State Immunity Before the Egyptian Court of Cassation

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The Egyptian Court of Cassation has addressed the question of the jurisdictional immunity of foreign states, one of the fundamental principles of public international law governing the exercise of jurisdiction by national courts over sovereign States, in **Appeal No. 8187/79 Judicial Year (J.Y.) (session of 2/1/2024), Appeal No. 2703/87 J.Y. (session of 15/6/2020), and Appeal No. 11590/80 J.Y. (session of 12/12/2011).**

Factual background:

In Appeal No. 8187/79 J.Y., the plaintiffs, who had acquired ownership of a building in Cairo in 1995, sought the termination of a lease agreement concluded on 17 June 1959 between the former owner and the Indian Embassy. The plaintiffs argued that the lease had expired.

In Appeal No. 2703/87 J.Y., the heirs of an Egyptian Army first lieutenant brought an action against the Ambassador of France, in his representative capacity, claiming compensation of ten million euros. They alleged that their predecessor had been captured during the 1956 Tripartite Aggression against Egypt and subsequently killed while in the custody of French forces.

In Appeal No. 11590/80 J.Y., an individual, who had been dismissed from his employment in Kuwait and deported, sought compensation from the State of Kuwait for material and moral damages resulting from his dismissal and deportation. He alleged that this followed medical tests conducted in laboratories affiliated with the Kuwaiti authorities, which had found him to be suffering from viral hepatitis.

Following a series of procedural developments, the cases ultimately reached the Court of Cassation.

Court of Cassation Decision:

Across the three judgments, the court addressed:

A. The procedural nature of the question of jurisdictional immunity;

B. The foundational basis of immunity;

C. The scope of immunity; and

D.Non-extinction of the underlying right notwithstanding.

A. The Procedural Nature of the Question of Jurisdictional Immunity:

In Appeal No. 2703/87 J.Y., the Court situated the question of international jurisdictional immunity within the broader framework of Articles 28 to 35 of the Egyptian Code of Civil Procedure, which govern the international jurisdiction of the Egyptian courts and rest on the principle that judicial authority is, in essence, territorial. The Court noted that the legislator characterized the rules governing the Egyptian courts' international jurisdiction as matters of public order — as reflected in Article 35 of the Code, which provides that where the defendant fails to appear and the Egyptian courts lack jurisdiction under the preceding Articles, the court must declare its lack of jurisdiction of its own motion. It follows, the Court stated, that the existence of the Egyptian courts' jurisdiction is a preliminary question that the court must examine proprio motu; being connected to public order, it remains open throughout the proceedings, and the Court of Cassation may likewise entertain it proprio motu. A judgment rendered in a dispute falling outside the jurisdiction of the Egyptian courts enjoys no protection and has no binding authority in law.

Building on this framework, the Court held that jurisdictional immunity forms part of the question of international jurisdiction itself. **It held that the rules of public international law derived from customary international law have established that foreign states, as legal persons, are not subject to the jurisdiction of national courts in disputes connected with acts performed by them in the exercise of sovereign authority.**

However, all three judgments acknowledged that immunity is not absolute and may be waived: the Court stated, in Appeal No. 2703/87 J.Y and Appeal No. 11590/80 J.Y, **that a foreign state submits to national jurisdiction only where it accepts to waive this immunity, expressly or tacitly, by adopting a position that leaves no doubt as to its meaning as a waiver of immunity** and an acceptance of voluntary submission to Egyptian jurisdiction.

The Court further addressed, in Appeal No. 2703/87 J.Y, the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, opened for signature pursuant to a UN General Assembly resolution of 2 December 2004. The Court mentioned Article 12 of the Convention, which provides that, “absent agreement between the states concerned, a state may not invoke immunity from jurisdiction before the courts of another state — otherwise competent — in proceedings relating to pecuniary compensation for death, personal injury, or damage to or loss of tangible property caused by an act or omission attributed to it, where the act or omission occurred wholly or partly in the territory of that other state and the author was present in that territory at the time.”

The Court observed that this provision would, in principle, have satisfied the conditions for Egyptian courts to entertain the claimants' case — a claim for monetary compensation for the death of their ascendant, killed by French forces on Egyptian territory during the 1956 war — and would have barred France from invoking immunity. **However, since Egypt is not a party to the Convention, it cannot invoke its provisions.** The Court clarified that international multilateral conventions bind only their states parties in their mutual relations, and a convention cannot create obligations or rights for non-party states without their consent, out of respect for those states' sovereignty; nor may a state benefit from the provisions of a convention to which it is not a party.

B. The Foundational Basis of Immunity:

The Court affirmed, in all three judgments, that the immunity by virtue of which a state is not subject to the jurisdiction of another state's courts rests essentially on the principle of the independence and sovereignty of states within the international community – one of the settled principles of public international law.

In Appeal No. 2703/87 J.Y., the Court explained that a state's right to adjudicate disputes arising from acts it performs as a sovereign power is inherently attached to its sovereignty, such that subjecting it to a foreign jurisdiction would amount to subjecting the state as a whole to that jurisdiction, thereby infringing upon its authority, sovereignty and independence. The same reasoning is extended in Appeal No. 11590/80 J.Y. to representatives of the state and representatives of its public authorities, who represent it internally or externally, since their submission to a foreign jurisdiction is equated with the submission of the state itself.

The Court in Appeal No. 2703/87 J.Y. also addressed, and rejected, arguments drawn from the contemporary erosion of sovereignty– particularly in international criminal law. It considered, and found unpersuasive on this point, the arguments drawn from the establishment of the International Criminal Court in 2002 and the enactment by some states of domestic laws empowering their national courts to try individuals accused of serious international crimes — genocide, ethnic cleansing, war crimes, and crimes against humanity — even where committed outside their territory and involving neither nationals as perpetrators nor as victims (termed in international doctrine "universal jurisdiction"). It likewise considered, and found unpersuasive, arguments based upon what international organizations have achieved, through international conventions, in their pursuit of codifying international responsibility — so as to allow a state, as a subject of international law, to bring a civil liability claim against the international person that caused it harm. The Court held that none of this reveals the existence of an international customary law permitting a natural person to bring a civil liability claim against a foreign state before national courts for compensation for damage arising from acts performed by that state in its capacity as a

sovereign power — the clearest example of such acts being a decision to wage war, even an unlawful, aggressive war.

C. The Scope of Immunity

The Court consistently limits immunity to acts performed by the foreign state "in its capacity as sovereign," excluding ordinary civil and commercial dealings.

Thus, in Appeal No. 11590/80 J.Y., The Court characterized **Kuwait's decision to deport the claimant** following a diagnosis of viral hepatitis as an exercise of its sovereign authority over the entry and residence of foreign nationals on its territory, in pursuit of a particular interest that it alone determines, and therefore **as an act shielded by immunity**.

Similarly, in Appeal No. 2703/87 J.Y., **the killing of the claimants' ascendant by French forces during the course of the 1956 war is treated as falling within the sphere of sovereign acts to which immunity attaches** — notwithstanding the Court's finding that French forces had violated the Geneva Conventions and their Additional Protocols, provisions which the Court held to have acquired customary status binding all states, whether or not parties to the Conventions, as peremptory rules of international public order representing the minimum standard of international morality indispensable to the international community and not subject to lapse through prescription.

By contrast, in Appeal No. 8187/79 J.Y., **the Court characterized the lease concluded with the Indian embassy in Cairo for the for the transient and temporary accommodation of its personnel as an ordinary civil transaction**unconnected to India's acts of sovereignty and therefore falls outside the jurisdictional immunity it enjoys — meaning it does not bar the jurisdiction of the Egyptian courts to adjudicate it.

D. The non-extinction of the underlying right notwithstanding

Finally, the Court in Appeal No. 2703/87 J.Y. emphasizes that a finding of lack of jurisdiction on grounds of immunity does not extinguish the claimants' underlying. The finding of no jurisdiction does not, therefore, preclude the claimants from calling upon the Egyptian Government — as the supreme executive and administrative authority, the sole representative of the state, and the expression of its sovereignty in its relations with other subjects of international law — to take all measures necessary at the international level and to pursue every avenue available under the rules of international law, so as to secure for the claimants their right to compensation for the harm caused by the French forces' killing of their ascendant after his capture, in violation of the four Geneva Conventions and their Additional Protocols and of peremptory rules of customary international law.

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