**The Question:**

Does the ‘living instrument’ doctrine always lead to ‘evolutive interpretation’? Some remarks after *Hassan v the United Kingdom*

*Introduced by Francesca de Vittor and Cesare Pitea*

In the *Hassan v the United Kingdom* judgment the European Court of Human Rights found that ‘a consistent practice on the part of the High Contracting Parties, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention’ (para 101).

According to the Court, such a ‘creative interpretation’: a) is based on the interpretive technique codified in Article 31 (3) (b) VCLT; b) is consistent with his previous case-law; and c) constitutes an application of the doctrine characterizing the Convention as a ‘living instrument’.

In *Hassan* the consideration of subsequent practice did not lead to an ‘evolutive interpretation’, i.e. to a more expansive or generous understanding of the scope of fundamental rights enshrined in the Convention. Quite the contrary, it was invoked and applied to limit or restrict those rights. Indeed, it has been used to add into the supposedly closed list of Article 5(1) of the ECHR an additional ground for the detention of persons during armed conflicts abroad, without the need to comply with the conditions set forth in Article 15 ECHR allowing derogation from conventional obligations ‘[i]n time of war or other public emergency threatening the life of the nation’ (see, in this respect, the Partly Dissenting Opinion of Judge Spano joined by Judges Nicolaou, Bianku And Kalaydjieva).

While some precedents had admitted the possibility of using the ‘common consensus’ of Contracting Parties as a circumstance justifying a restrictive interpretation (e.g. *Scoppola v Italy* (no 3) [GC] and *Mangouras v Spain* [GC]), the *Hassan* case appears to be the first in which the line between interpretation and modification has been crossed.
This situation raises a number of questions: Is the claim of consistency of the interpretive result with the VCLT and with the Court’s jurisprudence on evolutive interpretation convincing? Is the very concept of the Convention as a living instrument jeopardised, thus undermining the idea of the Convention as the most important instrument of European public order? Can the judgment be inscribed in a trend towards a growing deference to States sovereignty, at least in matters touching upon matters of foreign policy? Can this be considered as a counterpart of the jurisprudence concerning the extraterritorial application of the Convention in situations of armed conflicts?

QIL asked Luigi Crema (University of Milan) and Eirik Bjorge (University of Oxford) to address these questions against a common background, namely the ECtHR jurisprudence and the customary rules of treaty interpretation, as reflected in the VCLT. While their analyses converge in many respects, Luigi Crema explores whether, in the context of the expansion of substantive guarantees to situations of armed conflicts abroad, the controversial reading of Art 5 ECHR may really be labelled as ‘regressive’. Eirik Bjorge focuses on other issues, including on whether practice can legitimately lead to the de facto incorporation of rules of humanitarian law within the conventional system and if actual practice, as considered by the Court, justified such result in the specific circumstances of the case.