of 1955

Libya became an independent sovereign nation in 1951, as mentioned in chapter three, and four years later, the government introduced petroleum legislation in its legal system.⁴¹⁸ In 1955, the first petroleum law No. 25 was established in Libya following the discovery of oil in this country.⁴¹⁹ Since that date, this law has become, and is still, the governing law in the legal context which regulates the Libyan oil industry.⁴²⁰

Thus, law No. 25 of 1955 provides the legal basis for the oil industry, including concessions for oil exploration activities. Later in 1972, these concessions were replaced by a new framework of exploration and production sharing agreements (EPSAs) based on nationalising the Libyan oil industry.⁴²¹ There are several successive versions of the EPSAs, which currently continue to apply.⁴²² It is worth noting that, at present, the oil and gas framework remains unchanged from what was in force under Law No.25 of 1955. However, there are indications that the current legal framework is likely to change, and law No. 25 has

⁴¹⁸ The first law was established in this regard was the Mineral Law of 1953 and Petroleum Law No.25 of 1955, for more information see chapter 3 section 3.3.1 above, and Frank C. Waddams, *The Libyan Oil Industry* (Croom Helm London 1980). 17

⁴¹⁹ This law was enacted on 21 April 1955, along with two schedules, was published in the Official Gazette on 19 June 1955 in regard of Libyan petroleum law.

⁴²⁰ Open Oil (n 61) 18.

⁴²¹ Waddams (n 418) 18.

⁴²² Open Oil (n 61) 30.

recently been under study and review.⁴²³ It was seen as one of the more sophisticated oil laws in existence among the petroleum exporting countries.⁴²⁴ Law No. 25 contains 25 articles, and these articles focus in detail on the provisions relating to exploration activities.⁴²⁵ They provide clear definitions for most oil terms, meaning and situations.

Additionally, it is essential to realise that this law was enacted to establish concession agreements.⁴²⁶ The participation of international oil companies in oil concessions was as high as 49%. In Libya, the first one was awarded in 1955, and after that, 137 concession agreements had been awarded to 42 different companies by 1968.⁴²⁷

The development of the Libyan oil industry dates from 1951 and the coming to national autonomy. There had been examinations of little scope and technologically constrained kind in Libya in the Italian colonialism period. A few hints of oil had been found in Tripolitania since 1914 when water wells were bored to supply to Tripoli city. Oil was additionally found in Tripolitania during the 1930s. A full-scale investigation program was set up in the years 1937–1940 by the Italian national oil corporation under the geological direction of its specialists, yet never wholly executed because of the beginning of the war.⁴²⁸

The discovery of petroleum in Libya started in the early 1950s under the enforced mineral law of 1953,⁴²⁹ which had enabled survey work to be carried out in any area that had obtained permission.⁴³⁰ However, by 1955 when petroleum was discovered in Libya, drilling operations had been allowed under the new enacted law No.25 regarding the petroleum industry.⁴³¹ This was the first Libyan petroleum law amended to provide a legal structure for exploration by foreign oil companies and concessions agreements.⁴³²

The conditions and terms of the first version of law No.25 in some instances attracted a sufficiently large number of both primary and independent foreign oil companies to begin exploration in Libya.⁴³³ That was due to its favourable tax structure that could lead these companies to anticipate healthy profits and promises, making their perception of risk much

⁴²³ Means Associates (n 62).

⁴²⁴ John A. Allan, *Libya: the experience of oil* (Croom Helm London 1981) 101.

⁴²⁵ A Barrel Full, 'Libya Oil and Gas Profile' (online) <abarrelfull.wikidot.com/Libya-oil-and-gas-profile> accessed 23/03/2017.

⁴²⁶ Ibid.

⁴²⁷ Gurney (n 13) 39.

⁴²⁸ K McLachlan, 'Libya's oil resources' (1989) 20 *Libyan Studies* 243. 243

⁴²⁹ This law was published in the Official Gazette on 18 September 1953 in regard of Libyan Minerals law.

⁴³⁰ Waddams (n 418) 57.

⁴³¹ Open Oil (n 61) 30.

⁴³² Ronald Bruce St. John, 'Libya's Oil & Gas Industry: Blending Old and New' (2007) 12(2) *The Journal of North African Studies* 203. 204

⁴³³ Allan (n 424) 152.

lower.⁴³⁴ However, there had been some doubts on the government's side about terms relating to concessionaires in the Petroleum Law. These doubts led the Libyan government to take some steps during the 1960s to amend the existing provision of the 1955 law to develop it and make it more comparable with current concession conditions in other oil countries, particularly after Libya became a member of the OPEC in 1962.⁴³⁵

The Libyan Petroleum Law No.25 of 1955 is the primary legislation organising petroleum activities in Libya. It provides that the Libyan state has permanent sovereignty over its natural resources. All mineral resources on private or public land are the property of the Libyan state, with no distinction between surface minerals and sub-surface minerals.⁴³⁶ It also considered the basis of concessions agreements, which gave 49% as the participation of the international oil companies in Libyan oil concessions.⁴³⁷

This law has been amended a few times since its establishment. These amendments were made because there were some ambiguities of words and anomalies included in the law of 1955. Also, there were some amendments to add more articles to the 1955 law to make its conditions more comparable with modern concessions in other oil countries worldwide.⁴³⁸

The revised versions of the 1955 law regarding the agreements of new concessions brought continually improving relations with the producing companies during the years of exploration.⁴³⁹ The most substantial improvements made to this law concerned how the royalties were calculated and allowable cost deductions.⁴⁴⁰ The first one is that the provisions completely altered the procedure for the granting of concessions. The second is the altering of the definition of taxable profits of the concession-holders to bring Libyan practice in this respect into line with that prevailing in most Middle East oil-exporting countries at the time.⁴⁴¹

As previously pointed out, petroleum law No.25 of 1955 was issued when the discovery of oil in Libya was in its infancy. It aimed to encourage foreign multinational oil companies to enter the country and begin exploration with the term of the concession contracts granted at

⁴³⁴ St. John (n 432) 204.

⁴³⁵ Libya joined OPEC in 1962 two years after its establishment, for more information see OPEC, 'Member Countries: Libya facts and figures' (Organisation of the Petroleum Exporting Countries) <http://www.opec.org/opec_web/en/about_us/166.htm> accessed 19/03/2018.

⁴³⁶ Article 1 of Petroleum Law No.25 of 1955.

⁴³⁷ Open Oil (n 61) 30.

⁴³⁸ Waddams (n 418) 101.

⁴³⁹ Allan (n 424) 152.

⁴⁴⁰ St. John (n 432) 150.

⁴⁴¹ Waddams (n 418) 102.

that time.⁴⁴² Given these developments and the change in circumstances about the oil situation in Libya, the Petroleum Law was amended in 1961.⁴⁴³ This amendment took the form mainly of deletions, revisions and additions to 11 of the 25 Articles of the 1955 law and 8 of 29 clauses of the Concession Deed attached to the law as its Second Schedule.⁴⁴⁴ That amendment contained rules concerning the conclusion of agreements with concession-holders to revise their concession contracts following the new terms.

With the creation of the unitary State (Libyan Kingdom) in 1963, as mentioned previously in chapter three,⁴⁴⁵ and since Libya had joined the OPEC organisation in 1962, the last version of the petroleum law of 1961 needed updates to be suitable these new circumstances. The necessary legislation was issued for the amendment of the concession contracts under these conditions. Consequently, in 1965, the second amendment of law No.25 was established by the Royal Decree of 20 November 1965.⁴⁴⁶ In brief, these amendments contained provisions concerning the calculation of the royalties, defining the income of the companies from exported oil which comes under the profits, and the final settlement of presumable disputes under the Concession agreements through arbitration.⁴⁴⁷

In conclusion, the analysis of the petroleum law of 1955 and successive revisions of 1961 and 1965 reveals that, although these revisions paid substantial attention to the oil sector in Libya, this attention emphasised the developments according to the economic level. The impacts of this sector on the environment and livelihood were not at the same level of awareness. Even though it is evident that the Libyan legislation gave critical attention to the petroleum sector in the 1950s and 1960s, attention had not been given to the implications of this sector on people's livelihoods, such as the pollution, which would be likely to result from the various oil activities. Thus, the Libyan petroleum framework does not provide provisions dealing with civil liability for oil pollution damage in Law No.25 of 1955 and its amendments.

⁴⁴² Libya: Petroleum Law Amendment (Revision of Existing Concession Agreements), 5 I.L.M. 442 (1966).

⁴⁴³ This was a first amendment of the law No.25 of 1955 established by the Royal Decree of 3 July 1961 which published in the Official Gazette on 15 July 1961.

⁴⁴⁴ Waddams (n 418) 102.

⁴⁴⁵ See chapter 3 section 3.3.1 above.

⁴⁴⁶ The law was signed by King Idris on 20 November 1965, promulgated as a Royal Decree on 20 November 1965, and published in the Official Gazette on 22 November 1965.

⁴⁴⁷ Waddams (n 418) 137.

5.3 The Establishment of National Oil Company in Libya

After discovering oil and starting to export it on a commercial basis in 1962, Libya established the Ministry of Petroleum and later announced the creation of the Lipetco in 1968. Under the Qaddafi regime, the Lipetco has been replaced by the NOC in 1970. The following sections discuss the history of these oil companies and their role in controlling the oil industry and its liability for oil pollution events in Libya.

5.3.1 The Libyan General Petroleum Corporation (Lipetco)

The law No.13 of 1968 established the first national oil company under Libyan General Petroleum Corporation (Lipetco).⁴⁴⁸ The establishment of this company indicated positive formal moves towards the Libialisation of senior posts.⁴⁴⁹ According to this law, the corporation is a state-owned oil company. The company was established to operate within and outside the Kingdom of Libya in the petroleum industry and its various phases, including prospecting, exploration and drilling for oil, natural gas, and other hydrocarbons. Also, the company was involved in the production, refining, transportation and storage of these substances and their derivatives, including chemicals extracted from crude oil. Additionally, the charter of this company is to enter new, more advantageous partnerships with the international oil companies on terms more beneficial to Libya.⁴⁵⁰

The objective of establishing this company was to promote the Libyan economy by undertaking the development, management, and exploitation of oil resources in the various phases concerned with establishing national petroleum industries.⁴⁵¹ Since establishing this company, the monarchy announced that there is no concession awarded outside of the framework of Lipteco.⁴⁵² Lipteco presumed the government's share in any joint oil exploration and improvement ventures. The government also had a right to participate in existing and future concessions.

5.3.2 The National Oil Corporation (NOC)

⁴⁴⁸ Law No.13 of 1968 was issued as a Royal Decree on 14 April 1968. This law was published in the Official Gazette on 19 June 1968 in regard of Libyan Petroleum Company.

⁴⁴⁹ Waddams (n 418) 174.

⁴⁵⁰ St. John (n 432) 205.

⁴⁵¹ Ibid 175.

⁴⁵² Ibid 205.

After Qaddafi's coup in 1969, Lipteco was replaced by the NOC by law No. 24 of 1970.⁴⁵³ This law has shifted all the missions of the former company to the latter one.⁴⁵⁴ Operating under the supervision of the Minister of Petroleum, these missions of NOC from the outset were to achieve Libya's development plans in the hydrocarbon sector.⁴⁵⁵

The NOC is a state-owned company that controls Libya's oil and gas production through several subsidiaries. The corporation supervises all oil activities in Libya, including oil and gas exploration, refineries operation, drilling, petrochemical production, marketing, and petrochemical and oil products.⁴⁵⁶

Within the purpose of carrying out these activities, the subsidiaries of the NOC were established. The main examples of these subsidiaries are the Brega Petroleum Marketing Company, the Waha Oil Company, and the Arabian Gulf Oil company.

Since 1970, the Libyan petroleum and natural gas industry upstream and downstream has been controlled by the NOC and its subsidiaries.⁴⁵⁷ Law No. 24 of 1971 that sets up the NOC has constrained new ventures with foreign firms to those that took on all the risks of the pre-commercial exploitation period.⁴⁵⁸ The NOC had a significant influence on the Libyan government's new procedure of higher oil prices and the advances toward a standard of production-sharing arrangements and eliminating the previous concession arrangement.⁴⁵⁹ The NOC runs the Libyan oil industry. This state-owned company is responsible for the implementation of EPSAs with international oil companies.⁴⁶⁰ With the purpose of nationalism of the Libyan oil sector in 1972, the former concession agreements were replaced by the EPSAs, which referred 51% of previous concessions to the NOC.⁴⁶¹ In

⁴⁵³ This law was published in the Official Gazette on 30 March 1970 in regard of Libyan Oil Corporation.

⁴⁵⁴ Article No.1 of law No.24 of 1970 states that A public institution called (the National Oil Corporation) shall be established with a legal personality, and this institution shall replace the Libyan General Petroleum Corporation with its rights and obligations.

⁴⁵⁵ Article No.2 of law No.24 of 1970 states that The Corporation shall be attached to the Minister of Oil and Minerals, and it shall have the authority to supervise and control its activities. The Corporation shall work to achieve the goals of the development plan in the petroleum fields, taking into account the general policy of the state.

⁴⁵⁶ Open Oil (n 61) 59.

⁴⁵⁷ St. John (n 432) 177.

⁴⁵⁸ Funding Universe, 'National Oil Corporation History' <<http://www.fundinguniverse.com>> accessed 11/02/2017.

⁴⁵⁹ Open Oil (n 61) 30.

⁴⁶⁰ There were five EPSAs since 1974. The EPSA I consisted 10 contracts were signed between 1974-1979. The EPSA II was signed in 1979 which reduced concerns over reserve replacement ratios. The EPSA III was signed in 1988 which improved terms to attract investors. The EPSA IV was signed in 2005 which provides the open competitive bidding and transparency. For more information see Open Oil (n 61) 31-35.

⁴⁶¹ There were five EPSAs since 1974. The EPSA I consisted 10 contracts were signed between 1974-1979. The EPSA II was signed in 1979 which reduced concerns over reserve replacement ratios. The EPSA III was signed in 1988 which improved terms to attract investors. The EPSA IV was signed in 2005 which provides the open competitive bidding and transparency. For more information see Open Oil (n 61) 31-35.

2010, the Energy Intelligence Group included the NOC at number 25 in their Top 100 World Oil Companies ranking.⁴⁶²

The NOC was reorganised under a decision taken by the General Secretariat of the GPC No.10 of 1979 to empower it to accomplish the objectives of the development plans in the oil sector.⁴⁶³

The reorganisation was intended to assist the national economy by expanding, investing, and managing oil wealth inside and outside Libya, through entirely owned companies, or in partnership with others. In addition, the NOC organises some of its activities through collaboration with foreign exploration, production, and particular oil service companies.⁴⁶⁴

Therefore, based on the EPSAs agreements, the NOC is carrying out exploration and production operations through its own subsidiary companies or participating with other companies under different kinds of petroleum investment contracts or service agreements.⁴⁶⁵

This is besides the marketing operations of oil and gas, locally and abroad. For this purpose, NOC has its subsidiaries, which carry out operations of improvement, exploration, and production of oil, in addition to local and international marketing companies.⁴⁶⁶

Furthermore, the NOC has national service subsidiaries that undertake oil well drilling and workover activities and provide drilling equipment and material. Moreover, the NOC leads the operation of laying and maintaining oil and gas pipelines, building, and maintaining oil and gas storage tanks and carrying out related technical and financial studies.⁴⁶⁷

⁴⁶² NOC, 'The Energy Intelligence Ranks NOC 25 Among the World's Top 100 Companies' <<http://www.noc.ly>> accessed 01/03/2018.

⁴⁶³ The resolution of the General Secretariat of the General People's Congress No.10 of 1979 concerning reorganisation of the NOC was established on 05 August 1979.

⁴⁶⁴ A. Khalil and M. Lees, 'A consideration of Libya's national corporation (NOC) policy and practice in respect of overseas training programmes' (Research Institute for the Built and Human Environment, University of Salford) <<http://www.irbet.de/daten/iconda/CIB16565.pdf>> 284 accessed 04/07/2019.

⁴⁶⁵ Open Oil (n 61) 67.

⁴⁶⁶ Ibid 37.

⁴⁶⁷ There are a number of subsidiaries which are wholly owned by the NOC named: the Sirte Oil Company (SOC)), headquartered in Brega. SOC's operations include exploration, production and manufacturing. The Arabian Gulf Oil Company (Agoco) was established in 1980. The company is engaged in crude oil and natural gas, production and refining activities and is headquartered in Benghazi. The Ras Lanuf Oil and Gas Processing Company operates the Ras Lanuf Refinery and carries out production of petrochemicals, plastics and ethylene. The Zawia Oil Refining Company is the NOC subsidiary which operates the Zawia Refinery. Brega Petroleum Marketing Company Established in 1971 and based in Tripoli. This company deals with marketing and distributing petroleum products as well as related commodities all over the country. Its activities include establishing and maintaining storage tanks and gas stations; renting and operating petroleum tankers and ships and constructing pipeline networks. National Oil Wells, Drilling and Workover Company Based in Tripoli, provides technical support, carries out all land and marine drilling services (including drilling of water wells), carries out maintenance of oil wells for operator companies and all other works associated with drilling operations. Jowef Oil Technology Based in Benghazi, Jowef Oil Company supplies oil companies with drilling mud and all drilling and safety equipment. Additionally, there are other Joint Venture Companies that the NOC owned with other international partners such as Waha Oil Company,

Additionally associated with NOC is a petroleum research centre that conducts technical studies and research related to the petroleum industry. The centre carries out technical analysis and tests for the different phases of oil exploration and production, performs quality control tests, and issues certificates in this regard.⁴⁶⁸ It also assesses licenses of exploitation and the expenses and structures related to oil products and petroleum operations. It distributes the studies conducted by the centre in the publication of the centre, in addition to the local and international scientific publications.⁴⁶⁹

According to law No.24 of 70, the NOC is considered the main party to all exploration and production sharing agreements (EPSAs). EPSAs were presented in the Libyan market following the nationalisation of oil concessions in the early 1970s. The NOC is required to contribute following the conditions and criteria set out in those agreements. The Petroleum Ministry is liable for the approval of all agreements between the NOC and a second party.⁴⁷⁰ There was much discussion over the structure of the NOC would take following the ousting of Qaddafi's system in 2011. In September 2011 asserted that a provincial power clash was emerging as Tripoli and Benghazi contended to host the NOC. In any case, as of January 2020, the NOC remains headquartered in Tripoli.

5.4 Review of Policy and Legislative Framework of NOC and its Role during the Transitional Period

As previously demonstrated, in February 2011, the Libyan revolution began, and in October of the same year, Qaddafi was captured and killed by rebels. Libya had passed through the post-conflict stage during the period from the end of 2011 to the election of July 2012.⁴⁷¹ It could be described as a transitional state based on the analysis of the literature of post-conflict, transitional and failed states.⁴⁷² This shows that the features and conditions of the transitional state are suitable in describing Libya today as a transitional state.⁴⁷³

Mellitah Oil and Gas, Zuetina Oil Company, Harouge Oil Operations, Mabruk Oil and Akakoss Petroleum Operations, for more information, see Open Oil (n 61) 61-74.

⁴⁶⁸ NOC, 'Notional Oil Corporation in Brief' <<https://www.noc.ly/index.php/en/about-us-2>> accessed 06/03/2018

⁴⁶⁹ Ibid.

⁴⁷⁰ Ebtissam El Kailani, 'Extractive Industry and Conflict Risk in Libya' (This paper was prepared under the framework of the Civil Society Dialogue Network (CSDN) as background for the CSDN Meeting entitled Private Sector and Conflict, held in Brussels on 29 October 2012) <<http://www.libyanjustice.org>> 7 accessed 13/03/2016.

⁴⁷¹ See chapter 3 section 3.3.3 above.

⁴⁷² See chapter 3 section 3.4 above.

⁴⁷³ Bartu (n 34); Zoubir and Rozsa (n 29) and Alterman (n 34).

Further, since the overthrow of Qaddafi's regime, successive governments have existed in Libya. Libya also witnessed some significant oil pollution events during this period. On the other hand, NOC is considered a state-owned company and the first party to all oil exploration and production agreements according to law No. 24 of 1970. Hence, there is an important question that has been raised, namely, how do the NOC deal with these oil pollution events and with successive governments post-2011 civil war?

Since its establishment, the NOC has been considered one of the most important institutions in the country. Since the 2011 revolution, as discussed earlier, after the election of 2014, there was a conflict between the GNC in Tripoli and HoR in Tobruk about who is the legitimate political body for controlling Libya, and handing over power.⁴⁷⁴ Attempting to resolve this issue had led to the Supreme Court, which on 6 November 2014, Supreme Court ruled in effect that the basis on which the June 2014 HoR election was held was unconstitutional.⁴⁷⁵ Regarding the NOC, when the case was pending, the NOC waited for the decision of the Supreme Court, and then it followed the GNC as a legitimate government based on the Supreme Court decision.

Currently, Libya has two governments, which have both attempted to seize control of the NOC. However, the NOC plays a significant role to be independent of the ongoing political clash between these governments. Accordingly, in April 2016, the NOC recognised the authority of the GNA's Prime Minister-designate Fayez al Sarraj and the GNA Presidency Council.⁴⁷⁶

Regarding the impact of the post-2011 period on cases of oil pollution damage, since the NOC is considered the first party to all oil exploration and production agreements in Libya, most oil pollution events may be initially attributable to this company. As is discussed later, the analysis of oil pollution cases proves that Libyan civil courts apply the rules of the traditional civil liability that rely on fault-based liability regimes.⁴⁷⁷ That means civil liability can only be used if the criteria of a fault-based civil liability regime, fault, damage, and the causal relationship between them, are established.⁴⁷⁸

⁴⁷⁴ See chapter 3 section 3.4.1 above.

⁴⁷⁵ Supreme Court of Libya case 17/2014, 6 November 2014.

⁴⁷⁶ Mustafa Sanalla. 'NOC welcomes UN Security Council Resolution 2278 regarding illicit oil shipments' (National Oil Corporation) <<http://www.noc.ly/index.php/en/new-4/1407-noc-welcomes-un-security-council-resolution-2278-regarding-illicit-oil-shipments>> accessed 11/06/2016.

⁴⁷⁷ See chapter 7 below.

⁴⁷⁸ Ewart Thomas and Marry Parpal, 'Liability as a Function of Plaintiff and Defendant Fault' (1987) 53 *Journal of Personality and Social Psychology* 843 <<https://www.scopus.com/inward/record.uri>> accessed 22/02/2017. Ispas Petruta-Elena, 'General Conditions of Tort Liability' (2014) *Law Annals Titu Maiorescu U.*108

It seems that it might be difficult for the victims of standard oil pollution cases to sue the NOC as the defendant. Since most recent oil pollution events resulted from third parties' activities⁴⁷⁹ such as the Oil Installations Guards' deeds,⁴⁸⁰ the NOC could exclude the existence of the causal relationship. This can be done by proving the existence of the external cause, which contributed to oil pollution damage during periods when oil installations were not under its control.⁴⁸¹ In such situations, the NOC could depend on the provision of the Libyan Civil Code⁴⁸² and the agreements of exploration and production sharing agreements (EPSAs) in establishing its defence of the existence of force majeure.⁴⁸³

In other words, the NOC may reject and deny its responsibility for the oil pollution events that had happened because of the elements of fault-based liability regime are not available. The rejection was based on there being no fault attributed to the NOC, as these oil pollution events occurred when the oil instruments were out of their control.⁴⁸⁴ As a result, the NOC would not be liable for these damages because of missing a fundamental element of fault-based civil liability regime, which is the causal relationship between the damage and the fault.

5.5 Conclusion

In this chapter, legislation related to the petroleum industry in Libya has been discussed to determine whether the Libyan petroleum legislative framework contains provisions concerning the rules of civil liability for oil pollution damage. The formulation and most features of the petroleum law No.25 of 1955, which is considered the primary law governing

⁴⁷⁹ BBC Worldwide Monitoring (n 20).

⁴⁸⁰ NOC, 'National Oil Corporation Statement regarding the humanitarian and environmental catastrophe in Ras Lanuf' (NOC, 21 January 2016) <<http://www.noc.ly/index.php/en/new-4/1297-national-oil-corporation-statement-regarding-the-humanitarian-and-environmental-catastrophe-in-ras-lanuf>> accessed 26/01/2016.

⁴⁸¹ NOC (n 21).

⁴⁸² Article No.168 of 1954 Civil Code: "In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation If he proves that the injury resulted from a cause beyond his control, such as unforeseen circumstances, force majeure, the fault of the victim or of a third party. For more information see: Libyan Civil Code (n 59).

⁴⁸³ A clear example of the force majeure clauses that included in the (EPSAs) between NOC and foreign companies is signed in 2008 in which: "Any failure or delay on the part of a Party in the performance of its obligations or duties hereunder shall be excused to the extent attributable to force majeure. Force majeure shall include, without limitation: Acts of God; insurrection; riots; war; and any unforeseen circumstances and acts beyond the control of such Party, which render the performance of its obligations impossible". For more information see Jones Day Commentary, 'Force Majeure in Troubled Times : The Example of Libya' (2011) 1 <<http://www.jonesday.com>> 2-3 accessed 12/07/2017.

⁴⁸⁴ The oilfields have been out of NOC's control many times after 2011 revolution. the examples of these situations could be found at: US News, 'Libya's NOC declares force majeure on 70000 Bpd El Feel oilfield' <<https://www.usnews.com/news/world/articles/2018-02-24/libyas-noc-declares-force-majeure-on-70-000-bpd-el-feel-oilfield>> accessed 13/03/2018.

the petroleum sector in Libya, and its revisions of 1961 and 1965, including the justification of their establishment, have been reviewed.

Additionally, as this chapter aims to discuss the rules that govern civil liability for oil pollution damage that may include in the petroleum law, the legislation has been analysed to distinguish these rules. However, the analysis reveals that although the 1955 law and its following provisions gave urgent attention to the petroleum sector in Libya since the 1950s and 1960s, the focus was not given at the same level to its impacts on the livelihoods and environment in Libya.

In 1969, the first international convention concerning civil liability for oil pollution damage was established under CLC of 1969,⁴⁸⁵ which Libya acceded this convention in 2005, as discussed later in chapter 8.⁴⁸⁶ After that, in Qaddafi's era, there were no important changes in the Libyan petroleum law. Libya has not joined the conventions governing the civil liability for oil pollution damage, even though the CLC 1969 had been modified by the convention of 1992 and was no longer in force.⁴⁸⁷

In the second part of this chapter, attention has been drawn to the national oil companies in Libya. This is because of the importance and the role of these companies regarding oil pollution cases, as discussed later in chapter seven.⁴⁸⁸ It starts with establishing the first oil company, the General Libyan Petroleum Corporation, known as Lipteco. This company was established under Law No.13 of 1968 to promote the Libyan economy by developing, managing, and exploiting oil resources. After Qaddafi's coup in 1969, Lipteco was replaced by the NOC established under Law No.24 of 1970 and reorganised by resolution No.10 of 1979. The company's role has been discussed, particularly its position during the 2011 revolution and the following years. The analysis of related literature shows that although the NOC is regarded as a wholly-owned state company, it has played a crucial role during the troubled times and could act independently from the state, mainly when Libya has more than one government.

In sum, the analysis of the Libyan environmental law No 15 of 2003 and the petroleum law of 1955 reveals that no rules concerning civil liability for oil pollution damage are included

⁴⁸⁵ IOPC Funds, 'Liability and Compensation for Oil Pollution Damage: Texts of the 1969 Civil Liability Convention' (2011 Edition) <<http://www.iopcfunds.org>> accessed 01/11/2016.

⁴⁸⁶ IOPC Funds, 'Parties to the international liability and compensation Conventions: Libya' (Online) <<https://www.iopcfunds.org/about-us/membership/map/#member-state-103>> accessed 24/10/2018. For more information See chapter 8 section 8.4 below.

⁴⁸⁷ IOPC Funds (n 77).

⁴⁸⁸ See chapter 7 below.

Chapter 5. Civil liability regimes in the context of petroleum laws & institutions in Libya

in their articles. In such cases, the civil liability rules in the Civil Code must apply in the oil pollution cases, which will be the subject of the following chapter.

6. Civil Liability Rules in the Context of the Libyan Civil Code

6.1 Introduction

The Libyan Civil Code, enacted in 1954, is considered the foundation for all other Libyan legislation. Based on this, the civil liability regime for oil pollution damage would be governed under the relevant environmental or petroleum legislation. In chapters four and five, the review of the provisions of the Libyan environmental and petroleum legal framework appears to show that there are not manifest provisions regulating the civil liability for oil pollution damage contained in these pieces of legislation. In such cases, the civil liability regime within the Civil Code should be applied. Therefore, this chapter analysed these rules to determine which regime governs the oil pollution cases and to what extent this regime could tackle such oil pollution cases.

This chapter has been divided into six sections. The second section provides a general idea about the civil liability regimes. In the third section, the basis of the civil liability regime in the Libyan Civil Code has been analysed, with particular emphasis on the required criteria necessary for applying this regime, namely fault, damage, and the causal relationship between them. Section four reviews the applicable civil liability regime for oil pollution damage within the Civil Code in Libya, particularly the points concerning identifying the polluter and the problems around the point of causation. Additionally, since this thesis focuses on the current nature of Libya as a state in transition, in section five, the efficiency of the applicable civil liability regime has been tested during the transitional period. Finally, section six concludes this chapter.

6.2 Civil Liability Regimes in General

Civil law gives redress to those who may have suffered because of damage that arises from someone, and civil liability regimes may consider different compensation measures according to their legal systems.⁴⁸⁹ The traditional proposal of civil liability principles is to provide a compensation mechanism for those who have endured harm through the activities of others. The principles and terminology may vary between distinctive jurisdictions. While those based upon Roman or civil law traditions have adopted the term "delict", common law

⁴⁸⁹ John Murphy, *street on Torts* (12th edn, Oxford University Press 2007). 3

countries tend to use the term "tort"; however, the core aim remains common.⁴⁹⁰ Furthermore, there are three prominent areas of tort law: intentional tort, negligence, and strict liability, in which all these torts are legal wrongs and thus a breach of a legal duty.⁴⁹¹ An intentional tort is when a person intentionally involves a lead that causes damage or injury to others. Negligence is the most common type of tort. It occurs when an individual neglects or fails to maintain his obligation to prevent injury, leading to causing damages.⁴⁹² Strict liability, called also absolute liability, applies when a person is deemed responsible for damages or injury without consideration for fault or carelessness. These include cases of defective products and unintentional accidents such as oil pollution. Notably, there is no mental element required in negligence and strict liability: fault will be found solely in the causation.⁴⁹³

There are certain conditions for fault-based civil liability to be established, which ought to be met: a wrongful act, an injury, and the causality relationship between the fault and the damage. These conditions are the constituents of tort liability.⁴⁹⁴

Under strict liability, there is no requirement to prove fault, negligence, or intention. On the other hand, strict liability is the imposition of liability on a defendant without a proven fault. The plaintiff needs only to prove the causation relationship in which the pollution has caused damage to the plaintiff's property, and the respondent is proven to be the source of this pollution.

The law attributes strict liability to situations which consider dangerous. It discourages irresponsible performance and unnecessary loss by forcing potential respondents to take every possible precaution.⁴⁹⁵ It additionally has the impact of facilitating and thereby accelerating court decisions in these cases. Because intent does not need to be proven, a strict liability regime can prevent respondents from raising diminished mental capacity defences.⁴⁹⁶

⁴⁹⁰ Global CCS Institute, '5 Civil liability principles' <<https://hub.globalccsinstitute.com/publications/legal-liability-and-carbon-capture-and-storage-comparative-perspective/5-civil-liability-principles>> accessed 26/03/2018.

⁴⁹¹ Petruta-Elena (n 478) 108.

⁴⁹² David Gilo, Ehud Guttel, and Erez Yuval, 'Negligence, Strict Liability, and Collective Action' (2013) 42 Journal of legal studies 69. 70

⁴⁹³ Richard A. Posner, 'Strict Liability: A Comment' (1973) 2 Journal of legal studies 205. 207

⁴⁹⁴ Petruta-Elena (n 478) 108.

⁴⁹⁵ Kenneth S. Abraham, 'The Relation between Civil Liability and Environmental Regulation: An Analytical Overview' (2002) 41 Washburn L.J. 379. 398

⁴⁹⁶ Ibid.

6.3 The Basis of Civil Liability Regime in the Libyan Civil Code

In 1954, the first civil law was established following independence in Libya. Since that date, the Libyan Civil Code has entered into force and is still the governing law in the legal context regulating the Libyan civil system. As discussed previously,⁴⁹⁷ Libyan civil law is a mixed system characterised by the French and Egyptian Civil Codes and Islamic law principles.⁴⁹⁸ In general, civil liability is the legal obligation to compensate for the damage caused by the tortfeasor breach of its obligation. Tort liability is a breach of the obligation imposed by law; in other words, it is a compensation system for damage to persons and property because of an intentional act or negligent act.⁴⁹⁹

Libyan Civil Code organised civil liability in the first chapter under title sources of obligations. Section three of this chapter is specified for unlawful acts. It contains three types of civil liabilities: liability arising from personal acts (166-175), liability arising from acts of another (176-178) and liability arising from things (179-181).

The following section addresses the criteria of civil liability required in the Libyan Civil Code.

6.3.1 The Criteria of Fault-based Liability

Although the Libyan Civil Code stipulates three types of civil liability, it considers article No.166 as general rules for civil liability. This article stipulates that "every fault causes damage to another, that who committed it shall be obliged to compensate it". Based on this article, the Libyan legislator has adopted a fault-based liability regime as a basis for civil liability. Accordingly, the legislator requires the fault for establishing civil liability on the side of the tortfeasor, in addition to the other two elements, which are damage and the causal relationship.

6.3.1.1 Fault

The fault is contained two elements; infringement and discernment, and the standard of violation is the criterion of the average person in the definition.⁵⁰⁰ Therefore, the fault can

⁴⁹⁷ See chapter 3 section 3.2.3 above.

⁴⁹⁸ Fathi Abdullah Abdul Rahim, *Studies in tort*, (Dar Alma'arif, Alexandria 2005).10

⁴⁹⁹ Nils Jansen, 'The Idea of Legal Responsibility' (2014) 34 Oxford Journal of Legal Studies 221.

⁵⁰⁰ AbdulRazaq Al-Sanhoury, *The Mediator in Explaining the New Civil Law, The Theory of Commitment in General - Sources of Obligation* (Halabi legal Publications 1998). 779

be seen as a deviation from the expected behaviour of the average person resulting from a lack of awareness.⁵⁰¹

Generally, there are two forms of fault: intent, which is divided into direct and indirect, and negligence, divided into carelessness and gross negligence.⁵⁰²

Based on article No.166 of the Libyan Civil Code, a fault is the basis of the civil liability resulting from a wrongful personal act. The fault can be explained as a breach of a legal duty, either a commitment in the strict sense or a general obligation that entails civil liability for breach it.⁵⁰³ However, article 167 of the Libyan Code requires proving infringement and discernment for establishing fault. Accordingly, it is taken from the provision that it is not sufficient for establishing fault only proving a breach of a lawful duty. Still, it must also prove that this fault is a result of discernment and awareness.⁵⁰⁴

The fault is the infringement and violation of the rules governing normal behaviour. In this sense, fault consists of two pillars. The substantive or material breach of legal duty, which is the infringement that could be achieved by harming others, whether this harm is a result of commission or omission, and the mental element, which is the availability of discernment or awareness of the violator of this duty.⁵⁰⁵ Further, it links liability with fault and connects fault with discernment.⁵⁰⁶

Notably, in civil liability for oil pollution damage, the fault will exist when the person or his/her property has been violated. For example, as in the selected oil pollution cases, the lands and water sources were polluted because of the activities of subsidiaries of NOC, as is detailed later in chapter 7.⁵⁰⁷

Accordingly, law No.15 of 2003 on environmental protection has established specific legal obligations for those who engage in activities that may cause damage to the environment. Their violation from these texts constitutes a fault on their part that requires their

⁵⁰¹ Tawfik Hassan Faraj, *The General Theory of Commitment, Sources of Commitment with a Comparison between Arab Laws* (Halabi legal Publications 2002). 371; see also Azzeddin Al-Dinousuri and Abdulhamid al-Shawarbi, *Civil Responsibility in the Light of Jurisprudence and Jurisdiction* (Modern Journalism 1988).

⁵⁰² Janno Lahe, 'The Importance of distinguishing between forms of fault in the law of delict' (2009) 1632 *Juridica International Law Review* 94. 94

⁵⁰³ Article No.166 of Civil Code states that "every fault causes damage to another, that who committed it shall be obliged to compensate it".

⁵⁰⁴ Article No.167 of the Libyan Civil Code stated that: 1. Every person in possession of discretion is responsible for his unlawful acts. 2. When an injury is caused by a person not in possession of discretion the judge may, if no one is responsible for him, or if the victim of the injury cannot obtain reparation from the person responsible condemn the person causing the injury to pay equitable damages, taking into account the position of the parties.

⁵⁰⁵ Al-Sanhoury (n 500) 780.

⁵⁰⁶ AbdulRazaq Al-Sanhoury, *Mediator in explaining the civil law, part one, second folder* (Halabi legal Publications 1998). 879

⁵⁰⁷ See chapter 7 section 7.4 below.

responsibility.⁵⁰⁸ An example of this is Article 57 of the Executive Regulations of Law No. 15 of 2003,⁵⁰⁹ as previously discussed in chapter four.⁵¹⁰

In addition to a fault, the damage and the causal link must be proven for establishing civil liability, as illustrated below.

6.3.1.2 Damage

This element could be considered the essential element of civil liability, which will not be established without it. It is the first spark to think about the person's liability for compensation.⁵¹¹

Damage is divided into material and moral damage; the material damage results from injury of a property or legitimate interest that can be valued in cash, whereas moral damage affects victims' personal and psychological aspects. The moral damages cannot be evaluated in financial terms. They usually comprise physical or mental pain after violating the victim's non-property (personal) rights.

Damage, in any of its forms, requires specific requirements to be eligible for compensation. It must be certain, personally, directly, and the injury should result from trespassing a lawful right or interest.⁵¹² The certainty of the damage represents that basic condition according to which its existence is unquestionable, yet the degree of the damage can be built up at present. In the category of certain damages, actual and future damages can be included. In this respect, the actual damages being already caused the moment they are professed to be repaired. Additionally, the future damages which are certain to occur, although these damages have not occurred at this point, are likely to be assessed.⁵¹³

In other words, the damage must be realised, which has occurred or will occur in the future. This damage is different from the potential damage, which has no confirmation of its occurrence and is very unlikely to occur. Regarding the possible injury whose occurrence is not guaranteed, it cannot be deemed as a certain injury, which means it cannot justify a grant of compensation.

⁵⁰⁸ See chapter 4 section 4.2.1 above.

⁵⁰⁹ Article 57 of the Executive Regulations of Law No. 15 of 2003 on the protection and improvement of the environment states that (It is prohibited to dispose of any materials that may cause pollution of water resources directly or indirectly).

⁵¹⁰ See chapter 4 section 4.2 above.

⁵¹¹ Sulaiman Marqas, *Al-Wafi in obligations: second part in harmful action and civil liability, the first section in the general provisions* (5th edn, Cairo University 1990). 133

⁵¹² Petruta-Elena (n 478) 112.

⁵¹³ Al-Sanhoury (n 506) 971.

The damage is required to be personal, which means the injury is caused to the person who claims the right to compensation for the wrongful act. The condition is met whether the injured person is a natural person or a legal person. However, it is believed that the nature of this injury supposes that only the person who was the victim of the injury caused has the right to claim compensation.⁵¹⁴

The other condition required for the damage to be repaired is that it should be direct, which means this damage should directly result from the tortfeasor act. Thus, the existence of a causal link between the wrongful act and the damage caused to the victim is proved.

The last condition the injury must meet to engage the tortfeasor's liability is that the damage should result from the infringement or harm of a legal right or interest. The injury can only be considered when it occurs because of a breach of a substantive right or a lawful interest.⁵¹⁵

In addition to the elements of fault and damage, civil liability must directly link the fault committed by the liable person and the damage that affected the injured person. Consequently, this fault must be the direct cause of the injury; otherwise, liability will not be established as the causality between them is not proven, as detailed in the section below.

6.3.1.3 Causation Relationship

The causation relationship in fault-based liability requires establishing a direct link between the fault and the damage. If the victim cannot prove the relationship between the fault and the injury, it might be impossible to obtain the compensation required.⁵¹⁶

Concerning the fault-based civil liability regime, the principle is that tort liability is based on the fault that is obligated to be proven. That means the person is responsible for his wrongful act that causes harm to others under the rule stipulated in the Libyan Civil Code. In this regard, this means that when a legitimate act causes damage, it will not be subject to compensation under this type of liability.

It is noted that the causal relationship is distinctive from the element of fault. That is because it may exist without a fault in cases when there is an act causing damage to another, but it could not be described as a fault. Here, the person who caused the damage may be considered liable but without fault based on another kind of liability. In other words, the causation relation may be established in some cases, although the fault may not exist.

⁵¹⁴ Petruta-Elena (n 478) 113.

⁵¹⁵ Al-Sanhoury (n 506) 973.

⁵¹⁶ Ahmed Mahmoud Saad, *Extrapolation of Civil Liability in Environmental Pollution Disputes* (1st edn, Dar al-Nahda al-Arabiya 1994). 229

The above makes it clear that traditional civil liability is based on the availability of three elements: fault, damage, and causal relationship. If these elements are available, the responsible person shall be liable to reparation for the damage caused to the injured person. Applying these elements under the ordinary activities concerning others may not raise problems; this kind of liability is based on a proven fault, and caused damage should be compensated. However, concerning liability for oil pollution damage, the liability based on fault may not be a suitable regime for reparation of this kind of damage. In practice, several problems may arise, particularly in the transitional period.

Hence, considering the activities related to the oil industry, it may be challenging to set out a relevant standard to state that the fault is proven, and the same could be true for remain elements of the fault-based liability regime. This raises the question - to what extent could the fault-based liability regime stipulated in the Libyan Civil Code be applied to cases of oil pollution damage. Is fault-based liability sufficient to compensate for most of the damage resulting from oil pollution accidents? These questions will be discussed as follows.

6.4 Review the Fault-based Liability Regime as a Basis for Establishing Liability for Oil Pollution Damage

The rules of fault-based liability may not raise any difficulty in the application when the three elements – the fault, damage, and the causality relationship– have been met. Thus, when the previous elements are available, the defendant's liability will exist along with the right of the injured party to claim compensation.

The same shall apply to the damage caused by oil pollution. In such events, any natural or official person, private or public, who pollutes the air, water, or soil, or fails to take the necessary measures and procedures to prevent pollution from the activity related to the oil industry, will be liable for these damages caused to others.⁵¹⁷

In the fault-based liability, the fault element could be considered the main component of liability, which may be impossible for liability to exist without it. Therefore, the claimant must prove that the defendant was at fault, the caused damage, and finally, a causal link between the fault and the injury that allows the tortfeasor to be held accountable. Accordingly, the liability for oil pollution damage could be established based on the fault

⁵¹⁷ Abdel Wahab Mohamed Abdel Wahab, 'Responsibility for Damage Resulting from Pollution of the Environment: A Study on Establishing Principles for Civil Liability for Environmental Pollution Damage' (PhD thesis, Cairo University 1994). 319

when the injured can prove the fault, the damage, and the relationship of causality between them.

The fault-based liability regime is an application area in the Libyan courts for oil pollution cases; nevertheless, it seems that this regime could not absorb most of these damages due to several difficulties.

6.4.1 The Challenges of the Application of Fault-based Liability Regime regarding Oil Pollution Damage

6.4.1.1 The Problem of Proving Fault

The fault is the first fundamental pillar of the fault-based liability in which the injured person seeks compensation. Further, the injured should prove that the reasonable person commits a violation beyond the usual behaviour in such circumstances, whether this violated behaviour was because of deliberate action, negligence, or failure to observe the provisions of the laws and regulations.

Nevertheless, concerning civil liability for oil pollution damage, the burden of proof of fault faces several difficulties. It may be impossible to apply the fault-based regime on most oil pollution cases.⁵¹⁸

These difficulties are due to the special nature of the oil activity that causes such oil pollution damage. For instance, in the case of water contamination with oil, it may be challenging to determine the substances deposited in the water that could be considered a direct cause of the damage. This could be attributed to the multiple sources of pollution because pollution may result from dissolving these objects or may unite with other objects to pollute the water. This kind of pollution may need special experts to identify these facts. Consequently, since the determination of the oil pollution source could be difficult, it is difficult to determine the fault of the polluters and be attributed to them. That means it may be challenging to establish the civil liability and attribute it to the polluter based on the fault.

According to administrative regulations, there is the difficulty of introducing fault as a basis for liability for oil pollution damage in the case of pollution resulting from a legitimate activity permitted by law. For example, oil pollution caused by oil industry projects resulting from fumes leads to occurring oil pollution. However, these activities are authorised, and the projects have followed the technical qualifications of the assets of this industry.⁵¹⁹

⁵¹⁸ Saad (n 516) 217.

⁵¹⁹ Abdel Wahab (n 517) 344.

Accordingly, the NOC that is considered the fundamental party for the oil industry in Libya, for example, uses modern oil technology and exercises the activities based on the administrative authority and taking all necessary precautions to avoid the oil pollution events. It seems that it is difficult to attribute any fault to this company in the event of oil pollution resulting from such activities.

There is no doubt that it could be challenging to find a violation or fault on NOC that is being exploited in such cases. As a result, in such situations, the probability of compensating the oil pollution victims in the light of the rules of fault-based liability may be low because of the failure of proving the fault on the side of NOC. Thus, the victim still needs to bear the burden to prove the fault of the NOC related directly to the oil industry.

6.4.1.2 Problems related to Oil Pollution Damage

As discussed previously in this chapter,⁵²⁰ the damage, as one of the elements of civil liability, has several conditions to be compensated, including being personal, direct, and resulting from the claimed activity. However, the damage resulting from oil pollution has unique characteristics that may establish the obstacles that impede the oil pollution damage to meet the general conditions of the damage. That means the oil pollution damage features may be deemed impediments that may prevent the conformity or applicability of the damage conditions on the damage of oil pollution. With this peculiarity of oil pollution damage, it may be difficult for oil pollution victims to claim their compensation by relying on the fault-based civil liability rules.

Damage caused by oil pollution is often indirect, contributing to many causes – water, air, human activity, factory gases, and other sources – resulting in the sequence of damage and its accumulation.⁵²¹ There is damage caused by gradual, repeated contamination and the mixing of its elements over long periods.⁵²²

This damage is often not achieved in a single step because its effects may not appear immediately after it occurs. Still, it lengthens and extends to successive periods before it is discovered.⁵²³ It may take a long time before the damage is discovered. It is therefore difficult to determine its real source if it appears long after its direct origin. It becomes difficult to establish the causal link between the damage and the act causing it.

⁵²⁰ See section 6.2.1.1.2 above.

⁵²¹ Nizar Dandash, *Book of the Environment* (1st edn, Dar Al Khayyal for Printing and Publishing 2005).108

⁵²² Abdel Wahab (n 517) 348.

⁵²³ Saad (n 516) 226.

6.4.1.3 The Difficulty of Proving a Causal Relationship

It may be difficult to prove the causal relationship between the damage caused and the fault of the responsible person. This is another difficulty that may prevent those injured by oil pollution from being compensated for the damage caused by this pollution. The causal element, as mentioned above, is considered one of main element of the fault-based civil liability rules.⁵²⁴ Since this liability is based on a fault obligated to be proven by the injured, the latter must establish a link between this fault and the suffered damage. This is the element of the causation relationship,⁵²⁵ the causal link determining the act that caused the damage among the various acts surrounding the incident of oil pollution.

While the legal concept of causation could be applied to some cases of damages of oil pollution, it could probably not apply to most of them due to the nature of oil damage. Also, there is difficulty of identifying the source of damage, as discussed, when several factors contribute to the cause of such damage. These difficulties concerning the element of causation that should be demonstrated and proven may become apparent, especially in the context of the theory of the productive or effective cause, which consider the legal causes and ignore the natural causes as the cause of the damage.⁵²⁶

Oil pollution damage is often caused by the overlap of natural causes with legal causes. Natural causes may be the productive or effective causes of this damage.⁵²⁷ For example, in cases of simultaneous or united oil pollution, the substance of the material that results from this industrial activity may not cause any harm by its nature. However, it could become harmful when it may unite with others, which may not be harmful alone. In cases of multiple polluters, the victim needs to prove the causal relationship between the activity of the polluters and the resulting damage, the resulting fault and must determine the percentage of the damage caused by them.⁵²⁸ This may be deemed a fundamental obstacle that victims face in oil pollution damage, in which there may be no guarantee for them to be compensated. This obstacle may be due to failure to prove the source of the pollution and the causation link between the fault of the liable polluter and the damage suffered.

To conclude, the difficulties mentioned above, which likely face those affected by oil pollution, could impede them from being compensated sufficiently for their damage.

⁵²⁴ See section 6.3.1 above.

⁵²⁵ Adel Jabri Mohamed Habib, *The Legal Concept of Causality and Its Implications for the Distribution of the Civil Liability: Comparative Study of Islamic Jurisprudence* (1st edn, Dar Al-Fikr Al-Arabi 2003). 241

⁵²⁶ *Ibid* 242.

⁵²⁷ Saad (n 516) 230.

⁵²⁸ Abdel Wahab (n 517) 351.

Therefore, adopting and adhering to such provisions concerning applying the rules of fault-based civil liability regarding oil pollution damage means that the injured may not obtain sufficient compensation for the damage caused to them.

In sum, the review of civil liability rules stipulated in the Libyan Civil Code in article No.166 based on fault shows that these rules may not be effective in compensation for the damages caused by oil pollution during the stable time. Therefore, as Libya is considered a state in transition since the civil war in 2011, it should be considered whether the civil liability based on fault could apply efficiently during the current situation in Libya to compensate oil pollution victims. Also, to what extent did the victims of oil pollution damage caused during this period gain their compensation relied on fault-based liability.

Moreover, the damage is required to be direct, specific, and resulting from the violation of a lawful right or interest of a person. However, since oil pollution damage is in most cases caused indirectly and occurs from multiple sources with severe and long-term consequences, these characteristics cut the direct causal link between the wrongful act and the damage of oil pollution. Oil pollution damage likely occurs because of the aggregate effect of several polluting actions spread over time and place. Where the damage has been caused by the cumulative impact of the activities of many operators, it is often not possible to determine which actors' actions caused the damage, and the establishment of a causal link is primarily difficult.

Also, some facts can exclude causation links by proving an external cause that contributed to committing the wrongful act. For instance, the characteristics of oil pollution damage, the cases which represent causes of fault removal, the cases of oil pollution events happening because of the third-party.⁵²⁹ In all these cases, although the deed was committed and caused the oil pollution damage, the tortfeasor shall not be obliged to be liable based on the fault-based liability rules.

6.6 Conclusion

This chapter provides an overview of the issues associated with civil liability rules in the Libyan Civil Code that regulate civil liability for oil pollution damage. It addresses the typical characteristics of civil liability rules involving oil pollution injury or damage. The chapter analyses the fault-based liability for these harms and the remedies available if

⁵²⁹ BBC Worldwide Monitoring (n 20).

liability is imposed; concerns the difficulties related to the identification of polluters, the distinctive nature of oil pollution damage, and problems related to causal relationship.

Further, this chapter discusses the fault rules that should be proved as a basis for civil liability for oil pollution damage. The presentation of the concept and the rules applicable to this type of traditional civil liability revealed its apparent inability to absorb most of the damage caused by oil pollution due to several obstacles that could face the victims and cause multiple difficulties. These difficulties could be a specificity of the damage caused by the oil pollution. It could be challenging to determine which activity caused the damage and the problem of proving a direct relationship between the damage and the action that caused it.

In Libya, although the Qaddafi regime was overthrown in the revolution in 2011, there are no essential changes in Libyan regulations. Thus, under these circumstances, the legislation, previously established in his era, still applies in the Libyan courts. Besides, law No. 25 of 1955, as Amended up to 1965,⁵³⁰ is the governing law in the petroleum industry, whereas, regarding the environmental laws, a relevant law is law No. 15 of 2003,⁵³¹ along with its implementing regulations, which addresses environmental protection. However, following oil pollution damage, the civil liability rules underlying the Libyan civil laws may not be easily identifiable. That is because there are no specific rules relating to civil liability for oil pollution provided in its articles. In other words, these laws do not include specific details of explicit provisions regarding civil liability for oil pollution damage.

Consequently, these laws may not be appropriate to cover oil pollution damage because these laws do not address the civil liability in their articles. In this case, the fault-based liability regime, which is included in the Libyan Civil Code, must be followed, and applied in the courts to ensure that those who have suffered from oil pollution have been compensated.

The fault-based regime is probably not very effective in securing compensation for most injured persons, particularly with the impacts of the transitional period. The NOC could exclude its liability by proving the existence of the foreign cause that cut the causal relationship between the fault and damage.

However, in the next chapter, these rules are discussed within the context of oil pollution cases to identify the current approach of civil liability rules for oil pollution damage applied

⁵³⁰ This law was enacted on 21 April 1955, along with two schedules, was published in the Official Gazette on 19 June 1955 in regard of Libyan petroleum law.

⁵³¹ This law is established on 13 June 2003 on the protection and improvement of the environment and was published in the Libyan Legislation Code on 16 August 2003. (Online)

<<http://www.industry.gov.ly/files1/kordi%20%20%281%29.pdf>> accessed 29/10/2017.

in the Libyan court. In doing so, the oil pollution cases are analysed to determine whether the current legal framework of CLfOPD that was, and is still, applied in the Libyan courts is applicable to compensate the victims of oil pollution.

7. Analysis of the Application of Liability Rules under the Civil Code in the Context of Oil Pollution Cases in Libya

7.1 Introduction

Within the over-arching context of the Civil Code, the environmental and petroleum legislation, which provides for civil liability for oil pollution damage, was analysed thoroughly in previous chapters.⁵³² The analysis revealed that the relevant environmental and petroleum laws do not include provisions that regulate civil liability for oil pollution damage. Consequently, this leads to applying fault-based civil liability provisions under the Libyan Civil Code to oil pollution damage cases.

As previously pointed out in the introductory chapter one,⁵³³ this study involves both deductive and inductive research.⁵³⁴ Deductive research provides the general perspective of civil liability for oil pollution damage included in relevant Libyan laws.⁵³⁵ This study also involves inductive analysis, as the oil pollution case studies are considered and analysed in detail in this chapter.

The purpose of examining the selected oil pollution cases is to determine the nature of the civil liability regime being applied in the Libyan courts to compensate oil pollution damage victims. The selected cases assessed in this study are lawsuits raised to claim compensation for damages resulting from oil pollution before Libyan courts pre-and post-2011, corresponding to the end of the Qaddafi regime. Notably, this study involves the standard oil pollution cases and excludes the political violence oil pollution cases. These cases are suggested to be appropriate to the issue tackled in the study and chosen accordingly. These cases are standard oil pollution cases. They concern oil pollution damage involving different events over separate periods. Such occasions would include oil pollution damage resulting from leakage from fuelling stations or discharges to land and water bodies and emissions to the air from gasoline factories to the private properties of Libyan residents.⁵³⁶ As the primary oil producer, refiner, distributor & retailer of oil products in Libya, the NOC is the primary respondent in most of these selected cases.

⁵³² See chapters 3, 4 and 5 above.

⁵³³ See chapter 1 section 1.4 above.

⁵³⁴ See methodology section 1.5 in chapter 1 above.

⁵³⁵ See chapters 3,4 and 5 above.

⁵³⁶ See case of Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014] Sawani District Court/ Civil Department 19, [2014], see also case of Rokia v NOC & Oil Libya company [2008] Jumah District Court/ Civil Department 67, [2008]

These cases have been chosen based on specific criteria to be a suitable sample for the analysis in this research. The documents on these selected cases have been collected and obtained from Libyan courts and the NOC. The documents have been unofficially translated from Arabic to English. ⁵³⁷ The analysis is performed in this chapter to present significant findings and discuss their implications.

Remarkably, all the cases analysed in this research were collected from the courts located in the western region of Libya. However, the most recent oil pollution events have occurred in oil fields located in the eastern part of Libya. The reasons for this are first because the courts in the east region of Libya have not been fully operational after 2011, since the political conflict between the governments of the two parliaments took place after the election of 2014, as discussed previously in chapter three. ⁵³⁸ Secondly, as the main headquarters of the NOC is located in Tripoli in western Libya, the selected oil pollution cases have been obtained from this region.

This chapter is divided into six sections. Section one represents the introduction, while the second section discusses the importance of oil pollution cases, including the reasons for making this choice and its relationship with the present study. The criteria for choosing these cases, including their features, are deliberated in the third section. The background of selected cases, including their parties, content, proceedings, and the judge's decision, are studied in section four. The fifth section includes findings of the analysis of the selected cases with the discussion and interpretation of these findings. A final section concludes this chapter.

7.2 The Relationship between the Cases of Oil Pollution Studies and this Thesis

This study aims to analyse the legal civil liability framework concerning petroleum and environmental regulations, in the specific context of oil pollution occurring in the transitional Libyan state, to propose a new civil liability compensation scheme. The selected cases are assessed to determine the type of civil liability rule applied in Libyan courts for oil pollution damage before and after the 2011 revolution and investigate any changes to the application of these rules during the transitional period.

⁵³⁷ See section 7.3 below.

⁵³⁸ See Chapter 3 section 3.4.2 above.

This analysis involves cases concerning civil liability for oil pollution damage. This examination highlights contemporary practice's current weaknesses and deficiencies and adds some brief suggestions to address some of the existing shortcomings.⁵³⁹

Although there is only a limited number of cases of civil liability for oil pollution damage brought before the Libyan courts, the decisions taken by these courts are valuable indicators of the legal interpretation and application of the relevant laws within the context of the Civil Code. These cases are used as evidence of how Libyan laws are being interpreted and applied in this area. They are also helpful in assessing the practical gaps in the existing provisions of the Civil Code governing civil liability for oil pollution damage before and during the transitional period. Although this analysis covers cases of oil pollution damage pre-and post-2011, it focuses more on the cases raised during the present Libyan situation. This reveals the strengths and weaknesses of the currently applicable regime and the impacts of the transitional period on the regime. Therefore, these cases are directly related to the present study. Thus, they would study the impacts of the current Libyan situation on the decisions taken by Libyan courts under civil liability for oil pollution damage.

7.3 The Criteria for Selection of Oil Pollution Cases

The criteria employed for choosing suitable oil pollution damage cases can be listed as follows: (i) a requirement of a claim for compensation for damage resulting from pollution by oil; (ii) a requirement of raising these claims against oil companies before the Libyan courts; (iii) a requirement of claims made either before or post 2011 to distinguish the differences in the domestic courts' treatment of such oil pollution cases.

The selected cases have been chosen according to the criteria set out above. It relates to the incidence of oil pollution damage, the provision of civil liability for oil pollution damage; compensation claims for loss or damage occurring from oil pollution incidents; occurring both before and after 2011, going into the transitional period in Libya. These cases are certain cases that indicate clearly what type of civil liability rules applying to the oil pollution cases. It is important to underline that the chosen cases are not a representative sample nor a qualitative sample rather than an indicative trend. It is also essential to indicate that of the six selected cases, the two pre-2011 ones found liability because of no-fault proved, and the post-2011 cases found liability. However, the fault-based liability rule was applied in these

⁵³⁹ Carsten Stahn, 'Justice under transitional administration: contours and critique of a paradigm' (2004) 27 *Hous.J.Int'l L.* 311-313

cases. Accordingly, they are the most relevant and appropriate cases of civil liability for oil pollution damage. In this research, these cases will be analysed to examine the legal framework of civil liability for oil pollution damage in Libya and propose a strict rather than fault-based liability threshold to make the civil liability regime more efficient.

7.4 Background of the Selected Cases

The selected cases are lawsuits raised by victims of oil pollution damage against the NOC, or one of its subsidiaries,⁵⁴⁰ claiming oil pollution damage before Libyan courts.⁵⁴¹ The facts of these cases concern oil pollution damage involving different oil pollution events over different periods. The oil pollution damage events occurred both pre-and post-2011. In each of the following cases, the oil pollution damage events resulted from leakages from fuelling stations or emissions from gasoline factories, wholly or partially owned by the NOC, to the private lands of Libyan residents.

It is important to emphasise that only the judgements of six selected oil pollution cases will be discussed here, from documents collected from the Libyan courts and the NOC. Among these cases, only the case of *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]* refers to other documents - the opening sheet of the case, the defence memorandum, the letter of referral of the case to the judicial expert and the appeal petition to the expert's report. Of these six cases, two are from the Qaddafi period (before 2011), and the rest (4) is drawn from the post-Qaddafi period (after 2011).

According to the purpose of this research regarding the determination of the applicable liability threshold for the Libyan civil liability regime on oil pollution damage claims pre-and post-2011, the following analytical method has been selected for this purpose. Therefore, in the subsequent sections, the factual background of the selected cases is laid out.⁵⁴² This analysis combines description and examination. The case itself needs to be described concisely through its essential themes, and at the same time, the judgment will be analysed

⁵⁴⁰ See chapter 4 section 4.4.3 above.

⁵⁴¹ Court structure in Libya: The District Court: this is the lowest court dealing, in principle, with less serious cases. It has only limited jurisdiction in civil, commercial, personal status and criminal matters. The Primary Court: it has jurisdiction in al and personal status matters falling outside the jurisdiction of the district court. It hears cases both for the first time and as an appeal court. The appeal court constitutes the second layer of judicial proceedings. The appeal court in Libya is also a court of first instance in certain (major) criminal cases, and in administrative cases. The Supreme Court is Libya's highest court. The main responsibility of the court is to ensure the correct and unified application and interpretation of the law throughout the country. For more information see chapter 2 section 2.4.3 above and see Simpkins (n 198).

⁵⁴² Cengage, 'How to Brief Cases and Analyze Case Problems' (online)

<http://www.cengage.com/resource_uploads/downloads/0324786522_213006.pdf> accessed 05/02/2019.

and discussed. The format of the 'brief' will present the essentials of the case under headings and sub-headings as themes.⁵⁴³

The themes included here are; the case parties, the factual circumstances/situations, the proceedings that the courts have followed to make their decisions in these cases, the role of the experts in these cases. Other themes involve the main legal issues of each case, the legal basis of and applicable rules for these selected cases, and finally, the decisions of these cases.⁵⁴⁴ Accordingly, these themes are described below briefly for each of the following selected oil pollution damage cases, followed by an analytical discussion.

In this study, the six lawsuit cases concerning oil pollution damage are outlined below:

- *Rokia v NOC & Oil Libya company [2008] Jumah District Court/ Civil Department 67, [2008]*
- *Algundi v NOC & Asharara Aldhahabiya Company [2010] Zliten District Court/ Civil Department 249, [2010]*
- *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014] Sawani District Court/ Civil Department 19, [2014]*
- *Auan v NOC & Oil Libya company [2014] Jumah District Court/Civil Department 17, [2014]*
- *Khaled v Oil Libya company & Oil Station No.15 [2016] Elghiran District Court/Civil Department 129, [2016]*
- *Salem v NOC & Oil Libya company & Oil Station No.53 [2017] South Tripoli District Court/Civil Department 197, [2017]*

7.4.1 Parties of the Selected Cases

The selected cases are the lawsuits brought before Libyan courts by the plaintiff whose private property was damaged by oil pollution incidents. These claims were raised against the NOC as either sole or joint defendants involving one or more of its subsidiaries.

In the following sections, the parties of the above case studies are presented in the same order as follows:

⁵⁴³ Michael Makdisi and John Makdisi, 'How to write a case brief for law school: Excerpt reproduced from Introduction to the Study of Law: Cases and Materials' (3rd edn, LexisNexis 2009) <<https://www.lexisnexis.com/en-us/lawschool/pre-law/how-to-brief-a-case.page>> accessed 08/02/2019.

⁵⁴⁴ Owe Flick, *Introducing Research Methodology: a beginner's guide to doing a research project* (SAGE Publications Ltd 2011). 161

- a- The plaintiff: Mrs Rokia Elshahomi, a resident of the Elqasba area, Zliten city;
The defendants: the legal representative of Notional Oil Corporation and the legal representative of Oil Libya company.
- b- The plaintiff: Mr Ali Elgundi, a resident in Kaam area, Zliten city;
The defendants: the legal representative of National Oil Corporation and the legal representative of Asharara Aldhahabiya Company for Oil Services.
- c- The plaintiff: Mr Elnouri Muhammed, who is a resident of the Al-Sawani area, Tripoli;
The defendants: the legal representative of National Oil Corporation, the legal representative of Elbrega Petroleum Marketing Company and the legal representative of Oil Station No. 121 in the Al-Sawani area.
- d- The plaintiff: Mr Ali Auan, a resident in Elqasba area, Zliten city;
The defendants: the legal representative of National Oil Corporation and the legal representative of the Oil Libya company.
- e- The plaintiff: Mr Ibrahim Khaled, a resident in the front of oil station No.15 in Elghiran area, Tripoli;
The defendants: the legal representative of Oil Libya company and the legal representative of Oil Station No.15 in the Elghiran area.
- f- The plaintiff: Mr Ali Salem, a resident near oil station No.53 in Elmanshiya area, Tripoli;
The defendants: the legal representative of National Oil Corporation and the legal representative of Oil Libya company, and the legal representative of Oil Station No.53 in the Elmanshiya area.

Overall, across the selected cases, the plaintiffs or claimants mentioned above are the owners of private properties that may have been damaged by oil pollution. On the other hand, the defendants of the selected cases are the NOC as a substantial respondent and joint defendant with one of its subsidiaries. Except the case Khaled v Oil Libya company & Oil Station No.15 [2016], the first defendant is not the NOC but one of its subsidiaries, as detailed in the above section.

The NOC of Libya is a state-owned company that controls Libya's oil and gas production through several owned subsidiaries. It considers the first party to all oil exploration and production agreements according to law No.24 of 1970.⁵⁴⁵ Moreover, as was

⁵⁴⁵ Open Oil (n 61) 59.

discussed previously in chapter 4,⁵⁴⁶ several subsidiaries are wholly or partially owned by the NOC.⁵⁴⁷ Consequently, the NOC has regularly been sued as the essential defendant in the cases of oil pollution damage with one or more of its subsidiaries, which the NOC considers as a supervisor of them, regarding Article No.177 of the Civil Code.⁵⁴⁸

7.4.2 Factual Background/Circumstances of the Selected Cases

The facts of the case describe the important events and circumstances that led to the emergence of the claim. These facts must be set up sequentially according to their occurrence. Briefly, these facts should indicate the identity and arguments of the plaintiff and defendant and the reasons for the lawsuit, respectively. Therefore, some points are more important than others, and those facts are necessary to prove or disprove a claim.

Accordingly, across the selected cases, facts are related to oil pollution events that somewhat caused damage to private properties of habitats in different parts in Libya, pre-or post- 2011. These damages occurred because of fuelling factories and stations that followed the NOC or one of its subsidiaries. The details of the facts of each case are as follows.

Rokia v NOC & Oil Libya company [2008]: Mrs Rokia was the owner of a piece of agricultural land near a gasoline factory in Zliten city. Her land, including fruit trees, had been polluted by the rising discharges and emissions of the factory, the former of which had caused severe damage to her property. These emissions also accumulated on the leaves of the trees for prolonged periods, thus preventing the natural process of photosynthesis. This hampered tree growth, reduced crop production, and in some instances, destroyed them.

Algundi v NOC & Asharara Aldhahabiya Company [2010]: MrAlgundi has a land property. This land had been damaged because of oil leakage. This pollution resulted from the petroleum station, which was located opposite his property.

⁵⁴⁶ See chapter 5 section 5.4.2 above.

⁵⁴⁷ See chapter 5 section 5.4 above.

⁵⁴⁸ Article No.177 of Libyan Civil Code of 1954 states that “1. A master* is liable for the damage caused by an unlawful act of his servant**. When the act was performed by the servant in the course, or as a result of his employment.

2. The relationship between master and servant exists even when the master has not been free to choose his servant, provided he has actual powers of supervision and control over his servant.”

*The word ‘master’ in this article is used to denote a person who entrusts another with the management of his affairs.

**The word ‘servant’ is used to denote the person entrusted with the management of the master's affairs.

Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]: Mr Alnouri is the property owner, located at the front of fuel station No. 121. His land was polluted by fuel leakage from station No. 121.

Auan v NOC & Oil Libya company [2014]: Mr Auan is the owner of agricultural land. This property is located near a gasoline factory in Zliten city. His land, including fruit trees, was polluted by the emissions produced by the gasoline factory.

Khaled v Oil Libya company & Oil Station No.15 [2016]: Mr Khaled owns land near Tripoli in front of oil station No.15. Mr Khaled discovered that his drinking water source was contaminated by seepage from the mentioned oil station.

Salem v NOC & Oil Libya company & Oil Station No.53 [2017]: Mr Salem is the property landlord. His property contains a drinking water source, which was polluted because of infiltration from the oil station No.53.

7.4.3 Selected Cases' Issues

This section presents the central theme (or main issues) decided by the court. In civil procedure, an issue could be referred to as a single, specific and material point arising out of the allegations and contentions of the parties. It is a matter affirmed on one side and denied on the other, and when a fact is alleged in the complaint and denied in the answer, the point is then an issue between the parties.⁵⁴⁹ The issues of the selected cases listed as follows:

Rokia v NOC & Oil Libya company [2008]: Mrs Rokia claimed that her land, including fruit trees, had been polluted by the rising discharges and emissions of the factory, the former of which had caused severe damage to her property. She sued the legal representative of the NOC and Oil Libya Company as liable for the damages caused by oil pollution. The defendants' response stated that they had followed all obligatory safety procedures and taken precautions to prevent damage to others.

Algundi v NOC & Asharara Aldhahabiya Company [2010]: MrAlgundi claimed that his land property had been damaged because of oil leakage. This pollution resulted from the petroleum station, which was located opposite his property. He sued for damages to be compensated by the defendants.

⁵⁴⁹ Department for Education, 'Methodology for Legal Analysis- FIRAC: Thinking like a Lawyer and Applying statutory law to a fact pattern' <<http://www.judiciary.gov.bt/education/fiml.pdf>>1 accessed 07/02/2019.

Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]: Mr Alnouri claimed that his land was polluted by fuel leakage from station No. 121. Mr Alnouri sued the NOC, requesting compensation for the damages caused by oil pollution. In response, the NOC argued that the expert's report did not provide clear evidence on the existence of the fault on its side because an agricultural expert had prepared it. Thus, it requested to refer the case to another expert who was a specialist in environmental matters.

Auan v NOC & Oil Libya company [2014]: Mr Auan claimed that his land, including fruit trees, was polluted by the emissions produced by the gasoline factory. He sued for compensation for the damages caused by oil pollution. He sued the legal representatives of the NOC and oil Libya company.

Khaled v Oil Libya company & Oil Station No.15 [2016]: Mr Khaled claimed that his drinking water source was contaminated by seepage from the petrol station No.15. After testing the water, he confirmed that the reason for this pollution appeared to be due to leakage from the mentioned petrol station. Mr Khaled sued the defendants for compensation for all damage that resulted from this oil pollution source.

Salem v NOC & Oil Libya company & Oil Station No.53 [2017]: Mr Salem claimed that he and his family could not use drinking water source in his land as it had contaminated and risky due to pollution from the station's fuel. He also stated that he would not find other water sources in his land because the fuel leakage might have spread to all his lands. He decided to sue the NOC for damages, as this source of drinking water was the only one that existed on his property. He sued the defendants for compensation for the oil pollution damage.

Across the selected cases, the issue raised was whether the plaintiff was entitled to get compensation for suffered oil pollution damage or not? Or on the other side, whether the defendant- NOC or its subsidiaries- was liable for oil pollution damage done to the plaintiff? In the sample cases, the primary issue is whether the NOC's failure to prevent oil pollution from occurring is constituted as the establishment of its civil liability. As previously discussed in chapter five, fault as a foundation of tortious civil liability is stipulated in the Libyan Civil Code as a wrongful act based on Article No.166.⁵⁵⁰ Contently, fault, in this

⁵⁵⁰ See chapter 5 section 5.2.2 above.

context, could be determined as an intentional or unintentional act or even through negligence.⁵⁵¹

In the selected cases as a tort lawsuit, the plaintiff seeks to be compensated for NOC's wrongful act regarding their issues. The latter will be deemed liable if he breaches his duty of not harming the plaintiff.

The Libyan Supreme Court affirmed the meaning of the fault in its judgement No.273/38. It stated that

“...the obligation to carry out civil liability for unlawful personal acts as a general rule under Article 166 of Civil Code is that every fault causes damage to another, that who committed it shall be obliged to compensate it. Accordingly, the right to claim compensation based on this provision shall not be waived unless this fault is not abolished, no damage occurred because of this fault, or no causal relationship between this fault and damage. These are the elements of civil liability to claim compensation.”⁵⁵²

7.4.4 The Court Proceedings on the Selected Cases

There are various stages that the claim will pass through during litigation before the court's judgment is issued. In general, the lawsuit is brought based on the rules included in the Code of the Civil and Commercial Procedures of 1953⁵⁵³⁵⁵⁴ by the person (plaintiff) who has a personal and direct interest, according to the following procedures.⁵⁵⁵

Confidentiality: The pleading shall be public unless the court decides on its initiative or at the request of one of the litigants to conduct it in secret to preserve the public order or observe the ethics of the family privacy. However, only the parties and their lawyers can access court files.⁵⁵⁶

Commencement of proceedings: The case shall be brought to the court at the request of the plaintiff by a petition declared to the defendant by a bailiff of the judicial declaration unless the law otherwise requires.⁵⁵⁷

In tortious claims, the claimant may file their claim with the competent court, but only after he notices the defendant and allows him a grace period to fulfil his obligations amicably. If

⁵⁵¹ See chapter 5 section 5.3.2 above.

⁵⁵² The Judgement of the supreme Court No.273/38 which was issued on 05/04/1994 and published in the official Gazette No.3&4 year 29 of 1994.

⁵⁵³ Libyan Code of Civil and Commercial Procedures was enacted on 28th November 1953. [available online] < <http://www.aladel.gov.ly/home/wp-content/uploads/2015/04/pdf>> accessed 10/02/2019.

⁵⁵⁴ See chapter 3 section 3.2.3 above.

⁵⁵⁵ Libyan Code of Civil and Commercial Procedures (n 549) article No. 4.

⁵⁵⁶ Ibid article No. 130.

⁵⁵⁷ Ibid article No. 80.

the defendant insists on continuing the breach of obligations, the claim is filed by registering a statement with the court clerk. The court bailiff must deliver a copy of the claim to the defendant and inform the defendant of the time and date of the hearing.⁵⁵⁸

Later stages: After the defendant receives the statement of claim, the case progresses with adjournments to allow the parties to submit their arguments. They may take a few weeks or several months. The court may rely on experts regarding technical matters.

Declaration process timetable: The time to appear before the Court of First Instance and the Court of Appeal shall be at least eight days in the civil case and three days in the commercial proceedings. The date shall be three days before the District Court. If necessary, these two days may be reduced to three days and or to twenty-four hours.⁵⁵⁹

Litigation process timetable: The 1953 Code of Civil and Commercial Procedures also determines the procedural schedule of the lawsuit. The court process is usually slow and complex. First instance proceedings typically take at least two to three years. Appeals can take up to two years. In commercial and civil matters, a further appeal may be made on errors of law to the Court of Cassation. The process timetable depends mainly upon the nature of the case and the judge.

Case Dismissal: If the plaintiff or the defendant do not attend the hearing, the court shall issue a judgment in the case if it is valid for judgment or else it is dismissed. If sixty days have elapsed and neither of the litigants has demanded to proceed or attended after proceeding with the case, it is considered null and void from the beginning. This can have severe consequences if limitation periods apply, as the right of claim may be lost.⁵⁶⁰

Evidence: The opening sheet of the case shall include all the particulars mentioned in the judicial declaration papers, the court to which the litigants are required to appear, and the day and hour of their attendance.⁵⁶¹ The facts of the case, its evidence, the plaintiff's requests, and its causes shall be stated in the opening sheet of the lawsuit.⁵⁶²

The Code of Civil and Commercial Procedures allows the parties to provide their evidence when filing the claim or defense; however, it is delayed until the trial, where parties present

⁵⁵⁸ Ibid article No. 81.

⁵⁵⁹ Ibid article No. 83.

⁵⁶⁰ Ibid article No. 102.

⁵⁶¹ Ibid article No. 81.

⁵⁶² Ibid article No. 82.

both the oral and documentary evidence on which they rely. There is no requirement for a party to provide evidence that may assist his opponent's case.

Examination of witnesses: The questions shall be directed to the witness by the court or the judge. The witness shall answer the questions of the party who claimed his testimony first and then the other party's questions without any of the parties interrupting one another or the witness at the time of the testimony.⁵⁶³

Appointment of experts: The Code of Civil and Commercial Procedures provides for the Court's authority to appoint from one up to three experts upon necessity.⁵⁶⁴ Thus, the court can appoint one or more experts based on the requirements of the case brought before it. The court could estimate the expert evidence, even if the parties to the lawsuit request it. The Court may order the party of its own accord to submit the documents it has cited and may order the technical expertise, the examination of the persons, the inspection of the shops, the documents and everything that may serve as evidence.⁵⁶⁵

The court may, upon its discretion or any of the parties' request, appoint experts under the Code of Civil and Commercial Procedures and Law No.1 of 2003 regarding the organisation of judicial expertise.⁵⁶⁶ Nevertheless, experts' reports can be challenged. Upon such a challenge, the court may refer issues to the same experts or re-assign them to different experts.⁵⁶⁷

Experts' Fees: The party who requests the appointment of experts usually pays the experts' fees, while in case the court appoints the experts on its initiative, experts' fees are divided among parties equally.⁵⁶⁸

Appeals: Regarding court structure and grounds for appeal, the Court of First Instance judgments are appealed through the Court of Appeal. Appeals can be based on errors of fact

⁵⁶³ Ibid article No. 229.

⁵⁶⁴ Ibid article No. 201.

⁵⁶⁵ Ibid article No.115.

⁵⁶⁶ For more information about the role of the judicial experts in Libyan legal system, see Law No.1 of 2003 regarding the organisation of judicial expertise issued on 13/06/2003 which amended the law on the organisation of judicial expertise issued on 15/08/1956. (Online) <<http://www.aladel.gov.ly/home/?p=1297>> accessed 03/01/2019. In the same regard, see Libyan Code of Civil and Commercial Procedures of 1953 (n 549).

⁵⁶⁷ Ibid article No. 204.

⁵⁶⁸ Ibid article No. 206.

or errors of law.⁵⁶⁹ Decisions of the Court of Appeal are further appealed through the Court of Cassation. Appeals can be found on errors of law only.⁵⁷⁰

Time limit: The appeal shall occur within thirty days after the judgment was rendered unless the law provides otherwise.⁵⁷¹ The appeal through the Cassation Court shall take place within thirty days after the verdict was rendered.⁵⁷²

Fees: The court obliges the unsuccessful party to pay court fees which are a certain percentage of the final judgment, including the lawyer's fees.⁵⁷³

This is a summary of the necessary procedures included in the Code of the Civil and Commercial Procedures of 1953 and its amendments in which the civil and commercial lawsuit may pass through it during litigation. Furthermore, the following section will provide a brief of the actual procedures of the selected cases, followed by the role of the judicial expertise in the Libyan legal system.

7.4.4.1 Procedures of the Selected Cases

This section pinpoints the determinative proceedings of the case, such as those that indicate the opening, hearing procedures and the verdict of the case, including those who refer the matter to judicial experts who make a final decision.

In Rokia v NOC & Oil Libya company [2008], Mrs Rokia sued the legal representative of the NOC and the legal representative of Oil Libya Company on 04 December 2008. Then on 14 April 2009, the court referred the file of this case to the expert, based on the plaintiff request, who prepared report No.7 of 2008. The court provided the decision on this claim on 25 October 2009.

In Algundi v NOC & Asharara Aldhahabiya Company [2010], Mr Algundi brought his lawsuit against the legal representative of NOC and the legal representative of Asharara Aldhahabiya Company for Oil Services on 19 January 2010. Based on the claimant request, the judge decided to refer this case to the expert investigation on 25 March 2010. Then the case was decided on 26 January 2011.

⁵⁶⁹ Ibid article No. 306.

⁵⁷⁰ Ibid article No. 336.

⁵⁷¹ Ibid article No. 311.

⁵⁷² Ibid article No. 341.

⁵⁷³ Ibid articles Nos. 281, 284.

In the case of Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014], on 23 April 2014, Mr Alnouri raised the lawsuit against the legal representative of the NOC and the legal representative of Oil Station No.121 before the Al-Sawani District Court- Civil Department. The case was referred to the agricultural expert based on the plaintiff request. Then on 18 April 2016, based on the defendant request, the court directed the lawsuit file to a specialist expert in the environment to prepare a complete report about the reasons for the claimed pollution, the date of leakage, and the station storage statute. On 11 November 2017, the court issued its decision about this case.

The court proceedings on *Auan v NOC & Oil Libya company [2014]*: Mr Auan brought his lawsuit against the legal representative of the NOC and the legal representative of oil Libya company on 19 February 2014. Then on 14 April 2014, the court invited the expert who was appointed based on the plaintiff request and prepared report No.85 of 2013 about this case to discuss its elements. The court supplied the decision on this claim on 23 June 2014.

In the case of *Mr Khaled v Oil Libya company & Oil Station, No.15 [2016]*: on 21 April 2016, Mr Khaled brought a lawsuit against the legal representative of the NOC and the legal representative of Oil Station No.15 in the Elghiran area. On 19 May 2016, the judge referred this case to the environmental expert to prepare a detailed report including the reason for pollution and estimation of pollution, based on the claimant request. On 08 June 2016, the judge discussed the expert report No.129/2017. The court issued its decision on this case on 07 July 2017.

In *Mr Salem v NOC & Oil Libya company & Oil Station No.53 [2017]*: on 13 January 2017, Mr Salem raised a claim against the defendants. Based on his request, the court referred the lawsuit's file to the judicially appointed expert on 20 September 2017. The verdict of this case was issued on 01 December 2017.

Notably, the referrals of these cases to the relevant experts have been highlighted due to their importance in determining the reasonableness of the court's decision. Accordingly, after presenting the proceedings of the courts during the hearings of the selected cases, it is essential to emphasise the role of the experts on these cases in the Libyan legal system. As shown in the next section, across the selected cases, the judges referred the files to the judicial experts⁵⁷⁴ to investigate them based on Article No.115 of the Libyan Code of the

⁵⁷⁴ The Libyan civil law system used this expression to indicate the technical expertise likewise the French civil law which the latter considers the essential source of most Libyan legislation. In the regard of the judicial expertise see French Attorneys & counselors at law, 'French law concept of expertise' (Aubyn French, 29 May 2019) <<http://www.aubyn.fr/texte.php?id=58>> accessed 29/05/2019, and Marc Frilet and

Civil and Commercial Procedures. In some instances, the judge invited the experts to discuss and clarify some points included in their reports.

Significantly, the expert reports themselves are not available as separated documents; however, the details of these reports being reviewed were included in the judgements of the selected cases.

7.4.4.2 Role of the Judicially Appointed Experts in the Libyan Legal System

In terms of the role of the experts in the Libyan legal system as a civil law system, the judicially appointed expert (court-appointed expert) is a professional in a specific field, such as technical, technological, engineering or scientific, which would include medicine, architecture, economy, environment, finance, etc.

The charter of judicial expertise is regulated by the Code of Civil and Commercial Procedures of 1953 and the Law of Organisation of Judicial Expertise No.1 of 2003.⁵⁷⁵ Although both laws govern the main points related to the purpose of the judicial experts, however, the Code of Civil and Commercial Procedures focuses on the method of appointing experts through the court, including their tasks, fees and the situations of appointment them by the court. The law of Judicial expertise provides more details focusing on the expert's registration on the Court lists, the criteria of registration, their oath, and their method of registration and removal from these lists.

Following law No.1, acts of expertise in courts shall be performed by experts specialising in all fields. Their technical or scientific opinion shall be sought whenever necessary.⁵⁷⁶ Actions of expertise may be delivered via offices or cooperatives that are established for this purpose.⁵⁷⁷

Additionally, the experts shall be registered in schedules according to their respective specialisation, which is referenced in the Courts of Appeal or the Courts of First Instance,

Laurent Karila, 'The critical role of judicial expertise in construction litigation and arbitration in France' (2013) 8 CLI 42 <<http://www.gcila.org/wp-concept/uploads/knowledgecenter/CNT-GEN7>> accessed 29/05/2019.

⁵⁷⁵ For more information about the role of the judicial experts in Libyan legal system, see Law No.1 of 2003 regarding the organisation of judicial expertise issued on 13/06/2003 which amended the law on the organisation of judicial expertise issued on 15/08/1956. (Online) <<http://www.aladel.gov.ly/home/?p=1297>> accessed 03/01/2019. In the same regard, see Libyan Code of Civil and Commercial Procedures of 1953 (n 549).

⁵⁷⁶ Article No.1 of Law No.1 of 2003 of the organisations of judicial expertise (n 562).

⁵⁷⁷ Ibid article No.2

regarding the provisions of this law.⁵⁷⁸ For this registration, there are set criteria to be fulfilled within this law,⁵⁷⁹ whereas their fees should be defined by the judge who has appointed them based on the measures contained within this law.⁵⁸⁰

Practically, the use of court-appointed experts appears to be frequent to aid decision-making. As might be expected, experts are most often appointed to understand the technical issues necessary for judges to reach their decisions.

The mandate of an expert relates to the need for technical precisions to enlighten the judge's reflection. The experts perform their missions independently and bring the judge a piece of technical advice on which to base his judgment. Although the expert's report usually is advisory, in practice, as has been discussed,⁵⁸¹ the judges' decision is influenced strongly by the reports of experts. This could attribute to the nature of the facts of the selected cases as they deal with pollution matters which need technical expertise of which judges lack the knowledge to consider.

In this context, the analysis of the sample of selected cases affirmed that reports of the appointed experts influenced judges' decisions. For instance, the case *Rokia v NOC & Oil Libya company [2008]* was dismissed based on the details provided by the appointed expert in report No.7 of 2008.⁵⁸² The judge thus rejected the case according to this report and justified his decision by stating that:

“... according to the expert's report No.7/2008, there is no fault on the side of the defendants because they took all required precautions to prevent damage to the plaintiff's property. The report also proved that there were damages in the claimant's land. However, since expert report No.7 stated that the defendants committed no wrongful act, no causation relationship could be discussed. Therefore, since there was no fault on the defendant's side, no liability could be established as the basic element- the fault and the causal relationship- did not exist. Thus, with regards to the provisions of article 166, the liability elements were not available.”

Furthermore, the judge in *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]* also depends on the technical expertise in ruling his final decision on this case. For further details, the claimant in the opening sheet of his claim file, which

⁵⁷⁸ Ibid article No.3

⁵⁷⁹ Ibid article No.5

⁵⁸⁰ Ibid articles Nos.14-19, and Code of the Civil and Commercial Procedures, (n 549) article No.206.

⁵⁸¹ See section 7.4.3.1 above.

⁵⁸² It is important to note that the expert's report was included in the judgement itself of the case of *Rokia v the NOC [2008]*.

had been raised on 05 May 2014, requested an appointed agricultural expert to investigate the land conditions, pollution source, type of claimed damages and estimation of these damages. The court responded to the plaintiff's request by appointing an agricultural expert to complete this mission. The appointed expert submitted his report, which stated that pollution in the property of the plaintiff resulted from the leakage of the petroleum station No.121. However, the defendants submitted an appeal against the mentioned report. The defendants stated that this report is not sufficient to prove the source of pollution. This report has been submitted by an agricultural expert who is not professional in oil pollution matters, and the subject of this case is beyond his jurisdiction.

Conversely, he requested an environmental expert to investigate any pollution damage, its extent, and its source. On 2 May 2016, the court decided to refer the case file to the previous agricultural expert with the specialist environmental expert to prepare the comprehensive expertise report about this case.⁵⁸³ To achieve their mission, the experts invited the parties to attend the expertise mission.⁵⁸⁴ They made an examination visit to the claimant's land to identify whether there is pollution or not, the claimed damage, the source of pollution, its date and the condition of the storage of station No.121.

The appointed experts had submitted technical report No.64 on 27 November 2016. They stated that there was a leakage from station No.121. The report demonstrated that the date of pollution and the source of pollution was the leakage from the mentioned station. This leakage affected the plaintiff's property, in which the source of drinking water had been polluted as a result of the oil escape. The agricultural land of the plaintiff had been damaged because of the exposed oil pollution from station No.121. Moreover, the experts had estimated the amount of damages which the plaintiff suffered.

Thus, the judge built his decision on the aforementioned technical report, which the two appointed experts had prepared. The judge stated that

“...the liability elements were available. According to expertise report No.64 of 2016, the fault of the defendants is proven. The damages also were established on the plaintiff's land and the drinking water source by this report. These damages are caused by fuel leakage directly into the claimant's land, including the water well that irrigates the farm. This has been demonstrated by taking a sample of well water. This sample has been tested

⁵⁸³ Based on article No.201 of Code of Civil and Commercial Procedures.

⁵⁸⁴ Based on the article No.203 of Code of the Civil and Commercial Procedures the parties of case are sometimes invited to attend during the expertise mission and bring any documents might assist the court-appointed expert in his work.

to determine whether it is contaminated by oil or other substances. This test has revealed that the water well is polluted by leakage of fuel. The conditions of fuel station No.121 has been diagnosed in which the report proved that there was oil waste from it.

According to the attached technical report concerning material damages, they were valued at seven thousand Libyan Dinars. Furthermore, the causal relationship was also available throughout the report in which indicated that the damages were because of the oil leakage from the mentioned fuelling station. Consequently, this would entail the civil liability for the defendants by article No.166 of Civil Code, to pay an adequate compensation that the court considers to be fair and reparation according to articles Nos.173,224&225 Civil Code. The court drops the plaintiff's exaggerated request regarding the moral damages and estimates them at eight thousand Libyan Dinars.

The court upheld the case, holding that in the presence of the plaintiff and defendants to oblige the co-defendants to pay an amount of fifteen thousand Libyan dinars, in total, to the plaintiff as compensation for the claimed material and moral damages, with the duty to cover the expenses of the lawsuit and costs of lawyers.”

7.5 Legal Basis of the Selected Cases

The legal basis of the selected case determines what legal rules potentially apply to the issues and where the rule originates. The rule of law is the rules, legal principles, and precedence pertinent to deciding the stated issue. It is a legal summary of all the rules used in the analysis.⁵⁸⁵ The court gives reasons for its decision in which the case or statutory law relied on by the court in arriving at its conclusion. This includes references to the relevant laws and legal principles that the court applied to conclude the case. It reflects how the court applies the applicable law on the facts of the selected cases.⁵⁸⁶

Further, the decision reflects the opinion of the judge based on the application of the legal rules on the background cases' facts.⁵⁸⁷ It is important to note that the final decision of the court, based on the Libyan Code of Civil and Commercial Procedure,⁵⁸⁸ reflects the statement of what the judge has concluded about the case concerned. This statement does not include any details for reaching this decision; instead, it consists of the final decision. The rationale for this and all other information were previously provided in the different parts of the judgement.

Accordingly, the selected cases have been associated with the articles included within the Libyan Civil Code context regarding liability rules.

⁵⁸⁵ Cengage (n 542).

⁵⁸⁶ *ibid.*

⁵⁸⁷ Michael Makdisi & John Makdisi (n 543).

⁵⁸⁸ Article No.273 of Libyan Code of Civil and Commercial Procedures.

Across the selected cases which were accepted or dismissed, have been brought and ruled based on article No.166, which stipulates that “Every fault that causes damage to another, that who committed it shall be obliged to compensate it.”⁵⁸⁹ Based on this article, the person responsible should commit a fault, which causes injury to another. However, Article 167 of the Civil Code requires that the person who commits fault be discretion, and his fault (act) should be unlawful.⁵⁹⁰

Regarding the above two articles, as demonstrated in detail earlier in chapter 6,⁵⁹¹ Albadawi defines fault as a deviation from the expected behaviour of the average person that results from discrimination and awareness.⁵⁹²

In the same regard, the Supreme Court confirmed this meaning in its judgement No. 9/15, which stated that

“...since article No.166 of the Civil Code provides that every fault that causes damage to another, that who committed it shall be obliged to compensate it. Accordingly, the elements of tort liability following the mentioned article are fault, damage and causal relationship. Therefore, the person liable for a tortious liability should commit a wrongful act that causes damage to others, and the cause of such damage shall be his fault. It is common in jurisprudence that the fault in tort liability is a deviation from the usual attitude of the average person, and this fault should be proved. Thus, for those who claim a fault from another should prove the evidence of the existence of this fault.”⁵⁹³

Albadawi also states that in civil jurisprudence, the fault could be intentional or unintentional or negligent. The general rule is that civil liability is not affected by the magnitude of the fault but rather the damage amount. The objective of civil liability is to compensate the victims, not punishment the tortfeasor. However, the extent of the fault may affect the amount of compensation.⁵⁹⁴

Nevertheless, applying the rule of the fault-based regime on the cases of oil pollution would face several difficulties, especially those are related to proving the fault or proving

⁵⁸⁹ Article No.166 of Libyan Civil Code.

⁵⁹⁰ Article No. 167 of Libyan Civil Code stipulated that “1. every person who in possession of discretion is responsible for his unlawful acts.”

⁵⁹¹ See chapter 6 section 6.4.

⁵⁹² Muhammed Ali Al-Badawi, *General Theory of Commitment, Part One, Sources of Commitment* (3rd edn, Tripoli University 2013). 277

⁵⁹³ The Judgement of the supreme Court No.9/15 which was issued on 05/04/1969 and published in the official Gazette No.4 year 5 of 1969.

⁵⁹⁴ Al-Badawi (n 592) 285.

that oil pollution is occurred because of unlawful activities of the NOC or one of its subsidiaries.

It is difficult to prove that all damages that occur because of oil pollution result from unlawful activity under the legal concept, which would deem this activity contrary to the provisions of the regulations and laws. Because most of the oil activities that cause oil pollution find their source in regular activity or are permitted according to administrative regulations, they cause damage. The damage caused by oil pollution is not produced in all cases from the commission of wrongful conduct, illegal action, or violation of the laws and regulations in force.

On the contrary, it is produced in most cases from an authorised activity. The operator has obtained prior authorisation from the competent administrative authority and has followed the laws in force without committing any unlawful act or deviating normal conduct. Thus, the operator would take all necessary precautions and measures to prevent or at least minimise the damage, which makes his performance consistent with the expected behaviour and away from suspicion of fault. Nonetheless, more may be exaggerated in taking all precautions, that is, using the latest science reached in modern times; however, there is pollution resulting from these activities. In these cases, it may be impossible to determine the liability of the operator who exploited the activities which causing oil pollution under the rules of the fault-based regime since no fault could be established on his side.⁵⁹⁵

The polluter can deny his liability if he can prove that the fault is not on his side. The polluter needs to take all measures and procedures required by law and that he has done what is necessary following the standard of the ordinary person.⁵⁹⁶

As explained in the former chapter, regarding article No.166, the tortfeasor would be obliged to compensate an injury should they be responsible for causing harm to another person and found liable for committing a wrongful act. A claimant must prove the three elements of civil liability; the fault, the damage, and their association.⁵⁹⁷

In other words, these three elements should be proved by the claimant in the selected cases to establish the liability on the defendants' side- the NOC and its subsidiaries. Therefore, the plaintiffs raised their arguments based on Article No.166 of the Civil Code. In so doing, they

⁵⁹⁵ Saad (n 516) 194.

⁵⁹⁶ Abdulrahman Bou Falja, 'the civil liability for environmental damages and the role of the insurance' (PhD Thesis, University of Abu Bakr Belqayed-Algeria 2016). 64

⁵⁹⁷ Petruta-Elena (n 478) 118.

tried to prove that: oil activity of the NOC or its subsidiaries could be described as a wrongful act (fault). They also claimed that this wrongful act caused oil pollution and their properties suffered damages resulting from this act. These damages were a direct result of the mentioned fault of the NOC; thus, these damages would not occur without this wrongful act.

For that reason, the plaintiffs in their opening claim sheets- as the judges reported in their judgements of the selected cases- requested referring the file of the cases to the judicial expertise to prepare an expert report- since these cases concerning technical issues relating to oil pollution. Based on these facts coupled with the lack of judges' knowledge to be considered in these matters, the courts- as explained in the above section- referred these cases to judicial expertise, and thus, built their decision in proving or disproving the elements of civil liability on the content of the experts' reports.

Consequently, in the context of the selected cases, the courts found that the plaintiffs raised their arguments on the correct basis of law since they associated them based on Article No.166 of the Libyan Civil Code. For instance, in the case of *Salem v NOC & Oil Libya company & Oil Station No.53 [2017]*, the judge stated that:

“The court was dealing with a lawsuit, and during the process of discussing the evidence of the case, its expertise report, its findings, its documents, and its other hearings found that the plaintiff has established his lawsuit on a sound basis of reality and law since the elements of civil liability are available in the case based on the expert report. This would entail civil liability for the defendants following article No. 166 of the Libyan Civil Code.”

On the one hand, it was dismissed in the cases of *Rokia v NOC & Oil Libya company [2008]* and *Algundi v NOC [2010]*. The judges ruled their judgements based on article No.166, in which the fault, which is considered an essential element of the civil liability, was not approved. Since the fault did not exist, the other aspects of civil liability, particularly the causality relationship, did not exist as well. Thus, the claim of the plaintiff was dismissed.

Importantly, across these cases decided in the pre-2011 period, article No.166 of the Civil Code were applied to them. Since the elements of the fault-based liability regime were not found, the civil liability of the NOC was not established. The courts justified their judgments as no fault could be attributed to the defendants in which their activities could not be deemed unlawful based on the expert's reports regarding these cases.

For example, *Algundi v NOC & Asharara Aldhahabiya Company [2010]* was rejected. The court justified its decision based on the application of the previous article to the facts of this case. The statement of the court is as follows:

“The court has discussed the lawsuit evidence and documents and clarified that the plaintiff has not stated his lawsuit based on factual reality and law in which the liability elements were not available in this case. According to the expert’s technical report No.32/2010, the defendants took all required precautions and measures to prevent damage to the plaintiff’s property. The defendants commit no wrongful act. Therefore, following the provisions of article 166, the liability elements were not available; the fault has not been proved on the defendants' side. Thus, according to expert report No.32, no wrongful act can be attributed to the defendants. Since there was no fault on the defendant's side, no liability could, therefore, be established as the essential elements of the civil liability- the fault - did not exist, according to article No.166 of the Civil Code.

For these reasons, the court allowed the case, holding that in the presence of the plaintiff and defendants that the case was dismissed, and that the plaintiff is charged with the expenses.”

Accordingly, the Supreme Court in decision No.41/191⁵⁹⁸ confirmed that in the instances of compliance with the applicable legislation and precautions during the operation of industrial activity, it could not describe this activity as unlawful and thus could not be considered as liable for the suffered damage.

“...the tort liability under the provision of Article 166 of the Civil Code shall not be incurred unless the fault caused the damage. It is not enough to establish this liability, and thus, entail the right for compensation just because of the damage. Still, the injured person must prove the occurrence of a fault in which caused this damage and associated with it by the causality. Any breach of an obligation imposed by the applicable legislation or scientific assets of the profession shall be considered a professional fault, considering the circumstances and possibilities available.

Although the occurrence of such damage is presumed to be a presumption of wrongdoing or breach of obligation, however, this simple presumption does not preclude proof that the activity was exercised without committing a professional fault and without prejudice to the obligations imposed by the applicable legislation or scientific assets of the profession and that the damage was not the result of any wrongdoing or breach of obligation.”⁵⁹⁹

On the other hand, across the cases which were decided in the post-2011 period, the articles Nos.166, 224 and 225 of the Civil Code were interpreted & applied differently to them. Consequently, civil liability was established in which the NOC was liable for the damages inflicted on the plaintiffs. The courts justified their judgments as to the elements of based-fault liability had been proved based on the expertise reports about these cases. In these cases, which were all accepted, the judges ruled their decisions based on Article No.166, in which the elements of the civil liability were proved. Consequently, the courts stated that the defendants had been found liable for the claimed oil pollution damages based on the pre-

⁵⁹⁸ The Judgement of the Supreme Court No.41/191 which was issued on 10/03/1997.

⁵⁹⁹ Ibid.

mentioned article. Thus, the plaintiffs entail compensation for the suffered injuries caused by oil pollution based on Articles Nos. 173, 224 and 225 of the Civil Code.⁶⁰⁰

For instance, the case of *Khaled v Oil Libya company & Oil Station No.15 [2016]* was accepted in which the court justified its decision based on the application of the previous articles on the case's facts. The following is the reasonable statements of the court:

“...as the court is in the process of forming its doctrine and legal opinion, after that, reading the file of the case and full coverage of it, it becomes clear to them that this case was established based on reality and law, in which the pillars of civil liability of fault, damage and causal relationship between them exist in this case. The defendants' fault is proven and confirmed based on the attached expertise report No.129 of 2016.

The fault was available in the act to not take any protection or procedures to prevent or reduce oil leakage from the fuelling station No.15. According to the expert's report, the damages also were proved on the plaintiff's land and drinking water well by the technical report, which ensures that the drinking water well was polluted and became unhealthy to drink or even water the plants. The causal relationship was also available throughout the report, which indicated the damages directly resulted from seepage from the mentioned petrol station. Based on the reporting expertise, there was a leakage from petroleum station No.15. The report additionally proved that the water drinking source was polluted, and the type of polluting substances was of the same petroleum material leaking from the mentioned station. Thus, this would entail civil liability for the defendants under Article 166 of the Civil Code to pay adequate compensation. According to articles 173/224/225 of the Civil Code, the court considers fair reparation and justice.

For these reasons, after hearing the evidence, the court held that in the presence of the plaintiff and defendants to oblige the co-defendants to pay an amount of ten thousand Libyan dinars, in total, to the plaintiff as compensation for the claimed material and moral damages, with a duty to cover the expenses of the lawsuit and costs of lawyers.”

⁶⁰⁰ Article No.173 of Libyan Civil Code: “The Judge shall decide, in accordance with the provisions of Articles 224 and 225 and in the light of the circumstances, the extent of the damages for the loss suffered by the victim. If the Judge is not in a position at the time of the judgment to fix definitely the extent of the injury, he may allow the victim a delay within which he may claim reassessment of the damages.”
Article 224. “1. The judge will fix the amount of the damages, if it has not been fixed on the contract or by law. The amount of damages includes losses suffered by the creditor and profits of which he has been deprived that they are the normal result of the failure to perform the obligation or delay in such performance. These losses shall be considered to be a normal result if the creditor is not able to avoid them by making a reasonable effort.
2. When, however, the obligation arises from contact, a debtor who has not been guilty of fraud or gross negligence will not be held liable for damages greater than those which could have normally been foreseen at the time of entering into the contract.”
Article 225. “1. Damages also include compensation for moral prejudice. The right to compensation for moral prejudice cannot, however, be transmitted to a third party, unless it has been fixed by agreement or it has been the subject of legal proceedings,
2. The Judge may award compensation for moral prejudice only to spouses and to relatives up to the second degree, by reason of grief caused to them by the death of the victim.”

Further, as the NOC controls the oil industry in Libya under law No. 24 of 1970 through its wholly-owned subsidiaries, or in partnership with others, as discussed previously in chapter 4.⁶⁰¹ The claimant sued the NOC as the primary defendant (master) and its subsidiaries as co-defendants (servant). Accordingly, the plaintiffs in these cases referred their lawsuit to the legal basis of article No.177 of the Civil Code.⁶⁰² According to this article, the NOC has regularly been sued as the substantial defendant (master) in the oil pollution damage with one of its subsidiaries (servants) in which the NOC is considered a supervisor. It is important to underline that there is no obligation on the plaintiff to sue when its subsidiaries have an independent financial provision NOC, such as in the case of *Khaled v Oil Libya company & Oil Station No.15*. However, the plaintiffs prefer to sue the NOC as their supervisor, considering its financial capacity and ability to pay compensation upon judgment. The NOC could not, in these cases, deny its liability if the elements of civil liability were proved on the side of its subsidiaries. For example, in the case of *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]*, the judgement stated that "...as the second and third defendants follow administratively to the first defendant (NOC), these parties should share the liability under the provisions of Article No.177 in the Civil Code."

In this context, Al-Senhoury states that: "The liability of the person who is responsible for the work of his subordinate is the liability of others- in any case, interpreted, especially if it has been associated to the idea of guarantee- it makes the master responsible for his subordinate, and he cannot deny this responsibility even he proved that it is impossible to prevent the illegal work of his follower which caused the injury. This is because his obligation is a commitment to achievement rather than a commitment to care. The source of his liability is not the agreement to require discrimination, but rather its source is the law."⁶⁰³

7.6 In-depth Analysis

⁶⁰¹ See chapter 4, section 4.4.3 above.

⁶⁰² Article No.177 of Libyan Civil Code "1. A master* is liable for the damage caused by an unlawful act of his servant**. When the act was performed by the servant in the course, or as a result of his employment. 2. The relationship between master and servant exists even when the master has not been free to choose his servant, provided he has actual powers of supervision and control over his servant."

*The word 'master' in this article is used to denote a person who entrusts another with the management of his affairs.

**The word 'servant' is used to denote the person entrusted with the management of the master's affairs.

⁶⁰³ Al-Sanhoury (n 506) 1186.

In the preceding sections, the background of the selected oil pollution cases as a sample of an applicable rule, including their parties, facts, court's proceedings, central issues, legal basis and final decisions, have been evaluated based on the briefing of these cases.⁶⁰⁴ This analysis, together with the previous content analysis of the current legal framework of civil liability for oil pollution damage,⁶⁰⁵ have been performed to achieve the objectives and answer the central questions of this research.

Accordingly, examining the selected oil pollution cases reveals some potential findings of interest to the present study related to the applicable civil liability regime. Some of these findings relate to the judicial decision about oil pollution cases themselves. In contrast, the other results are related to the impacts of the current situation in Libya on these cases. Accordingly, the findings related to the themes described above⁶⁰⁶ based on the facts of the selected oil pollution cases will be discussed below; these are as follows.

7.6.1 Judicial Decisions of the Oil Pollution Cases

7.6.1.1 The Fault-based Civil Liability Regime is the Applicable Rule in the Libyan Courts

The analysis found that Libyan courts apply the provisions that govern the civil liability in general, which codify in article No.166 of Civil Code, on the oil pollution cases. The discussion in the previous chapters has shown that there are no particular legislative provisions which regulate the oil pollution cases are included in environmental and petroleum laws. The analysis of oil pollution cases in this chapter reveals that the courts applied the fault-based liability in such cases. For instance, in the case of *Auan v NOC & Oil Libya company [2014]*, the judge stated that:

“The court was dealing with a lawsuit, and during the process of discussing the evidence of the case, its findings, its documents, and its other hearings, it found that the plaintiff has established his lawsuit on a sound basis of reality and law since the elements of civil liability are available in the case. This would entail civil liability for the defendants under article No. 166 of the Libyan Civil Code.”

This decision confirms that the civil liability rule stipulated in the Libyan Civil Code, which is a fault-based liability, should be applied to the cases of oil pollution damage. As concluded

⁶⁰⁴ See section 6.4 above.

⁶⁰⁵ See chapters 3,4, and 5 above for more details.

⁶⁰⁶ For more information see section 6.4 above.

previously,⁶⁰⁷ this is due to the limitation of the environmental and petroleum laws, which do not include any provisions that may regulate and govern these cases. Thus, civil liability can only be applied if the criteria of fault-based civil liability regime- fault, damage, and the causal relationship between them- are met. For the reparation of oil pollution damage to be effective, damages should be a direct result of the fault, which is measurable and immediate and a finite act or incident. There should be identifiable liable parties; a causal link should be established, and a party with legal interest that should bring an action.

Moreover, the court on the case of *Algundi v NOC & Asharara Aldhahabiya Company [2010]* reported that

“...the court has discussed the lawsuit evidence and documents and clarified that the plaintiff has not stated his lawsuit based on correct reality and law in which the liability elements were not available in this case. According to the expert’s technical report No.32/2010, the defendants took all required necessary precautions and measures to prevent damage to the plaintiff’s property, and the defendants commit no wrongful act. Therefore, under the provisions of article 166, the liability elements were not available; the fault has not been proved on the defendants’ side. Thus, according to expert report No.32, no wrongful act can be attributed to the defendants. Since there was no fault on the defendant’s side, no liability could, therefore, be established as the basic elements of the civil liability- the fault-did not exist, according to article No.166 of the Civil Code. For these reasons, the court allowed the case, holding that in the presence of the plaintiff and defendants that the case was dismissed, and that the plaintiff is charged with the expenses.”

On the other hand, in the case of *Salem v NOC [2017]*, the statement of judgement reported that

“...the court has discussed the lawsuit evidence and documents and clarified that the plaintiff has stated his lawsuit based on the correct basis of law and reality since the liability elements were available in this case. Therefore, according to the expert’s report No.75/2017, the defendants’ fault is proved. The technical report also proved the damages on the claimant’s land and drinking water well. It reported that the plaintiff’s drinking water source became unhealthy and risky due to pollution and fuel contamination from the mentioned station. Thus, the plaintiff and his family could not use this source of drinking water, which was the only one that exists in his property, and the fuel leakage was spread in all of the plaintiff’s land. The causal relationship was also available throughout the report, which proved that the claimed damages were because of leakage from oil station No.53. The report revealed a leakage from the fuelling station, and the water drinking well was polluted by the same type of substantial source of petroleum of the mentioned station. Consequently, the expert concluded that the source of pollution for the plaintiff’s property was the seepage from petroleum station No.53. Thus, the elements of civil liability were proved by technical report No.75 of 2017. This would entail civil liability for the defendants under article No.166 of the Civil Code, to pay adequate compensation which the court considers to be fair reparation and justice according to articles 173/224/225 of the Civil Code.”

⁶⁰⁷ See chapter 3 and 4 above.

From both statements, it is evident that the Libyan courts applied the principle of fault-based liability regime on the cases concerning oil pollution damages based on article No.166 of the Civil Code. In the first case, which was brought and ruled before 2011, the judge focused on the availability of the fault. Since the expertise report did not prove the fault, the judge rejected the claim of the plaintiff. Hence, as the fault on the side of the NOC (defendants) was not exist based on the expert report, there was no causal relationship that would be discussed.

Whereas in the case of *Salem v NOC & Oil Libya company & Oil Station No.53 [2017]*, which was brought and ruled after 2011, the judge did not focus on the fault requirement itself. The judge mentioned that although the fault was proved, instead, he focused on the existence of oil pollution damage and the causality relationship in this case. As applied to this case, the rule contained in article No.166 was interpreted to mean that once the plaintiff has made a showing of the existence of oil pollution damage reasonably related to the NOC or one of its subsidiaries polluting activities. In this context, the judge's understanding is that the plaintiff still has the burden to make a showing of harm plausibly connected to the defendant's activities, and the defendant then has the burden of showing the burden of proving its absence. This may reflect the tendency of those judges to interpret the applicable civil liability rules differently in an attempt to mitigate the fault-liability requirement.

7.6.1.2 Importance of the Role of the Judicial Expertise

The judicial expertise plays a crucial role in the Libyan judicial system as the judges mainly depend on the expert report to rule their decisions. This might occur due to the performance in which such experts are appointed and removed according to law No.1 of 2003 on the organisation of judicial expertise and Code of Civil and Commercial Procedures of 1953. Since the judicial expertise is structured carefully by the Libyan regulations, which regulate the experts' performance their registration,⁶⁰⁸ fees,⁶⁰⁹ accountability,⁶¹⁰ etc., these might consider merits of the expert work system. Based on this, the judges derive confidence in dealing with the expert's reports in which the judges might trust the expert's opinions and consider them in ruling their decisions. Additionally, the parties of the cases could appeal in the expert's reports if they are not satisfied with them and request other experts, as shown in *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No.121 [2014]*.

⁶⁰⁸ Law No.1 of 2003 regarding the organisation of judicial expertise (n 562) articles Nos.3-7.

⁶⁰⁹ Ibid articles Nos. 14-18.

⁶¹⁰ Ibid articles Nos. 20-28.

This could be considered another advantage of the judicial experts' system and a guarantee for the case's parties in which the judgement will be ruled.

Further, the appointed experts were invited, in many instances, by the court for clarifying and discussing any unclear points that were included in their reports. For example, in the case of *Auan v NOC & Oil Libya company [2014]*, the expert appointed previously to prepare a report about this case had been invited to attend a hearing on 14/04/2014. The judge asked him to discuss the details of his report and clarify some points that were included in the attached report. By doing so, the judge had made his final decision considering the expert opinion following the discussion during the hearing of this case. The judgement was reported as follows.

“The court has discussed the lawsuit evidence and documents and clarified that the plaintiff has stated his lawsuit based on true reality and law. The liability elements were available in the act of not taking any protection or procedures to reduce oil emissions and avoid damages to the agricultural land situated just two hundred fifty metres away from the factory. Therefore, according to the expert's report, the fault of the defendants is proved. Also, the damages were proved on the claimant's land by the technical report prepared upon declaration no. 85/2013 issued in Primary Court - Zliten, on 05/12/2013, ensuring that the trees were damaged. Equally, the claimant certainly endured emotional turmoil by seeing the destruction of his fruit trees. The causal relationship was also available throughout the report, which indicated the damages were because of dust emissions from Oil Libya Co., which followed the first defendant. This would entail civil liability for the defendants following Article 166 of the Civil Code to pay adequate compensation. According to articles 173/224/225 of the Civil Code, the court considers fair reparation and justice. According to the attached technical report regarding the material damages, the expert estimated the value of them in the amount of 3800 Libyan Dinars. For moral damages, what the plaintiff requests is excessive, which is an enrichment at the expense of others, as compensation is initiated to reparation the damage. Therefore, the court fairly estimates the moral damages at 3500 Libyan Dinars. For these reasons, after hearing the evidence, which was often very documental, the Court held that in the presence of the plaintiff and defendants to oblige the co-defendants to pay an amount of seven thousand, three hundred Libyan dinars, in total, to the plaintiff as a compensation for the claimed material and moral damages, with the duty to cover the expenses of the lawsuit and costs of lawyers.”

Regarding the role of the judicial expertise in the Libyan system, the Supreme Court, in its judgement No.77/18, stated that

“...the court is not obliged to take all the provisions of the expert's report or abide by it, but it has the right to consider part of it and leave the other. However, the court should, if it deems it, disclose its opinion in contravention of the opinion of the expert and justify it with sufficient evidence to accept it.”⁶¹¹

⁶¹¹ The Judgement of the Supreme Court No.77/18 which was issued on 08/05/1973 and published in the official Gazette No.4 year 9 of 1973.

In consideration of the right of a claimant to request technical expertise, the Libyan Supreme Court, in the judgement No.11/26, stated that

“originally, the request for the appointment of an expert is considered a license granted to the court. However, suppose the investigation by the expert is the only way of deduction in proving the claim. In that case, the court may not reject the request for referral to the expertise without apparent reason. Because this refusal leads to depriving the plaintiff of the sole method of proving his case, and this right should not be legally denied.”⁶¹²

7.6.1.3 Challenges of Oil Pollution Damage Cases

7.6.1.3.1 The Difficulty of Proving the Elements of Fault-based Liability

Following proving the elements of fault-based liability, particular problems may, therefore, arise in every respect in the context of oil pollution damage, particularly with the impacts of a transitional situation. It is difficult to expect that all the three requirements mentioned in article 166 will be met simultaneously.

The analysis reveals that proving the elements of the fault-based regime, fault, damage and causation relation, coupled with the impacts of transitional Libyan situation, could be considered a problematic barrier, impeding its application on oil pollution cases.

Turning first to proving of fault, applied to the oil pollution cases, the rule contained in Article 166 of Civil Code ⁶¹³ means that fault of the NOC or one of its subsidiaries is a requirement of fault-based liability, and the plaintiff must prove the evidence for its existence. However, the analysis of the pre-2011 oil pollution cases shows that the fault of the NOC or one of its subsidiaries was rebutted by showing that all precautions were followed. It is also difficult to describe the oil activities of the NOC as unlawful based on Article 167 of the Civil Code.⁶¹⁴ Since the damage caused by oil pollution is not produced in all cases from the commission of wrongful conduct or illegal action or violation of the laws and regulations in force, no fault could be attributed to the NOC or its subsidiaries which means no civil liability could be attached to them.

Regarding multiple sources of pollution, for example, in the cases where oil pollution damage occurred because of the aggregate effect of several polluting acts spread out over

⁶¹² The Judgement of the supreme Court No.11/26 which was issued on 18/11/1981 and published in the official Gazette No. 3&4 year 18 of 1982.

⁶¹³ See chapter 6 section 6.3.1 above.

⁶¹⁴ See chapter 6 section 6.4.1 above.

time and place. Here, the damage could be produced by the cumulative impact of the activities of many operators; it is often not possible to determine which party's actions caused the particular damage. For example, in the case of *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]*, the respondents were not satisfied with the report of the agricultural expert. Thus, they requested another expert, and therefore, the file of the case had been referred to the environmental expert to determine the exact causal source of the sued oil pollution damage is?

The decision of the court to refer the case to the environmental expert was as follows:

“Referring to the court’s decision issued in lawsuit No.19/2014, registered in the Civil district on 18/04/2016, submitted by Mr Elnouri against the legal representative of the NOC and others. The decision stipulated to charge a reappointed expert with another environmental specialist expert, among the experts mentioned in the table, to prepare a complete expert report. The experts are invited to consult the lawsuit file in their attempt to achieve the task, make an examination visit to the location, and clarify the station storage leakage, indicating its date. The experts should notify both lawsuit parties about the expert examination date, with enough time before executing, and should deposit the requested report before the audience date (09/05/2016).”

In terms of a causation relationship, the defendant can exclude the causation relationship by proving the existence of a foreign cause, which contributed to the wrongful act being committed.⁶¹⁵ Accordingly, the analysis of the documents retrieved from the NOC reveals that, under current circumstances of Libya as a transitional state, the NOC may claim that it shall not be liable for damages caused by the oil pollution events that happened during the periods when oil installations were not under its control.⁶¹⁶ Although the NOC accentuated its attempts to prevent several oil pollution events that occurred during the transitional period, these attempts failed because of the actions of the Oil Installation Guards.⁶¹⁷

Similarly, in other oil pollution events, the NOC announced that the oil installations were under a *force majeure* because the events were a result of the activities of a third party such as ISIS.⁶¹⁸ That means the NOC could exclude the existence of the causation relationship by proving the foreign cause- a third party deed- that contributed to the oil pollution damage.

⁶¹⁵Article No.168 of the Libyan Civil Code, ‘Damage caused by a foreign cause if the person proves that the damage was caused by a foreign cause, such as a sudden accident, force majeure or mistake of the injured or wrong of others, he is not obliged to compensate for this damage, unless there is a text or agreement and so on’

⁶¹⁶ NOC (n 21) (n 311).

⁶¹⁷ Ibid.

⁶¹⁸ BBC Worldwide Monitoring (n 20).

It is significant to note that even though no lawsuit has been raised against the NOC claiming that oil pollution damage resulting from the aforementioned oil pollution events that occurred during the civil war, or attacks of different militias groups, in the post-2011 transitional period, there have been oil pollution damage claims reported by locals to the NOC and its subsidiaries.⁶¹⁹ There may be a high possibility for those claimants to sue for compensation for these damages. On the other hand, there is a high possibility for the NOC to take advantage of a foreign cause of these events, considered as force majeure or the action of a third party.

In this regard, the Supreme Court, in judgment No.40/109,⁶²⁰ affirmed the necessity of the availability of the elements of the civil liability to establish it on the defendant's side as follows.

“The provision of Article 166 of the Civil Code stipulated that tort liability has three pillars, namely, fault, damage and the causal relationship between them. This requires that the fault must be the cause of the damage to establish the liability implications. So, if the causality is absent because of the existence of the foreign cause, a person is not obliged to compensate for the damage under article 168 of the Civil Code. This is because the foreign cause cuts the causal relationship, and at the same time abolishes the fault ratio to the liable person.”⁶²¹

7.6.1.3.2 Difficulty of the Identification of the Actual Polluter

In addition to the problems discussed in the previous section, there is another dilemma that could challenge the victims of oil pollution due to the application of the fault-based regime in cases of oil pollution damage. This problem is the difficulty of determining the party liable to be sued for the damages that occurred as an identifiable legal responsible. The problem here is related to establishing a causal link between harmful action and subsequent loss, which could be extremely difficult to do because it is often impossible to determine which party's deeds caused the particular damage. Causation must be proven because each operator is responsible for the damage it has caused, not for harm caused by someone else. An example of this would be a case where the damage has been caused by the cumulative impact of the activities of many operators.

⁶¹⁹ Mahmoud Darwesh and Najla Hamdy, ‘Spotlight: Residents suffer from oil, gas pollution in eastern Libya’ (Xinhua, 29 January 2019) <http://www.xinhuanet.com/english/2019-01/29/c_137784764.htm> accessed 24/06/2019.

⁶²⁰ The Judgement of the Supreme Court No.40/109 which was issued on 27/03/1995.

⁶²¹ Ibid.

An example for this dilemma is the case of *Alnouri v NOC & Elbrega Petroleum Marketing Company & Oil Station No. 121 [2014]*, in which the judge in the determination of the source of the pollution refers this case to the environmental expert, in addition to the previous agricultural expert. The appointment of experts is to investigate the actual source of the claimed damage. This is to ascertain whether the claimed injury resulted from oil pollution from leakage from the fuelling station No.121- as the plaintiff stated in his claim, or whether this pollution was caused by other sources or by the cumulative impact of the activities of many operators.

Even though, as discussed earlier in this chapter,⁶²² the appointed experts in their report attributed the source of the pollution to the oil that leaks from the fuelling station No.121. Based on this report, the court found the defendants, in this case, to be liable to compensate the plaintiff for oil pollution damage. However, the determination of the actual source of oil pollution in many instances would face many difficulties in reality.

7.7 Impacts of the Transitional Period on the Oil Pollution Cases

As discussed in chapters 2 and 3, the content analysis of the literature of post-conflict, transitional, and failed states appear to show that the features and conditions of the transitional state are suitable to describe Libya in the present day as a transitional state.⁶²³ Furthermore, analysing the literature relevant to contemporary Libyan circumstances shows that the current nature of Libya has met most of the characteristics and conditions of the transitional states. Consequently, this situation has influenced Libya as a country and its institutions, including the function of political and judiciary systems. In this view, these sections concern the findings related to the impact of the transitional period on the oil pollution cases. The following sections will focus on what has been found from the analysis of previous cases and possible predictions as a result of future oil pollution cases.

Therefore, evaluating the current situation of Libya leads to an understanding of the Libyan political and judicial systems functions during this period and why the previous legislations that were introduced before 2011 are still applied today, as discussed previously in this thesis.⁶²⁴ Moreover, considering the findings mentioned above of the examined oil pollution cases, which show that the fault-based liability rule is the applicable rule regarding the oil

⁶²² See section 7.4.3.2 above.

⁶²³ Bartu (n 34) and Zoubir and Rozsa (n 29) 1267. See chapter 3 section 3.4 above.

⁶²⁴ See chapter 3 section 3.2.3 above.

pollution cases, and there is a change in the judicial decision without changing this rule. This section will reflect these findings in light of the impact of the transitional period on the oil pollution cases with an attempt to refer them to existing literature and theories related to the influence of the political authority on judicial decision-making.

7.7.1 Comparison between Pre-2011 and Post-2011 Judicial Decisions

The remarkable finding in this research is that although the rules concerning civil liability remain the same rules that were applied pre-2011, the judges' decisions have changed since then. Notably, after 2011, the judges exercised significant discretion in rendering their decisions.

The analysis of oil pollution cases provided further information by proving that the Libyan civil courts apply the rules of the fault-based liability regime. For this type of liability to be valid, certain conditions required by the Civil Code should be met: the wrongful act, the injury, and the causation relation between them.⁶²⁵

In the case of *Rokia v NOC & Oil Libya company [2008]*, for example, the claim was dismissed as the plaintiff could not prove that the defendant was indeed at fault. In this case, the judge stated:

“... with regards to the provisions of article 166, the liability elements were not available; the fault has not been proved on the side of the defendants because the defendants took all required precautions to prevent damage to the plaintiff's property. Moreover, according to expert report No. 7, the defendants committed no wrongful act. Since there was no fault on the side of the defendant, no liability could, therefore, be established as the basic element – the fault – did not exist.”

However, in the case of *Auan v NOC & Oil Libya company [2014]*, for example, the judge decided to accept the claim of the plaintiff and compensate him because the elements of civil liability were proven as follows:

“... under the provision of article No. 166, the liability elements were available; the fault was available from the wrongful act of the defendants since their tortuous act of the emission in the dust and polluted air of their factory and their failure to take precautions to prevent damage to the plaintiff's farm. Moreover, according to the expert report, the fault of the defendants is verified. Also, the damages were accounted for on the plaintiff's land by the report prepared upon declaration No. 85/2013, issued in Primary Court - Zliten, referred

⁶²⁵ Article 166 of Libyan Civil Code stated: “every fault that causes damage to another, that who committed it shall be obliged to compensate it”.

to as 28/2013 and dated 5th December 2013, ensuring that the trees were damaged. The causal relationship was also available throughout the report, which indicated that the damages were because of dust emissions from Oil Libya Co., which followed the first defendant. This would entail civil liability for the defendants under article No. 166 of the Civil Code, to pay adequate compensation, which the Court considers to be fair reparation and justice according to articles 173/224/225 of the Civil Code.”

It is important to note that despite the similarity of factual background and circumstances of both cases and the court applied the same article No.166 to both of them. The judicial decisions are different. In the first case, the plaintiff’s lawsuit was dismissed, whereas in the second example, the lawsuit was acknowledged, and the plaintiff was awarded compensation for the claim.

Despite the significant disparity between the cases, they are related to wrongful acts that were committed. In the case of *Rokia v NOC & Oil Libya company [2008]*, the lawsuit was discharged because the judge considered that there was no fault that could be attributed on the side of the defendants since they have an administrative license to carry out the industrial activity. They followed the guidelines for safety and the prevention of occupational hazards when undertaking industrial activity and prevention of any damages that occur due to this act. Therefore, the defendants' liability could not be enforced because their act of was not considered unlawful.

Whereas in the case of *Auan v NOC & Oil Libya company [2014]*, the plaintiff's claim was accepted because the elements of fault-based liability according to Article 166 were approved by the expert report, as discussed above. As a result, the judge did not focus on the details of the defendants' fault rather than concentrated on the oil pollution damage and the existence of the causal relationship between this damage and the oil activity of the defendants.

It is interesting to note that the analysis of the pre and post- 2011 oil pollution cases shows a notable distinction in the way of ruling these cases. In the post-2011 period, the judges interpret the relevant articles differently, particularly Articles 166 & 167 of the Civil Code. The diligence of judges to interpret the applicable legal provisions differently and move away from the literal application of them might be considered an exception to what was previously applied in the Libyan courts. However, this trend was not evident pre-2011, where the judges were adhering to the literal interpretation of the text.

7.7.2 Role of Politics in Judicial Decision-making

Despite the consistency of the laws applied to compensation cases for oil pollution damage pre-and post-2011, there has been a disparity in the judicial decisions made during this period. This may be attributed to the lack of influence of political authority on the judicial decisions during the transitional period, in which these decisions will be accepted and applied. Under these circumstances, there is a lack of interference of the political authority on the judiciary's work in the post-2011 period, and there are no notable effects of the political decision-making on judiciary decisions, as it was under Colonel Qaddafi's regime. At that time, judges were under strict control by a political authority. They were under a supreme council of judicial bodies administrated directly under the control of Qaddafi's regime. Judges were therefore held accountable when their verdicts were not in line with the propensities of Qaddafi.⁶²⁶ In addition to Qaddafi's arbitrary control over the promulgation and implementation of legislation, he is also empowered to intervene in judicial matters by obstructing the administration of justice or changing court judgments.⁶²⁷

Additionally, decisions made by Libya's judiciary during the pre-2011- even decisions of the Supreme Court, the highest court in the country- were often ignored. For example, many Libyan prisoners who the Supreme Court acquitted were not released when the decisions of the Supreme Court were ignored.⁶²⁸

In theory, judges would exercise significant discretion in rendering their decisions, but in reality, this fact probably is not always actual. There are determinants of judicial decisions, which are law and politics, that in many respects are inextricably intertwined.⁶²⁹ Nevertheless, there is a debate regarding how judges reach their decisions and theories regarding judicial decision-making.⁶³⁰ In practice, the current Libyan transitional situation has proved that the Libyan judiciary has become freer and fairer. This might be because there is a separation between the judiciary and political authority in Libya after the revolution of

⁶²⁶ The supreme council of Judicial bodies was established under the law No.51 of 1976, [online] <<http://aladel.gov.ly/home/?p=1282>> accessed 08/01/2019.

⁶²⁷ Marco Pannella, 'Libya: A judiciary without justice' (2005) <<http://www.radicalparty.org/en/content/libya-judiciary-without-justice>> accessed 14/12/2018.

⁶²⁸ Noha Aboueldahab, *Transitional justice and the prosecution of political leaders in the Arab region: a comparative study of Egypt, Libya, Tunisia and Yemen* (1st edn, Hart publishing 2017). 88

⁶²⁹ Bradley W. Joondeph, 'The Many Meanings of "Politics" in Judicial Decision Making' (2008) 77 UMKC Law Review 347.

⁶³⁰ Timothy J. Capurso, 'How Judges Judge: Theories on Judicial Decision Making' (1998) 29 University of Baltimore Law Forum. <<http://www.scholarworks.law.ubalt.edu/1f%0Ahttp://scholarworks.law.ubalt.edu/1f/vo129/iss1/2>> 5 accessed 20/07/2019.

2011, resulting from the priorities of the political decision-making during the uncertain period, as discussed in-depth previously in chapter two.

Accordingly, this might be related to the judges' behaviour regarding the impacts of transitions in the Libyan statute. As discussed in the previous section, the judges differ in ruling their decisions in oil pollution cases. They make every effort to accept the claims of oil pollution victims, since they interpret the existing civil liability rule differently. On the other hand, the opposite was confirmed in the Qaddafi era, in which the oil pollution cases were unreasonably dismissed with regularity. A real-life example of this is comparing two previously mentioned cases: *Rokia v NOC & Oil Libya company [2008]* and *Auan v NOC & Oil Libya company [2014]*, as discussed earlier.⁶³¹

7.7.3 Independence of the Judiciary

The discussion in the second chapter has demonstrated ample evidence in Libya's literature, marking the first successful civil political transition in 2012. Libya's political transition from four decades of authoritarian military rule to democracy constitutes a momentous milestone in the country's political history. It is influential in that the country has witnessed this after its most extended period of military regimes during the period of authoritarian rule and the first election in its modern history. This is a civil transition that transfers the power from one civil government to another, elected by the Libyan people devoid of military intervention in governance.⁶³²

This situation has impacted the function of the judiciary in some respects. For instance, comparing the judgments of similar oil pollution cases (*Rokia v NOC & Oil Libya company [2008]* and *Auan v NOC & Oil Libya company [2014]*) has shown that there are differences between their decisions. The facts, legal basis, and the procedures of both cases are similar, but the courts' decisions are different. The case of pre-2011 was dismissed, whereas the other cases of post-2011 were accepted, and the claimant was compensated for the claim for oil pollution damage. This might be due to the judiciary system in Libya practising more free and fair trials, and the judges have practised their rule independently from political authority.

⁶³¹ See this chapter section 7.5.2.2.1 above.

⁶³² Hakeem O Yusuf, *Transitional Justice, Judicial Accountability and The Rule of Law* (Routledge 2010). 156

Although, in the present Libyan transition, it is early to say if there is a full separation between the three main powers – executive, legislative and judicial powers. However, in practice, the judge’s method of ruling and interpreting laws after 2011 is distinctive for those that were ruling pre-2011, and this may be considered practical evidence for the independence of the judiciary.

7.8 Conclusion

This chapter examined the oil pollution cases submitted by the oil pollution victims against the Libyan NOC and its subsidiaries. Accordingly, it analysed the backgrounds of the oil pollution cases involving different oil pollution events over different periods. The analysis pointed out that a claimant (or plaintiff) in these selected cases was a party who has suffered from oil pollution events. At the same time, the defendant was the NOC or any one of its subsidiaries. Regarding the facts of selected cases, these cases were raised to receive compensation for the damages resulting from oil pollution incidents. Additionally, the analysis found these cases were submitted based on article No. 166 of the Civil Code.

Moreover, the courts' proceedings on these cases have been pointed out due to their importance in ruling them. In this regard, the judges required some measures to investigate these cases, such as the judicial experience. The court usually appointed experts to prepare reports that include particular points relating to an oil pollution event. However, judges decided to invite the expert to discuss and clarify some included issues within the report in some instances. Here it is crucial to indicate that these reports are not compulsory for judges to apply their decisions. The judges use them as a guide or assistance for making their decisions since the oil pollution matters might need an expert's report as clear evidence to ensure whether there is oil pollution damage and an attributable source of the damage. According to the selected cases' decisions, the analysis revealed the civil liability rule applied on these cases to justify the judge's final decision in both accepted and rejected claims.

The analysis of oil pollution cases has found that the Libyan courts apply the fault-based civil liability regime stipulated in article No. 166 on the oil pollution cases. The application of this regime, coupled with the limitations of the Libyan framework of civil liability for oil pollution damage, has shown that these rules may not be practical to secure compensation for most oil pollution victims, particularly in times of transition. Significantly, the attribution of fault-based civil liability is highly unsatisfactory related to the difficulty of proof of the elements of this type of civil liability rules, particularly regarding a causal relationship.

The discussion has also shown a notable change in the decisions on the oil pollution cases during the post-2011. Although, the applicable fault-based civil liability is still applied without any modification. Accordingly, this may be attributed to the impacts of the transitions period. The judges differ in ruling their decisions regarding oil pollution cases. They currently tend to accept the claims of the oil pollution victims and compensate them. On the other hand, the opposite was confirmed in the Qaddafi era, in which the oil pollution cases were regularly unreasonably dismissed. Therefore, judges and lawyers are currently challenging the previous regime's legal infrastructure in which the laws may not always be understandable, desirable, or easily enforceable.⁶³³

However, it is essential to realise that a few oil pollutions cases have been brought before Libyan courts pre the 2011 revolution and during the transitional period. However, these cases are not representative samples for this study. They could be seen as the practical evidence from Libyan courts showing the type of the applicable fault-based civil liability regime with the extent its efficiency and the judges' tendency in ruling oil pollution cases. Accordingly, the analysis of these cases revealed how the verdicts of the oil pollution cases had been altered, although there were no amendments applicable to the civil liability rules after 2011.⁶³⁴ This could be linked to the legal theory about the influence of political authority on judicial decision-making. With this view, it seems that there is a separation of the Libyan state's central powers, which may be considered one of the main characteristics of the transitional Libyan state. In this regard, the judiciary shows independence to some degree from the political authority.⁶³⁵ Despite the importance of this change in the ruling of oil pollution cases, this finding could not be generalised over Libyan courts. That is because this study was limited to analysing judgements issued by courts in the western region of Libya.

Therefore, although this distinction was evident between the pre-2011 era and post-2011, judicial decisions of oil pollution damage may reflect the desire of the judiciary in Libya to adopt more realistic rules regarding the civil liability regime. This could be considered a basis for new legislation that would mitigate the impacts of the current transitional Libyan

⁶³³ Faran Foley, 'The Role of the Judiciary and Lawyers in Combatting Torture in Libya' (Association for the Prevention of Torture (APT), June 2014) <http://www.apr.ch/content/files_res/mena-digest_faran-foley_the-role-of-the-judiciary-and-lawyers-in-combatting-torture-in-libya_06_2014.pdf>1 accessed 18/12/2018.

⁶³⁴ These rules are stipulated in the related Libyan legislation, which have been analysed in previous chapters. For more details, please return to chapters 3, 4 and 5.

⁶³⁵ Christopher M. Larkins, 'Judicial Independence and Democratization: A Theoretical and Conceptual Analysis' (1996) 44 *American Journal of Comparative Law* 605. 605

situation. In doing so, the relevant International Oil Pollution Compensation regime will be introduced in the next chapter and examined as a suitable model for introduction as a new regime within the Libyan civil system.⁶³⁶ An efficient and appropriately enacted civil liability compensation scheme is meant to solve such discussed issues that might occur in a transitional period, such as Libya after 2011, in a consistent way of applying modern laws. This convention has been selected according to the criteria related to environmental protection, the provision of civil liability for oil pollution damage; a no-fault strict liability regime; and would suit the characterisations of the transitional Libyan state. These points are the subject of the next part of this thesis.

⁶³⁶ IOPC Funds (n 25).

Part 3. A Proposal for a New Civil Liability Compensation Scheme based on the International Oil Tanker Pollution Compensation Scheme's Model and How this would Respond to the Defects Discovered in Part One and Part Two.

Introduction to Part Three

Concluding from the previous two parts, the analysis of the applicable legislation in Libya concerning oil pollution damage by testing the related law cases [pre- and post-2011] helps determine that the current fault-based civil liability regime is ineffective in most oil pollution cases. This is mainly seen in times of uncertainty when an action of a third party or a force majeure could cut the causative link between the oil pollution damage and its source.

Furthermore, to identify and establish the extent to which the Libyan regulations engage with the international regime in the field of civil liability and compensation for oil pollution damage, the IOTPCS⁶³⁷ has been selected as a model to establish a no-fault civil liability scheme with compulsory insurance for oil pollution damage in Libya.

This convention has been selected according to the criteria of the examination of this research, which is related to environmental protection, the provision of civil liability for oil pollution damage, a no-fault strict liability regime, and would suit the characterisations of the transitional Libyan state. Accordingly, this scheme has been chosen to justify and analyse the principles of the international conventions that govern civil liability for oil pollution damage, as well as discuss the relevant literature related to them.

The international liability and compensation regime is currently based on the Civil Liability Convention - International Oil Pollution Compensation (CLC-IOPC) Fund regimes.⁶³⁸ The CLC 1969 and 1971 Fund conventions were amended, leading to the adoption of the CLC 1992 Fund and the 2003 Supplementary Fund Protocol.⁶³⁹ These three instruments implement pollution damage caused by spills of persistent oil from tankers in the territory (including the territorial sea) and the exclusive economic zone (EEZ) or equivalent area of a state party to the respective treaty instrument.⁶⁴⁰

The conventions were endorsed to ensure sufficient compensation pay for victims of oil pollution damage caused by discharge or release from ships carrying oil in bulk as cargo.

⁶³⁷ IOPC Funds (n 25).

⁶³⁸ IOPC Funds (n 72).

⁶³⁹ Ibid 8.

⁶⁴⁰ Article II of CLC 92.

The purpose of these conventions is to launch uniform international rules and procedures for establishing liability for oil pollution damage. Therefore, they provide the basis for liability to be strict. Since it does not have to prove fault on the part of the ship-owner, the strict liability regime is advantageous to claimants in oil pollution incidents. Furthermore, responsibility for oil pollution damage is channelled to the ship-owner. The conventions provide for the person responsible for compensating victims of oil pollution damage. Moreover, the ship-owner must maintain compulsory insurance to ensure compensation in the event of oil pollution damage.⁶⁴¹

The IOTPCS has been chosen as a legal model to establish a similar no-fault civil liability scheme for oil pollution damage in Libya based on the criteria pointed out above. Due to the limitations of the Libyan legal framework of civil liability for oil pollution damage and the advantages of the IOTPCS.^{642 643}

The reflection of the previous two parts in this part sheds some light on the question of “to what extent a new regime of a strict liability compensation scheme could address the limitations of the Libyan framework of civil liability for oil pollution damage, particularly during the transitional phase”. This part has, therefore, been divided into two chapters. The first chapter (chapter eight) critically reviews the international regime on liability and compensation for oil pollution damage. In the second chapter (chapter nine), the capacity developments for establishing a new Libyan civil liability compensation application for oil pollution damage have been suggested.

⁶⁴¹ Gurumo and Han (n 76) 185.

⁶⁴² IOPC Funds (n 77).

⁶⁴³ IOPC Funds (n 72).

8. The International Regime on Liability and Compensation for Oil Pollution Damage: A Critical Review

8.1 Introduction

Under the International Maritime Organization (IMO), the international regime that governs the compensation for oil pollution damage caused by spillages from oil tankers is developed.⁶⁴⁴

In the last century, the world has witnessed the dramatic consequences of oil pollution in marine environments. During this period, the first significant oil spillage through the Torrey Canyon was observed in 1967.⁶⁴⁵ An increase in the amount of oil being transported by sea, in addition to the size of oil tankers, were of particular concern to IMO and the Torrey Canyon disaster of 1967, in which 120,000 tonnes of oil was spilt, demonstrated the scale of the problem of oil pollution.⁶⁴⁶

In light of oil pollution damage, IMO was assigned to set up a framework for providing compensation to those who had endured financially because of oil contamination. Therefore, two conventions were established, in 1969 and 1971, which empowered victims of oil contamination to acquire pay considerably more basically and rapidly than had been conceivable previously. The two treaties were revised in 1992 to increase the limits of compensation payable to victims of pollution.⁶⁴⁷ Additionally, in 2003, an International Oil Pollution Compensation Supplementary Fund (Supplementary Fund) was established as an optional additional fund to the 1992 Fund to provide a third tier of compensation to victims of oil pollution.⁶⁴⁸

This chapter is divided into six sections. Following an introduction, section two specifies a rationalisation for choosing the IOTPCS as model of strict liability regime. Section three provides a background of the international conventions on civil liability and compensation

⁶⁴⁴ In 1948 an international conference in Geneva adopted a convention formally establishing IMO (the original name was the Inter-Governmental Maritime Consultative Organization, or IMCO, but the name was changed in 1982 to IMO). The IMO Convention entered into force in 1958 and the new Organization met for the first time the following year. For more information see IMO, 'Brief History of IMO' <<http://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>> accessed 24/10/2018.

⁶⁴⁵ The Exxon Valdez (that ground in Prince William Sound, Alaska, spilled approximately 40,000 tons of crude oil), the Erika (spilled approximately 30,884 tons of fuel oil and polluted over 400 kilometres French coast), the Prestige (broke in two and sunk west of Vigo –Spain. Approximately 63,000 tons of heavy fuel oil was spilled). For more information see Gurumo and Han (n 76) 183.

⁶⁴⁶ IMO (n 644).

⁶⁴⁷ Article 4 of the 1992 Fund.

⁶⁴⁸ Article 4 of the 2003 supplementary fund protocol.

funds for oil pollution damage. These conventions are reviewed in the fourth section by discussing the principles underlying them and the difficulties of their application in detail. The polluter-pays principle is the subject of the fifth section. Section sixth includes an application of the international regime on the liability and compensation for oil pollution damage. The Libyan status on these conventions is reviewed in the seventh section, while the final section concludes this chapter.

8.2 Rationalisation for Choosing the IOTPCS as a Model for Strict Liability Regime

There are reasons for choosing an international convention of IOTPCS as a model instead of a national or regional regime imposing strict liability for oil pollution damage such as the US, UK, or the EU as comparators.

An international regime could be considered general rules that states can use as guidance when issuing their laws. However, in the case of using a national or regional regime, the domestic circumstances of its law system should be considered. Therefore, the international regime provides standard rules regarding strict liability for oil pollution damage without considering the domestic conditions of the national or regional regime. Moreover, Libya is a member of the petroleum organisation (OPEC), and it is also part of the international convention of 69-CLC. Based on this, it might be beneficial to use such convention as a model for adopting the no-fault strict liability rule in the Libyan law system. Therefore, the IOTPCS has been selected as a model to establish a no-fault civil liability scheme for oil pollution damage in Libya. It has also been chosen to identify the extent to which the Libyan regulations engage with the international regime in civil liability and compensation for oil pollution damage in order to develop them.

Importantly, this research has an examination criterion that laid out for selecting the specified international convention of IOTPCS. This criterion is based on the provision of civil liability for oil pollution damage, civil liability of no-fault regime, suitable for the transitional Libyan state characterisation, and finally related to environmental protection.

Moreover, this scheme guarantees compensation for oil pollution damage through strict liability, which is advantageous to oil pollution victims. The international regimes have been tested by measuring the subsequent developments of conventions governing the civil liability for oil pollution damage by assessing the effectiveness of the current enforcement of IOTPCS. This measure could include the promptness/efficiency of claims administration, transparency of claims and adequacy of compensation, as detailed below.

Based on the criteria and reasons mentioned above, the IOTPCS was chosen as an inspiration amongst other existing strict liability schemes as comparators because it would be the most relevant and appropriate international legal framework for liability as a compensation scheme that provides compensation for loss or damage occurring from oil pollution incidents.

8.3 Background

Two international conventions initially governed compensation for oil pollution damage caused by tankers: the 1969 International Convention on Civil Liability for Oil Pollution Damage (CLC 69) and the 1971 International Convention on establishing an International Fund for Compensation for Oil Pollution Damage (Fund 71). These old regimes were amended in 1992 by two protocols. The amended conventions are recognised as the 1992 Civil Liability Convention and the 1992 Fund Convention.

As of 2 April 2019, 138 States had ratified or acceded to the 1992 Civil Liability Convention, 116 States had ratified or acceded to the 1992 Fund Convention, and 32 States have ratified or acceded to the Supplementary Fund Protocol.⁶⁴⁹

8.3.1 International Conventions on Civil Liability for Oil Pollution Damage (CLCs)

The first Civil Liability Convention was adopted on 29 November 1969 and entered into force on 19 June 1975. This convention was established to guarantee full compensation to individuals⁶⁵⁰ who suffer from oil pollution damage resulting from maritime casualties involving oil-carrying ships. The CLC 69 regulated the liability for such damage on the ship-owner from where the polluting oil escaped or was discharged.⁶⁵¹

⁶⁴⁹ IOPC Funds, ‘The International Regime for Compensation for Oil Pollution Damage: Explanatory Note’ (April 2019) <https://www.iopcfunds.org/fileadmin/IOPC_Upload/Downloads/English/explanatory_note.pdf>1 accessed 13/06/2019.

⁶⁵⁰ Article I/2 of CLC 69 and CLC 92 stated that “Person” means any individual or partnership or any public or private body, whether corporate or not, including a State or any of its constituent subdivisions. For more information see IOPC Funds (n 77) 5.

⁶⁵¹ IOPC Funds (n 649) 7.

However, this convention was replaced by the 1992 Protocol, adopted on 27 November 1992 and entered into force on 30 May 1996.⁶⁵² The 1992 CLC applies to oil pollution damage resulting from spillages of persistent oil from tankers.⁶⁵³ It covers pollution damage accrued in the territory, territorial sea or exclusive economic zone (EEZ) or equivalent area of a State Party to the convention.⁶⁵⁴ In determining the scope of application, the flag State of the tanker and the nationality of the ship-owner are irrelevant.⁶⁵⁵

The 1992 CLC covers spillages of cargo and bunker oil from laden tankers, and in some cases, unladen, seagoing vessels constructed or adapted to carry oil in bulk as cargo.⁶⁵⁶ However, this convention does not cover damages caused by non-persistent oil, such as gasoline, light diesel oil and kerosene.⁶⁵⁷ The 1992 CLC governs the ship-owner's liability for oil pollution damage by laying down the principle of strict liability for the ship-owner and creating a system of compulsory liability insurance.⁶⁵⁸ The ship-owner is usually entitled to limit liability to an amount linked to the tonnage of his ship.⁶⁵⁹

8.3.2 International Conventions on Fund for Oil Pollution Damage (Fund Conventions)

The first convention in this regard was adopted on 29 November 1971 and entered into force in 1978.⁶⁶⁰ This convention was updated by Fund 1992, which came into force on 30 May 1996, providing higher compensation limits and a broader scope of application.⁶⁶¹

The 1992 Fund was established under the IOPC Fund to compensate victims who do not obtain full compensation under the 1992 CLC.⁶⁶² The latter is financed by contributions levied on any person who has received more than 150,000 tonnes of crude oil or heavy fuel oil in a calendar year after sea transport in a 1992 Fund Member State.⁶⁶³

⁶⁵² IMO, 'List of conventions: International Convention on Civil Liability for Oil Pollution Damage (CLC)' <[http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-\(CLC\).aspx](http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-on-Civil-Liability-for-Oil-Pollution-Damage-(CLC).aspx)> accessed 24/10/2018.

⁶⁵³ The definition of persistent oil is highly technical, being based on the distillation characteristics of an oil. Hydrocarbon mineral oils such as crude oil and heavy fuel oil are persistent oils, while aviation fuel and petrol are non-persistent oils. Article I/ 5 of CLC 92.

⁶⁵⁴ Article II of CLC 92.

⁶⁵⁵ Article I/4 of CLC 92.

⁶⁵⁶ Article I/1 of the CLC 1992.

⁶⁵⁷ Article I/5 of the CLC 1992.

⁶⁵⁸ Article III.1 of CLC 92.

⁶⁵⁹ IOPC Funds (n 77) 3.

⁶⁶⁰ The 1971 Fund ceased to be in force on 24 May 2002, when the number of 1971 Fund Member States fell below 25. For more information see IOPC Funds (n 647) 7.

⁶⁶¹ Catherine J. Grey, 'The cost of oil spills from tankers: an analysis of IOPC fund incidents' (International Oil Spill Conference American Petroleum Institute, 1999). 41

⁶⁶² Article 4 of the 1992 Fund.

⁶⁶³ Article 10/2a of the 1992 Fund.

This protocol provides additional compensation beyond the 1992 Fund for oil pollution damage in the states that become parties to this protocol.⁶⁶⁴ Furthermore, the International Oil Pollution Compensation Supplementary Fund was established in May 2003. It entered into force on 3 March 2005 and has applied to incidents occurring on or after that date.⁶⁶⁵ Membership of the Supplementary Fund is optional, which is open to any state member of the 1992 Fund. It is financed by contributions payable by oil receivers in the states that ratify the protocol.⁶⁶⁶

The entities that receive certain types of oil by sea transport must pay contributions to fund the IOPC Funds. These contributions are depended on the measure of the amount of oil received in the relevant schedule year and cover expected claims, along with the expenses of administering the funds.⁶⁶⁷

8.4 Principles of the International Regime on Liability and Compensation for Oil Pollution Damage

The international liability regime for oil pollution damage set out several principles governing their application. This section will not discuss all these principles. Instead, it will focus on the main elements related to the Libyan legislation given the subject under the study as follows.

8.4.1 Scope of Application

The CLC and IOPC Fund conventions have placed a particular scope of being applied to occurring oil pollution incidents regarding the ship's owner, oil tanker and pollution damage. Accordingly, they are imposed only on the ship's owner; neither the servants, agents or other persons are liable under these conventions.⁶⁶⁸ The owner, however, is responsible irrespective of their residence. Following the oil tanker definition, it was defined under CLC 69 to spillages from oil tankers carrying oil as cargo. However, of immediate concern, the oil tanker definition has been extended under the CLC 1992. The definition applies to

⁶⁶⁴ Article 4 of the 2003 supplementary fund protocol.

⁶⁶⁵ The maximum amount payable for any one incident is 750 million SDR, including the amount payable under the 1992 Fund. For more information see Article 4/b of supplementary fund protocol.

⁶⁶⁶ Article 2 of the 2003 supplementary fund protocol.

⁶⁶⁷ IOPC Funds, 'Funds Overview: 2018' <<https://www.iopcfunds.org/about-us/>> accessed 26/10/2018.

⁶⁶⁸ Article III.4 of 1992 CLC.

spillages from any oil tanker, whether carried on board a ship as cargo or in the ship's bunkers at the time of the incident.⁶⁶⁹

In the view of CLC and Fund Conventions, the concept of 'pollution damage' is defined as loss or damage caused outside the ship by pollution leading to the escape or discharge of oil from the ship. However, compensation is included costs incurred or to be incurred for reasonable measures to restore the contaminated environment.⁶⁷⁰

Additionally, the notion of pollution damage includes property damage, economic loss and 'preventive measures', wherever taken, to prevent or minimise pollution damage in the territory, territorial sea or EEZ or territory of a state party to the convention.⁶⁷¹ Expenses incurred for preventive measures are recoverable even when oil spillages do not occur, provided a grave and imminent threat of pollution damage.⁶⁷²

Taking the identifications of the above concepts into account and applying them in the Libyan context, as it has previously discussed in chapter 3,⁶⁷³ Law No.15 of 2003 regarding protection and improvement of environment has identified the scope of its application regarding the concepts of environmental pollution, oil, ships and tankers,⁶⁷⁴ as follows:

Ships, tankers and floaters: All floating marine units under the definitions stated in Libyan legislation, international conventions and treaties in force.⁶⁷⁵

Environment pollution: The occurrence of any situations or circumstances that may endanger human health or the integrity of the environment as a result of pollution of air, seawater, sources, soil or imbalance of living organisms, including noise, clamour, vibration and odours, and any other contaminants resulting from works and activities exercised by the natural or moral person.⁶⁷⁶

⁶⁶⁹ Article I.1 of 1969 CLC states that "Ship" means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo. Whereas Article I.1 of 1992 CLC states that "Ship" means any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargo shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage, unless it is proved that it has no residues of such carriage in bulk aboard.

⁶⁷⁰ Article I.6 of 1992 CLC stipulates that "pollution damage" means: a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss or profit from such impairment shall be limited to costs of reasonable measures of restoration actually undertaken or to be undertaken; b) the costs of preventive measures and further loss or damage caused by preventive measures.

⁶⁷¹ Article I. 7 of 1992 CLC.

⁶⁷² Article 4.1 of 1992 Fund convention.

⁶⁷³ See chapter 3 section 4.3 above.

⁶⁷⁴ Article 1 of law No.15 of 2003.

⁶⁷⁵ Article 1/ 9 of law No.15 of 2003.

⁶⁷⁶ Article 1/ 3 of law No.15 of 2003.

Oil: Crude oil - fuel oil - heavy diesel oil - lubricating oil and other oil derivatives.⁶⁷⁷

Waste oils: Oil exhausts of all kinds of forms and specifications.⁶⁷⁸

Oil mixture: Any combination containing any oil content.⁶⁷⁹

Thus, although Libyan environmental law has defined the previous concepts, it remains incomplete compared to the international conventions uniquely identifying oil pollution.

8.4.2 Geographical Scope

These conventions are being applied when the territory- including the territorial seas of a member state- is contaminated. Therefore, the geographical scope of this application is the place where the damage occurred within the member state territory. It is not required for the ship to fly the flag of contracting states. It is important to note that the application of the CLC 69 is constrained to the pollution damage inside the territory, including the territorial sea, in addition to the exclusive economic zone (EEZ).⁶⁸⁰ Be that as it may, the EEZ under CLC 92 is stretched to an area adjacent to the territorial sea of a contracting state identified by that state if it has not built up EEZ under UNCLOS.⁶⁸¹

Accordingly, referring back to law No.15 of 2003, the Libyan legislation in respect of the oil pollution is being applied when the oil pollutes the Libyan territory.⁶⁸²

8.4.3 Liability

8.4.3.1 Type of Liability (Strict Liability)

The International Conventions on civil liability and compensation for oil pollution damage regulate the liability of ship-owners for oil pollution damage by setting out the principles of strict liability for ship-owners and establishing compulsory liability insurance. They impose strict liability on the ship-owner, with only very few exemptions from liability.⁶⁸³ Moreover,

⁶⁷⁷ Article 1/ 6 of law No.15 of 2003.

⁶⁷⁸ Article 1/ 7 of law No.15 of 2003.

⁶⁷⁹ Article 1/ 8 of law No.15 of 2003.

⁶⁸⁰ The concept of exclusive economic zone (EEZ) is established under United Nations Convention on the Law of the Sea (UNCLOS) in 1982.

⁶⁸¹ Article II of CLC 92, Article 3 of 1992 Fund Convention and Article 3 of 2003 Supplementary Fund Protocol: This convention shall apply exclusively: as follows: a) to pollution damage caused: (i) in the territory, including the territorial sea, of a contracting state; and (ii) in the exclusive economic zone of a contracting state, established in accordance with international law, or, if a contracting state has not established such a zone, in an area beyond and adjacent to the territorial sea of that state determined by that state in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured. b) to preventive measures, wherever taken, to prevent or minimize such damage.

⁶⁸² Article 2 of law No.15 of 2003.

⁶⁸³ Article III.1 of CLC 92.

the ship-owner's liability is generally limited to an amount that corresponds to the tonnage of the ship.⁶⁸⁴

Following the reform of the 69 CLC by the 1992 CLC, the ship-owner's liability remained indifferent. Accordingly, it holds the ship's owner obligated for any contamination damage that escapes from his vessel because of an occurrence unless he demonstrates several specific facts,⁶⁸⁵ as explained in the next section.

The 1992 CLC determines the liability of ship owners for damages due to oil pollution. It establishes the principle of strict liability and creates a system of compulsory liability insurance for ships carrying more than 2,000 tonnes of oil. Therefore, being the vessel's owner at the time of the oil incident is sufficient to be responsible for oil pollution. This is without assessing his nationality, residence or the state in which the vessel is registered. Additionally, the convention adopted the strict liability approach instead of the fault-based liability or negligence, which is problematic for oil pollution victims. Thus, it is not required for the claimant to prove that the ship-owner is at fault or has shown negligence. This also applies in cases where it has been proven that the oil pollution incident is not because of the ship-owner's fault or due to his negligence; in such cases the claimant is entitled to compensation.

Taking the previous discussion into consideration and referring to the Libyan legislation, the rule contained in Article 166 of the Civil Code means that the claimant must prove the defendant's fault firstly, and then the damage and the causal relationship between them to be entitled to compensation for suffered damage.⁶⁸⁶ In contrast, the strict liability stipulated in the CLC and Fund conventions means it is therefore not necessary to prove the fault to place liability on the ship-owner for the oil spillage.

However, the analysis of the selected oil pollution cases has shown a distinction between the court decisions of the cases pre and post-2011 despite the continuity of the applicable legislation. As discussed in chapter 7, in the post-2011 cases, the judges did not focus on the

⁶⁸⁴ Article V.1 of CLC 92.

⁶⁸⁵ Article III.2,3 of the 1992 CLC stipulates that (2. No liability for pollution damage shall attach to the owner if he prove that the damage: a) resulted from an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character, or b) was wholly caused by an act or omission done with intent to cause damage by a third party, or c) was wholly caused by the negligence or other wrongful act of any government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function. 3. If the owner proves that the pollution damage resulted wholly or partially either from an act or omission done with intent to cause damage by the person who suffered the damage or from the negligence of that person, the owner may be exonerated wholly or partially from his liability to such person).

⁶⁸⁶ See chapter 6 section 6.4.5 above.

fault itself but rather the existence of the damage and the causality relation that may be approaching no-fault liability rules.⁶⁸⁷ Since Libya is still in the transition, this situation might affect such oil pollution cases. The judiciary would show more independence in making the decisions.⁶⁸⁸

Although this could be considered a foundation for establishing such a no-fault liability regime in the Libyan system, particularly on the condition that the Supreme Court affirmed these decisions, these decisions could be considered precedents are binding on the lower courts. However, since the legal system in Libya is the Civil Law System, which depends on the Coding of legislation, the civil liability regime must change the relevant legislation to guarantee its application on all of the oil pollution claims in the future.

Considering the defects of the applicable fault-based liability scheme for oil pollution damage and the features mentioned above of the International CLCs that impose a no-fault strict liability scheme, adoption of a similar strict liability scheme would mitigate the limitation of the applicable Libyan framework with regards to oil pollution damage. Such a scheme would guarantee compensation for oil pollution damage through strict liability, which is advantageous to oil pollution victims, particularly in the transitional period.

Accordingly, the prospect of a strict liability compensation scheme could be run directly by the Libyan oil industry, providing compensation directly to individual victims and funding the remedial measures for oil pollution damage. Regarding the impact of the Libyan transitional situation, such a strict liability scheme could also act to bypass or avoid the otherwise uncertain governmental authority exercised by the competing Libyan factions in this transitional phase of Libya's modern history.

The strict liability regime will not compensate victims of political violence cases, which are the most outstanding issues during the transitional period. For example, the existence of a foreign cause such as the third-party act (ISIS) in which the NOC could escape from its liability. However, adopting such no-fault strict liability in the Libyan legislation would be beneficial for the standard oil pollution cases. There is no need to prove the fault of the NOC for establishing its liability for compensation. In contrast, the fault is required to be confirmed in the applicable fault-based liability regime, which considers an obstacle in most oil pollution cases.

⁶⁸⁷ See chapter 7 section 7.5.2.1 above.

⁶⁸⁸ See chapter 7 section 7.5.2.3 above.

This discussion is detailed in the next chapter to propose a new rule of civil liability that may allow the Libyan regulations to engage with the International civil liability scheme in oil pollution. In this case, they are using the no-fault liability scheme as a model to establish civil compensation construction for oil pollution damage in Libya.

8.4.3.2 Exceptions to Strict Liability

Some exceptions limit the strict liability of the ship-owner provided by the International Conventions on civil liability and compensation for oil pollution damage.⁶⁸⁹ The system provides three kinds of exemptions: a) the damage resulted from an act of war, including civil war or natural disaster; b) it was entirely caused by the negligence of public authorities or c) a deliberate act or omission wholly caused by a third party.⁶⁹⁰

The first situation, which considers a reason for exclusion of liability, is where the pollution damage was because of an act of war, hostilities, civil war, insurrection or natural disaster.⁶⁹¹

The second circumstance which exempts the liability and fund from compensation is when it has been proven that the pollution damage was caused by an oil spill from a warship or other ship owned by the government and used for non-commercial service at the time of the incident.⁶⁹² Also, the liability and fund shall incur no obligation if the plaintiff cannot prove that the damage resulted from an incident involving one or more ships.⁶⁹³ Furthermore, they may be exempted from liability, wholly or partially, if the claimant can prove that the oil pollution damage resulted from an act or omission carried out intentionally by the person who suffered the injury or by their negligence.⁶⁹⁴

Furthermore, the 1992 Fund, in such cases, applies when the ship-owner is not liable under the 1992 CLC because of the existence of the primary cause when damage was caused as a result of a grave natural disaster. Additionally, liability will be unfounded if a third party wholly caused the damage or wholly caused because of the negligence of public authorities in maintaining lights or other navigational aids.⁶⁹⁵ However, in the oil pollution cases that result from an act of war, hostilities, civil war or insurrection, the 1992 Fund will not pay compensation.⁶⁹⁶

⁶⁸⁹ Article III.2,3 of the 1992 CLC.

⁶⁹⁰ David Soto-Onate and Gonzalo Caballero, 'Oil spills, governance and institutional performance: The 1992 regime of liability and compensation for oil pollution damage' (2017) 166 J Clean Prod 299. 301

⁶⁹¹ Article 4.2: a of the 1992 Fund convention.

⁶⁹² Ibid.

⁶⁹³ Article 4.2: b of 1992 Fund convention.

⁶⁹⁴ Article 4.3 of 1992 Fund convention.

⁶⁹⁵ IOPC Funds, 'Claims Manual' (IOPC Funds, 2019 Edition) <<https://www.iopcfunds.org/about-us/>> 11 accessed 06/04/2020.

⁶⁹⁶ Ibid 11.

To conclude, the general rules of the force majeure are being applied as exceptions to strict liability for oil pollution damage based on the CLC-IOPC Fund regime. Similarly, Article No.167 of the Libyan Civil Code has stipulated this rule, discussed in detail previously.⁶⁹⁷ However, under the strict liability regime based on the 1992 CLC, the absence of a fault requirement implies that the defendant may not avoid liability by raising that it acts diligently, and the causation is presumed. Applying this to the Libyan context on the standard oil pollution cases could be effective since the NOC or its subsidiaries will not escape liability by proving that they take all precautions and safety measures stipulated in Libyan legislation.

8.4.4 Channelling of Claims

The compensation schemes under the 1992 CLC and Fund Conventions are established to compensate any individual who suffers loss or damage because of contamination resulting from oil spills within party states. Claimants could be individuals, partnerships, companies, private organisations or public bodies, including States or local authorities.⁶⁹⁸ The compensation will include costs of immediate clean-up action, preventative measures, regeneration of affected environments and reasonable compensation for subsequent economic losses, such as loss of tourism and a decline in the fishing industry.⁶⁹⁹ Further, the claimant could only sue the registered owner of the tanker concerned for oil pollution damage under the 1992 CLC and IOPC Fund Conventions. However, under the 1992 CLC, the ship-owner is the main party that is strictly liable for pollution damage and able to limit his liability. He is required to obtain insurance for such liability.⁷⁰⁰ The 1992 CLC imposes compulsory insurance or other financial security for the ship-owner. It will be discussed in the next section as this claim could be brought either against the owner or directly against the insurer or other person who provides financial security for the ship-owner liable for pollution damage.⁷⁰¹

⁶⁹⁷ See chapter 6 section 6.6 and chapter 7 section 7.8 above.

⁶⁹⁸ IOPC Funds, 'Compensation and Claims Management' <<https://www.iopcfunds.org/compensation/>> accessed 13/06/2019.

⁶⁹⁹ IOPC Funds (n 500) 2.

⁷⁰⁰ UNCTAD, 'Liability and Compensation for Ship-Source Oil Pollution: An Overview of the International Legal Framework for Oil Pollution Damage from Tankers' (Studies in Transport Law and Policy - 2012 No.1, New York and Geneva, 2012) <https://unctad.org/en/PublicationsLibrary/dtl1b20114_en.pdf> 45 accessed 18/06/2019.

⁷⁰¹ Ibid 3.

Typically, a principle of the system of claims under the 1992 CLC and IOPC Fund Conventions is to remain out of court; but it does not prohibit recourse to the courts.⁷⁰² Following the competence of the courts, claims may be brought before the courts of the state party in the territory, territorial sea or EEZ or equivalent area where sued damage occurred. Applications are assessed based on criteria set out by the member states' governments.⁷⁰³ Moreover, for the duration of the claim, it should be submitted within three years of the date on which the damage occurred or within six years of the incident date.⁷⁰⁴

Since these conventions lay down the clear criteria for compensation and claims management, therefore, the majority of oil pollution claims are settled out of courts. Accordingly, applying the provision of strict liability on such claims means that the claimants must submit a piece of sufficient information and supporting documentation for the assessment of the amount of the damage that they have suffered to be entitled to compensation, even if the pollution was not due to any fault on the defendants' side.

Applying such criteria of channelling the oil pollution claims in the Libyan context would assist both the oil pollution victims and oil companies settle their cases out of the courts. This could be advantageous to both parties, as it is likely to shorten the trial time and enable the parties to provide the required evidence to prove or disprove the liability.

Based on these merits of this compensation scheme, adopting such civil liability rules on the oil pollution cases arising before the Libyan courts in which the claimants are exempt from proving of defendant's fault would mitigate the difficulties related to the applicable fault-based regime.⁷⁰⁵ Therefore, the oil pollution claims would quickly settle once the plaintiff could prove the claimed damage and the causality relation.

8.4.5 Compulsory Insurance

In addition to imposing the principle of strict liability, the CLC 1992 requires providing financial security for more efficient compensation claims for the victims of oil spillages on the ship-owner as a person responsible for the oil pollution damage. The shipowner must maintain compulsory insurance to cover his liability for pollution damage employed to the ships registered in a contracting state and conveying more than 2,000 tonnes of oil as

⁷⁰² Article VI.1,2 of CLC 92.

⁷⁰³ IOPC Funds, 'International Oil Pollution Compensation Funds- Annual Report 2017' (2018) <https://www.iopcfunds.org/uploads/tx_iopcpublishations/Annual_Report_2017_e.pdf> accessed 30/10/2018.

⁷⁰⁴ Article VIII of CLC 92.

⁷⁰⁵ See chapter 6 section 6.5.1.3 above.

cargo.⁷⁰⁶ The 1992 CLC also permits the ship-owner to supply other forms of financial security, such as a certificate delivered by an International Compensation Fund or a bank guarantee.⁷⁰⁷

In this context, tankers registered in a contracting state and carrying more than 2,000 tonnes of persistent oil as cargo are obliged to maintain a certificate on board attesting to the insurance coverage. The certification requires all the ships which enter or leave a port of a contracting state, regardless of whether the vessel is not registered in a contracting state, given that it is conveying more than 2,000 tonnes of oil as cargo.⁷⁰⁸ Therefore, the contracting state must guarantee that the ships-owners are secured by applicable insurance or other security required by the 1992 CLC.⁷⁰⁹

The CLC 1992 builds up a privilege of direct activity for the claimant against the insurer or other person supplying financial security to the ship-owner.⁷¹⁰ This right of action permits the claimant to recover, even where the financial capacity of the ship-owner in settling claims is insufficient, such as in cases of bankruptcy or insolvency of the ship-owner. Also, the insurer's liability is permanently restricted to the same level of the limited amounts available to the ship-owner, even in situations when the ship-owner has lost his right to limitation. The insurer may, in most instances, invoke the same defences of the ship-owner available under the convention.⁷¹¹ In the same regard, in the cases of excluding ship-owner liability under the convention, the insurer will not be liable. However, the insurer can avoid liability altogether if it is proved that the pollution damage occurred because of the deliberate act of the ship-owner himself.⁷¹²

8.5 The Polluter-Pays Principle

It is not the purpose of this thesis to consider environmental principles in any broad sense. There is no intention to assess their function in environmental law or their limitations in a legal context. However, because of the importance of the polluter-pays principle, this section briefly discusses the essential points provided in the 1992 CLC and Libyan environmental law No.15 of 2003.

⁷⁰⁶ Article VII.1 of CLC 92.

⁷⁰⁷ Article VII.2 of CLC 92.

⁷⁰⁸ Article VII.11 of CLC 92.

⁷⁰⁹ Article VII.5 of CLC 92.

⁷¹⁰ Article VII.8 of CLC 92.

⁷¹¹ Article VII.8 of CLC 92.

⁷¹² UNCTAD (n 700) 50.

The causes of the oil spills in Libya are often pipelining vandalism or sabotage of oil installations. Operational oil spills also do occur there. The fact that the oil spill was either accidental or not is not the main issue here. This is because it is an established principle of international environmental law that the polluter should pay for the harm he caused to the environment. When oil spillages occur, specific issues arise which are very important: the need to identify the responsible party who caused the oil spill; the extent to which the polluter/responsible party is accountable for the oil spill; the scope of the damage caused to the environment and measures to be taken to prevent future occurrences of events of similar nature.⁷¹³ The polluter-pays principle thus holds someone responsible for the damage caused to the environment and prevents a situation where nobody wants to claim responsibility for an oil spill.

The question of whether the polluter-pays principle serves as a deterrent to oil spills is fundamental. A key reason for this is that there is a need to reduce and prevent oil spills in Libya. This is because the devastating effects of oil spills on the environment are usually significant and are not matters that can be treated with levity.⁷¹⁴ The impacts on Libyans' economy, human health and even the marine environment are weighty. Liability has to be established so that the persons responsible for the spill is held accountable for their actions. Oil companies, ship owners and the government involved in the oil business are not left to enjoy the profits of the oil business. Still, they are also expected to take all necessary precautions to prevent future oil spills from happening.

The polluter-pays principle could be defined as '...the polluter should bear the cost of measures to reduce pollution according to the extent of either the damage done to society or exceeding an acceptable level (standard) of pollution'.⁷¹⁵ The importance of the polluter pays principle stems from the fact that it allows the party responsible for polluting the environment to take responsibility for his actions. It also provides for that party accountable for the pollution to be '...charged with the cost of whatever the public authorities determine pollution prevention and control measures, whether preventive measures, restoration or a combination of both. Moreover, in terms of liability for pollution damage caused on the territory or territorial sea of a contracting party, as a result of discharges from ships, the 1992 CLC makes the shipowner at the time of the incident, responsible for the damage subject to

⁷¹³ Ayobami Olaniyan, 'Imposing Liability for Oil Spill Clean-Ups in Nigeria: An Examination of the Role of the Polluter-Pays Principle' (2015) 40 *Journal of Law, Policy and Globalization*. 73

⁷¹⁴ Ibid.

⁷¹⁵ OECD, 'Glossary of Statistical Terms' (December 2007) <<http://stats.oecd.org/glossary/download.asp>> accessed 12/09/2021.

three exceptions.⁷¹⁶ These exceptions are that the shipowner must prove that the damage from the pollution- did result from an act of war or natural phenomenon;⁷¹⁷ was caused by the act or omission of a third party done with intent to cause damage;⁷¹⁸ and that the damage occurred as a result of the negligence or other wrongful act of any government or other authority.⁷¹⁹

Furthermore, the position under environmental and safety law generally is that the installation operator, in particular, bears the liabilities and obligations. Liability from oil spills could be civil depending on the cause of the spill, or criminal such as imposing criminal fines under health and environmental regimes following oil spill incidents.

Furthermore, given the international environmental law perspective, the polluter- pays principle is one of the critical legal and policy principles that have emerged from international environmental law to shape the development of environmental law.⁷²⁰ These principles are seen to maintain a balance between development and the preservation of a healthy environment and allocation of liability. The principle wants polluters to bear the oil pollution costs resulting from their actions so that ‘...the cost of their goods and services reflects the true costs of the measures that primarily the state adopts to eliminate, reduce and treat the polluters’ emissions’.⁷²¹

This statement boils down to the fact that polluters should bear responsibility for their actions. The function of environmental law is to balance the emissions that pollute the environment generated by economic activities against the need of society for a healthy environment.⁷²² Those emissions are then set by the government (or its regulators) at levels that are acceptable to the regulated (businesses and the public). Thus, the polluter pays principle, which is also an international environmental law principle, helps environmental law achieve a tolerable environment. The polluter-pays principle also ‘...enables the state to charge the cost of rectifying ecological damage to the relevant polluter provided that the polluter can be identified’.⁷²³

⁷¹⁶ 1992 CLC, Articles II and III.

⁷¹⁷ 1992 CLC, Article III (2) (a).

⁷¹⁸ 1992 CLC, Article III (2) (b).

⁷¹⁹ 1992 CLC, Article III (2) (c).

⁷²⁰ Susan Wolf and Neil Stanley, *Wolf and Stanley on Environmental Law* (5th edn, Routledge 2011). 14

⁷²¹ *Ibid* 17.

⁷²² Susan Wolf, Anna White and Neil Stanley, *Principles of Environmental Law* (3rd edn, CPL 2002). 6

⁷²³ S Wolf and N Stanley (n 717) 17.

In regard to Libyan law perspective, the polluter pays principle is also recognised under Libyan laws. A piece of legislation that deals with response to oil spills is law No.15 of 2003 on protecting and improving the environment. This legislation contains provisions that embody the polluter pays principle. For example, article No.67 states that: ‘A fine not less than fifty thousand Libyan dinars and not exceeding one hundred thousand Libyan dinars shall be imposed on the master or shipowner or its supplier or user if they violate the provisions of article 22 of this law. If they repeat the violation, the retribution or fine shall be not less than two hundred thousand Libyan Dinars and not more than three hundred thousand Libyan Dinars’.⁷²⁴ The above article thus makes a polluter responsible for keeping the Libyan territory clean, and failure to doing so will attract a fine of 50 to 300 hundred thousand Libyan Dinars.

8.6 Application of the International Regime on the Liability and Compensation for Oil Pollution Damage

Over several years, the CLC and IOPC Fund Conventions have served the international community, particularly oil contamination victims. They guarantee that the liability for dealing with the spillage is directed to the shipowner and that the financial burden is shared by the global oil receivers whose products have been carried by sea.

On this view, the application of international conventions involves applications and enforcements by state parties in which they are legally implemented related provisions of the conventions. The 1992 CLC and IOPC Fund regimes confer national courts within state parties to hear claims bringing by oil pollution victims with exclusive jurisdiction. It has been a notable accomplishment in foreseeing the law and procedure common throughout the world.⁷²⁵ However, this application may face some obstacles in its implementation within the distinctive legal systems in state parties. In this regard, some applications, for instance, include criminal punishments, whereas others apply civil law exclusively as intended by the convention. In other instances, different courts, even in the same state, may construe the conventions in other ways.⁷²⁶

⁷²⁴ Article 22 of law No.13 of 2003 stipulates that: ‘It is prohibited to throw oil or oil mixture or washing tanks, or discharge heavy and light oils, or bottom water or ballast in the ports or territorial waters of the Great Socialist People’s Libyan Arab Jamahiriya’.

The ban applies to all ships and carriers of all nationalities.

⁷²⁵ Gurumo and Han (n 76) 185.

⁷²⁶ Ibid. 186

However, instead of these facts, the CLC and IOPC Fund conventions could be considered the most successful compensation schemes in existence over the years. Most compensation claims have been settled out of courts as a result of negotiations.⁷²⁷

According to the 2017 annual report of the IOPC Fund, since their establishment, the IOPC Fund Conventions have been involved in 150 incidents of varying sizes all over the world and have paid several million in compensation.⁷²⁸ They have been successful in providing financial compensation for oil pollution damage that occurs in its member states, resulting from spillages of persistent oil from tankers. In this context, statistics show that millions in monetary compensation have been offered to such victims regarding the available funds at the appropriate time.⁷²⁹

As previously pointed out in chapter seven, the analysis of oil pollution cases shows that the Libyan courts applied the fault-based regime on these cases. Thus, this regime is not sufficient for securing compensation to oil pollution victims due to this application. Notably, this analysis identified the area of the difficulty and limitation of the Libyan legislation because of adoption of the fault-based civil liability regime and led to the identification of future reforms that will be recommended to develop related Libyan legislation.

The plaintiff must corroborate the defendant's activity, which causes the damage and the relation of causality. Based on these facts, establishing such a scheme in the Libyan transitional context would mitigate the restricted conditions of the fault-based liability regime. It would also alleviate the impacts of the transitional period on the oil pollution cases regarding the challenges that may face the victims of oil pollution, particularly the foreign cause.

Imposing such a compensation scheme- strict liability with compulsory insurance at the Libyan national level would provide adequate financial security for the victims of oil pollution. In furtherance of the principle of strict liability, stipulating the compulsory insurance in the Libyan legislation means that the claimant has the right to sue the defendant- the NOC and its subsidiaries- or with the insurer for the suffered damages. The liability could be channelled against more than one liable- the defendants and the insurer. Such a scheme can be advantageous not only to the oil pollution victims in which they would have the right

⁷²⁷ Jose M. Barandiaran, 'International regime on liability and compensation for oil pollution damage' (Catania, 13 November 2003)

<http://ec.europa.eu/echo/files/civil_protection/civil/marin/reports_publications/prestige_workshop_catania_documents/session6/presentation_maura.pdf>8 accessed 25/01/2019.

⁷²⁸ IOPC Funds (n 77) 4.

⁷²⁹ £674 million paid by the IOPC funds in compensation since 1978 (£331 millions of which was in respect of the 1971 fund) for more information see IOPC Fund (n 77) 16-17.

to raise their claims against the polluter directly or with the insurer, but also to the defendants in which this scheme could cover their liability financially the insurer.

8.7 Review of the Libyan Status on International Conventions of Civil Liability and Compensation for Oil Pollution Damage

Libya is one of the world's major oil-exporting countries.⁷³⁰ Since the discovery of oil in the 1950s, it has become highly dependent on the oil and gas industries—these industrial activities ranging from exploration to production.⁷³¹ Moreover, Libya has been a member of the Petroleum Exporting Countries (OPEC) since 1962. Libya also became a member of the International Maritime Organisation (IMO) in 1970.⁷³²

Furthermore, Libya has just acceded to the first International Civil Liability Convention (CLC- 69).⁷³³ According to the IOPC Funds, the deposit of accession of Libya was accepted on 28 April 2005, which was brought into force on 26 July of the same year.⁷³⁴ On the other hand, with regards to the 1992 Civil Liability Convention and the 1992 Fund Convention, Libya has not joined any of them yet. Since these conventions supply a broader extent of application on numerous points and much higher limitation of compensation than within the original provisions of these conventions. States parties to the 1969 CLC, such Libya, are advised to denounce that convention at the same time as they deposit their instruments in respect of the 1992 Protocols. This is advisable so that the 1992 Protocols enter into force for that state on the same day as the denunciation of that convention.⁷³⁵

8.8 Conclusion

In this chapter, the International Conventions govern the CLCs and IOPC Funds for oil pollution damage have been reviewed, and the Libyan status on these conventions.

The framework for the regime was the 1969 CLC and the 1971 Fund. Over time, it became apparent that the scope of the regime extended, and the amount of available compensation

⁷³⁰ Gas Exporting Countries Forum (n 12).

⁷³¹ Gurney (n 13) 15.

⁷³² IMO, 'Status of IMO Treaties: Comprehensive information on the status of multilateral Conventions and instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions' (16 October 2018)

<<http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202018.pdf>>
accessed 24/10/2018.

⁷³³ IOPC Funds (n 486).

⁷³⁴ IOPC Funds (n 83).

⁷³⁵ IOPC Funds (n 703) 8.

under these conventions for significant oil pollution incidents required to be increased. Thus, two further instruments have been established, known as the 1992 CLC and the 1992 Fund. After that, following the Erika and Prestige incidents,⁷³⁶ a third instrument known as Supplementary Fund Protocol, was established in 2003. This protocol provides additional compensation above and beyond that providing by the 1992 Fund Convention for oil pollution damage in the states that ratified this protocol.

It has been indicated that the most noteworthy feature of the CLCs is the laying down of a strict liability regime on the ship-owner. The strict liability under the 1992 CLC is established to avoid the shortcomings of fault-based liability regimes to claimants, such as proving the fault on the part of the ship-owner, which may be difficult in many cases. Therefore, the ship-owner is will likely be liable under the 1992 CLC for any oil pollution damage that escapes from his vessel due to an incident, without considering his nationality, residence, or the state in which the ship is registered.

However, even though the strict liability under the 1992 CLC is channelled to the ship-owner, some limited exceptions might release the ship-owner from the liability. Although the strict liability regime seems more favourable to claimants at the first glance, the possibility of the ship-owner limiting him to the limited amount supplied by the 1992 CLC would balance the rights of both parties. It, therefore, imposes compulsory insurance on the ship-owners to cover the extensive liabilities regarding other marine liability regimes.

Similarly, the 1992 Fund is also entitled to limit its liability. Claimants can receive compensation up to a certain amount, and any further damage is not payable under the 1992 CLC. The establishment of the Supplementary Fund Protocol 2003 might provide an essential tool as it increases liability limits. However, the 1992 Fund's member states don't need to become a part of it since it is left up to the states whether they prefer to be a part of this protocol or not.⁷³⁷

In joining the International Conventions for Civil Liability and Compensation for Oil Pollution Damage, Libya has joined the 1969 CLC since 2005. With regards to other relative conventions, Libya is currently not a part of any of them.

⁷³⁶ The Malta registered Erika, carrying 30,884 tonnes of fuel oil, broke in two near the French coast while encountering heavy seas on 12 December 1999. On the morning of 12 December, oil was observed escaping the vessel and subsequently the plating of one of the ballast tanks was torn badly but remained attached to the ship. The vessel split in two with the bow section sinking immediately, while the stern section sank as it was being towed out to sea. Between June and September 2000, the remainder of the oil was pumped out. For more information see Justine Wene, 'European and International Regulatory Initiatives Due to the Erika and Prestige Incidents' (2005) 19 *Austl. & NZ Mar. LJ* 56. 57

⁷³⁷ Mojgan Farahani, 'Liability and Compensation Regime for Oil Pollution Damage under International Conventions' (Master Thesis, Lund University 2011). 70

To sum up, by reviewing the elements of the international regime of CLCs and Fund Conventions and highlighting its fruitful successive developments, this research recommends adopting the relevant articles that govern the civil liability for oil pollution damage in the selected model to meet Libyan legislative needs. This study recommends establishing a strict civil liability regime with compulsory insurance for Libyan legislation related to the oil industry to ensure full compensation is provided to victims of oil pollution in the Libyan transitional period. This will be the subject of the following two chapters of this thesis.

9. Capacity Development in Establishing a New Civil Liability Compensation Scheme for Oil Pollution Damage in Libya

9.1 Introduction

As indicated in the previous chapter, after the Torrey Canyon disaster, international attention was drawn to the deficiencies of applicable regulation and legal problems related to the oil pollution issues.⁷³⁸ Thus, in drafting some conventions related to oil pollution damage, e.g., the CLCs and the Fund Conventions, the method of strict liability has been taken by legislators as the basis for these conventions.⁷³⁹ Prospectively, in the Libyan context, the deficiencies in the traditional remedies of fault-based liability regime, including in the Libyan Civil Code, as far as the oil pollution damage is concerned, would prompt Libyan legislators to bring new legal regimes for oil pollution claims. Replacing fault-based liability with strict liability would be valuable since it includes more advantages for oil pollution victims.

Nevertheless, this process is not as simple as it seems at first glance. Enacting a strict liability compensation scheme for oil pollution damage is one thing; however, reforming the judiciary and building capacity will facilitate this scheme's adoption and its implementation process.

Since Libya is still in the transition phase, this requires filling gaps in human resources and reforming governmental institutions and administrations. Importantly, in the Libyan context, capacity development in such situations entails attention highly. It is how individuals and organisations obtain, improve, and retain the skills, knowledge, tools, equipment, and other resources needed to do their jobs competently. It also allows individuals and organisations to perform to a higher capacity (more extensive scale, broader audience, more significant impact, etc.).⁷⁴⁰

Therefore, a new strict-liability scheme is recommended in this chapter. It starts with this introduction, and section two introduces why it is essential to enact and implement a new regime regulating compensation for oil pollution damage. The theoretical importance of enactment of a strict-liability compensation scheme for oil pollution damage, including the

⁷³⁸ See chapter seven section 7.2 above.

⁷³⁹ Wene (n 736) 57.

⁷⁴⁰ UNDP, 'Capacity Development in post-conflict countries' (Global Event Working Paper, 2010) <<http://www.undp.org/content/dam/aplaws/publications/capacity-development/capacity-development/>> 10 accessed 28/06/2019.

case of *Burlington Resources v Ecuador* is introduced in section three. The fourth section provides theoretical and practical foundations for Libyan policy choices on the strict liability compensation scheme for oil pollution damage. In the fifth section, the application of this scheme, including the effective engagement to the International Conventions and consideration of the domestic context, is presented. However, this application cannot be effective, particularly during a transition time in Libya, unless using tools such as building capacity and reforming the judicial and environmental systems; these points are discussed in the sixth section. Finally, section seven concludes this chapter.

9.2 Importance of Enactment of a New Strict-Liability Compensation Scheme for Oil Pollution Damage

As discussed in the earlier chapters, in the context of oil pollution damage, since the establishment of the Civil Code of 1954, Libyan courts have applied the traditional remedies of fault-based liability regime. As shown in the case law analysis undertaken in chapter seven above, the application of this regime is not in favour of the oil pollution victims due to its deficiencies in practice.

The interesting findings of the analysis of the selected cases are that there is a notable distinction between the judicial decisions pre-and post- 2011 regarding the compensation for oil pollution damages.⁷⁴¹ Thus, most pre-2011 oil pollution cases were dismissed, while most post-2011 oil pollution claims were accepted, although they were ruled by the same articles stipulated in the Libyan Civil Code.⁷⁴²

Accordingly, the fault-based liability stipulated in article No.166 needed to be proved in both cases. Notably, judges in the post-2011 cases focused on the causation relationship rather than a fault, which was the focus of judges in the cases of pre-2011. Although they applied article No.166, which laid out the fault-based regime, the analysis of selected oil pollution cases reveals that the judges interpreted this article differently. They required that the claimant should prove not just fault but an intent fault in the pre-2011 cases to establish liability in the side of the NOC or its subsidiaries to be liable. Whereas, in the post-2011, the judges initially required the fault to establish liability to the NOC or its subsidiaries. Instead, they are now satisfied with proving the cause of the damage; if the plaintiff proves that the

⁷⁴¹ See chapter 7 section 7.6.3 above.

⁷⁴² See chapter 7 section 7.5.1 above.

damage caused because of the defendant activity (NOC or its subsidiaries, the latter will be liable for compensation.⁷⁴³

Nevertheless, this finding could not be generalised to all of the Libyan courts' oil pollution cases even though the change in the behaviour of the judges in this context could be considered as an initial foundation for applying a no-fault civil liability regime. However, without codifying this regime in the Libyan legislation, there is no guarantee that this behaviour will be continued, particularly during an uncertain ongoing political situation in Libya.

Although, the proposed strict liability regime has no guarantee to compensate political violence victims, which are the most outstanding cases during the transitional period. Such as the existence of force majeure in which the NOC could escape its civil liability. However, embracing such no-fault strict liability in the Libyan enactment would be valuable for standard oil pollution cases. There is no compelling reason to demonstrate the fault of the NOC in establishing its liability for compensation. Conversely, the fault is needed to be affirmed in the applicable fault-based liability rule, which considers an obstruction in most oil pollution cases.

On the other hand, the analysis of selected cases has shown not only the limitations of the applicable legislation because of the adoption of the fault-based civil liability regime but also the future reforms recommended to develop related Libyan legislation. In the context of the reform proposal, in the previous chapter, the chosen model for oil pollution scheme based on international regime of CLCs and Fund Conventions- has been reviewed and examined to highlight its main features and characteristics of the strict-liability scheme to use as a model in the civil liability context to meet Libyan legislation needs. In drafting the international regime following oil pollution damage, strict liability has been selected as the foundation for the related conventions. Likewise, considering the fruitful successive developments of these conventions, establishing such a strict civil liability regime for Libyan legislation related to the oil industry would be the potential to ensure full compensation is provided to victims of oil pollution in the Libyan transitional period.

⁷⁴³ See chapter 7 section 7.5.1 above.

9.3 The Theoretical Importance of Enactment of a Strict Liability Compensation Scheme for Oil Pollution Damage: the Case of *Burlington Resources v Ecuador*⁷⁴⁴

Experience gained from other jurisdictions has shown that successful implementation of a legal framework for oil pollution damage is more likely to occur when well-designed legislation involving a strict civil liability rule is carried out. For example, in Ecuador, since the 1970s, Ecuador has incorporated environmental standards into its legislation, including concerning hydrocarbons activities, at the constitutional, legislative, and regulatory levels.⁷⁴⁵ Ecuador's environmental framework for oilfield operations has been amended several times, including the civil liability rules. The fault-based liability regime was stipulated in the Civil Code. It was the applicable framework for the cases of oil pollution till the establishment of the 2008 Constitution, which lays down the principles of a strict liability regime for the environmental damage.⁷⁴⁶

In the case of *Burlington Resources v Ecuador*,⁷⁴⁷ to rule this case, the court reviewed the tort liability regime for environmental harm both under the 2008 Constitution and before it. Since the strict liability regime of the 2008 Constitution did not apply retroactively, the court had to assess the rules governing liability for hydrocarbons operations before the 2008 Constitution. In this regard, before the entry into force of the 2008 Constitution, tort liability was controlled by the Civil Code. While liability was fault-based, the Civil Code also provided an objective liability standard applicable to particular situations such as risky activities. Moreover, the Ecuadorian courts, especially the Supreme Court, had extended accurate liability to hazardous activities such as oilfield operations based on the theory of risk. The Supreme Court identified the elements of strict liability. First, the plaintiff must prove injury associated with the respondent's activities; the fault is not required to be proven,

⁷⁴⁴ *Burlington Resources v Ecuador*, ICSID Case No. ARB/08/5, (7 February 2017) <<http://www.italaw.com/cases/181>> accessed 01/04/2019.

⁷⁴⁵ *Ibid.* 74

⁷⁴⁶ *Ibid.* 99

⁷⁴⁷ The Claimant in this case is Burlington Resources Inc., which is a corporation active in the exploitation of natural resources, was founded in 1988 and existed under the laws of the State of Delaware, United States of America. The Respondent is the Republic of Ecuador. There are the production sharing contracts in Blocks 7, 21 between a Burlington wholly-owned subsidiary and Ecuador. In 2002, a dispute arose between the parties in the wake of the oil price spike. The Parties are in dispute as to how the economic benefits of this oil price spike must be distributed between them. In contrast, in January 2011, Ecuador asserted two counterclaims in its Counter-Memorial on Liability against Burlington. Ecuador claims that the activities of Burlington caused pollution damage to the environment. Thus, Burlington being liable for restoring environment in areas within Blocks 7, 21, and should pay costs required to restore the environment and remedy the infrastructure of these blocks, for more information see *Burlington Resources v Ecuador* (n 744).

and causation relation is presumed. Additionally, the respondent is being exonerated in establishing that the injury was caused by a force majeure, the victim or a third-party act.

It is worth noting that the analysis of the previous Ecuadorian Supreme Court decision demonstrates that it cannot rebut the presumption of fault by showing that all precautions have been followed. The defendant can be acquitted only in the situation of display of force majeure, an act of a third party or the victim.⁷⁴⁸

Although, the Supreme Court found that fault-based liability was governed Ecuador's claims for environmental damage predates the 2008 Constitution. However, in practice, strict liability has regulated cases of environmental damage at the latest since 2002 in Ecuadorian law.⁷⁴⁹ Accordingly, the decisions of the Ecuadorian courts have merely "strengthened the presumptions in favour of a finding of liability in the case of damage caused through hazardous activities."⁷⁵⁰ These courts have laid down the principles of strict liability for hazardous activities, particularly oilfield operations.⁷⁵¹

Applying this to the Libyan situation, as shown in chapter six, the fault-based liability regime is the applicable regime in the Libyan courts regarding the oil pollution cases.⁷⁵² However, practically post-2011, the Libyan courts mitigate the conditions of the fault-liability regime, particularly regarding proving the fault in the defendant side, which in practice plausibly could be considered a type of no-fault liability. This may affirm by the Libyan Supreme Court Decision No.31/28, which stated that

"...As the case is based on tort liability, since the elements of this responsibility are the fault, damage and association between them, the act that caused the damage doesn't need to be unlawful or punishable by law. It is sufficient to provide the fault that the person causes the damage with prior knowledge of its consequences. Then a civil fault shall be filed against him, in which he shall be liable to compensate the injured party for the damage he suffered following the provisions of Article 166 of the Civil Code. He cannot dispose of this liability and exempt from compensation except in the cases provided by Article 168 of Civil Code of a sudden accident, force majeure or fault of the injured or fault of the others."⁷⁵³

A recognised provision is different from what was recognised by the Supreme Court regarding the definition of the fault; as is discussed in chapter 7,⁷⁵⁴ this decision was ignored

⁷⁴⁸ Ibid. 105

⁷⁴⁹ In Ecuadorian law strict liability governed instances of environmental harm at the latest since the Delfina Torres decision was handed down in 2002. For more information see *Burlington Resources v Ecuador* (n 744) 105.

⁷⁵⁰ Ibid 109.

⁷⁵¹ Ibid 109.

⁷⁵² See chapter 6 section 6.4 above.

⁷⁵³ The Judgement of the supreme Court No.31/28 which was issued on 22/04/1985 and published in the official Gazette No.3&4 year 23 of 1985.

⁷⁵⁴ See chapter 7 section 7.4.5 above.

during the period pre-2011. However, since there is a distinction in requiring the elements of fault-based liability according to the provision of article 166 after 2011, this decision can be used as a basis to approve these new judgements regarding oil pollution cases. It could also be considered presently as a judicial precedent to underpin the establishment of a new strict liability regime.

Accordingly, the case of *Burlington Resources v Ecuador* could be used as an example of developing civil liability regime, for the Libyan courts to appreciate the legal background of the new strict liability rule and to interpret the provisions of civil liability under the environmental law or Civil Code. Moreover, the previous judgements of the Libyan Supreme Court and other sources such as the international conventions could be used extensively to this effect. Also, adopting such significant decisions of the selected oil pollution cases and considering them as judicial precedents for other courts over Libya would pave the path for establishing the strict liability rules in the Libyan legislation in respect of oil pollution damage.

9.4 Theoretical and Practical Foundations for Policy Choices on the Strict Liability Compensation Scheme for Oil Pollution Damage

Libya is amongst the world's major oil-producing countries.⁷⁵⁵ It is very dependent on the oil and gas industries for its income.⁷⁵⁶ Although these oil activities have different impacts on the environment based on their nature and type of contamination,⁷⁵⁷ the analysed of such effects have not been thoroughly analysed.⁷⁵⁸ Accordingly, the arising environmental problems have not been addressed comprehensively in Libya, particularly in a current transitional stage. Additionally, since the first establishment of legislation concerning oil pollution in 1958, Libya proved unable to develop its laws and solve the country's fundamental problem of insufficient environmental legislation. That is why the existing applicable law is being investigated in order to reform it by recommending changes to bridge the gaps.⁷⁵⁹

Under the current transition circumstances of Libya, in 2013, the Libyan government invited the UNEP to assess the impacts of the conflict on the environment in Libya after 2011.⁷⁶⁰

⁷⁵⁵ Gas Exporting Countries Forum (n 12).

⁷⁵⁶ Gurney (n 13) 15.

⁷⁵⁷ Nait (n 14) 7.

⁷⁵⁸ Weir (n 15) 8.

⁷⁵⁹ Nait (n 14).

⁷⁶⁰ Kellay (n 4) 42.

Notably, the evaluation was on the oil sector because of significant oil pollution incidents occurring during this period.⁷⁶¹ Even though no assessment has been undertaken yet because of insecurity situation in Libya,⁷⁶² this may reflect the Libyan law-makers desire to revise or abolish the outdated laws concerning civil liability for oil pollution damage.

As is discussed in chapter one, the UNEP has assisted the Nigerian government concerning oil pollution occurring in Ogoniland.⁷⁶³ Accordingly, the UNEP could assist Libya in the same way as it did in its report on long-term oil pollution damage in Ogoniland (Nigeria).⁷⁶⁴ This supports the future Libyan government to create an Environmental Restoration Fund based on its following environmental assessment and report's recommendations. As the case of oil pollution matters in Libya is similar to the issue of Nigeria in several aspects, Libya can learn lessons from Nigerian experience with oil pollution damage to dealing with matters of environmental restoration. This could include the clean-up of the environment, building governance and administrative capacity, including sensitisation and training programmes.⁷⁶⁵ Notably, the UNEP report on Ogoniland has not focused on the civil liability for oil pollution damage and the compensation of Ogoni oil pollution victims. Instead, it has provided recommendations to cleaning up the environment, training programmes and sensitisations. To fund this project, The Federal Government, through the Nigerian National Petroleum Corporation (NNPC), on behalf of the Joint Venture Partners, had released into the Ogoni Trust Funds. It is domiciled with the Board of Trustees of HYPREP, the sum of three hundred and sixty million dollars out of which the Project Coordination Office (PCO) can spend on this project. The PCO receives releases from the Board of Trustees to fund projects and activities that it generates.⁷⁶⁶

On the other view, as the analysis of the selected cases has highlighted, it seems that the Libyan courts have currently applied the principles of no-liability on the oil pollution cases implicitly. Although it appears at first glance, the judges- during the duration of hearing and investigating the oil pollution cases- require the fault as a basis to establish the liability to the side of defendants (NOC). However, the analysis shows that judges focus on a causation

⁷⁶¹ Ibid 42.

⁷⁶² Weir (n 15) 8.

⁷⁶³ UNEP (n 80) 222-231.

⁷⁶⁴ Ibid.

⁷⁶⁵ Federal Ministry of Environment, 'Ogoni Clean Up- the Journey so far' (Hydrocarbon Pollution Remediation Project (HYPRP), July 2019) <<http://www.hyprep.gov.ng>> accessed 29/12/2019.

⁷⁶⁶ Federal Ministry of Environment, 'Separating Ogoni Trust Fund from HYPREP PCO Accounts' (Hydrocarbon Pollution Remediation Project (HYPRP), March 2020) <<http://www.hyprep.gov.ng>> accessed 05/04/2020.

relationship between oil pollution damage and the source of this pollution. Practically, this could be seen as the initial foundation for establishing a strict liability regime in the context of oil pollution damages.

Based on the Libyan Constitution 2011, Islamic Law (Shari' ' a) is the primary source of legislation in Libya.⁷⁶⁷ In the context of civil liability rules, the basis of these rules in Islam could be theoretically referred to as a kind of no-fault liability rule. In Islamic jurisprudence, it is notable that the theory of liability based on damage is not a foreign concept, although the names differ. The Islamic jurists know it as a "Guarantee". The latter has been defined as a reparation tool for occurred harm that someone may suffer.

However, Islamic jurisprudence does not require a fault or offence for damage to be compensated. There is no difference between the damage caused by an intentional act and the harm caused by an act of unintentional infringement. Islamic law makes the harm not the fault as a basis to establish the liability.⁷⁶⁸ The base of the liability (guarantee) in Islamic law is a reparation, not a punishment.⁷⁶⁹

The objective direction of the Islamic jurisprudence does not differentiate between the fact that the person who caused the harm was at fault or not; he will compensate for damage even if his act was lawful. Accordingly, Islamic jurisprudence does not require recognition and discrimination for inclusion. It agrees with the objective theory of inclusion that builds liability not based on fault but the mere occurrence of harm.

Thus, the view of Islamic law regarding civil liability could be considered the theoretical basis for a law-maker to establish a new no-fault liability compensation scheme for oil pollution damage.

This theoretical foundation, coupled with the practical foundation, could pave the way for the Libyan policymaker to adopt strict liability rules as the appropriate remedy to establish the compensation scheme for oil pollution damage.

⁷⁶⁷Article 1 of Libya's Constitution of 2011 states that: "Libya shall be an independent democratic state in which the people shall be the source of all powers. Its capital shall be Tripoli, Islam shall be its religion and Islamic Shari'a shall be the main source of legislation. The State shall guarantee for non-Muslims the freedom to practice their religious rituals. Arabic shall be the official language, while the linguistic and cultural rights of the Amazigh, the Tabous, the Touareg and the other components of the Libyan society shall be guaranteed." For more information see Constitute, 'Libya's Constitution of 2011' (Oxford University Press, Inc. 2019) <http://www.constituteproject.org/constitution/Libya_2011.pdf> accessed 21/02/2019.

⁷⁶⁸ Sheikh Ali Al-Khafif, *The Guarantee in Islamic Jurisprudence* (Dar Al-Fikr Al-Arabi 2000) 54; Abdulsalam Al-Tounji, *Institution of Responsibility in Islamic Law* (1st edn, Publications of the International Islamic Call Society 1994)144; Khalil Ahmed, *Profits, Tort Liability for Personal Acts between Islamic Shari'a and Law* (1st edn, Misurata, Dar Rabah of Publishing and Distribution 1995) 9.

⁷⁶⁹ Based on the Hadith of the Prophet Muhammed peace be upon him: (Harm should be removed) which narrated by Malik in al-Muwatta.(Online) <<https://ahadith.co.uk/maliksmuwatta.php>> accessed 22/02/2019.

9.5 Application of a Strict Liability Compensation Scheme for Oil pollution damage

9.5.1 Consideration of the domestic context and circumstances

Domestic conditions are always as vital as to the contents of any law reform. Generally, any law is effective and enforceable when the local context and circumstances deem and reflect during the enactment process. Nevertheless, this process is not as simple as it seems at first glance. Enacting a strict liability compensation scheme for oil pollution damage is one thing; however, identifying the domestic factors that will push and facilitate the implementation process of this scheme will take more precise effort. These factors are related to various aspects, mainly political, cultural, and social principles. Therefore, an essential element for successful reforms and application is access to information about the scope of the legal framework that exists to tackle a specific problem and the conditions under which this framework may or may not be enforceable.⁷⁷⁰

In the political regard, even though the current situation in Libya has become blurred due to various factors, the UN agenda is considered an essential guide and reference to the most critical issues in Libyan affairs, aimed at political decision-makers and national leaders.⁷⁷¹ Accordingly, as demonstrated above⁷⁷² that Libya is a party member in OPEC and the 69-CLC on oil pollution damage. The request of Libya to the UNEP in 2013 regarding the environmental pollution⁷⁷³ reflects the Libyan desire to revise the existing environmental laws to develop or abolish them if necessary. In this regard, the international convention must ensure that the domestic law and practice of the state party are consistent with what is required by the treaty.⁷⁷⁴

In the social regard, as Libya is an Islamic state since December 2013, a Tripoli-based Review Committee, under the supervision of the Ministry of Justice, has been entrusted with the task of reviewing Libyan legislation. Their mission is to identify any contradictions to Shari'a basic rules and suggest how such inconsistencies can be tackled. This committee will

⁷⁷⁰ Kathrima Pistor, 'The Standardisation of Law and its Effect on Developing Economic' (2002) 50 JSTOR 97. 126

⁷⁷¹ United Nations, 'National legislation and the Convention – Incorporating the Convention into domestic law' (Department of Economic and Social Affairs) <<https://www.un.org/development/desa/disabilities/resources/handbook-for-parliamentarians-on-the-convention-on-the-rights-of-persons-with-disabilities/chapter-seven-creating-national-institutions-to-implement-and-monitor-the-convention-5.html>> accessed 01/03/2019.

⁷⁷² See chapter 7 section 7.5 above.

⁷⁷³ Kellay (n 4) 42.

⁷⁷⁴ United Nations (n 771).

review all existing laws to make them comply with Islamic law.

On the other hand, cultural transformation in Libya after 2011 affects the configuration of institutions. In this regard, it is worth noting the impact on the evolution of the environmental framework of the growing environmental awareness in Libyan society, which demanded increases in the education for the environmental matters relating to the nature of legal remedies and treatment.⁷⁷⁵ For this purpose, it has been requested that the existing environmental legislation must be revised to meet international best standards. Thus, the currently applicable law is being reformed based on the recommendation amendments.⁷⁷⁶

As is discussed in the previous section, the basis of the civil liability in the Islamic Shari'a law is the no-fault regime. Based on the fact that the fault-based regime stipulated in the Civil Code is currently the applicable regime in the Libyan courts, thus, these regimes should be revised by the committee to comply with Islamic law.

9.5.2 Accession and effective engagement to International Conventions on liability and compensation for oil pollution damage

Libya is a petroleum state and one of the crucial members of the OPEC since 1962, and it is also member of the CLC 1969 for oil pollution damage. This would assist Libya in adopting the relevant principles of these conventions and international institutions regarding oil pollution remedies such as no-fault liability regime in its national legislation. In light of the importance of engagement with these conventions, the related environmental institutions should work closely with international councils concerning oil pollution in Libya. For example, the UNEP could assist the Libyan government regarding the influences of the civil war on the environment, including improving relevant legislation of compensation and civil liability for oil pollution damage.⁷⁷⁷

This engagement would assist Libyan legislators concerning civil liability for oil pollution damage by considering the principles of the conventions, which are Libya is part of them, as a basis for establishing the method of strict liability regime. Accordingly, it is notably evident that those countries with better governance performance functioned better in dealing with the oil spill monitoring, law enforcement, preventive activities, cleaning operations, assistance to victims. Thus, the international conventions' engagement would also help the

⁷⁷⁵ Since 2012 environmental curriculums have been introduced into the curriculum of the faculties of law in Libya.

⁷⁷⁶ Nait (n 14) 7.

⁷⁷⁷ Kellay (n 4) 42.

transitional government in Libya improve its leading institutions regarding the oil pollution issues.⁷⁷⁸

9.6 Effectiveness and enforceability of a strict-liability compensation scheme for oil pollution damage during transition times

A state of institutions, the rule of law and independence of the judiciary were among the chief demands that demonstrators voiced on the morning of 17 February 2011. The lack of internal security has meant that it has created significant challenges for the legal and institutional systems in which judges are currently contending with the previous legal regime, institutional laws of which are not always understandable, desirable, or easily enforceable. In terms of institutionalisation and regulation, the structure and bureaucracies of the Libyan state have traditionally possessed little power or regulatory capacity.⁷⁷⁹

Understanding the Civil Law System in the Libyan jurisdictions is, therefore, critical to informing policy decisions related to proposed legal reforms and endeavours for which civil law is necessarily affected. Understanding the system will better determine how to facilitate long-term legal institutions in the aftermath of conflict. The institutional deficits in Libya are of critical concern due to the vital strategic importance of this country to the international community.⁷⁸⁰

Accordingly, institutions are "the rules of the game in a society", some are formal, and some are informal, but both types are important to how a legal system function. Laws are formal institutions. How people understand laws and whether they respect them are features of a society shaped by informal institutions.⁷⁸¹ Therefore, the use of weak judicial institutions, particularly in the ongoing transition in Libya, may affect the oil pollution cases in both its content and extent.⁷⁸²

The judiciary and security sectors in any country are closely related to a government's functioning or non-functioning institutions. Since the ending of the regime of Qaddafi, Libya has struggled to install an effective governance structure and properly working institutions. Therefore, reforming the institutions, particularly those related to the judiciary and

⁷⁷⁸ United Nations (n 771).

⁷⁷⁹ AfDB, 'From Inherited Wealth to Productive Economy: Planning for Development in Post-Civil War Libya' (AfDB, 2013) <<http://www.afdb.org>> 5 accessed 28/06/2019.

⁷⁸⁰ Stigall (n 88) 292.

⁷⁸¹ Graham Ferris, 'The Path-Dependent Problem of Exporting the Rule of Law' (2012) 101 (4) Round Table 363. 366

⁷⁸² Aboueldahab (n 628) 97.

environment, with a specific focus on capacity-building would assist Libya in imposing an effective and enforceable strict-liability compensation scheme for oil pollution damage during transition times.

9.6.1 Reforming the Judicial System

As discussed previously in chapter 3, a constitutional declaration issued on 3 August 2011,⁷⁸³ explicitly articulates the independence of the judiciary, prohibits the establishment of exceptional courts, and prohibits the establishment of any legal provision granting immunity to administrative decrees against judicial supervision. It also abolished the immunity of the High Judicial Council's decisions and made it subjected to judicial appeal. Moreover, the jurisdiction of the Supreme Court has been expanded to allow it to establish mechanisms to handle electoral appeals.⁷⁸⁴

The Supreme Judicial Council (SJC) is Libya's highest judicial, the UNSMIL supported the SJC during the transitional period to promote the adoption of a new judicial reform strategy.⁷⁸⁵

UNDP, under UNSMIL, organised meetings for the council with counterparts in Italy and the Netherlands in the administration of justice. Capacity-building initiatives were initiated by UNSMIL, targeting some 900 judicial members in Libya in close collaboration with the High Judicial Institute. In October 2013, a workshop was organised by the Bar Association, and the High Judicial Institute organised with the No Peace Without Justice (NPWJ) to boost trial monitoring capacities among the Libyan judicial staff. Shortly after, NPWJ organised another workshop on awareness of Libya's obligations towards international humanitarian law and the prosecution of war crimes and human rights violations.⁷⁸⁶

Changes to the structure of judicial bodies and judicial appointments did take place in Libya following the fall of Qaddafi. The NTC issued law No.4 of 2011, which modified the composition of the SJC. Instead of having the justice minister as its head, the Supreme Court Chief become the default head. However, the SJC remained financially dependent on the justice ministry, and its leaders continue to be appointed by the legislature.⁷⁸⁷

⁷⁸³ See chapter 3 section 3.4.2 above.

⁷⁸⁴ For more information see Libya's Constitution of 2011, [Available online] <https://www.constituteproject.org/constitution/Libya_2011.pdf> 5 accessed on 03/10/2017.

⁷⁸⁵ Libya Herald, 'Judicial reform Boosted by Training on Trial Monitoring' (13 October 2013, UK Foreign & Commonwealth Office, Libya) <<http://www.libyaherald.com>> accessed 09/06/2018.

⁷⁸⁶ Ibid.

⁷⁸⁷ Aboueldahab (n 628) 94.

Another point related to reforming the judicial system is, as discussed in chapter 7, the analysis of the post-2011 oil pollution cases has shown that the Libyan judiciary seems to become more independent. Judges may show some independence in making their decisions beyond the executive and legislative power's influence.⁷⁸⁸ Based on this, judicial independence should be underpinned by a sufficient legal framework that can be applied effectively in practice.

Based on the recommendations of the Euro-Mediterranean Human Rights Network, the Libyan government should enable experts to examine all limitations and weaknesses in the current judicial system and investigate the obstacles impeding its independence and integrity. Those experts should also be empowered to carefully draft laws that guarantee the independence and integrity of the judiciary as a pillar of the state of law.⁷⁸⁹

Other substantial recommendations that should be incorporated in the organisation constitution are including all the principles that guarantee the independence of the judiciary. Such these principles are the separation of powers; organisation of courts, their jurisdictions, and the authorities of constitutional courts; the right to appeal and regulation of legal immunities.⁷⁹⁰

Additionally, ban legislation that infringes on judicial authority powers by establishing special courts and committees outside the regular judicial framework to hear cases under the pretext of urgency. Also, improve the financial situation of judges and promote their living standards to protect them from corruption and subordination that may impact their independence. Moreover, create a favourable environment for judges and courts and support sovereign security institutions, which would positively impact the performance of judges. Further to these recommendations, vital mechanisms for enforcing judicial rulings to achieve their objectives, for example, maintaining and reinstating rights and punishing perpetrators, must be vitalised. Legal rulings are meaningless unless voluntarily or enforced coercively.⁷⁹¹

⁷⁸⁸ See Chapter 7 section 7.5.2.3 above.

⁷⁸⁹ Euro-Mediterranean Human Rights Network, 'Reform of Judiciaries in the Wake of Arab Spring' (2012) <<http://docs.google.com/document/d/1R5KGw1oWs3620w7ZEQWcqRfAKZeXXZKs3NTnCefwZiw/edit>> 82 accessed 18/03/2019.

⁷⁹⁰ *Ibid* 82.

⁷⁹¹ *Ibid* 83.

9.6.2 Reforming the Environmental General Agency Role

A strengthened, more accountable, effective, and efficient Environment General Authority is essential for the management, implementation, and monitoring of the domestic environmental general agenda in Libya and at the regional and international level.⁷⁹²

As a backdrop to a discussion in chapter 3, it has been noted that Libya currently may not have functioning institutions, and there are frequent references to the weakness of these associations.⁷⁹³ It is also pointed out that a particular characteristic of the institutional performance and structures inherited from Qaddafi's regime was a concentration of decision-making with individuals rather than departments. This weak institutional capacity must be changed into the new government in which a new one is required urgently but would take time to grow.

Accordingly, in cooperation with the Libyan government, the UNEP has developed a project called "Strengthening Environment General Authority's Capacity for Sound Environment Management".⁷⁹⁴ It is important to note that the transitional insecurity situation creates risks that have highly affected the project's intended outcomes. This project is still on the paper and has not taken place on the ground yet. However, the UNEP has made and given vital recommendations regarding the institutional building capacity of the EGA.

The project will assist the Libyan government in tackling and addressing environmental issues through improving the EGA capacity at the management and technical levels. The government's capacity will be improved by enhancing EGA's internal capacity for environmental examination and analysis. The project will also strengthen the EGA capability in examining, collecting, and adopting a procession of monitoring through the effective use of advanced laboratories. Therefore, EGA's capacity to use a comprehensive system will be improved; this will be done within an effective system of information management that includes generating, documenting, processing, distributing and use of knowledge within the EGA.⁷⁹⁵

In addition, this project will assist the Libyan government in improving the technical capacity of the EGA for effective professional performance and achieve linkages and harmonisation with national development plans. The project will also enhance the national

⁷⁹² UNDP (n 68) 4.

⁷⁹³ See chapter 3 section 3.4.1 above.

⁷⁹⁴ Ibid 1.

⁷⁹⁵ Ibid 29.

ability regarding the management and monitoring of the implementation of global environmental conventions and treaties.⁷⁹⁶

Accordingly, recognising the EGA's role in ensuring that Libya meets its international obligations, the EGA is involved in providing strategic input on key strategies and legislation that impact the environment in Libya.⁷⁹⁷

Considering the Ogoniland experience, for example, the UNEP reviewed Nigeria's legal and institutional issues related to oil pollution. Like in Libya, it had been found⁷⁹⁸ that there are multiple institutions with unclear mandates and overlap of authorities and responsibilities regarding environmental matters. It recommended some solutions for dealing with jurisdictional gaps and overlaps authorities and responsibilities between ministries and a lack of resources within key agencies for environmental management on the ground, including enforcement. Based on this, the UNEP would assist the capacity development and strengthening of the Libyan governmental institutions by conveying the international experience to benefit the staff and draw on international best practices.⁷⁹⁹

Additionally, the UNEP made specific recommendations to strengthen the legal and institutional weaknesses identified during the environmental assessment of Ogoniland.⁸⁰⁰ It recommended that, for instance, the existing Nigerian legislation on oil pollution be reviewed comprehensively, considering recent international developments in regulation and incorporating community consultation to determine remediation closure levels so that decisions on new legislation are seen as both transparent and inclusive.⁸⁰¹ In the same regard, Libya could take the Nigerian experience as an example and follow the given recommendations to strengthen the legal and institutional weaknesses identified by the UNEP. In doing so, the fault-based civil liability regime should be amended and replaced by the no-fault strict liability regime concerning compensation for oil pollution damage.

9.6.3 Building capacity {awareness and training programme}

Organisationally, building capacity can be seen as a process or activity that improves the ability of a person or institution to carry out its stated objectives. The capacity development process focuses on technical capacities, organisational change, leadership, social cohesion,

⁷⁹⁶ Ibid 30.

⁷⁹⁷ UNDP (n 68) 29.

⁷⁹⁸ See chapter 4 section 4.5 above.

⁷⁹⁹ UNEP (n 104) 8.

⁸⁰⁰ Ibid 217.

⁸⁰¹ Ibid 15.

or shifts in policies or other aspects of the enabling environment that can facilitate more effective use of capacity.⁸⁰²

The topics and target groups for capacity building regarding the establishment of a strict liability regime could be determined as follows. The focus of the capacity building programme should include an introduction of the importance of the enactment of a no-fault strict liability regime in the Libyan legal system, the law of civil liability for oil pollution damage through the environmental, petroleum and Civil Code, and fundamental of strict liability regime concerning oil pollution claims. This project should target the national bodies in relation to the judiciary, environmental and petroleum sectors. Judges, judicial experts, EGA staff, enforcement officers, NOC and subsidiaries staff, the undergraduate and postgraduate law students.

Referring to the UNEP report about Ogoniland, it is noted that the baseline data of this report has been updated a few times since its first establishment in 2011.⁸⁰³ Based on this, the 2016 report of UNEP has provided some new recommendations to the Nigerian government regarding training and developments. For example, the UN Institute for training and research held some consultative workshops for Ogoni residents to develop their skills and knowledge about the restoration of the livelihoods of the Ogoni communities.⁸⁰⁴ Accordingly, the UN in 2017 has developed the content of its training programme and carried out different training projects such as clean-up technology. It provided technical assistance to the Ogoni graduates who were educated in Environmental Sciences to enhance their capacity and involvement in the community to implement the restoration project successfully.⁸⁰⁵

In the Libyan context, judges, judicial personnel, civil society workers and concerned individuals have presented several essential solutions to consolidate an independent and effective judiciary. They recommended that the technical and scientific training and qualification of judges be so that they may keep pace with the situation after the revolution and the evolution of the judiciary. There are also recommendations made in the Euro-Mediterranean Human Rights Network Report that might be classified under the building capacity head.⁸⁰⁶

⁸⁰² UNDP (n 740) 11.

⁸⁰³ Federal Ministry of Environment (766).

⁸⁰⁴ *Ibid.*

⁸⁰⁵ *Ibid.*

⁸⁰⁶ Euro-Mediterranean Human Rights Network (n 789) 83.

Accordingly, it is noted that there are some professional judges; however, institutional problems inherited from the previous regime meant it is imperative to create a legal framework and corresponding procedures in which justice is central.⁸⁰⁷

In this regard, there is a need to educate judges regularly on regional and international law developments by extending support to local and national law journals and encouraging judges to participate in cultural courses and conferences. Also, it is desirable to ensure the training and qualification of judicial assistant sensitisations, including clerks and experts.⁸⁰⁸

Accordingly, the UNEP made some recommendations in respect of institutional building capacity to the Libyan transitional government. It recommended building the capacity of governmental and non-governmental agencies to enable them to fulfil their mandates. It improves the technical skills of individuals in the various agencies to allow them to deal effectively with environmental issues, runs training courses, and enhances the capacity and skills of the target groups and individuals.⁸⁰⁹

Accordingly, the NOC has paid attention to the preparation and implementation of ongoing and varied educational and training programmes regarding the effects of oil pollution on the environment in Libya. Thus, these training activities in the NOC aim to raise the level of competence and efficiency of the individuals both technically and administratively.⁸¹⁰ The example for these training programmes is the workshops running by the NOC internally to raise the knowledge of its staff and public about the impacts of oil pollution on the environment.⁸¹¹ Besides this, the NOC regularly participates in international conferences regarding the oil industry and oil pollution matters, particularly to build its employees' capacity.⁸¹²

In sum, reforming the civil law system, judiciary system, and the relevant institutions with building capacity of the target topics and groups would assist the enactment of the strict civil liability regime for oil pollution damage and straighten its enforcement. This will result from the combination of reforming the concerned authorities and raising awareness in accordance with compensation scheme for oil pollution damage.

⁸⁰⁷ Chatham House, 'Libya: Establishing the Rule of Law' (Middle East and North Africa Programme: Libya Working Group Meeting Summary, May 2012) <<http://www.chathamhouse.org>> accessed 18/03/2019.

⁸⁰⁸ Euro-Mediterranean Human Rights Network (n 789) 83.

⁸⁰⁹ UNDP (n 741) 11.

⁸¹⁰ NOC, 'NOC and PTQI review Institute's plans for 2019' <<http://www.noc.ly>> accessed 04/07/2019.

⁸¹¹ NOC, 'Training program of Ras Lanuf Oil & Gas Manufacturing Company' (online, 24/03/2018) <<http://www.noc.ly>> accessed 04/07/2019.

⁸¹² Khalil and Lees (n 466) 283.

9.7 Conclusion

In this chapter, the theoretical basis for reforming Libyan laws & institutional capacity-building for establishing a compensation scheme for a new Libyan civil liability for oil pollution damage has been suggested. The enactment of this new scheme is important as this will fill the gap of the limitation of the existing fault-based liability regime in the applicable Civil Code in Libya. The findings of the analysis of selected oil pollution cases in which the current tendencies of the Libyan courts seem to mitigate the conditions for proving the fault in the side of the NOC. This could be deemed a practical foundation for the Libyan policymakers to adopt the strict liability for oil pollution compensation scheme. This helpful foundation could be found theoretically and supported by the rules included in Islamic law, in which the latter is considered the primary source of the Libyan legislation.

This scheme to be applicable and effective might consider the domestic context and circumstances during the enactment process. Additionally, Libya might access and engage effectively with the international conventions on liability and compensation for oil pollution damage, particularly the CLCs and Funds Conventions.

Other procedures should support the enactment process of a new strict liability scheme to be effective and enforceable in the Libyan context. The functional institutions in Libya should be reformed to enforce and apply a new compensation scheme. Amongst these systems, the important ones that should be improved are the judicial system and general environmental agency in particular. Effectively, full attention should be paid to building capacity and should focus on preparing and implementing ongoing and varied educational and training programmes.

Finally, the next chapter provides the final recommendations for the Libyan legislators regarding the civil liability compensation scheme for oil pollution damage. It also reflects on the three previous chapters and then provides the conclusion to this thesis as follows.

10. Conclusion and Final Recommendations

10.1 Introduction

The essence of this thesis is to explore, from several different perspectives, the capacity development of an effective civil liability compensation scheme for oil pollution damage in Libya. This thesis considers the needs of the national legal system, the international standards of compensation scheme regarding oil pollution damage, integrating with the impacts of the current transition Libyan situation.

Libya has implemented a legal framework of civil liability for oil pollution damage relying on a fault-based civil liability regime regarding its civil law system. However, the main issues that have been raised in this thesis suggest that this system may be insufficient. In most instances, the system cannot secure compensation for oil pollution victims, particularly during unstable times, unless it is designed to adopt a kind of no-fault civil liability regime. It is the analysis and combination of the critical elements—civil liability rules for oil pollution damage through the analysis of oil pollution cases and the impacts of the current Libyan transition situation on them—to its future legal development in this regard. This marks a significant and unique analysis of the subject from the Libyan perspective, insofar as they fill the gap in subject literature and present a country-specific analysis of the impacts of the transitional period in Libya.

Further, this thesis looks at civil liability rules for oil pollution damage included in environmental, petroleum and Civil Code during the transitional period in Libya. It seeks to assess the issues that can arise from a comprehensive understanding of these different factors. In this regard, the research addresses weaknesses in the current literature by raising how the strict-fault civil liability regime can be positively applied on the cases of oil pollution damage through the transitional period in Libya.

It suggests a standard by civil liability regime for oil pollution damage which can contribute towards establishing guidelines for environmental administrative institutions (or for any similar civil legal system or any country pass their transitional stage).

It can be used in the decision-making process of assessing any application of civil liability rules for oil pollution damage, for judges in determining related cases, in particular, oil pollution damage cases during the transitional period. Additional improvement of the model can meet the Libyan needs in respect of CLfOPD framework under international conventions, considering the specific circumstances of the Libyan transitional period after

2011, satisfying and serving the concept of legal capacity development in Libya in this regard.

A second central analysed of this thesis concerns doctrinal, non-doctrinal and non-empirical approaches, which have been used to develop concrete arguments for socio-legal and administrative reforms to address present weaknesses in the Libyan CLfOPD framework. These methods have analysed the strengths and weaknesses of the applicable CLfOPD legislation to improve the role of direct institutions and optimise capacity development for a civil liability compensation scheme for oil pollution damage. Specifically, it analyses the oil pollution cases brought before Libyan courts and reviewed the efforts undertaken by judges in ruling such cases during the transitional period concerning the interpretation and enforcement of these rules. Its overall aim is to understand the efficiency level of these applicable civil liability rules regarding oil pollution damage within the Libyan civil legal system and the impacts of the unstable period after 2011.

In this respect, the research has made a unique contribution to understanding the impacts of the transitional period on ruling the oil pollution cases regarding the fault-based applicable civil liability rules and the extent of the effects of the political power on the judiciary decision-maker in Libya. It suggests how a strict liability regime can be activated like an instrument for environmental law and Civil Code change to guarantee that the full compensation would provide to oil pollution victims. And how, theoretically, it can be applied in any petroleum nation that shares similar circumstances with Libya, such as Iraq and Syria.

This approach helped identify shortcomings in the system and suggested reforms. The results of the analysis of oil pollution cases, collected from Libyan Courts and translated officially from Arabic to English, have helped understand the limitations of the applicable civil liability rules. It has also shed light on the changes of the judge's attitude in ruling these cases pre-and post-2011 at the level of the interpretations of the same applicable civil liability rules included in the Civil Code. This could help policymakers in using these provisions as judicial precedents and foundation to amend the applicable law in line with what is applied in the international conventions in this regard, to bring about a more efficient and effective mechanism.

Overall, the research suggests that applying such a new strict liability compensation scheme could fill the gap of the limitations of the applicable fault-based civil liability regime to meet the needs of the Libyan legislation regarding oil pollution damage, particularly during the transition period. This scheme should be supported by capacity developments, including

reforming the judicial and environmental institutions and capacity buildings to increase awareness regarding the enforcement of this scheme.

The following sections include some reflections on the three parts of this thesis in relations with the main findings of the research in terms of theoretical, practical analysis and suggesting the new civil liability compensation scheme for oil pollution damage in the Libyan transition state.

10.2 Reflecting on Part I: The current nature of the Libyan State: Post-Conflict, Transitional or Failed state?

This research starts with reviewing the existing literature regarding the post-conflict, transitional and failed state (chapter 2). The analysis of the literature reveals that every type of these states has its special features, which may distance it from the other concept. Although in some instances, it seems that the meanings of these terms overlap, and it may be difficult to distinguish between them, post-conflict and transitional states in particular.

Chapter two establishes the conceptual framework of these concepts by providing conditions, characteristics, and examples of these types of states to apply this framework to the Libyan state to identify its current nature. In doing so, chapter 3 reviews the literature related to Libya, including its history from its independence in 1951 through the Qaddafi's era, the 2011-revolution and current history within post-2011 till January 2020.

The literature review shows that Libya had passed the post-conflict stage when the election took place in July 2012. However, it may be difficult to classify the current nature of Libya in a specific concept. However, the nearest one to describe might be the transitional state because most of the conditions and characteristics of this type of state are available in Libya. The transition to democracy has three stages: initial mobilisation to oust the old regime, holding free elections, and delivering public services and public goods.⁸¹³ It seems that Libya has met these three stages since 2011, overthrowing Qaddafi's regime in 2011, holding the free elections in July 2012, and delivering the essential services and goods to Libyan citizens by the successive governments. However, the transition process has encountered several challenges during the past ten years. The intervention of the international actors and the non-state actors impeded the Libyan transitional period. The lack of international agreement on the situation in Libya confused the Libyan political scene. In addition, NATO intervention in 2011 without the precise plan for post-2011 to support Libya increased the chance for

⁸¹³ Strachen (n 155) 5.

chaos instead of stability. The international support for non-state actors also led Libya to return to the conflict several times. Since 2014, Libya has been split between factions based in the capital Tripoli, in the west, and in the city of Beneghazi, in the east.

Significantly, although Libya in the present day is facing several challenges in the transitional period, it is likely not falling back to the pre-transitional state in which the third election plans to take place in Libya on 24 December 2021.⁸¹⁴

Based on the purpose of this research, this thesis tries to make an analysis and recommendation tailored to the post-conflict and transitional nature of the Libyan state. The importance of displaying the conceptual framework of the post-conflict, transitional and failed state is the possibility of its application to the Libyan case in this thesis. Specifically, that it is not post-conflict because the political violence has erupted post-revolutionary violence, and there is no longer a single government that controls the territory of the country, and there has been a failure to monopolise violence by the state. In such circumstances, it might be sensible to look at functioning institutions when thinking about efforts at redressing damage – including oil pollution damage. Therefore, there is a focus on regimes that exist in the absence of a compelling state (as in the international environment, hence the use of IOTPICS) and to focus on NOC – which is a vital and functioning institution neither Libyan government wishes to undermine (as it is the source of resources).

In this regard, the literature review shows the relationships between the central institutions (NOC, LCB, GNA and the judiciary) and the successive governments (post-conflict 2011 in particular). It reveals that these institutions could play a crucial role during that time since they are trying to work independently and distancing themselves from the ongoing clash between the two existing governments located in Tripoli and Tobruk. This could be considered as an important impact of the current transitional period in Libya.

Additionally, the reviewing of the literature sheds light on the priorities of the successive governments post-2011. It shows that the law-makers have not likely paid attention to environmental matters, and the impacts of the oil pollution events have been ignored during these times in most instances. This explains why the previous framework of CLfOPD established in Qaddafi's era or even before is still being applied in the Libyan courts on the current oil pollution cases.

⁸¹⁴ Resolution No.33 of 2021 regarding the regulation for updating the voter register attached to the decision of the IHEC council,(online) < www.hnec.ly > accessed 02/09/2021.

This part, within its two chapters, answered the question of under which concept (post-conflict, transitional or failed state) could we classify Libya after the 2011 revolution? and in the oil industry context, how does the NOC deal with the successive governments? It explores the current nature of the Libyan state post-2011 revolution in which could be considered as a transitional state. It also investigates potential impacts of this current transitional nature of the Libyan state on the functions of the prominent institutions. In this regard, the NOC played the crucial role during the transitional period by showing its independency from the political conflict between two existing governments. It also reveals effects of the transitional nature of the Libyan state on the judiciary and Civil Law Systems in particular, and more specifically on the applicable framework of CLfOPD. It shows that judiciary and Civil Law Systems reforming are not in the priorities of the law makers policy. The law-makers have not also paid attention to environmental matters, and the impacts of the oil pollution events since the end of 2011 revolution.

10.3 Reflecting on Part II: Environmental protection for oil pollution damage within the civil law system of Libya

This research examined the legal and regulatory framework for CLfOPD in Libya while considering the characteristics of the current transitional situation and its significant impacts on the development of the national legal system.

Part 2 of this thesis provides the answer to the questions of to what extent do the current Libyan legal framework of civil liability for oil pollution damage (CLfOPD) cover oil pollution cases? And who is legally responsible for environmental damage caused by oil pollution? And what are the challenges encountered by victims of oil industry pollution when they resort to the courts?

Chapter 4 evaluates environmental law No.15 of 2003 to determine whether this law addresses the civil liability for oil pollution damage. It reveals that there are no civil liability rules included in this law. This chapter also highlights the role of the environmental institutions (GNA), which shows that these institutions play a weak function in tackling the environmental issues in Libya.

Chapter 5 assesses the provisions of petroleum laws to evaluate these provisions regarding the civil liability for oil pollution damage. It shows that these provisions have not stipulated any articles in this regard. This chapter also assesses the role of the NOC in which indicates that the NOC has potential in the cases of oil pollution damage since it is considered the main defendant in most oil pollution cases.

Chapter 6 demonstrates why the provisions of civil liability in the Libyan Civil Code have been applied in the Libyan courts on the oil pollution cases. This may be due to the environmental and petroleum laws being devoid of any rules dealing with civil liability for oil pollution damage. In such cases, the provisions of civil liability in the Civil Code should be applied as general rules. It reveals that the fault-based civil liability regime stipulated in article No.166 is the applicable regime in this regard.

Chapter 7 combines the results of part one in regard to the impacts of the current transition Libyan state with the development of the previous chapters of this part regarding civil liability for oil pollution damage by analysing the oil pollution cases. Although, these documents could be seen as practical evidence determining the type of the applicable civil liability regime and the impacts of the current transitional period on these cases. However, these cases are not the representative sample nor a qualitative sample rather than an indicative trend. It is also essential to indicate that of the six selected cases, the two pre-2011 ones found liability because of no-fault proved, and the post-2011 cases found liability.

The gathering of these documents as primary sources, followed by conducting an analysis of these selected cases, assists in achieving the objectives of this thesis. In particular, it critically interpreted the results to develop a better understanding with the determination of the applicable fault-based civil liability regime on the oil pollution cases, with particular emphasis on the impacts of the current Libyan transitional situation in ruling these cases.

The findings of chapter 7 show that applying the fault-based civil liability regime stipulated in article No.166 of Civil Code on the oil pollution cases may not be a sufficient rule to compensate oil pollution victims, which might be seen as an impediment in applying a CLfOPD framework more successfully.

The analysis of the selected oil pollution cases shows a notable change in the decisions on the oil pollution cases throughout pre-and post-2011, although the applicable rules of fault-based civil liability being applied are sustained without any modification. Accordingly, this may be related to the judge's behaviour in terms of the impacts of the transitions of the Libyan transitional state. The judges differ in ruling their decisions about oil pollution cases. On the other hand, the opposite was confirmed in the Qaddafi era, in which the oil pollution cases were regularly unreasonably dismissed. Despite the importance of this change in the ruling of oil pollution cases, this finding could not be generalised over Libyan courts. That is because this study was limited to analysing judgements issued by courts in the western region of Libya.

In conclusion, as the discussion shows, the research findings provide valuable insight into CLfOPD related issues and determine the impacts of the current transitional situation in Libya on the oil pollution cases and elements.

10.4 Reflecting on Part III: A proposal for a new civil liability compensation scheme based on the model of the International Oil Tanker Pollution Compensation Scheme and how this would respond to the defects discovered in Part One and Part Two

Concluding from the findings of the two parts of this thesis, part one finds that Libya at its present day could be classified as a transitional state, and this situation has impacted positively and negatively the functions of its main institutions. Part two concludes that the applicable Libyan framework for oil pollution damage may not be efficient to provide compensation for oil pollution victims, although there are notable distinctions between the judges' decisions on oil pollution cases pre-and post-2011. Although, the analysis of the selected oil pollution cases has shown that the judiciary could be seen more independently after 2011. It seems that they exercise similar type of no-fault civil liability on the selected oil pollution damage. However, since the legal system in Libya is based on Civil Law System, which relies on coding the laws to be applied, these changes to be used on all oil pollution cases must be stipulated in the Civil Code.

Based on these findings, this part answers the question of how would a compensation scheme based on strict liability stipulated in the IOTPCS be implemented into the Libyan civil law system? Accordingly, it provides some suggestions regarding the civil liability regime for oil pollution damage based on the International Oil Tanker Pollution Compensation Scheme model. In doing so, chapter 8 reviews the literature related to civil liability and funds conventions for oil pollution damage. The vital principle of the CLC-Funds Conventions in this study is applying the strict liability regime. By considering the defects of the applicable fault-based liability scheme for oil pollution damage and the features of the International CLCs that impose a no-fault strict liability scheme, adopting a similar strict liability scheme would mitigate the limitation of the applicable Libyan framework with regards to oil pollution damage. Such a scheme would guarantee adequate compensation for oil pollution damage through strict liability, advantageous to oil pollution victims, particularly in the transitional period.

Regarding the impact of the Libyan transitional situation, such a strict liability scheme could also act to bypass or avoid the otherwise uncertain governmental authority exercised by the competing Libyan factions in this transitional phase of Libya's modern history.

By reviewing the elements of the international regime of CLCs and Fund Conventions and highlighting its fruitful successive developments, this research would recommend adapting the relevant articles that govern the civil liability for oil pollution damage to meet Libyan legislation needs. This study also suggests establishing a strict civil liability regime with compulsory insurance for Libyan legislation related to the oil industry to ensure full compensation is provided to victims of oil pollution in the Libyan transitional period.

Additionally, the enactment process of a new strict liability scheme should support other procedures to be effective and enforceable in the Libyan context. The functional institutions in Libya should be reformed to enforce and apply a new compensation scheme. Amongst these systems, the important ones that should be reformed are; judicial system and the general environmental agency in particular. To complete the development process, full attention should be paid to the building capacity. The latter should focus on the preparation and implementation of continued and varied educational and training programmes.

10.5 Recommendation policy for the Libyan government

The outcomes of this study could be a guide for future CLfOPD frameworks to improve and serve Libyan national law and its legal development policy. Therefore, the following recommendations are based on the finding of this research. Recommendations include issues that Libyan policymakers should take in replacing the applicable fault-based civil liability regime with a new strict-liability regime in ruling oil pollution cases in particular. These recommendations take into account the effects of the transition period on the oil pollution cases and the influence of political authority on judicial decision-making.

10.5.1 Establishing a new strict liability compensation scheme for oil pollution damage

This research suggests establishing a compensation scheme based on a strict liability regime. However, this regime should be completed by establishing the compulsory insurance to support the application of the strict liability regime. Accordingly, this study suggests that the compulsory insurance should be imposed on the NOC and other petroleum companies that working in the Libyan territory.

10.5.2 A need for an effective engagement to International Conventions on liability and compensation for oil pollution damage

Considering that Libya is a petroleum state, and it may be described as a transition state at its present day, it has been many oil pollution events that occur after the 2011 revolution. In the light of the importance of engagement to the conventions related to remedies for oil pollution damage, including compensation scheme, the related institutions, the EGA, in particular, should seek to work closely with international councils regarding oil pollution in Libya.

Accordingly, it seems clear that the countries with better governance performance functioned better in dealing with oil pollution matters, law enforcement, preventive activities, cleaning operations, and assistance to victims. Thus, the influential association to the related international conventions would help the transitional government in Libya to improve civil liability rules for oil pollution damage and the function of its central institutions for better applicability and enforcement of the related laws. This effective engagement would assist Libyan legislators to understand the better remedies suitable for the current Libyan situation concerning civil liability for oil pollution damage by considering the principles of these conventions as a basis for establishing the method of strict liability regime.

10.5.3 Training programmes

A training programme on CLfOPD should be introduced by the Libyan government and integrated into prevailing corporate education and training conferences for the petroleum companies based in Libya. These courses should cover the importance of legal protection for the oil pollution victims, the main environmental protection issues, and the application procedure within direct institutions. Also, it should define government strategies on the capacity developments, particularly reforming the judicial system and the EGA. This programme should aim to improve awareness among petroleum companies' employees and directors, individuals, judicial experts, and law students to explain how they can take advantage of a new strict civil liability compensation scheme for oil pollution damage. This programme should provide management sessions for environmental remedies based on the UNEP and Euro-Mediterranean Human Rights Network recommendations regarding building capacities such as a policy on environmental exploitation, clean-up, environmental law valuation and monitoring programmes.

10.6 Future research

This thesis has examined the legal framework for oil pollution damage in the Libyan transition situation. It has also examined the role of legal and environmental administration institutions and the development's capacity for a new civil liability compensation scheme, considered the primary vehicles for future results.

However, this thesis is limited in terms of civil liability for oil pollution damage and the impacts of the transitional state in such cases. As a result of this study, some issues have been raised which need further investigation. For example:

- 1- Since Libya witnessed the civil war in 2011 and during the transitional period, some wars emerged at separate times, including the 2016 ISIS war and the current war in Tripoli's areas (political violence cases). Subsequently, numerous contaminations events have occurred in view of utilising the weapons. This situation could be the subject for future examination about the civil liability for weapons pollution damage.
- 2- As presented in this study, there are two types of oil pollution cases (standard and political violence cases). This research explores the standard oil pollution cases. However, other oil pollution cases resulting from political violence are also important to further study.
- 3- As this thesis has referenced that the strict liability regime is the basis for the foundation of civil liability rules in Islamic jurisdiction, further research is needed to address this point, particularly how Islam redresses a civil liability for ecological contamination.
- 4- As presented in this research, the suggested compensation scheme is based on establishing a strict liability regime. However, based on the international scheme, the CLCs is completed by the IOPC Funds to cover the limitation of the CLCs, particularly on account of the presence of foreign cause. In like manner, this study suggests that the NOC, other petroleum companies, EPSAs and joint ventures could build up a similar Fund Compensation Scheme. This scheme could be financed by the oil companies working in the Libyan region, and compulsory insurance could be set up. Further study is needed to investigate how the framework of this Fund could be applied at the national level based on the international standard.

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