5.   Methodology: Writing about how we do research

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1.   INTRODUCTION

One way of writing about 'methodology' in a legal field is to treat it as denoting a systematic exposition of the ways the members of the field go about their activities within that field.[2] In this tradition, writing about the 'methodologies of international law' would mean identifying and describing the specific techniques of argumentation, persuasion and description which international lawyers accept as belonging to the field.[3] Another familiar use of the idea of methodologies in international law is to denote a conversation about particular theoretical approaches to international law.[4]

[2]   See, e.g., the special issue on research methods in law of the *Utrecht Law Review* which includes; Philip Langbroek and others, 'Methodology of Legal Research: Challenges and Opportunities' (2017) 13(3) *Utrecht Law Review* 1; Tom R Tyler, 'Methodology in Legal Research' (2017) 13(3) *Utrecht Law Review* 130; René Brouwer, 'The Study of Law as an Academic Discipline' (2017) 13(3) *Utrecht Law Review* 41. See also: Stefan Talmon 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal Of International Law* 417.

[3]   Koskenniemi describes 'the methodology of international law' as 'the criteria that legal arguments ought typically to fulfil in different contexts—including the academic context—in order to seem plausible'. Martti Koskenniemi, 'Methodology of International Law' in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP online edition 2007). Koskenniemi's is a reflexive, or meta-account, but one could have a micro account too, whether reflexive or not. People may also offer an account of the methodology of a particular piece of writing in terms of its relation to the accepted methodologies of the field.

[4]   One example is the Symposium in 1999 in the *American Journal of International Law*. See Steven Ratner and Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93(2) *American Journal of International Law* 291–302. (Although not relevant to my argument here, it cannot go unremarked that notoriously, the Symposium refused the contributions on method written by renowned scholars from what was then an emergent tradition of Third World Approaches to International Law. Okafor's 2008 article notes the 'eventual' inclusion of a TWAIL approach in Ratner and Slaughter's 2004 book. See Obiora Chinedu Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?' (2008) 10(4) *International Community Law Review* 371, 377.) Other examples include Ingo Venzke, 'International Law and Its Methodology: Introducing a New Leiden Journal of International Law Series' (2015) 28(2) *Leiden Journal of International Law* 185; Dov Jacobs, 'Sitting on the Wall, Looking in: Some

This can sometimes take the form of a list of 'methods'; legal positivism, feminist jurisprudence, law and economics, critical legal studies, legal pluralism, comparative law, Marxism, and so on.[5] Or it can take more bespoke, path-breaking forms.[6] When 'methods' is used in this way, the difference between 'methodology' and 'methods' is grammatical rather than substantive. So, 'methodological' is used as the adjectival form of method, rather than to distinguish something called 'method' from something called 'methodology'.[7]

A different way of addressing the question of 'methodology' is to treat it as a scholarly practice which forms part of the craft of research. This refers to the ways one does a particular piece of research,[8] but more precisely, to the practice of *writing about* the ways one does the research.[9] Because it emphasises practice and technique, rather than theory or precept, work in this tradition is often catalogued in the technical writing, or 'how to write a PhD/Dissertation' section of the library. It may be dismissed – too quickly – as only for students, or close to academic self-help. Such works are seldom written from the perspective of a jurist, and even more rarely an international legal scholar.[10] But in the changed inflection from precept to practice,

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Reflections on the Critique of International Criminal Law' (2015) 28(1) *Leiden Journal of International Law* 1.

[5]   This is sometimes the way that a 'research methods' seminar will be conducted. This 'list' approach is both very common and much criticised. See, e.g., Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93(2) *The American Journal of International Law* 351; and Hilary Charlesworth, 'Feminist Methods in International Law' (1999) 93(2) *The American Journal of International Law* 379, which begins with a very uneasy preface and long disclaimer.

[6]   Anne Orford, 'On International Legal Method' (2013) 1(1) *London Review of International Law* 166.

[7]   See, e.g., Orford (n 6), 167. Mowbray's contribution (responding to Orford) only uses the word methodology, not method. Jacqueline Mowbray, 'International Authority, the Responsibility to Protect and the Culture of the International Executive' (2013) 1(1) *London Review of International Law* 148. Most of the AJIL Special Issue articles mentioned above do this as well, apart from Ratner and Slaughter's introduction, which on page 292 defines method as broader than methodological.

[8]   See, e.g., Keith Punch, *Introduction to Social Research: Quantitative & Qualitative Approaches* (SAGE, 3rd edition., 2014).

[9]   In this, I follow Genovese, McVeigh and Rush who draw attention to the centrality of writing to the activities of the jurist. Drawing attention to the practice of writing as an integral part of activities of the jurisprudent led Genovese, McVeigh and Rush to coin the neologism of 'jurisography'. See Ann Genovese, Shaun McVeigh and Peter Rush, 'Lives Lived with Law: An Introduction' (2016) 20 *Law Text Culture* 1. Taking up their idea, one could perhaps loosely think of what I am trying to describe as methodography, though I would have to follow those three authors more faithfully to use the suffix in this way.

[10]   This text by Martha Minow comes close; Martha Minow, 'Archetypal Legal Scholarship: A Field Guide' (2013) 63 *Journal of Legal Education* 65. It is interesting that she describes its genesis as notes circulating 'underground', which she realised she should publish, given their wide circulation. A good example of practical methodology by a non-legal scholar is David Evans, Paula Gruber and Justin Zobel, *How to Write a Better Thesis* (Springer, 3rd edition, 2014).

and from theory to technique,[11] approaching methodology as the practice of writing about how we do our research has several advantages.

First, it enables international legal scholars with different theoretical approaches to talk more easily to each other about how we do research.[12] This has collegial and intellectual benefits.[13] Second, teaching newer scholars about methodology becomes a training exercise, directed toward cultivating a scholarly ethos[14] rather than either indoctrination into a particular school, or the presentation of a marketplace of approaches from which to 'choose'. This raises a different set of demands than trying to teach a theory or dogma, and can be taught and mastered across a variety of projects, sub-disciplines and theoretical orientations.[15] Third, it can assist international lawyers to describe our methods to readerships not schooled in the same disciplinary traditions as the researcher. For international legal scholars, treating methodology as a practice of writing about how we do our research means paying attention to our training as well as to our theory, and describing our practices with an awareness of that training and its limits.[16] Such training will be different in different places, but it will share something with other international jurists, as compared to, say, literary scholars, sociologists or mathematicians.[17] So instead of diving into an account of a particular theoretical approach or method of data collection or doctrinal analysis intelligible only to the initiated, treating methodology as a practice of writing about how we do our research invites us to attend to – and explain – what may be particular in disciplinary terms as well as what may be distinctive about this particular work. This might help us to hold the interest of those who do not share our approach and allow our work to make sense to a wider audience. It also helps us in the excitement of interdisciplinarity, to explain what may be distinctive about international legal

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[11]   From the Greek, Technē, meaning art, skill or craft. A more contemporary citation would be Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958).

[12]   As Kenneth Burke puts it 'even readers who do not share one's judgements…might find something of use in one's methods…'. Kenneth Burke, *Language as Symbolic Action: Essays on Life, Literature and Method* (1966, University of California Press) vii.

[13]   Madelaine Chiam, Sundhya Pahuja and James Parker, 'How to Run a Writing Workshop? On the Cultivation of Scholarly Ethics in "Global" Legal Education' (2018) 44(2) *Australian Feminist Law Journal* 289.

[14]   Ethos here does not denote a shared faith or belief. Instead, in line with the etymology of ethos as both custom and character, it joins the conduct of the researcher to the practice of the group, to denote a shared way of doing things. In this, it is a practical ethical positioning. 'Ethos' comes etymologically from the Greek for character, custom and habit. See, e.g., Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press, 2012).

[15]   For me these include supervising my own PhD students, speaking to groups of researchers undertaking PhDs in law and cognate fields, supervising masters' theses across disciplines, addressing interdisciplinary groups of researchers at global research workshops and summer schools, and conducting research masterclasses.

[16]   Shaun McVeigh, 'Afterword: Office and the Conduct of the Minor Jurisprudent' (2015) 5(2) *UC Irvine Law Review*, 499, 502–4.

[17]   We could call such commonality an ethos. See Margaret Davies, 'The Ethos of Pluralism' (2005) 27 *Sydney Law Review* 87.

scholarship, and to remember that theorising – and writing – about international law is itself a form of 'practice'.[18]

Approaching the question of methodology as a practical exercise of writing about how we do our research is helpful too in various formal settings, from PhD and Dissertation proposals, to the thesis itself, and from grant applications to book proposals. These forms typically require a 'method' or 'methodology' section written early on in a project, when we are still in a relatively deep state of unknowing. But how do we describe our 'methodology' in a research proposal or grant application before we have done the actual research? This is not a pragmatic question, but a practical one. Good scholarship in international law, and in the humanities and social sciences more broadly, has a strong theoretical grounding and self-awareness. But most of our research activity is reading, and part of the ongoing task is to work out how to orient ourselves theoretically, and to craft an idiom as we go.[19] So in that case, how do we think about methodology as a practice which can include the beginning of a new project? Is there a way of thinking about it which can help us work out how to proceed? The same project forms use 'methodology' retro-pro-spectively too, to denote a description of how we ended up doing what we did, but located at the beginning of the thesis, article or book, and describing the work to come. Writing is not the transcription of thinking. Rather, writing is a mode of thinking.[20] Thinking of methodology as a practice of writing about how we do our research is flexible enough to help us both plan our research, and to write a rear-facing account at different stages of the work, whether for 'methodology' sections, or for abstracts or project descriptions.

The question I am reflecting on in this chapter, then, is a practical one. It could be expressed as: 'how may we think about methodology as a practice of writing which helps us to conduct, refine and explain our research at multiple stages of an ongoing project?'[21]

As a practical matter, 'methodology' encompasses crafting, explaining and justifying two things; (i) an object of enquiry;[22] and (ii) a lens by which to interpret

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[18]   Here I am referring to the putative theory/practice divide. See Andrew Fitzmaurice, 'Context in the History of International Law' (2018) 20(1) *Journal of the History of International Law / Revue d'histoire du droit international* 5.

[19]   Sheila Jasanoff, 'The Idiom of Co-Production' in Sheila Jasanoff, *States of Knowledge: The Co-Production of Science and Social Order* (Routledge, 2004) 1–13.

[20]   I borrow this idea from a spoken address by Seth Kim-Cohen, 'Reading and Writing Sound: A Workshop with Seth Kim-Cohen' (Liquid Architecture, 27 July 2019) https://liquidarchitecture.org.au/events/reading-and-writing-sound-a-workshop-with-seth-kim-cohen accessed 13 November 2019. Writing is not only a mode of thinking of course.

[21]   There is an ethical dimension to this too, which entails taking responsibility for our conduct as scholars, but I will put that to one side for the purposes of this essay. See Genovese, McVeigh and Rush (n 9).

[22]   In his Foreword to Umberto Eco's *How to Write a Thesis,* Francesco Erspamer suggests that one of the causes of today's crisis in the humanities 'is the fact that there is a loss of concrete practices and capabilities, where one must "work methodically", of opportunities "to build an object"'. 'Umberto Eco, *How to Write a Thesis* (trans, Caterina Mongiat Farina and Geoff Farina, MIT Press, 2015) [orig. 1977] xiii.

that object.[23] We tend to separate both the research question, and an account of the significance of the research from our methods. But the relationship between these elements is so recursive that in practical terms it can help to think of them at the same time, whilst keeping them structurally distinct. Linking these pieces together as we think and write about how we do research can help to make sure they make sense together, or 'fit'. A good 'fit' is easy to intuit when we see it but can be more difficult to achieve. While we are writing, it can seem that the elusive element which makes the combination of *this* question, *this* object and *this* approach 'click', or seem sensible to the reader (Figure 5.1) will magically arrive at the end, like a *deus ex machina*. But what can seem like conjuring or serendipity is really a matter of craft and care. Keeping in mind the significance, or 'so what?' of the project as we go, as part of the methodological practice, can help make the pieces fit well together by helping us continually to refine the way we pose our research question and to justify our choices as the project progresses.
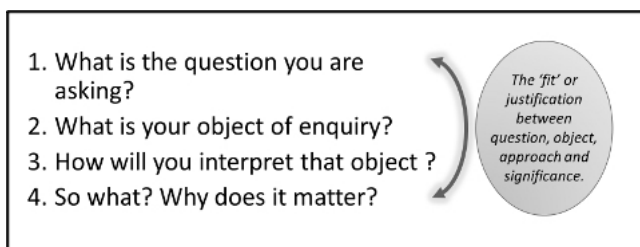

1. What is the question you are asking?
2. What is your object of enquiry?
3. How will you interpret that object ?
4. So what? Why does it matter?

The 'fit' or justification between question, object, approach and significance.

Figure 5.1   The 'fit' between question, object, approach and significance

2.   RESEARCH AS GENRE WRITING

If I am insisting that writing is an integral part of the practice of methodology, it is equally true that for international legal scholars, the craft of research itself involves writing. Research in international law is more accurately described as 'research-writing'. To think of legal research as a form of writing, gently disrupts the false separations between researching, reading, interpreting and writing. I am not sure if these distinctions serve other disciplines very well, but they map poorly on to research practices in law, and in the humanities and social sciences more broadly. Research-writing is not just any writing though, but writing in a particular genre.[24]

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[23]   This is similar to the distinction Howell draws between 'methodology as the research strategy that outlines the way one goes about undertaking a research project, whereas methods identify means or modes of data collection'. Kerry Howell, *An Introduction to the Philosophy of Methodology* (Sage, 2013), xi.

[24]   I was inducted into this approach by my colleagues Peter Rush and Shaun McVeigh at the Melbourne Law School from whom I continue to learn much through conversation and co-supervision. On just one reflection on teaching academic writing through genre, see

By genre, I mean a style of literature in which the structural and stylistic elements of a text convey something to the audience as well as the content.[25] 'Methodology' is a genre of writing within the broader genre of 'research-writing'.[26]

Unless we are literary scholars, we may tend both to take genre conventions for granted, and at the same time, not to think in terms of genre at all. Often, we learn to write in particular genres by osmosis and mimicry, and sometimes by reverse engineering; the judgment, the memorandum, the statement of claim, the letters to clients, the brief to counsel, the exam answer, the law review article, the introductory chapter, the academic monograph.[27] But thinking explicitly with genre can be helpfully demystifying, because once we think of research-writing as a particular genre, we can work out what the conventions of the genre are.[28] This invites us to be more intentional as both writers and readers. It encourages us to read for craft as well as for content or to critique, and to be more aware of – and better equipped for – how to structure and present our own research or scholarship.[29] In other words, thinking explicitly about genre conventions can help us work out how to proceed.

Genres are a patterned response to a recurrent (rhetorical) situation. They have a purpose and create expectations in the reader related to that purpose. Some forms of research-writing, like a PhD, have more or less explicit rules.[30] These rules articulate the formal expectations of the reader (in this case, the examiner), and shape the pattern and purpose of the PhD genre. But more general readers of the genre of research-writing also have expectations which must be met.[31] For the purposes of this

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Sarah W Beck and Jill V Jeffery, 'Genre and Thinking in Academic Writing Tasks' (2009) 41 *Journal of Literacy Research* 228. Rolf Hughes, 'The Poetics of Practice-Based Research Writing' (2006) 11(3) *The Journal of Architecture* 283.

[25] Like a novel compared with a newspaper, or science fiction compared with romance, encyclopedia entries, love letters or investigative journalism. Unless we are literary scholars, we tend to take genre for granted. We know it when we see it, and possibly only notice when something seems amiss.

[26] As is an introduction, or conclusion, and so on. They each have their conventions guided by the expectations of the reader. Different sub-genres of research-writing (PhD, Grant Application, Journal Article, Proposal), will have different genres of methodology-writing.

[27] Writing in genres is an element of our training, though we do not usually express it as such. See Vijay K Bhatia, *Critical Genre Analysis: Investigating Interdiscursive Performance in Professional Practice* (Routledge, 2017).

[28] Especially for doctoral theses. I have never found it particularly helpful to try to define what a thesis 'is' or is not, perhaps because there are so many different kinds. And yet there is certainly a PhD thesis genre. And a grant proposal genre. And a book proposal genre…

[29] I often advise students and mentees to think of three common but distinguishable purposes of academic reading as 'content, craft and critique'.

[30] Such as the criteria for examination. In Australia at least, these are available online and can easily be found. Even if they are not online, in my experience, universities will send the criteria for examination to the examiner along with the thesis.

[31] Genre expectations are formal rather than substantive expectations. So, for example, if you were to open a flatpack containing a self-assembly bookshelf expecting to find an instruction manual, you would probably be confused and annoyed if you were to find instead, an historical essay about bookshelves. (The distinction between form and substance is only ever

chapter, we can highlight three formal expectations which need to be met in order to fulfil the purposes of the genre, and not to disappoint the reader.[32] The first is the expectation that research-writing will say something new. We often refer to this as making an 'original contribution' to the field. This is a rather grandiose way of saying that the reader of research-writing expects the piece to show us something in a new light, to tell us something we did not already know, or to add something, even very small, to a body of knowledge through conducting and presenting research. We expect that good research will not simply repeat what has gone before. The second is the expectation that the author will engage critically with the materials they are examining. This generic expectation of critical thinking is different from critique. It does not mean to work in a tradition of 'critical approaches' or its kin, to perform critique,[33] or to adopt a particular type of theoretical approach.[34] Rather, it involves an expectation that the researcher will avoid taking up what has gone before in an uncritical and unreflexive way.[35] We expect research-writing not to assume too much, nor to repeat 'received wisdom' unless the researcher has thought about whether it is defensible. The third expectation is that the research is rigorous. 'Rigour' can sometimes be used to police the boundaries of 'acceptable' research within a discipline,[36] but for me, rigour means that the research is both careful and can be seen to be such, so that it may be understood as reliable, with some durability for researchers in the future. Together these three readerly expectations give research-writing much of its shape. The 'methodology' dimension of the practice of research-writing, whether separated out as in certain sub-genres, like a PhD, proposal or report, or woven through the text as it often is in an article or book, is an articulation of how these expectations are being met.

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provisional of course, but I trust you get the point here.) As well as being connected to rhetorical patterns, they are connected to scholarly responsibility and practical ethics, but again, I am not explicitly drawing out the ethical dimensions of scholarly conduct here.

[32]   You can, of course, subvert the genre too for all kinds of good reasons. But here I am explaining my sense of the conventions, rather than modes and uses of disruption. I will resist pontificating on the relationship between rules and freedom, but on that question in the context of writing stories, see Philip Pullman, 'Daemon Voices: On Stories and Storytelling' (2018) (22) *Publishers Weekly* 82. I am using scholarly writing interchangeably with research writing. Of course, there are other modes of scholarly writing than those bound up with a particular kind of university-based research. My approach is a product of my own training and the academic circles in which I move. It is written with those who seek practical guidance in mind.

[33]   By this I mean critique within a specific European tradition.

[34]   Such as British critical legal studies, American 'CLS', 'Newstream' international law, etc now largely regarded as historical moments, for better or worse, rather than current methods.

[35]   Examples of how this generic expectation is expressed in the context of the PhD would appear in many criteria for examination. At Melbourne University, one criterion says; 'does the candidate show sufficient familiarity with, and understanding and critical appraisal of, the relevant literature?' See Melbourne University, 'Thesis Examination Criteria' (2015) https://ask.unimelb.edu.au/app/answers/detail/a_id/3260/~/thesis-examination-criteria, accessed 10 March 2021.

[36]   This kind of rigour is stiff, like rigor mortis.

2.1 Avoiding Genre Confusion

The most common form of genre confusion for researchers in law tends to be between scholarly writing[37] and the policy paper. Although good policy-making relies on good research, the policy genre differs from the scholarly genre in both purpose and style, and generates different expectations in the reader. The purpose of policy writing is to produce recommendations for reform, or normative recommendations. Its objective is to describe what should and could realistically be done. It does not have to show a reflexive self-awareness of the traditions of thought within which it is working, or what bodies of thought it is working against. Its purpose is to solve a problem.[38] Arguably, the purpose of research in international legal scholarship – and in the humanities and social sciences more broadly – is less one of problem-solving than problematisation.[39] Even if a researcher wants to conclude a piece of scholarly writing with a recommendation, or 'solution', it is the tip of a research iceberg, and in rhetorical and argumentative terms, not integral to the research, or to the account of the project itself. When people do choose to conclude their research in this way, the recommendation is often the most conjectural and least enduring part of the writing, and often a reason why readers reject the analysis when they otherwise might not.[40]

3. ASKING BETTER QUESTIONS

Once we have begun to think of research-writing as a genre of writing, paying attention to the research question can be a useful way to begin thinking about methodology. Not many books on research methodology spend much time on how to craft a research question.[41] This is a pity, because not all questions are equal; some questions are better than others. This is not a question of area, topic, subject-matter or politics. It is a function of inflection or form. To put it more precisely then, some

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[37] I am using scholarly writing and research-writing interchangeably for these purposes.

[38] For various reasons, many funding bodies demand that humanities projects be framed as 'problem solving'. There are many things one could say about this. Suffice to say here, that it is useful also to think of grant writing as writing within a particular genre, and that if you must apply for one, seek advice on the genre from those with experience.

[39] This of course does not mean one cannot write in that genre as part of an academic career. But I have found it is useful to be able to draw a distinction between those different forms of writing, so we can decide which one we need, rather than accidentally perform one rather than another.

[40] I am sure you can think of works in which you agree with the analysis, but not with the solution proposed.

[41] For a shared observation with more evidence, see Tyler G Okimoto, 'Toward More Interesting Research Questions: Problematizing Theory in Social Justice' (2014) 27 *Social Justice Research* 395–411. I am sure there are exceptions to this which I have not come across, but one I have is Mats Alvesson and Jörgen Sandberg, *Constructing Research Questions: Doing Interesting Research* (SAGE Publications Ltd, 2013). I will say more about this book below.

types of question are better than others. Better questions are ones which help us meet the (genre-based) expectations of the reader.

In their book length treatment of research questions, Alvesson and Sandberg write from the field of social science, on the way that good research questions help us to do 'interesting' research. 'Interesting questions' for them open up thought, encourage reflection and trigger intellectual activity.[42] Posing a good question is just as important as finding an answer. Okimoto follows Alvesson and Sandberg from the field of social justice, interpreting 'interesting' as research which leaves you with a 'wow' feeling when you read it, avoids being theoretically dull and boring, and, more prosaically, is likely to be cited or gain influence. These are great aims, but for me, are hard to translate into practical guidance. It is a given that the researcher will find her own research interesting. As a practical matter though, it may be more useful to aim for – and to encourage – the production of research which meets the expectations of the genre. In other words, research which is more like scholarly writing than some other genre. So, for me, better questions are ones which help us to meet the demands of the genre of scholarly, or research-writing. That is, they help us: (i) make an original contribution to knowledge; (ii) be critical and reflexive in a generic sense; and (iii) write something rigorous which can be relied upon by researchers in the future.

Where the account of what Alvesson and Sandberg mean by 'interesting' research, and what I mean by genre appropriate research-writing, tend to overlap is in the idea that the goal is to construct questions which problematise their object of enquiry. By that I mean they challenge the reader's taken-for-granted assumptions in some way. In legal research, problematisation often also involves interrogating the assumption that particular normative instruments are appropriate in achieving a specific outcome.[43] So, framing a question in terms of 'how' and 'what' helps us to choose and to problematise our objects more easily than 'should' questions (Figure 5.2). 'How' and 'what' questions can also help us to avoid a slippage between the normative and analytical registers of writing. Questions that seek to solve a problem, 'fill a gap', or determine what should be done, are all questions which are less likely to help us meet the requirements of the genre of scholarly writing.[44] This might be controversial to some readers – and supervisors. And some contexts do ask us to present our research precisely as being directed toward 'problem solving'.[45] But this is often a question of presentation.

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[42]   Alvesson and Sandberg, ibid., 1.

[43]   This could involve the normative instrument of law itself. So, in other words, good research does not assume that changing the law is equivalent to producing the outcome that the law purports to produce. It might be a crucial part of it, but good research explains and justifies that assertion if it needs to rely on it, rather than assume it. A legion of scholars, including feminist scholars and Law and Society Scholars have explained this for decades, and still we forget.

[44]   Alvesson and Sandberg (n 41) agree, and spend time talking specifically about the problematic assumptions that a 'gap spotting' approach to scholarship can encourage.

[45]   This is particularly true of grant writing, but I tend to think of grant applications as their own genre, rather than being the research itself. With some tweaks at the front end (see

Straight Line Questions	Better Questions
What should we do?	How can we understand?
How do we make a given law effective?	What work does that law do in the world?
Does a particular law or norm meet its aims and objectives?	What relations does a particular law or norm create and with what effect?
What does a particular norm mean?	What different meanings have been given to a norm and to what effect?

Figure 5.2   *Straight line questions and better questions*

Even if we are motivated by a 'what should we do?' question, what we write will not endure as research unless it is grounded in a fully articulated account of how to understand the thing we wish to do something about. So, the 'solution', 'recommendation', or reform proposal is the tip of an iceberg of analysis, inquiry and critical description. Noticing this can be very helpful in the process of doing better international law research. Remember too, that the 'working question' which helps the research move along while we do it, will almost certainly be different to the way we state our 'research question' at the end, and is not the same as the central argument statement with which we lead a piece in narrative terms.

3.1   Why not 'Why'?

You might notice that I am avoiding mention of 'why' questions. 'Why' questions are often the thing that engenders our passion as researchers. Why is the world this way? Why is this situation of injustice occurring? Why is this (bad) pattern so resilient? These are great political and rhetorical questions. But 'why' questions make poor research questions for legal scholarship because they are causation questions. Part of the function of a research question is to set the parameters for our enquiry. But our research question is also the way we invite readers to measure the success of our research. Causation questions demand answers which reliably show that one thing caused or led to another thing. But this is almost impossible to prove. It is much easier to provide a reliable and enduring answer to a 'how' or 'what' question, and so better to frame the research question in those terms. As an element of presentation, we may well want to mobilise a 'why' question rhetorically, as a frame for our research, or as

the section on context, below), I have still found this practical methodology useful for grant writing.

a marker of its significance, but this comes later in the research-writing process, so I will not deal with it in this chapter.[46]

3.2   Examples of Better Questions

Better questions might have different goals (predictive, theoretical, synthetic, diagnostic), and can be expressed in different words, but will often be underpinned by an underlying curiosity about how we might understand something. Examples of good questions include variations on this 'how can we understand?' question. Often they invite new descriptions of things we think we already know.[47] So for example, questions which invite useful (re)descriptions include enquiries into how a particular set of legal arrangements works,[48] the kinds of relations instituted by a particular law,[49] or what kinds of effects a particular law might produce.[50]

   I sometimes use the phrase 'bendy questions' to describe these better kinds of question. This is to distinguish them from 'straight line' questions. Straight line questions draw a straight line from problem to solution, through mastery, will and expertise. The possibility of drawing such a line relies on accepting the frame of analysis in which a particular legal approach is located, and the account of the world carried with and by that frame. In legal research, straight line questions tend to accept the normative instruments which are available and assume they can be linked directly with a practical problem. The chain of assumptions this depends on generally does not meet the generic requirement to think critically about the field of study. This conflation (between law reform and social change, for instance, or between improvement and more international law) is often what makes legal research unpersuasive to researchers in other disciplines.

   So, for example, a project might ask whether a particular initiative improves 'food security'. But 'food security' is a legal rubric which may or may not be connected to the practical goal of reducing hunger. If the project explicitly wishes to analyse

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[46]   You can test this idea yourself, by looking at the first sentences of research books, and see that scholars often rhetorically construct a 'why' frame for what is analytically a 'what' or 'how' question. I did it myself in *Decolonising International Law*, which starts with the sentence; 'why has international law, from the perspective of the Third World, been so disappointing?'

[47]   For a meditation on description, see Anne Orford, 'In Praise of Description' [2012] 25(3) *Leiden Journal of International Law* 609. This is related to the task of problematisation, see Alvesson and Sandberg (n 41). See also, Quentin Skinner, *From Humanism to Hobbes: Studies in Rhetoric and Politics* (Cambridge University Press, 2018).

[48]   An example of this might be Jorge Esquirol, 'Titling and Untitled Housing in Panama City Essay' (2008) 4(2) *Tennessee Journal of Law & Policy* 243.

[49]   See Julia Dehm, 'Indigenous Peoples and REDD+ Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy?' (2016) 7(2) *Journal of Human Rights and the Environment* 170.

[50]   An example of what kinds of effects a theoretical approach might produce is Frankenburg's famous essay on comparative law. Günter Frankenberg, *Comparative Law as Critique* (Edward Elgar Publishing, 2016).

'food security' as a legal rubric, then that could be an appropriate formulation. But attaining 'food security' may or may not reduce hunger. Assuming *a priori* that it does, or even that it is a reasonable proxy, reduces the value of what our research might reveal.[51] The conflation of normative instruments and practical outcomes can take the form of collapsing laws and the idea(l)s behind them, or assuming the virtue of particular laws (including human rights, or 'native title' for example).[52] These contractions inevitably reproduce the worldviews in which those particular normative instruments are embedded.[53] Good research strives to be intentional, and aware of the traditions in which it is located. Even if it does not wish to critique dominant worldviews, it should aim not to reproduce them unreflexively.[54]

4.   THE OBJECT OF ENQUIRY

Even a good research question will be framed at a certain level of generality which is too vast to direct the way we actually conduct our research.[55] Generally it will indicate a topic rather than an object. But we need something more precise to focus on. This something (or somethings) is our object of enquiry. But how do we alight upon it? The answer is part discovery, part craft, so remembering the recursive dimensions of the practice of methodology becomes useful here.

As we try to craft an object of enquiry, we can both link and think 'upwards' to our question, as well as 'downwards' to the concrete ways we will construct it. We need to come up with something – a 'thing' – which we will explore to help us investigate our question. It might be an event, a legal case, an historical incident, a policy tool, a treaty, a situation, an intervention, an institutional debate, and so on. But the thing needs to be relatively precise. Here it may help to think about what actual material we will be analysing. Planning exactly what we will look for and read can also help to control the scope of our enquiry. For many international legal scholars, con-

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[51]   So, if a researcher wanted to know what the effect of trade and investment treaties had on levels of hunger in South Africa, but asked the question in terms of whether trade and investment treaties affected 'food security', they might not be discovering the thing they thought they were.

[52]   On this, see David Kennedy, 'When Renewal Repeats: Thinking against the Box Millenium Issue: Shaping the Parameters of International Law in the New Millennium' (1999) 32(2) *New York University Journal of International Law and Politics* 335.

[53]   Most notably, Eurocentrism. This is particularly important in the context of the demand to 'decolonise the university' currently gathering momentum in the countries of the former British empire.

[54]   More substantively, this reproduction is inattentive to the coproduction of description and norm. See Jasanoff (n 19). It therefore ignores its role in, and responsibility for, world-making, or the creative function of law. See Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge University Press, 2013).

[55]   Sometimes those with a great deal of erudition and experience can bridge the genres of survey and research-writing, but for the neophyte in particular, as Eco remarks, 'the more you narrow the field, the better and more safely you will work'. Eco (n 22), 13.

structing the object of enquiry will involve library-based research,[56] and/or reading documents. In this case, ask yourself what documents will you need to construct your object? It is helpful to imagine what will actually be on your desk(top). Case law and commentary? Policy papers? Historical studies about a particular law? Judgments? Arbitrations? Institutional debates? The writings of a particular group of people from a particular time?

We can think of this pile as our 'archive', the thing we are going to explore. It is different to the pile of readings we will draw on for our theoretical orientation, which I will touch on in a moment. If we have a different idea of how to form the object of enquiry, such as interviewing people, or conducting surveys, watching films or engaging in ethnographic research, we will need a separate method for gathering the data. Examples in this case might include sociolegal methods related to reliable survey methods, ethnographic methods about observation, and so on. It is here that we can also make sure that our object fits our question. If it does not, we can tweak the question.

4.1   An Example of an Object

In the 2011 book *Decolonising International Law*,[57] the research question is something like 'what happened when the Third World tried to use international law to its advantage?' The book approaches this question through constructing three 'objects'. Each object is a 'moment', or example when the Third World tried to use international law to its advantage. They are: (i) decolonisation; (ii) the claim to permanent sovereignty over natural resources; and (iii) the assertion of the rule of international law. The scope of the enquiry is narrowed (or the object made smaller) by focusing on the institutional claim in each instance. The archive centres on the institutional debates in each instance, and fans out from there.[58]

4.2   Starting with the Object

Sometimes international legal scholars will begin with the object rather than the question. A familiar example of this is a case, or judgment. One could simply set out to 'write about' the judgment, and we might well begin that way. But in the context of scholarly research, the jurist will soon have to ask what is important or

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[56]   Including virtual libraries of course.

[57]   I am using my own book here so that I can be expedient without unfairly oversimplifying the work of someone else. Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth, and the Politics of Universality* (Cambridge University Press, 2011).

[58]   This tidy anatomical diagram is a retrospective description. It bears little relation to how the book was written. I would like to think I am more practiced at directing my own research now. I don't think this is a shift from 'slow research' to expediency, but I might be wrong. See Kenneth Burke on the criticisms of Edgar Allen Poe's essay 'The Principle of Composition' in Burke, 'Poetics in Particular; Language in General', *Language as Symbolic Action: Essays on Life, Literature and Method* 25–43.

special about the judgment as a way of organising the contribution into something which distinguishes the scholarly account from a Digest or Report.[59] At that point, it can be helpful to think about why the case is interesting, and to craft a notional research question directed toward that, for which the case in question then becomes the object of enquiry. A good example of this is the classic Charlesworth article on the Nicaragua Decision.[60] In that article, the author presumably set out to write about *Nicaragua*[61] and as she was reading, realised that what was interesting about it was how it related to customary international law. We can then think of something about custom as having become the question, and *Nicaragua* the object. This may have been something like, 'how does the court in *Nicaragua* understand Customary International Law?' Once the approach to custom became the question, the context of the research became the disciplinary contestation over customary international law. As we shall see below, the 'context' is roughly the 'why do you care?' question. The disciplinary controversy also provides the significance, because the existence of the controversy is *why it matters* what the court thought of customary international law in this case. Once framed in this way, the *Nicaragua* case was located in an important debate in the field, and the piece took shape as a contribution about a very specific thing, but with broader implications for the field.[62] Thinking in this recursive way between object, question and context also helps to articulate the central argument later in the writing process, and to explain the significance of the contribution.

5.   THE LENS OF INTERPRETATION

As we think about the object of enquiry, we may already have in mind a sense of how we will interpret it. This could be articulated or unarticulated. It will often be related to the work we have done before, the literatures we prefer and the theoretical approaches in which we are schooled. For some legal scholars, because of our 'legal' training, it might be both unarticulated and difficult to articulate.[63] In thinking with practical methodology, we invite ourselves to be more deliberate about these preferences by posing to ourselves (or to our supervisees) the question, 'what literatures will I draw on to help both to study and to describe my object?' Recursivity can guide refinements here through questions like, 'why are these literatures helpful for

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[59]   These are of course their own genres of writing, deeply familiar to legal scholars.

[60]   Hilary CM Charlesworth, 'Customary International Law and the Nicaragua Case' (1984) 11 *Australian Year Book of International Law* 1.

[61]   Ibid. See *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14.

[62]   I am imagining the sequence of thought and writing here, I have not interviewed the author about it, but am using the written work as an example of a piece of work which could have been constructed around the object.

[63]   For some legal scholars, it is difficult to explain their 'methodology' because it (literally) goes without saying. This can be true for those moving into scholarly research for the first time, or for those trained in schools which assume that there is only one way to do things.

this question? Or 'do these literatures push me toward this question, or a different question?'

Again, it can help to think of this as a group of texts, but as a different group of texts than those comprising the archive we compiled to craft the object of analysis. This second body of literature is the books and articles which will help us craft the lens through which we read the archive we have assembled, or through which we will interpret the data we have gathered.[64] This compilation will invite a choice about the traditions of thought within which we want to work,[65] and within which we are able to work well, given our training and the time available for the research we are writing.[66]

It is in the choice of theoretical orientation, or lens of interpretation, that the difference becomes most apparent between variations in training, sensibility and intellectual influences. We will generally share more in common with those who share our approach, than with those who share our topic. For instance, a scholar who works in the tradition of liberal thought conducting research on trade law will have more in common, in scholarly terms, with someone working on human rights from a liberal tradition than with another trade lawyer working from a Marxist tradition.[67] We could almost say that if our general area of research (tax treaties, corporations, human rights, international criminal law) is our 'family', our theoretical orientation is where we find our friends.[68] It's not so much what you do as the way that you do it that determines what kind of scholar you are.

This element in my practical methodology approach is a point of intersection with the other two approaches to 'methodology' I put to one side at the beginning of this chapter. 'Methods talk', whether bespoke, or of schools or approaches, corresponds with the 'lens of interpretation', or 'theoretical orientation' part of practical methodology. Such readings are helpful in working out your theoretical orientation, or crafting your lens. 'Methodology' as a systematic exposition of how 'international lawyers' do things is actually a particular 'theoretical orientation' – or circumscribed range of orientations – which claim to be the proper choices for the discipline.[69] The key to thinking about methodology as a practice of research-craft, is to notice

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[64]   I once heard a very experienced scholar talking about this literally in terms of 'tomato boxes', so before digitalisation, she would literally gather the two types of stuff into two cardboard boxes, so that when she wanted to pick up and write, she grabbed the correct box for her purpose, and off she went.

[65]   And the traditions we don't want to work in.

[66]   Some research will necessitate learning another language, for example, but if that's not feasible, then better to make a virtue of necessity by reframing the question to fit one's capacity, and not frame the question or orientation in ways which cannot credibly be satisfied by working only in translation. Working in a hegemonic language like English can make it harder to appreciate these particular limitations.

[67]   If you don't believe me, imagine who are more likely to fight with each other.

[68]   PhD applicants often name potential supervisors based on expertise in a particular technical domain, whereas a better supervisory fit is often determined by theoretical orientation.

[69]   It also carries an acceptable range of objects of enquiry within itself. Objects outside that range will often be described as not proper 'legal' research.

this intersection as the place in the practice of methodology-writing where such readings may be drawn in. A good deal of research time is spent reading within one or more traditions of thought, trying to determine not only how to interpret and explain the object, but how to craft and to refine that object as well. We iteratively refine both object and interpretation in an ongoing way, by reference to a reflexive engagement with the schools of thought within which we are working. We also need to keep checking if our object and lens relate well to our question. Because none of those three is a 'sovereign' element, this can become confusing. Thinking about methodology-writing and its generic structure provides us with a way to organise the different kinds of things we read, and to write about that process of organisation, explanation and interpretation in a generically appropriate way.

6.   SO WHAT? CONTEXT, SIGNIFICANCE AND THE GOOD 'FIT'

Now that we have our better question and two elements of 'methodology' (object and lens), we can return to the notion of 'significance'. Significance is a statement of why the research matters. I tend to shorthand this as 'so what'. Without the 'so what', we have no explicit measure of justification for what we have done. But the researcher needs to explain what the significance is in her own terms.[70] Not explaining why our research matters makes us hostages to fortune by leaving it up to the reader to work it out. They may then judge by a different standard to the one we intended or could decide it actually does not matter.

As a matter of practical methodology, significance is the linchpin of 'fit'. Remember that the idea is to craft a good fit, between the question you are trying to answer, the object you choose to analyse, and the way you do it, so that at the end, the significance, or 'so what' of the piece, is to explain why looking at this thing, in this way, helps us see something differently than before (Figure 5.3). When the fit is good, the claims made are justifiable or defensible. By breaking the elements down, and by treating no one element as sovereign,[71] the practice of methodology invites us to work recursively between them. This makes the elusive fit a matter of craft or care, rather than magic. The intentionality of this practice helps us to give a critically self-reflective account of the link between the question, object and approach which

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[70]   In some contexts we need also to explain the significance of what we take to be the significance. Australian grant applications are a good example of this. We might wish to discover something theoretical in the context of a funder who wants 'practical' outcomes. One strategy is to find a way to explain the (necessary) link between the two things. Responding to peer review is another moment when it helps to be clear about why what we are doing matters. I often find that a hostile peer review can help me to clarify and better explain the purpose of the research.

[71]   In other words, we don't say, 'the question must rule', or 'the theory must rule'.

justifies that particular constellation of elements, and which explains why that method of interpretation is right for that archive, to answer that problem.
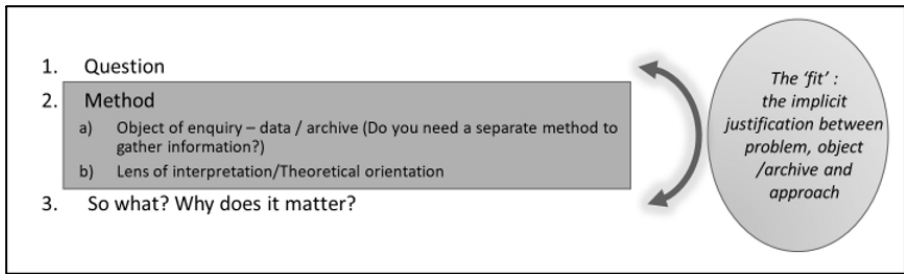

Figure 5.3   Justification of method

6.1   A Note on Context

Crafting a better research question is the first step in the activity of practical methodology. But once we have a good question, we need to add an explanatory element before that question. That element is 'context'. Context works like a picture frame which is both of and not of the picture. On one hand, the context is the situation that you are trying to engage with, or which motivates your enquiry. But on the other, the context is what links the research to the reader. Specifically, the 'context' introduces the reader to the question. It will be shaped by the expectations of the readers you wish to reach. If the sub-genre in which you are writing means that you need to frame your research as 'solving a problem',[72] this is where the articulation of the 'problem' belongs. This could be a worldly problem, or a problem in theory, jurisprudence or doctrine if the project is to be framed as a purely theoretical or doctrinal project.[73] If the significance is the 'so what', the context is both 'why do I care?', and 'why should the reader care?'. So, to our diagram (Figure 5.3), we could add Context. This gives us four essential elements: (1) Context; (2) Question; (3) Method (comprising object and interpretation); and (4) Significance. When we produce our research-writing as a text, we can see that aesthetically and rhetorically, 'significance' is the flipside of context.

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[72]   For example, many types of grant application in Australia demand that funded research 'solve a problem'.

[73]   But it's very hard to make an original contribution to theory, so for myself and mentees, I tend to prefer to think of a practical context, even though the approach might be highly theorised.

7.   CONCLUSION

The best research is rigorous and thorough. In practical terms this requires focus, care and control. At the same time, great research is also exciting because it takes us beyond the instance at hand, to gesture towards the big implications of the precise thing being studied. It can show us the universe in a grain of sand. But for most of us, research-writing cannot be about the universe.[74] It has to focus on the grain of sand. Conducting, refining, and explaining our research at multiple stages of an ongoing project, or treating methodology as a practice of research-writing, helps us to achieve this.

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[74]   Gramsci winkingly called writing that addresses large abstract problems, 'brief notes on the universe', a genre best left to those with decades of experience. See Gramsci quoted in Eco (n 22), 14.