The judgments under review invite the following considerations. It has to be stressed that even though both the *Corte di Assise di Appello* and the Supreme Court made reference to international law, they reached different conclusions on the distinction between terrorism and guerrilla warfare. This result is probably due to the uncertainty which persists at the international level on the specific problem of kamikaze attacks directed at foreign military forces and affecting civilians in the form of collateral damage. Undoubtedly, there is currently a consensus on a definition of terrorism in time of peace, as recognised by a number of scholars (CASSESE, "The Multifaceted Criminal Notion of Terrorism in International Law", JICJ, 2006, pp. 933-958), while freedom fighters' acts targeting military objectives are usually governed by humanitarian law. Nevertheless, courts have to establish whether a freedom fighter's act – possibly of a kamikaze-style nature – reflects the specific aim of a terrorist act, i.e. the spreading of terror among the population. However, in distinguishing between acts of terrorism and acts of guerrilla warfare, there remains a grey area where courts have to make an assessment and qualify: i) the situation existing at the time of the (planning of the) attack, that might be perpetrated in time of war (or of a foreign military occupation) or in time of peace, or during preliminary operations for subsequent occupation; and ii) the envisaged targets, which might be military personnel involved in belligerent operations, but also military forces engaged in humanitarian aid or other similar activities completely extraneous to belligerent operations.

As a consequence, the task of the domestic judge is more complex than simply establishing the boundaries between terrorism and guerrilla warfare, because he has to fully consider the multifaceted context of the country where the attacks are, or may have been, realized. Faced with such a question, in the case under review the Supreme Court used a systematic method in interpreting the criminal notion of international terrorism, within the context of current international norms, in an attempt to situate the problem in the international legal system as a whole. In this way, the Court provided elements useful for shaping the gradual development of the notion in question at the international level.

LUCIA ALENI

XV. CO-OPERATION IN JUDICIAL, LEGAL, SECURITY, AND SOCIO-ECONOMIC MATTERS

European Convention on Extradition – European arrest warrant – No provision of maximum time limits for preventive custody – Refusal to surrender the accused

Corte di Cassazione (Sez. VI penale), 8 May 2006, No. 16542
Cusini

Corte di Cassazione (Sez. VI penale), 2 October 2006, No. 38852 (order)
Vllaznim

In these two cases, the *Corte di Cassazione* settles certain questions linked with the passive surrender procedure under the European arrest warrant. In particular, the Court evaluated whether it is possible to surrender people to a foreign judicial authority in the presence of a condition imposed by the Italian Law No. 69 of 22 April 2005, a law implementing the EU Council Framework Decision 2002/584/JHA, of 22 April 2005, on the European arrest warrant and the procedure for the surrender of the accused among Member States (hereinafter, the "Italian implementation law"). According to Article 18(e) of the Italian implementation law, the Appeals Court may refuse execution of the warrant "if the laws of the issuing Member State do not provide any maximum time-limits for preventive custody". That rule is a direct transposition of the last paragraph of Article 13 of the Italian Constitution, which states: "The law establishes the maximum duration of preventive detention". It is neither a provision of the Council Framework Decision nor a condition provided for by the extradition procedure on the basis of the European Convention on Extradition of 13 December 1957, which was replaced by the Framework Decision (see Recital 5).

Both cases are interesting, primarily because the *Corte di Cassazione* suggests different solutions. The *Cusini* Judgment (No. 16542/2006) deals with the appeal of Ms. Cusini against the decision by which the Appeals Court of Venice had decided to surrender her to the judicial authority of the Kingdom of Belgium under the European arrest warrant for fraud on the basis of Article 496 of the Belgian Criminal Code. In this judgment, the *Corte di Cassazione* takes note of the debate in the European literature and, above all, of the jurisprudence of the European Court of Human Rights in relation to the fundamental right to have preventive detention limited to a reasonable time on the basis of Article 5, para. 3, of the ECHR. The Court holds, in accordance with the European Court of Human Rights' case law, that it

> "is not necessary for the requesting State to guarantee procedures corresponding to the State receiving the request; what counts, rather, is that the laws of the requesting State ensure the fundamental requirements for the defence of the accused and the respect for the fundamental rights provided for by the European Convention on Human Rights".

The *Corte di Cassazione* had already reached these conclusions in its jurisprudence on extradition. The Italian Code of Criminal Procedure, at Article 705, para. 2(a), also considers the violation of fundamental rights in the ECHR to be a limit on extradition. Nevertheless, the Court says that it "must take note that the Italian legislator, with the national law implementing the European arrest warrant, chose to regard the national regime of preventive custody as the only point of reference" within the meaning of the decision on surrender of the accused.

In relation to this explicit rule, in the opinion of the Court, the principle that national judges, when interpreting national laws, must conform to European

Community law, as formulated by the European Court of Justice (ECJ) in *Pupino v. Italy* (Case C-105/03, Judgment 16 June 2005) is not applicable in this case. Indeed, the ECJ itself had affirmed that there are limits to this principle:

> "The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*" (para. 47 of the *Pupino* judgment).

The *Corte di Cassazione* thus excludes the possibility that it may submit a preliminary reference to the ECJ, on the basis of Article 35 of the Treaty on European Union, because the ECJ had already clarified the matter in the *Pupino* case. It also excludes the possibility of addressing a question of constitutionality to the Constitutional Court, because Article 18(e) of the Italian implementation law reproduces a constitutional rule and because of "the significant time required to verify the norm's constitutionality, which ironically would imply a further restriction on the appellant's liberty". Finally, the Supreme Court affirms that the condition expressly provided for by the Italian implementation law (i.e. the existence of a maximum time-limit for preventive custody) prohibits the execution of the European arrest warrant and the surrender of Ms. Cusini to the Belgian judicial authorities.

The *Vllaznim* Decision (Order No. 38852/2006) concerns the claim of Mr. Vllaznim, who was arrested pursuant to a European arrest warrant issued by the German Tribunal of Hanau and who now contests the judgment of the Appeals Court of Lecce whereby he was surrendered to the German judicial authority. In the *Vllaznim* case, the *Corte di Cassazione* reconsiders its opinion in relation to the interpretation of Article 18(e) of the Italian implementation law on the basis of "indications from the [...] Framework Decision" and the "underlying premises of a political, institutional and cultural nature of that decision and of the national law that implemented it". The *Corte di Cassazione*, on the basis of the recitals included in the first part of the Framework Decision, underlines that "the mechanism of the European arrest warrant is based on a high level of confidence between Member States" (Recital 10) and that the Decision "respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof" (Recital 12). Consequently, the Court adopts a new interpretation of Article 18(e). This article can conform to European Community law only if the judge carries out an evaluation of the "equivalence" of the different legal systems for preventive custody and their maximum time limits:

> "From this perspective, it is thus for the judicial authority, with reference to individual cases, to verify *in concreto* the level of guarantees provided by the requesting State and to evaluate whether they offer an appropriate guarantee comparable to that which, in our legal system, is ensured by the mechanism of maximum time limits for preventive custody fixed by the legislator".

In the Court's opinion, the fact that the Italian implementation law reproduces a part of Article 13, para. 5, of the Italian Constitution is not in contrast with this holding. The constitutional rule in the Italian legal system cannot of course be ignored but this does not preclude the possibility of recognizing that the legal systems of other European Union Member States have different rules but provide for an equivalent, if not better, protection for the freedom of the defendant before forms of detention characterized by unreasonable duration from the standpoint of Italian law or even without time limits. The *Corte di Cassazione* underlines that the principle of equivalence is applied for the procedure of extradition on the basis of the European Convention on Extradition of 13 December 1957. The Court also adds a general consideration: it would be unrealistic to think that the European integration process develops by way of the absorption of the Italian legal model by the legal systems of other Member States. Finally, the judges emphasise that the new interpretation of Article 18(a) is preferable to the ruling in the *Cusini* case on the basis of a policy argument. To confirm the *Cusini* judgment could undermine the functioning of the European arrest warrant and of the Italian implementation law; consequently, the refusal to surrender defendants to Member States of the European Union in cases of grave offences should imply their release or the necessity to bring actions against them, where possible, on the basis of the Italian Criminal Code.

From the analysis of these decisions of the *Corte di Cassazione*, it is first of all clear that a "potential" jurisprudential conflict between two sections of the Supreme Court emerges. Indeed, the solution of this conflict has been referred by the judges of *Sezione VI* of the Court to the *Sezioni Unite* (the *Cassazione*'s plenary session). It is also clear that the Italian implementation law, by including grounds to refuse surrender not mentioned in the Framework Decision, fails to properly transpose this Decision within the Italian legal system.

In addition, the *Cusini* judgment has identified in Article 18(e) of the Italian implementation law the prohibitory condition for the surrender of an individual to the judicial authority of a EU Member State. Indeed, Article 18(e) reproduces a constitutional rule for the protection of a fundamental right. In the context of relations between national law and Community law, this is the only case in which a judge, identifying a conflict between a national rule and a European Community rule, cannot apply the latter. However, in the judgment this conclusion was justified on the basis of the judgment of the ECJ in the *Pupino* case. The preferable option for the *Corte di Cassazione*, in accordance with constitutional jurisprudence (see Constitutional Court, Judgments Nos. 183/1973 and 170/1984), would have been

to leave the resolution of the conflict to the Constitutional Court itself. Indeed, on the basis of the constitutional review of the law implementing the Treaty on European Union, the Constitutional Court may verify the compatibility between a Framework Decision and the fundamental principles of the Italian constitutional system and inalienable human rights. Nevertheless, the *Corte di Cassazione*, realizing the possible problems with respect to the relationships between Italy and the other EU Member States, due to a persistent conflict between national and European rules, invited future legislative action on the part of the Italian Parliament.

The risk that the participation of Italy in the European integration process may be jeopardized, because of the adoption of principles such as those enunciated in the *Cusini* Judgment, is at the orogin of the *Cassazione*'s *revirement* in the *Vllaznim* case. As we have seen, the Court affirms that the modes of protection of fundamental rights can bend to the necessity of Italy's membership in the European Union. Nevertheless, the Court specifies that a degree of flexibility with respect to fundamental rights does not imply their negation. It identifies in the principle of equivalent protection the guarantee of a consistent safeguarding of fundamental human rights. This results from the high level of mutual trust existing between EU Member States, in particular due to their common legal values such as the protection of fundamental rights as enacted in the European Convention on Human Rights. On the basis of these remarks, the *Corte di Cassazione* seems to reaffirm – and to develop – a thesis already advanced in relation to extradition. Indeed, the *Corte di Cassazione* had justified the disparity of treatment – and therefore the disparity of individual guarantees – for those individuals subject to the European Convention on Extradition and those to whom the Convention does not apply. Lesser guarantees on the basis of the European Convention's regime were justified because extradition concerns countries having a sufficient socio-economic and legal degree of affinity with Italy (see *Corte di Cassazione*, *Sez. VI penale*, Judgment of 9 December 1996, No. 3811, *Pettai*). We must also remember that the principle of equivalent protection was formulated by German jurisprudence in relation to the European Community legal system (see especially *Solange II*, 2BvR 197/83 of 22 October 1986; *Maastricht*, 2BvR 2134/92 and 2BvR 2159/92 of 12 October 1993; *European Arrest Warrant*, 2BvR 2236/04 of 18 July 2005). This principle was applied by the European Court of Human Rights as a criterion by which to appraise the safeguarding of human rights and fundamental freedoms within international organizations (see *Waite and Kennedy v. Germany*, Application No. 26083/94, Judgment of 18 February 1999; *Bosphorus Airways v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005).

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