

## DECISION OF 31 JANUARY 1953<sup>1</sup>

THE UNITED NATIONS TRIBUNAL IN LIBYA,

Established by Resolution 388 (V), dated 15 December 1950, of the United Nations General Assembly,

Composed of Messrs. Faiz Yorukoglu, President; Hugo Wickström, Judge; Vicente Sánchez Gavito, Judge,

With regard to the case concerning the administration of certain properties of the State in Libya

between

The Government of Italy, represented by Mr. Fernando Valenzi,  
and

- 1) The Government of the United Kingdom of Great Britain and Northern Ireland, represented by Sir Harry Trusted,
- 2) The Government of the United Kingdom of Libya, represented by Mr. W. L. Dale,

DELIVERS THE FOLLOWING SENTENCE:

The Memorial instituting these proceedings was presented by the Agent of the Italian Government on 22 December 1951. In it the said Agent names the British Government as the defendant and makes the following submissions:

(a) The return to the Italian Government of the administration of its *patrimonio disponibile* in Tripolitania and Cyrenaica, of which the said Government still has the right of ownership;

(b) The restitution of the administration of the buildings listed in Annexes 3 and 4, over which the Italian Government, pending the conclusion of agreements with the Libyan Government, intends to claim ownership for the requirements of its diplomatic and consular services and of the schools in Tripolitania.

Libya came into being as an independent state two days after the presentation of the aforesaid Memorial, and the Tribunal, as it has declared in its decision of 18 February 1952, delivered in the Incident of Interim Measures, considered the Government of Libya as a co-defendant and communicated the Memorial to both the British and the Libyan Governments. In the same decision, the Tribunal rejected the Libyan Government Agent's exception of lack of jurisdiction, having ruled that the instant action has been properly brought before the Tribunal, its subject-matter being the transfer of the administration of properties comprised in the categories specified in Article I, paragraphs 3 (a) and 5, of the United Nations General Assembly Resolution 388 (V), dated 15 September 1950, and the said action being as it is on Article X, paragraph 1 (b), of said Resolution 388 (V).

In its Counter-Memorial, submitted on 31 January 1952, the British Government contends that by Article 23 (1) of the Italian Peace Treaty Italy renounced all rights and title to the Italian territorial possessions in Africa, Libya, *inter alia*, and that "the continued ownership of the property in question by Italy is inconsistent with such renunciation." It is further contended in the said Counter-

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<sup>1</sup> General list No. 1.

Memorial that Resolution 388 (V) does not convey any title to the property in question and that “no inference as to the ownership thereof can be drawn therefrom.”

With these two contentions as its legal basis, and after referring to the compliance by the British Government with the United Nations General Assembly Resolution of 17 November 1950, the said Counter-Memorial submits (a) that the British Government acted in a proper fashion when it handed over the property in question “to the custody of the Government of the United Kingdom of Libya, pending a final settlement”, and (b) that the present proceedings against it are misconceived.

With regard to the factual chapter of the Libyan Agent's Counter-Memorial, mention should be made of the statements contained therein with respect to the properties listed in Annexes 3 and 4 of the Italian Agent's Memorial, i.e., those properties whose administration Italy wants restituted to it in order to meet the requirements of its diplomatic and consular services in Libya and of the schools serving the Italian community in Tripolitania. The said statements read as follows:

3. Under arrangements made with the Italian Government, the whole of the properties listed in Annex 4 to the Memorial of the Italian Government have, for some time, been in the possession of the Italian Government for use as schools.

4. The Libyan Government has undertaken to give up to the Italian Government two buildings in Tripoli (included in Annex 1 to the Italian Government's Memorial) for use as diplomatic and/or consular premises. Negotiations are in progress for handing over these buildings, which are acceptable to the Italian Government.

5. A building in Benghazi, formerly the Tribunale Militare, has been handed over to the Italian Government for use as diplomatic and/or consular premises.

This same chapter of the Libyan Agent's Counter-Memorial contains the following statement with regard to the Italian Government's claim to the administration of the properties which constituted its *patrimonio disponibile* in Tripolitania and Cyrenaica, namely:

6. In addition to the buildings mentioned in paragraphs 3 to 5 above the Italian Government in its Memorandum claims the administration of some 500 buildings or other properties. Out of all these properties the Italian Government can, under the terms of the United Nations Resolution of 15 December, 1950, expect to obtain the transfer of a building in Tripoli for a hospital and one or two more buildings in Libya for diplomatic and/or consular use. In other words the Italian Government claims that because it has legitimate aspirations towards obtaining perhaps three or more buildings out of 500 properties, it ought to administer all the 500 until the three are decided upon.

In the chapter of the said Counter-Memorial on the law applicable to the case, the Libyan Agent reiterates the British Agent's allegations and expounds an additional thesis, namely, that even if, contrary to the contention of the respondent Governments, the Tribunal were to rule that the Italian State retains the “technical ownership” of the properties in question, it has without a doubt surrendered its claim to the “beneficial ownership, use and enjoyment of all the properties with the exception of the few required for diplomatic and/or consular use, and use as schools and hospitals, as provided by the United Nations Resolution of 15 December 1950”.

In this respect, the said Agent contends that “the terms of the United Nations Resolution itself, apart from the Italian renunciation, clearly indicate

that the beneficial enjoyment of the properties is to go to Libya with the exceptions just stated.”

Lastly, the said Counter-Memorial states that the Libyan Government “will preserve the property in accordance with its obligations and will not deal with it otherwise than in accordance with the United Nations Resolution of 15 December 1950”, and concludes with the allegation that “it is incompatible with the sovereign status of the Libyan Government that the properties should be placed under the control of any other Government.”

In the Reply and Rejoinders, the Italian Agent, on the one hand, and the British and Libyan Agents, on the other, sustained their positions, the Italian Agent having added in the said Reply that his Government reserves “for a later date the request for reparation of the damage” caused to it by the transfer which the British Government made to the Libyan Government of the administration of the *patrimonio disponibile* and of the “immovable property mentioned in paragraph 5, Article I, of the Resolution” [Reply, paragraphs XVIII (a) and (f)].

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The Tribunal will deal, in the first place, with the Italian Agent’s claim that the administration of the properties constituting the *patrimonio disponibile* in Tripolitania and Cyrenaica be returned to his Government. The administration of these properties was transferred to the Libyan Government by the British Government when, on 24 December 1951, Libya achieved its independence.

With regard to the said claim, the Agents for the respondent Governments contend that the continued ownership by Italy of the Properties in question is inconsistent with the renunciation made by the Italian Government in Article 23 of the Peace Treaty, signed in Paris on 10 February 1947, which reads as follows:

*Article 23*

1. Italy renounces all right and title to the Italian territorial possessions in Africa, i.e. Libya, Eritrea and Italian Somaliland.
2. Pending their final disposal, the said possessions shall continue under their present administration.
3. The final disposal of the possessions shall be determined jointly by the Governments of the Soviet Union, of the United Kingdom, of the United States of America, and of France within one year from the coming into force of the present Treaty, in the manner laid down in the joint declaration of February 10, 1947, issued by the said Governments, which is reproduced in Annex XI.

The Italian Agent in his Reply contests this allegation of the said Agents and refers to United Nations Document A/AC.38/SC.1/R.1/Add.1 which contains the following excerpts from Fauchille’s *Traité de droit international public*,<sup>1</sup> namely:

When a dismembered State cedes a portion of its territory, property which constitutes *public* property, namely property which by its nature is used for a public service, existing on the annexed territory, passes with its inherent characteristics and legal status to the annexing State, being devoted to the public service of the ceded province, it should belong to the sovereign power which is henceforward responsible for it . . .

<sup>1</sup> Vol. I, 8th ed., pp. 360. 361

As regards *private* State property, i.e. property which the State possesses in the same manner as a private person, in order to derive income from it, it must be noted that failing any special provisions it does not become part of the property of the annexing State. In spite of the loss the dismembered State has suffered, it remains the same person as before and does not, any more than a private person, cease to be the owner of the things it possesses in the annexed territory and there is no principle preventing it from having the ownership of immovable property in that territory.

The Tribunal is of the opinion that the principles set forth in the above quotation constitute a generally accepted rule of international law. Private state property does not become part of the property of the successor state unless there is a "special provision" to that effect.

The Tribunal considers that this rule is followed in the Italian Peace Treaty wherein the loss of sovereignty by Italy over the ceded territories is established in Part I, entitled "Territorial Clauses", and the transfer of privately-owned state property within the said ceded territories is regulated by means of Annex XIV ("Economic and Financial Provisions Relating to Ceded Territories"), paragraph 1, which reads as follows:

1. The successor State shall receive without payment, Italian State and para-statal property within territory ceded to it under the present Treaty, as well as all relevant archives and documents of an administrative character or historical value concerning the territory in question, or relating to property transferred under this paragraph.

The following are considered as State or para-statal property for the purposes of this Annex: movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations.

Annex XIV, paragraph 1, constitutes, as far as the territories ceded by Italy by means of the Territorial Clauses of the Peace Treaty are concerned, the "special provision" which is necessary in order that the private state property in the ceded territories be transferred to the annexing state.

However, Annex XIV expressly excluded the former Italian Colonies from its scope. The terms of paragraph 19 of the said Annex XIV are the following:

19. The provisions of this Annex shall not apply to the Former Italian Colonies. The economic and financial provisions to be applied therein will form part of the arrangements for the final disposal of these territories pursuant to Article 23 of the present Treaty.

The procedure established in the above-quoted paragraph 19 led to the adoption by the United Nations General Assembly of Resolution 388 (V), which bears the title "Economic and Financial Provisions Relating to Libya". The said Resolution 388 (V), consequently, occupies the place, as far as the regulation of the economic and financial issues in Libya is concerned, that Annex XIV does with regard to the issues of identical nature posed by the cession of territory effected by means of the Territorial Clauses of the Peace Treaty.

The process whereby Resolution 388 (V) was adopted is succinctly and clearly expressed in its preamble, which is transcribed in its entirety together with Article I, paragraphs 1, 2 and 3 (a) thereof, the latter provisions being the next subject which the Tribunal intends to analyse:

*Whereas*, in accordance with the provisions of article 23 and paragraph 3 of annex XI of the Treaty of Peace with Italy, the question of the disposal of the former

Italian colonies was submitted on 15 September 1948 to the General Assembly by the Governments of France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America,

*Whereas*, by virtue of the above-mentioned provisions, the four Powers have agreed to accept the recommendation of the General Assembly and to take appropriate measures for giving effect to it,

*Whereas*, the General Assembly, by its resolutions of 21 November 1949 and of 17 November 1950, recommended that the independence of Libya should become effective as soon as possible, and in any case not later than 1 January 1952,

*Whereas*, paragraph 19 of annex XIV of the Treaty of Peace with Italy, which contains the economic and financial provisions relating to ceded territories, states that "The provisions of this annex shall not apply to the former Italian colonies. The economic and financial provisions to be applied therein will form part of the arrangements for the final disposal of these territories pursuant to article 23 of the present Treaty",

*Whereas* it is desirable that the economic and financial provisions relating to Libya should be determined before the transfer of power in that territory takes place, in order that they may be applied as soon as possible,

*The General Assembly*

*Approves* the following articles:

#### *Article I*

1. Libya shall receive, without payment, the movable and immovable property located in Libya owned by the Italian State, either in its own name or in the name of the Italian administration of Libya.

2. The following property shall be transferred immediately:

(a) The public property of the State (*demanio pubblico*) and the inalienable property of the State (*patrimonio indisponibile*) in Libya, as well as the relevant archives and documents of an administrative character or technical value concerning Libya or relating to property the transfer of which is provided for by the present resolution;

(b) The property in Libya of the Fascist Party and its organizations.

3. In addition, the following shall be transferred on conditions to be established by special agreement between Italy and Libya:

(a) The alienable property (*patrimonio disponibile*) of the State in Libya and the property in Libya belonging to the autonomous agencies (*aziende autonome*) of the State.

It appears clear to the Tribunal that the above-quoted Article I, paragraph 1, sets forth the general objective to be attained in the matter of state property in Libya, namely, that title to all such property shall be vested in the Libyan Government; that paragraph 2, in line with the generally accepted rule of international law to which the Tribunal has referred above, establishes, through the use of the formula "shall be transferred immediately", Libya's right to full and immediate ownership of its *demanio pubblico* and *patrimonio indisponibile*; and that paragraph 3 (a) makes the transfer to the Libyan Government of the *patrimonio disponibile* dependent on the special agreement between Italy and Libya which is to determine certain conditions of the said transfer.

The factors mentioned in the preceding paragraphs have led the Tribunal to conclude that the renunciation made by Italy in Article 23 of the Peace Treaty encompassed the *demanio pubblico* and the *patrimonio indisponibile* but

had no effect on its title to the properties constituting its *patrimonio disponibile* in this country, and that, in the absence of the special agreement between Italy and Libya called for by Resolution 388 (V), Article I, paragraph 3 (a), the said title to the *patrimonio disponibile* remains vested in the Government of Italy.

The nature of the transfer which the said paragraph 3 determines shall take place on some future date will be examined in the following paragraphs.

In this respect, the Tribunal has taken into account, firstly, the fact that when the *Ad Hoc* Political Committee of the United Nations General Assembly was discussing the terms of the "Economic and Financial Provisions Relating to Libya", the Italian Representative to the said organ announced that his Government desired to transfer its *patrimonio disponibile* in Libya to the Libyan Government, without compensation, as Italy's contribution to the economic reconstruction of Libya.

The controlling factor of the State property provisions of Resolution 388 (V) certainly is the desire to be of assistance to the new Libyan State and to ensure it the means which will make possible its future existence. The return to Italy of the administration of the *patrimonio disponibile* would run counter to this spirit.

The circumstances that Italy renounced the properties which it owned as a private person in Albania (Article 29 of the Peace Treaty), as well as within the territories it ceded to France, Greece and Yugoslavia (Annex XIV), is also worthy of note.

Reference should also be made to the fact that Italy gave its full co-operation to the United Nations General Assembly in the drafting of Resolution 530 (VI), dated 29 January 1952, entitled "Economic and Financial Provisions Relating to Eritrea", and that in the said resolution provision is made for the transfer without compensation to the successor state of the *patrimonio disponibile* and for the said transfer to be contemporaneous to the final transfer of powers to the successor state by the Administering Power.

Also, as Libya is to receive the properties in question without compensation, it seems clear to the Tribunal that the conditions to be established by the agreement envisaged by Resolution 388 (V), Article I, paragraph 3, can only concern the practical details of the formal transfer of title and the protection of the interests of third parties.

Consequently, the Tribunal finds that, in so far as the properties constituting the *patrimonio disponibile* in Libya are concerned, all that has yet to be transferred to Libya by means of the agreement called for by Resolution 388 (V) Article I, paragraph 3 (a), is title to the said properties.

The soundness of the above interpretation is borne out by considering what the situation would be if it were supposed that the object of the future transfer envisaged by Resolution 388 (V), Article I, paragraph 3 (a), is not only that of the formal title to the properties concerned but also the right to administer the said properties. In such a hypothetical case, the administration of the *patrimonio disponibile* would have been turned over to the Italian Government in order that, after a short period of time, this Government would transfer the said administration to the Libyan Government. In the Tribunal's opinion, it is not permissible to conclude that the General Assembly of the United Nations had in mind a procedure of this nature when it adopted Resolution 388 (V).

It seems opportune to state at this juncture that, in modern practice, the exercise by a foreign state of the rights of full ownership to large portions of land is not considered as an encroachment on the sovereignty of the territorial state. In the present case, in which title to the properties in question is still vested in Italy but the other attributes of ownership are properly being exer-

cised by the Libyan Government, it is evident that the juridical status of the said properties can have no effect whatever on the latter's sovereignty.

In view of the aforesaid reasons, the Tribunal rejects the Italian Agent's first claim. In doing so, the Tribunal establishes that, as title to the properties in question is yet to be vested in the Libyan Government, the said Government shall abstain from disposing of any of the said properties and shall maintain the present-day administrative agency entrusted with the custodianship of the said properties. It is in this manner that the Tribunal interprets the Libyan Agent's commitment to the effect that his Government "will preserve the property in accordance with its obligations and will not deal with it otherwise than in accordance with the United Nations Resolution of 15 December 1950", as well as the statement the said Agent made in the Incident of Interim Measures with respect to the administrative measures that the said Libyan Government has taken with respect to the custodianship of the properties in question.

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The Italian Agent's second claim — i.e. the restitution of the administration of the properties listed in Annex 3 (buildings for the Italian diplomatic and consular services) and Annex 4 (schools for the Italian community) to the Memorial — will be examined in the following paragraphs.

This subject is governed by Resolution 388 (V), Article I, paragraph 5, which reads as follows:

5. Italy shall retain the ownership of immovable property necessary for the functioning of its diplomatic and consular services and, when the conditions so require, of the schools necessary for the present Italian community whether such property is owned by the Italian State in its own name or in the name of the Italian administration of Libya. Such immovable property shall be determined by special agreements concluded between Italy and Libya.

It will be recalled that the Libyan Agent, in his Counter-Memorial, informs the Tribunal that the Italian Government has for some time been in possession of all of the properties listed in Annex 4 (schools); that the Libyan Government "has undertaken to give up" to the Italian Government two buildings in Tripoli for use as diplomatic and consular premises; and that, with the same object in mind, a building in Benghazi "has been handed over to the Italian Government".

Chapter V of the Italian Agent's Reply makes it clear that the Government of Italy is not satisfied with the present-day situation because (a) it is not based on the special agreements called for by Resolution 388 (V), Article I, paragraph 5; (b) "to grant the use of a property is quite a different thing from granting the ownership of the property, use being considered as only one of the elements of ownership (*godimento*), there lacking the other element (*disponibilita*)"; (c) the building being used for its diplomatic establishment in Benghazi has been leased to it; and (d) it has yet to receive all the buildings required by its diplomatic and consular services in Libya.

The Tribunal agrees with the opinion that the said paragraph 5 calls for the vesting in the Italian Government of title to the properties specified therein, but this is a matter which does not fall within the purview of the Italian Agent's second claim.

The Tribunal will examine separately the Italian Agent's petitions that his Government be reinstated in the administration of (A) the properties listed

in Annex 3 of the Memorial (buildings for the Italian diplomatic and consular services in Libya) and (B) the properties listed in Annex 4 of the Memorial (schools for the Italian community in Tripolitania).

### A

The circumstance that the Italian Government heretofore did not have diplomatic and consular establishments in Libya underlines the need for an agreement between the Governments concerned, specifying the buildings that are to be used for the said establishments. The pleadings in the present case seem to indicate that such an agreement has only partially been reached.

Moreover, the said pleadings do not afford the Tribunal with precise information as to the Italian Government's present-day desires on the subject. For example, although Annex 3 of the Memorial lists nine properties, three of which are located in Tripoli, the Italian Agent in his Reply [Chapter V (b)] states that while the Libyan Government has designated two buildings to be handed over to the Italian Government for the latter's diplomatic and consular services in Tripoli, "there is lacking . . . a third building in Tripoli, a building at Misurata, and one in Benghazi."

With respect to the said two buildings in Tripoli, the pleadings solely indicate that they are not among those listed in Annex 3 but are included in Annex 1 of the Memorial. The arrangements in Benghazi are also obscure, for in respect thereto the Italian Agent states that a building in that city, known as the ex-Tribunale Militare, has been leased to his Government and it is impossible to determine whether or not the final part of the above quotation from the Reply refers to that property or to some other.

In view of this lack of precision and that the pleadings in the present case indicate that the negotiation between the Libyan and the Italian Governments of the relative agreement envisaged by Resolution 388 (V), Article I, paragraph 5, is still proceeding, the Tribunal rejects without prejudice the petition of the Italian Agent under reference.

### B

With respect to the properties listed in Annex 4, the Italian Agent insists in having a decision of the Tribunal even though, as stated above, the Libyan Agent informs that the Italian Government has for some time been in possession of all of the said properties. Given these circumstances, the Tribunal rules that until the conclusion of the agreement called for by Resolution 388 (V), Article I, paragraph 5, relative to the schools for the Italian community, the Italian Government is entitled to administer the properties listed in the said Annex 4 of the Italian Agent's Memorial.

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FOR THESE REASONS, THE TRIBUNAL DECIDES:

- I. The Italian Government's claim, that the administration of the properties constituting the *patrimonio disponibile* in Tripolitania and Cyrenaica be returned to it, is rejected. However, in the absence of the agreement called for by Resolution 388 (V), Article I, paragraph 3 (a), the Libyan Government (a) shall abstain from disposing of any of the properties constituting the said *patrimonio disponibile* without obtaining either a statement on the part of the Italian Government to the effect that it has no objection to the specific act of disposal or the express



authorization of the Tribunal to perform the said act of disposal, and (b) shall maintain the present administrative agency entrusted with the custodianship of those properties;

- II. The Italian Government's claim, that the administration of the properties listed in Annex 3 of the Memorial be now restituted to it, is rejected without prejudice;
- III. The Italian Government is entitled to administer the properties listed in Annex 4 of the Memorial until the relative agreement called for by Resolution 388 (V), Article I, paragraph 5, is concluded.

The present sentence has been drawn up in the English and French languages, the English text being authoritative.

Tripoli, Libya, this thirty-first day of January, nineteen hundred and fifty-three.

Hugo WICKSTROM

F. YORUKOGLU

V. SÁNCHEZ GAVITO

Cette sentence a été déposée au Greffe, ce jourd'hui, 5 (cinq) février 1953.

*Le Greffier,*

(*Signé*) Adib MAAKAD