static approach,\textsuperscript{10} Judge Bedjaoui noting in his \textit{Gabčíkovo-Nagymaros} Separate Opinion that \textit{Namibia} was simply a ‘special situation’ in which the evolutionary approach was taken as an exception to the ‘primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion’.\textsuperscript{11} Numerous modern-day scholarly texts addressing evolutionary interpretation directly contrast it with the principle of contemporaneity.\textsuperscript{12}

Clearly, the evolutionary treaty interpretation doctrine began its life as an exception to the principle of contemporaneity and ultimately ended up as a counterpoint to it. Whereas the principle of contemporaneity requires interpreters to use the meaning of a treaty term it had when the treaty was concluded, the evolutionary treaty interpretation doctrine prefers the different meaning that a treaty term may end up having at the later time when the treaty falls to be interpreted or applied. At its core and essence, the evolutionary treaty interpretation doctrine constitutes a position on the issue of whether to use the original or later-emerging meaning of treaty terms subject to diachronic semantic change.\textsuperscript{13}

However, evolutionary interpretation is rarely defined so narrowly, largely because it has come to be used so frequently in ways that go beyond this relatively confined question. Since the \textit{Namibia} Advisory Opinion of 1971, the evolutionary interpretation doctrine has found expression as a justification for adjudicatory acts outside the scope of interpretation, including departing from existing case

---

\textsuperscript{10} \textit{Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)}, above n 1, 31–32, para 53. (‘Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant – “the strenuous conditions of the modern world” and “the well-being and development” of the peoples concerned – were not static, but were by definition evolutionary, as also, therefore, was the concept of the “sacred trust”.’)


law, introducing external norms as applicable law, and even finding that States have impliedly modified the terms of their treaty. Moreover, evolutionary interpretation has come to mean different things to international lawyers in different sub-fields of international law. Indeed, this volume bringing together international lawyers with specialised knowledge of different sub-fields of the discipline itself provides proof of how the rarely defined doctrine of evolutionary interpretation has come to take on so many different meanings.

Most significantly, a schism has developed between those who still see evolutionary interpretation as a principle of treaty interpretation, and others who see it as a jurisprudential philosophy favouring outcomes more in keeping with modern-day laws and values. Careful study of how the doctrine of evolutionary treaty interpretation has been invoked by international courts and tribunals reveals that there is a form of the doctrine – particularly prevalent in international case law relating to human rights and the environment – that is less worried about whether a treaty should be given its original or modern-day meaning, and more worried about what outcome the interpretation given will achieve. While these two main forms of the doctrine may both be referred to as ‘evolutionary (treaty) interpretation,’ they are fundamentally very different.

As comparative lawyers know very well, it is extremely difficult to meaningfully discuss the merits of a doctrine if that doctrine means different things to different people. Without any clarity about what the doctrine means or which form of it should be analysed, discussion is likely to go no further than mentions of how the doctrine has been invoked and where it might find its basis or justification. The competing notions of what evolutionary interpretation entails are so different that an investigation of the merits of the doctrine will require posing very distinct questions for each form of the doctrine. The merits of evolutionary treaty interpretation as a doctrine favouring the meaning of a treaty term at the time of its application (form A) can only be evaluated in contradistinction to the merits of a principle of interpretation favouring the meaning of a treaty term at the time of its conclusion. By contrast, the merits of evolutionary treaty interpretation as a doctrine justifying progressive adjudication (form B) can only be evaluated in the context of an assessment of the proper role of international adjudicators, especially when they are faced with the interpretation and application of a treaty that appears to be out of step with modern-day values.

No study – and certainly no paper – can purport to offer meaningful observations on two questions of such breadth and depth, so this chapter leaves the second question to other chapters in this volume and does not even purport to

15 See, eg, Award in the Arbitration regarding the Iron Rhine (‘Ijzeren Rijn’) (Belgium v Netherlands) (2005) 27 Reports of International Arbitral Awards 35, 72–75, paras 78–84.
address it. Instead, this chapter returns to the sense of the evolutionary treaty interpretation doctrine that dominated when the doctrine first emerged and deals uniquely with the first-mentioned task: the question of original or modern-day meaning.

Yet, with so much of the case law and literature dealing with a doctrine of evolutionary interpretation that purports to do much more than simply take a position on this question, the author cannot, in good conscience, speak of ‘evolutionary interpretation’ and instead must, in the finest Heideggerian tradition, adopt other, less-loaded language. Fortunately, there is no need to resort to neologisms in this instance because there is already a notion that raises the original and core question of evolutionary treaty interpretation without the extra baggage that the doctrine has acquired since the Namibia Opinion. The so-called ‘problem of intertemporal linguistics’ – introduced by the esteemed international jurist and expert on international dispute resolution, Shabtai Rosenne, in some regrettable too often ignored contributions to International Law Commission and Institut de droit international debates occurring at the time of the emergence of the evolutionary interpretation doctrine – specifically raises the narrower yet undeniably important question of how an interpreter should respond to the problem caused by changes in the meaning of treaty terms through time. 18

The benefits of focusing on the problem of intertemporal linguistics instead of the doctrine of evolutionary interpretation are manifold. First, we avoid the confusion potentially generated by examining a doctrine understood in different ways and used for different purposes by focusing instead on a precise practical legal problem that can be defined independent of subjective value judgements. Second, we can also avoid the main difficulty inherent in an exploration of evolutionary interpretation qua progressive adjudication, namely of generally evaluating whether it is appropriate to give the international adjudicator an enhanced, law-updating role across structurally and practically very different sub-systems of international law. Third, with Rosenne’s notion of intertemporal linguistics we can go beyond the unduly narrow question regarding the temporal aspect of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) to investigate whether international adjudicators should acknowledge all changes that have repercussions for the interpretation of treaty terms, whether those changes arise from the development of international law or from other developments such as those of a social, moral, economic or mere linguistic nature. And, fourth, because of how it is expressed, the notion of intertemporal linguistics gives us the added benefit of pointing to the link between interpretation and language and onwards to the field of linguistics, a field which is largely neglected by the international law community, but which the

---


...