The Court of Cassation Discusses The Legal Effect of The Basel Convention in The Egyptian Legal System.

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Court of Cassation (Criminal Circuit)

Appeal No. 3487 of Judicial Year 71

19 October 2003

On 19 October 2003, the Egyptian Court of Cassation [“**the Court**”] addressed the legal effect of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal [“**Basel Convention**”] within the Egyptian legal system. This was in the context of a case where the Public Prosecution charged the defendant with importing hazardous waste whose importation into the country is prohibited, namely used medical X-ray films resulting from therapeutic activities.

The matter was thus referred to the Felony Court, which convicted the defendant. In reaching this conclusion, the felony court had rejected the defendant's argument that the seized X-ray films did not qualify as hazardous waste. It reasoned that, under Article 151 of the 1971 Constitution, treaties concluded by the President and duly ratified and published acquire the force of law; that the Second Declaration under the Basel Convention records Egypt's declaration — made in exercise of its sovereign rights under Article 45 of the Convention — prohibiting the import of all hazardous and other waste and its disposal within Egyptian territory; that Annex I to the Convention, setting out the categories of waste subject to control, expressly includes "clinical waste from medical care in hospitals, medical centers and clinics"; and that item 4020 of the Convention's consolidated waste list (the Convention having been approved by Presidential Decree No. 385 of 1992 and ratified by the People's Assembly on 30 November 1992) likewise includes clinical waste and waste arising from medical and nursing practice, generated in hospitals and similar facilities in the course of diagnosing or treating patients. Reading this together with Article 32 of Law No. 4 of 1994, which prohibits importing hazardous waste or allowing it to enter or pass through Egyptian territory, the trial court concluded that used X-ray film discarded from medical care in hospitals and clinics had constituted prohibited waste ever since the Basel Convention took effect upon its ratification (published in the Official Gazette on 8 July 1993, issue 27), its import being criminalized under Articles 32 and 88 of Law No. 4 of 1994 (published in the Official Gazette on 3 February

1994).

The defendant appealed against this judgment by way of cassation, arguing that the imported films did not in fact fall within the legal category of hazardous waste, and that this was a technical question that the impugned decision had failed to properly investigate through expert evidence.

The Court of Cassation accepted this argument stating that:

> *"Criminal law is a punitive body of law possessing a system independent of other legal systems and pursuing its own distinct objectives, in that it aims, through punishment, to defend state security, and its principal function is the protection of fundamental interests; it is not merely a legal system whose function is confined to serving the ends with which those other systems are concerned.*
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> *Accordingly, where a court applies criminal law to an offense provided for therein, the elements and conditions of which are established, it must adhere to the intention of the legislature as expressed in this domestic law and observe its provisions, by which the legislature has addressed the criminal court as these are to be given primary consideration, irrespective of whatever rules or principles international law imposed by international law and addressed to the States of the international community.*"

The Court then turned to the legal character of the Basel Convention itself, holding that the Convention, as implicated by its preamble, is merely an invitation by states, in their capacity as subjects of public international law, to undertake coordinated action to ensure the effectiveness of the measures adopted, which secure the management of hazardous and other wastes — including their transboundary movement and disposal — in a manner consistent with the protection of human health and the environment, wherever disposal takes place. The Court noted that the Convention itself does not define offenses, prescribe penalties, or establish trial procedures, but rather left all of that to the domestic laws of the states party to it; and since Law No. 4 of 1994 promulgating the Environment Law was issued on 27 January 1994 and published in the Official Gazette on 3 February 1994, containing a definition of the offenses relating to violations of its provisions and their penalties — the provisions of this later law must be applied to the case, given that its scope of application differs from that of the Convention.

Moreover, the Court held that Law No. 4 of 1994 on the Environment, despite prohibiting the import of hazardous waste,did not enumerate them exhaustively, but assigned to the Ministers — each within his own competence, in coordination with the Minister of Health and the Environmental

Affairs Agency — the task of issuing schedules of the hazardous materials and wastes subject to the law's provisions, specifically charging the Minister of Health with issuing the schedule of hazardous materials and wastes for hospitals, pharmaceuticals, laboratories, and household insecticides. The Minister accordingly formed the Committee on Hazardous Materials and Wastes under Decisions Nos. 82 of 1996 and 226 of 1999; yet the schedules of materials and wastes referred to had still not been prepared even after the incident came to light.

The Court accordingly held that recourse to the Basel Convention's annexes, published in the Official Gazette on 8 July 1993, cannot be relied upon to identify hazardous materials and wastes. Those annexes do not exhaustively list such materials and wastes, nor do they expressly provide that used X-ray films fall within hazardous waste. Moreover, the legislature enacted a subsequent law of equal rank to the Convention that regulates the same subject, and that law does not refer to the Convention. Had the legislature intended otherwise, it could have said so expressly. This is confirmed by Article 1(3) of Chapter One of the Preliminary Part of the Environment Law. It defines "the Convention" as "*the International Convention for the Prevention of Pollution from Ships of 1973/1978, as well as the international conventions to which Egypt accedes in the field of protecting the marine environment from pollution and compensation for pollution*."

The Court's concluding reasoning held that the condition for the validity of a conviction for the offense of importing waste whose importation is prohibited is that the imported material fall among the hazardous wastes specified in the Environment Law, and that establishing the true nature of the imported material can only properly be resolved by technical evidence upon which the soundness of the judgment's ruling depends.

On this basis, the Court held that the felony court, having failed to investigate this matter through a competent expert despite being obliged to do so, rendered its judgment defective by insufficiency of reasoning, alongside a breach of the right to a defense. This defect was not cured merely because the defense had not explicitly requested expert examination — the appellant's dispute over the material's true nature itself amounted to a demand that the matter be investigated and properly answered. Nor did the judgment's earlier response remedy the defect, since it failed to address the appellant's defense on this technical issue, which the Court could not resolve on its own but had to refer to expert opinion

On this basis, the Court concluded that the judgment under appeal shall be annulled, and the case remanded, without need to examine the remaining grounds of appeal.

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