

# *Curriculum vitae*

## A Prequel

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**Abstract:** In his inaugural lecture as Professor of Public International Law at UCL, Roger O'Keefe teases out some recurrent international legal problems through the story of the life and opinions of D H G H-G Salamander, lesser highly qualified publicist and minor poet.

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### *PACTA VIRVMQVE CANO*

A long time ago, in a hemisphere far, far away, was born a man by the grandiloquently improbable name of Dionisio Hans Georg Hans-Georg Salamander. Reared in a home girt by sea and seared by summer infernos, he was a creature of both water and fire. As a boy, he enjoyed endless days at the beach and, as something of a juvenile versifier, endless nights in the embrace of Calliope, Euterpe, Erato or Thalia, depending on which was free and could bear to spend a warm summer's evening humouring an underage wordsmith. Young Dionisio Hans Georg Hans-Georg did well at school and, after what could only be called a modicum of tertiary educational peripatensis, his grown self settled on a career as an international lawyer. Well, it could only be called that by a lawyer.

More precisely, D H G H-G Salamander settled on a career as an academic international lawyer.

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'Pah!', scoffed a City solicitor friend, informed one drunken night of Salamander's vocation. 'Those that can, do. Those that can't, teach.'

'Ho, ho!', replied Salamander sarcastically. 'Those that can, do. Those that can't, solicit.'

Absurdly early next morning, nursing a hangover, a cut lower lip, and the forlorn wish that his *jeu de mot* had been by way of *l'esprit de l'escalier*, Salamander was up and at 'em, slaving over a manuscript to the inexorable deadline of some unrelenting editorial Fury. Absurdly early ... Inexorable ... *L'esprit de l'escalier* ... *Lo spirito* ... *Der Geist* ... *Der Volksgeist* ... *Der Rechtsgeist* ... *L'esprit des lois* ... *La solidarité sociale* ... *Le dédoublement fonctionnel* ... Voiceless labiodental fricative on cut lower lip ... *La compétence de la compétence* ... Forlorn ... Forlorn! The very word was like a bell to toll him back from the sibilant fricative of article 36(6) of the Statute of the International Court of Justice to his sole self! And sole was the word. It was a solitary calling. Eunomia was a demanding mistress. To mix metaphors.

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In terms of the legal philosophy to which he subscribed, D H G H-G Salamander was a positivist. Given the practical difficulty in a world of sometimes radical moral and political pluralism of ascertaining from reason an objective notion of the good, he believed that the intersubjective approximation of the latter derivable, directly or at one adjudicatory remove, from the premise that international law was what states—through their governments, as the representatives of their peoples—mutually agreed it to be was the most legitimate and prudent basis for an international legal order.

This was not to say that said Salamander was ideologically wedded to the privileged position of states within the international legal order of his day. International legal positivism, to his way of seeing things, had nothing inherently to do with states. What legal positivism meant was simply that the law was whatever an authorized temporal lawmaker validly said it was (or ‘posited’, as in ‘lay down’), instead of being wholly deducible from certain first principles or divinely ordained; and in the international legal system as it then stood, it just so happened that the authorized temporal lawmakers were first and foremost states. If these states were to agree the following morning, preferably not absurdly early, that international law was whatever a global legislature of everyday individuals or a troika of sage, prophet, and poet deemed it to be, international law would remain a positivist legal system but one in which states no longer played a formal role in lawmaking. Anyway, the essence of positivism, it seemed to Salamander, was an adherence to what is, rather than to what *a priori* principle says should be, and it was an observable fact that states had acquiesced in at least the loosening of their monopoly on international lawmaking, conceding some role to international organizations and, to all intents and purposes, to international courts and tribunals. Moreover, to say that international law was what states posited it to be was to enunciate no more than the formal juridical position. It was not to deny the existence of a much larger, heterogeneous cast of actors who, in the real world of political and other social contestation, influenced the international lawmaking policy of governments and, through them, of the legal constructs that international law called states.

Having reproduced the foregoing *apologia pro vita sua* in half a dozen applications for a chair, Salamander had it down to an *ars finis*. No, ‘ars’.

As it was, Salamander had always struggled to see what was inherently wrong with states, as the term was used in international law. A ‘state’ within the meaning of international law was no more than a legal person, a juridical construct, a formal juristic concept abstracted from political and other social reality, even if it was mapped onto that reality. In the words of the immortal Austrian, the state for the purposes of international law ‘[was] not a biological, psychological, or sociological unit; it [was] ... a specifically juristic unit’, ‘the personification of a social order, constituting the community we call “state”’.<sup>1</sup>

As far as Salamander could tell, the story went something like this.

In the beginning God created the heavens and the earth. Fast-forwarding a few frames, God said, ‘Let the water under the sky be gathered to one place, and let dry ground appear.’ And it was so. He or she—the jury was still out—called the dry ground ‘land’, and the gathered waters he or she called ‘seas’, saw that it was good,

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<sup>1</sup> Hans Kelsen, *Principles of International Law* (Rinehart & Co 1952) 100.

had a breather, did a bit more work, had another breather, created man in his own image, male and female he created them, giving us a hint as to the gender question, the serpent appeared, the apple got ate, the happy couple were cast out, they were now less happy, if more knowledgeable, they threw on some clothes, were fruitful and multiplied, probably not in that order, and their descendants, as many as the stars in heaven and as the grains of sand on the seashore, arranged themselves in orderly fashion—albeit maybe with a smidgen of terminological, not to mention earthly and celestial, overlap—into thrones, dominions, principalities, and powers.

In the alternative, and speeding up proceedings somewhat, there was a whopping great but oxymoronicly silent bang, primordial slime, mitochondrial DNA, apes (aquatic or otherwise), a square-jawed lass called Lucy, *homo erectus*, a brief period of censorship, *homo sapiens*, who, like the unhappy couple, was knowledgeable, *homo sapiens sapiens*, even more so, and eventually the aforementioned arrangement into thrones, dominions, principalities, and powers.

Now some of these TDPPs were good, some bad, some happy, some sad, some monarchical, some republican, some national, some multinational, some unitary, some federal, some democratic, some depends on what you mean by democracy, some secular, some theocratic, although the amount God rested cast doubt on his or her fitness for office. Regardless, however, or perhaps on account of their many and varied contingent qualities, these TDPPs, having no common judge but needing legal rules among them, duly acknowledged the existence of an inter-TDPP law, in which the fundamental juridical unit was, no prizes for guessing, the TDPP, good or bad, happy or sad, a unit which came to be referred to variously as *civitas*, *respublica*, *gens*, the more personalized *princeps* or *souverain*, and eventually, in a drive for terminological standardization, the state.

In this light, the standard critique of the state-centrism of this interstate—or, courtesy of the auto-iconic Mr Bentham, international—law was, to Salamander's mind, misdirected. The problem was not that the legal community we call 'state'<sup>2</sup> was the radical site of international law. The problem was some of the social orders of which the state was the legal personification. States as such were not the issue. Bad governments or systems of government were. There were plenty of bad apples, but no-one blamed the apple. Anyway, had not these selfsame states voluntarily fettered their governments' freedom of repression through international human rights law (including minority rights and the rights of indigenous peoples), the law of non-international armed conflict, and like international legal goods?

Furthermore, could an international lawyer not conceive of the state in favourable terms, as the juridical vehicle through which a people, in the sense of the entire population of a state, exercised its right to self-determination? Was the state, sovereign and equal with others, not simply the formal international legal guise in which the people clothed in it—without prejudice to the existence and rights of any peoples forming a subset of that people—freely determined its political status and freely pursued its economic, social, and cultural development, in the words of the two international covenants?

All of this looked to Salamander like the road to human flourishing, not perdition.

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<sup>2</sup> Ibid.

As one may have guessed, D H G H-G Salamander was also a legal formalist—what some would call a ‘black-letter’ lawyer, which was certainly more promising than a ‘dead-letter’ lawyer but less arousing than his or her ‘French’ counterparts. He adhered to the orthodox methodological disciplines of international law, looking for answers to international legal questions within the international legal system itself, identifying, interpreting, and applying the positive law by way of a strict application of the system’s framework rules and concepts and its general canons of legal reasoning. To his perhaps-simplistic way of seeing things, legitimacy compelled the faithful giving effect to the rules of the game settled on by the game’s recognized rule-makers. Conversely, he viewed at least a certain brand of anti-formalism in international law as the Trojan horse or useful innocent of hegemony, whether geopolitical, institutional or personal. At a more fundamental level, truth compelled fidelity to the logic of the thing, and Salamander had a thing for truth.

Salamander was not deaf to or uninterested in the instrumental potential of international law, scrupulously practised, as a means of emancipation. But by temperament he cleaved to a modest vision of the role of the international legal academic in such things, holding a sanguine estimation of his own likely influence on the international legal order.

As for international law’s geopolitical, politico-philosophical, moral-philosophical, and sociocultural contexts and influences, past and present, Salamander saw these as worthy and fascinating objects of inquiry in their own right. He valued too the insights of legal philosophy, linguistics, and hermeneutics, while applauding the empirical turn in international legal scholarship. Nor was he hostile to critical-theoretical approaches, which played their salutary subversive role in an ecumenical college as a kind of loyal opposition, even if again by temperament, which included his semantic hypersensitivity, he himself preferred not to ‘problematise’ things but to make them as simple as possible, though no simpler. Old-school natural law also had its place, provided it was invoked in mindfulness of its particular intellectual heritage and as no more than a critical standard against which to measure the desirability of a positive rule, rather than to deny that rule’s formal applicability. In all things academic, Salamander’s sole yardstick was a good argument. If truth be told, moreover, alongside the good arguments of these other schools he could feel inadequate, a journeyman, a trundling medium-pacer in the midst of their fast, fierce bouncers or fizzing flippers and googlies.

No, D H G H-G Salamander’s bugbears roamed elsewhere.

Salamander took issue with academic international lawyers and even more so judges who claimed that the resolution of this or that international legal question was not what a faithful adherence to the rules of the game suggested but what their partial account of the values purportedly reflected in the law was said to suggest. In Salamander’s view, this essentially populist opposition of positive law and the values underlying it—between mere ‘black-letter’ law and some more authentic spirit of that law—was spurious. The positive law *was* the values, or at least a particular formal embodiment of those values. This being so, recourse, in preference in effect to the application of the positive law, to what were said to be the values underpinning it was misconceived at best and special pleading at worst. Moreover, positive rules of international law, whether posited directly by states or created by the judicial application of higher-order positive rules, were typically the embodiment not of unalloyed values but of a pinchbeck, compromise sort of value, in the assay of which

by some international lawyers there was a predictable tendency to neglect the base metals.

None of this meant that an international lawyer was not to apply those established rules of treaty interpretation which looked to the gist of a provision—reading the text in the light of the treaty’s object and purpose, considering the rationale for the provision in accordance with the uncodified maxim *ut res magis valeat quam pereat*, even cautious recourse to the perilous *travaux préparatoires*. These rules of interpretation were part of the rules of the game. Moreover, they related to ascertaining the content of the positive law in the first place, not to effectively displacing the application of that law in favour of its purported *raison d’être*. Nor did international legal formalism leave no place for the teleological application of policy *infra legem*, provided that this was genuinely *infra legem* and that the policy appealed to was manifestly privileged by the regime of international law in question, by the general body of international law or by general canons of legal reasoning. Even less did a formalist approach to international law exclude the application in appropriate international cases, as permitted again by the rules of the game themselves, of those elementary principles of equity common to the world’s legal traditions.

As for those academics and judges who would substitute for the unswerving application of a rule of positive law policy considerations wholly extraneous to it, they were beyond the pale. This was the job not of the lawyer but of the legislator, who, as it was, displaced the applicable rule of positive law not with values as such but with the embodiment of those values in the specific form of a new rule of positive law.

Only slightly less far up his nose got those academic international lawyers and judges who, while paying lip-service to the rules of the game, played fast and loose with them in pursuit of *a priori* commitments overt or covert. He acknowledged that complete divestment of the jurist’s ego was impossible. But this banal insight did not mean that the jurist could not strive for an account of the positive law that was as objective as humanly possible. Nor was he fool enough to think that the answers arrived at by applying the rules of the game were in every instance clear—indeed, anything but. The legal system provided for by these rules was as much inductive as deductive; its functioning was heavily dependent on the blurred calibration of factual and legal-factual appreciation; competing rules were often in play; and so on. It was not an exact science. *Pace* the immortal Austrian, it was not really a science at all. In short, there were always hard cases, points on which reasonable people could differ, with predicted outcomes per force stated in terms only of probabilities. But this was not the same as radical indeterminacy. The convincing existed when the compelling did not. There existed in each case a penumbra of reasonableness, a finely-enough calibrated intersubjective standard, a generally shared sense of where the line was to be drawn, beyond which an answer reached by the purported application of the rules could be said to be wrong. Now, simple muddle-headedness was excusable. Everyone made mistakes. Understandable too was legal advocacy by legal advocates. It was the job of counsel in litigious proceedings to spin the law in the way most favourable to their client, even if there still ought to be self-restraint, a self-policing adherence to some sort of internal discipline in the higher interest of what, by no coincidence, was called the discipline. The same, *mutatis mutandis*, could be said on both counts of legal officers of campaigning NGOs. Their job, within limits, was to campaign. There was even nothing wrong with international legal academics speaking and writing explicitly *de lege ferenda*, in declared reformist mode. No, the kick of Salamander’s

hobby-horse was reserved for those international legal academics and judges who disingenuously passed off policy as *lex lata*.

In D H G H-G Salamander's eyes, these three exasperating types, which in essence were one and the same, wilfully, knowingly, and unacceptably bent the agreed rules. In the pungent words of the Faustian German, quoting an imprudent Frenchman, they wanted to cheat. They sought to exempt themselves from the ineluctable distinction between 'is' and 'ought' on which positivist international law—the international legal system as it had functioned since the temporal eclipse of natural law—was founded. And the scorn that not a few of them poured in the process on the formalist positivism of this agreed system riled Salamander. So it was with a dark, delicious pleasure that he was wont to quote that true bearer of light from University College London, the sceptical, quixotic German, who wrote all those years ago in *Current Legal Problems*:

International lawyers ... are prone to suffer from a professional disease against which other members of the legal profession are remarkably immune. ... The reasons for this idiosyncrasy are not far to seek. The inherent weakness of international law in an overriding system of power politics; an understandable temptation to hide this state of affairs from oneself and others by means of elaborate images; ... and a revivalist movement towards a new naturalism which lacks so conspicuously the innocence of mind of the early naturalists—all bear their measured share in producing the phenomenon of the evangelist international lawyer.<sup>3</sup>

And by no means were the evangelists to be found only among the fluffy bunnies. The hawks too had their unhealthy share of proselytising ideologues.

But what drew D H G H-G Salamander to a formalist vision of international law went beyond the jurisprudential.

International legal formalism provided an outlet for what Salamander cared to think of as his aesthetic sensibility. There was a Vitruvian beauty in the systematic logic of international law's formal reasoning, a *venustas* to complement the discipline's *firmitas* and *utilitas*. Things had their pleasing place. Salamander felt called to maintain and even refine this attractive intellectual architecture.

Salamander revelled too in the play of formal international legal reasoning, relishing what the jocular German saw as 'the characteristic lightness and sense of relief we find in playing'<sup>4</sup> and the '*energeia* [with] its *telos* within itself' that was '[t]he being of all play'.<sup>5</sup> It was no coincidence that Salamander referred to the normative framework of the international legal system as the 'rules of the game'. By this he did not intend that international law was mere recreation, idle amusement, a parlour game like a round of charades, even if there were shades of musical chairs when it came to the big professorships. In the further words of the merry Marburger, play 'contain[ed] its own, even sacred, seriousness'.<sup>6</sup> What Salamander meant, borrowing again from the humorous Hessian, was that international legal reasoning comprised a closed universe in which the 'purposive relations' of ordinary human existence were 'curiously suspended'.<sup>7</sup> It was a mutually-agreed imaginary world with 'its own proper spirit',<sup>8</sup> where 'the player's conduct [was] tied to the make-believe goals of the

<sup>3</sup> Georg Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 263, 263.

<sup>4</sup> Hans-Georg Gadamer, *Truth and Method* (first paperback edn, trans rev Joel Weinsheimer & Donald G Marshall, Bloomsbury 2013) 112.

<sup>5</sup> *Ibid* 107.

<sup>6</sup> *Ibid* 117.

<sup>7</sup> *Ibid* 107. See also, similarly, *ibid* 112.

<sup>8</sup> *Ibid* 111.

game’, rather than to ‘the world of aims’, where that player ‘experience[d] the game as a reality ... surpass[ing] him [or her]’,<sup>9</sup> and where ‘the player’s actions should not be considered subjective actions, since it [was], rather, the game itself that play[ed], ... draw[ing] the players into itself and ... itself [becoming] the *subjectum* of the playing’.<sup>10</sup> International legal reasoning, in other words, was ‘its own measure’, transcending ‘the question whether it [was] ... real ... because a superior truth [spoke] from it’,<sup>11</sup> a truth that was ‘properly neither “believed” nor “not believed” outside the play situation’,<sup>12</sup> ‘the truth of play’,<sup>13</sup> the truth of the logic of the thing. In this way, a formalist vision of international law appealed not only to the *homo ludens* in Salamander, who, with Chesterton, believed that the true object of all human life was play, but also to the seeker in him of what was true.

Salamander also found communion in the universe of formal international legal reasoning. He felt himself, perhaps quaintly, part of a tradition spanning generations and continents—a tradition which was ‘always different, ... always new’,<sup>14</sup> whose ‘historical life ... depend[ed] on being constantly assimilated and interpreted’.<sup>15</sup> In this living canon he ceased to feel alone. Indeed, in the internalization, actualization, and revitalization of this common dogmatic and hermeneutic heritage, Salamander lost sense of the dancer for the dance. Or ‘dahncer’ for the ‘dahnce’. Let’s call the whole thing off.

In these various senses, international legal formalism felt, to Salamander, like the sea, with its shapely beauty, its ‘rest[ing] absolutely within itself’,<sup>16</sup> its oneness over time and space. It was perhaps no coincidence that the law of the sea occupied a central place in the history of ... Actually, it was complete coincidence. What a load of bollocks! Thank God for ‘Delete’, he reflected, relieved.

In addition, Salamander relished the craft of black-letter international lawyering. The international lawyer, like the sawyer and the bowyer, was the exponent of a skill and know-how gained by apprenticeship, honed by experience, and wondrous to behold in the hands of a master. The business of international law rested on a seasoned judgment and what a London cabbie would call ‘the knowledge’—on ‘a kind of tact’ and ‘a well-stocked memory’, to quote once more the Teutonic tickler-pink.<sup>17</sup> This practical aspect appealed to the *homo faber* in Salamander, who, like your typical bourgeois professional, sometimes yearned for the more grounded life of the cooper, the cordwainer, the mason, the shipwright, the organic wine-maker, the artisan patissier, the acorn-fed *cerdo ibérico* swineherd or the virtuoso landscape architect, even if he lacked the capability. Shoddy workmanship irked him, shysters even more so.

Finally, Salamander viewed black-letter international lawyering as a form of service. It involved, in the words of Heidelberg’s high priest of hermeneutics and hilarity,

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<sup>9</sup> Ibid 113–14.

<sup>10</sup> Ibid 505.

<sup>11</sup> Ibid 116.

<sup>12</sup> Ibid 503.

<sup>13</sup> Ibid 506.

<sup>14</sup> Ibid 220.

<sup>15</sup> Ibid 415.

<sup>16</sup> Ibid 116.

<sup>17</sup> Ibid 5.

subordinating oneself to the ‘superior claim’ the rule made,<sup>18</sup> placing oneself at ‘the service of what [was] considered valid’.<sup>19</sup> And Salamander had a thing for service.

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But it was not all beauty, truth, and miscellaneous high-mindedness. The international legal system, while its own reality, was predicated on the external reality—the real reality, as it were—of the practice of states. It was ultimately positivist, and as an international legal positivist D H G H-G Salamander was necessarily a down-and-dirty empiricist. And what down-and-dirty data, what incident and idiosyncrasy with which to work! All human life was there! The agony and the ecstasy, the tragedy and farce, the stuff and nonsense of international affairs past and present, *visibilia omnia et invisibilia*! The human world, the bringer of pluralities, its song be sung, its rill be run! Like the sea, it teemed with life. So too knew it death, the destroyer of worlds, Assyrian, wolf, and fold all kneeling before it and trembling. The divine comedy! The encyclopaedia satanica! He sang the corpus eclectic. Out of this Dionysian frenzy, out of the fury and the mire of human veins, it was not only the distinctive service but also a large part of the fun of the international lawyer to discern and to elaborate with Anzilottian clarity a normative logic.

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As for whether at heart he was an international legal apologist or critic, Salamander took the view that he could rightly no more praise or condemn international law for justice or injustice than he could a language for a kind or hurtful word. There was no use indicting laws. They were no shoddier than what they peddled. Law, to quote again the immortal Austrian, was simply ‘a specific social technique for the achievement of ends determined by politics’.<sup>20</sup> International law, as someone else would write somewhere, was no more than a vehicle for human values, a language of human self-ordering, a particular praxis of human willing.<sup>21</sup> If the rules were warped, the blame lay with the crooked timber.

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Yet for all her tender ministrations, Eunomia remained a demanding mistress. She also remained a demanding read, or at least her namesake did, although no-one—the London cabbie, the troika (or trinity) of sage, prophet, and poet, and least of all D H G H-G Salamander—minded too much.

Yes, she was a demanding mistress alright. So much to write, so little time, to borrow from Wonka. The job involved so much drudgery. Tomorrow and tomorrow and tomorrow crept in this petty pace from day to day. Yet here were his friends pumping out publications as if by colonic irrigation! The pugnacious Georgian, the feisty Serb, the neotenous Nigerian, the bouffanted Belgian ... Goddammit, did that well-coiffed

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<sup>18</sup> Ibid 322.

<sup>19</sup> Ibid.

<sup>20</sup> Hans Kelsen, *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems, with Supplement* (Frederick A Praeger 1950) xiii.

<sup>21</sup> Roger O’Keefe, ‘Once Upon a Time There Was a Gap ...’ in James Crawford & Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law. Volume 3, 2010* (Hart 2011) 401, 404.

Walloon never sleep? The productivity of these characters was demoralising! Just when he thought it was safe to go back in the water, out leapt another book, article, chapter or blog-post by one of these men possessed! And men they all were, these Gatling guns of international legal scholarship. The legions of women womanning the academy, saner and more *sapiens*, seemed to stop to smell the roses. There was probably an article in there somewhere ... but there was no bleeding time to write it! Salamander felt the urge to cry out ‘*Polako polako! Doucement! Festina bloody lente!*’ and whatever the cognate injunction was in Georgian and Yoruba. But it would have been in vain. Professors Fangio, Gonzáles, Runner, and Bolt were not about to take their respective feet off the gas. Their Stakhanovite output was unstoppable.

Did these guys not have teaching, supervising, marking (summative *and* formative), external examining, pastoral, and ‘enabling’ duties? Did they not have admin coming out their ears, or out of what Joe Orton would have called their ears? References, student admissions, attendance monitoring, peer observation, peer appraisal, self-appraisal, time allocation surveys, fire safety induction, expense claims, faculty meetings, committee meetings, sub-committee meetings, workshops of every shape and size ... DID THEY NOT HAVE FACULTY AWAY DAYS? The Teaching Away Day, the Learning Away Day, the Teaching and Learning Away Day, the Research Away Day, the Research Funding Away Day, the Funding the Research Funding Away Day Away Day, the Student Satisfaction Away Day, the Student Dissatisfaction Away Day, the Staff Dissatisfaction Away Day, the Staff Suicide Away Day ... The list went on. Sure, more often than not Salamander interpreted the key term to mean that he would be away that day. But it was the thought that counted. To his friends’ well-meaning inquiry ‘What are you working on at the moment?’ honesty compelled the answer ‘Half a dozen hypothetical scenarios on the Dangerous Dogs Act 1991 (UK) for the undergraduate client-interviewing competition.’ Dignity, however, prompted an equivocal but no less truthful ‘Oh, the usual.’

Where had fled his youthful *sprezzatura*? What had spawned this *pasticciaccio brutto*? Who in Satan’s name invented moodle®? HOW MANY GODDAMN EMAILS COULD A HUMAN BEING GET? It depressed him. Work, work, work, without so much as a sponge soaked in vinegar by way of mercy! *ELOI, ELOI, LAMA SABACHTHANI?* O God! O Montreal!

To top it all off, that lusophone Latin American light of the international judicial world and universal legal conscience had just published his *maximum opus*:

**The Construction of a Humanized International Law:  
A Collection of Individual Opinions (1991-2013)**

His Excessivity Judge Anônimo Aeterno Canardo Triplicade

December 2014

- ISBN: 9789004251021
- Hardback (1876 pp.)\*
- List price: €395.- / \$512.-
- Language: English

\* ACTUAL SIZE

1,876 pages! Jesus wept. Salamander had been forced to brush up his schoolboy Latin just to get through these epistles to the Philistines, although finishing them seemed merely to deepen his perplexity. *Quo usque tandem abutere, Catilina, patientia nostra?* He could handle the 'Primus'. He could tolerate the 'Secundus'. He could even just about hold down the 'Tertius' after a big night out with his City solicitor friend. But, whether out of excessive whetting of Occam's razor or simple eye fatigue, he was unable to suppress the suspicion that, if an epilogue ever contained a 'Quadragesimus quintus', something somewhere had gone horribly wrong. Words, words, words! A veritable cornucopia of words! The miracle of the loaves and footnotes! Full many a flower was born to blush unseen and waste its sweetness on the desert air ... but not this rare specimen! Reading the stuff was like ploughing through the *procès verbaux* of *I'm a Celebrity, Get Me Out of Here!* A whole series of it. With commentary by Augustine and Aquinas. True, in the beginning was the Word. But there was only one of them.

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Even leaving aside demanding mistresses, D H G H-G Salamander did not find it all plain sailing. For all his unrepentant formalist positivism, he harboured at times unsettling methodological, even existential doubts.

To begin with, the rules of the game were to an extent fluid, neither immutable nor amendable solely at specified constitutional moments. Their ongoing ascertainment, like that of other rules of customary international law, rested ultimately on induction from the quizzicality and quiddity of human affairs. It was not always clear where hegemonic sleights of hand and shoddy workmanship ended and novel processes of international lawmaking began, where rigorous adherence to the methodological disciplines of the international lawyer's craft flowed into fusty insistence on *dépassé* forms or harrumphing reaction. At crucial moments was he a vigilant custodian of the *lux et pocula sacra* or a blind defender of the *ancien régime*? When should he jump ship? The timing called for such keenly attuned, disinterested, and fearless exercise of the practical discernment of the international lawyer as now and then to make him queasy. This was not the sea of psychic refuge but a dolphin-torn, a gong-tormented sea. It was maybe more enticing than a snotgreen sea, a scrotumtightening sea, but if so only marginally.

Exacerbating Salamander's episodic nausea, his commitment to a formalist, positivist international law was inescapably and discomfortingly a conservative preference. Granted, such an international law could be a vehicle of emancipation as much as of domination. Think of the right to self-determination. Think of international human rights law. All it took was agreement among states. But such a vision still reflected a plumping for the civility of form and process over the righteous overthrow of the tables of the moneychangers and the seats of them that sold doves. And he was never persuaded beyond doubt that the first was the better. It seemed undeniable that strict adherence to the rules of the game could leave unremedied, even ratify, injustice and suffering. It was all very well and good to blame the crooked timber, but what of the drowned child in the here and now? At times it was anguishing.

Had not many of the great progressive developments of international law come about after a judge or scholar, with a fine disregard for the rules of the game as played at the time, picked up the ball and ran? You couldn't make an omelette without breaking a few eggs. What was so wrong with appealing to at least manifest underlying values in

those rare instances where the positive law appeared so at odds with them and where an intimation of justice, or of at least manifest injustice, cried out for it? Was intentionally and knowingly disguising *lex ferenda* as *lex lata* really a hanging offence? After all, judicial decisions and the teachings of the most highly qualified publicists (the latter term interpreted these days somewhat indulgently) were no more than subsidiary sources for the determination of rules of international law. If they failed to persuade states, states would take them at best *cum grano salis*. For every *Tadić* there was an *Ayyash*. Indeed, if they failed to persuade other judges and scholars, they would suffer a similar fate or worse. For every *Tadić* there was an *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* waiting to trash it. All Salamander would be doing by pushing out the boat would be contributing to the debate. To mix metaphors.

And why, for that matter, did he place himself alongside international judges? Judges decided actual cases, cases in which states had submitted to a court's jurisdiction on the implied understanding that the rules of the game would be scrupulously observed. Moreover, the fluid international legal game had begun to resemble a watered-down common-law system, in which courts actually made law, applicable beyond the parties to the dispute, making legitimacy all the more imperative in the judicial context. But international legal academics decided nothing, and the writings of the most, the least, and the fair-to-middling highly qualified publicists did not make international law. Was it not a little precious to insist that the ivory tower play by the rules? To mix more metaphors.

Most fundamentally and scrotumtighteningly, what of the suspension of the purposive relations of ordinary human existence that was of the essence of a formalist vision of international law? Was this not a moral abdication? Was it not fiddling while Rome burned? And was it not ethically glib to believe that the actions of the players in the game—albeit the serious, even sacredly serious game—of international legal reasoning were not their own actions but those of the game itself? This sounded frighteningly like just following orders. Everyone had the power to choose.

In short, was there any sin in being an evangelist academic international lawyer? Was it damnable not to be?

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Yet he could not bring himself to take that plunge. Free to dream, he might have dived right in. But his mind-forg'd manacles, his perhaps-oversusceptible aversion to what he intuited as untruth, held him back. So too did his temperament, although it was probably the same thing. Like Dr Rieux, he would not let himself go when he ought not to. One had to stick with what one knew, to describe what one had seen. Whether this was courage or its opposite, he was uncertain. But to act otherwise would have been a lie. He was not sure what was right, but he knew what felt dishonest. What an impossible fellow I am, he sighed with the whisky priest, and how useless.

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‘The law is always deficient’, wrote the jocular German, ‘not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law’.<sup>22</sup> To the *homo sapiens sapiens* in Salamander, this rang true.

He was not persuaded beyond doubt. His instinct felt truer than the alternative, but it was a defeasible truth. His conviction was provisional.

His conviction also rested on a desperate hope.

It was a hope that others might do better, if only fail better. Salamander drew a modicum of consolation from the thought that he was but part, a small, brief part, of ‘a conversation’, in the words of the late centenarian *Spielmeister*, ‘that never ends’, in which ‘[n]o word is the last word, just as there is no first word’, in which ‘[e]very word is itself always an answer and gives rise always to a new question’.<sup>23</sup> In turn, the conversation that was international law was but a small part of a greater conversation. Salamander found some comfort in reminding himself that, when all was said and done, it was only law. It was only a game, as it were. It did not foreclose the possibility of moral agency and attendant practical action in the world of social reality. It was only one specific technique among many for human self-ordering and, where desired, for the remedy of social ills. ‘There [were] many times’, in the words of the down-to-earth Dudleian, ‘when it [was] much better to call upon a politician, or a priest, or a doctor, or a plumber’.<sup>24</sup> And, indeed, the greater part of the task of setting the world to rights fell to the first of these, to that more important universe of human imagining and willing, to politics—which is to say that it fell to the human capacity to imagine a better world and to the strength of the human desire to bring it about. Here Salamander’s hope, his desperate hope, lay in the eventual, world-historical vindication of the human intolerance of injustice, a hope that was ultimately one and the same as his hope in the inevitable correction by the cosmic Logos of unidiomatic usage.

Perhaps best of all, Salamander’s hope hinted to him that maybe he did not have to work quite so hard. Maybe while the pugnacious Georgian, the feisty Serb, the neotenous Nigerian, and the bouffanted Belgian burned the midnight oil, while the lusophone Latin American light of the international judicial world and universal legal conscience levelled whole rainforests in his zealous construction of a humanized international law, he, Dionisio Hans Georg Hans-Georg Salamander, could bunk off to the beach.

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Play up, then, he thought to himself, play up, and play the game, the wistful, beautiful game. *Joga bonito*, as His Augustinian Excellency might have said. Embrace what the sceptical, quixotic German, in his inaugural lecture at University College London, called the misery and grandeur of international law.<sup>25</sup> Practise your craft, the craft of

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<sup>22</sup> Gadamer (n 4) 328.

<sup>23</sup> Hans-Georg Gadamer, ‘Letter to Dallmayr’ (trans Richard E Palmer & Diane P Michelfelder) in Diane P Michelfelder & Richard E Palmer (eds), *Dialogue And Deconstruction: The Gadamer-Derrida Encounter* (SUNY Press 1989) 93, 95.

<sup>24</sup> Vaughan Lowe, *International Law* (Clarendon Press 2007) 290.

<sup>25</sup> See Georg Schwarzenberger, ‘The Misery and Grandeur of International Law’ (1964) 17 *Current Legal Problems* 184, especially 204, where Schwarzenberger challenges ‘[the] assumption ... that it is the duty of the academic international lawyer to adopt his subject as a “cause” and, in a spirit of missionary, if not prophetic, zeal and “dedication”, indulge on its behalf in quasi-theological

the guild of international lawyers present and past, but do so with a humility born of indefeasible doubt. Take to sea, the sea, the sea, but beware the murderous innocence of the sea.

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When tidying his office for the first time in fifty years, D H G H-G Salamander chanced upon a poem he had written in his youth. It went like this:

*Aqua vitae*  
(*Uisce beatha*)

When I grow up, I dream  
I'll be a sea-otter,  
gorging my belly  
on paw-shucked abalone,  
effortlessly light and lounging  
on pillows of kelp.

When I grow up, I fear  
I'll be a beaver,  
the worthy of the woods,  
whose winter warmth is earned  
with summer days not spent  
but banked.

Yet when I grow up, I bet  
I'll be a salamander,  
promising but never quite managing  
to live on dry land.  
Entertaining in a fashion,  
perhaps bizarre to some,  
but floating unflinching.

Of course, he became none of these things, at least not literally. He became an academic international lawyer. And in the fullness of time he assumed the posts of Comptroller-General of the Integrity of the Normative System and, on retirement, Poet in Residence at the *European Journal of International Law*. Seaside residence.

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During the aforementioned excavation of his office, D H G H-G Salamander also found an old photo, a photo whose message felt apt for a legal field peculiarly prone

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apologetics'. 'Actually,' continues Schwarzenberger, 'the functions of the doctrine of international law are very different. Beyond the limited task of providing technically competent legal analysis, they demand, before anything else, a willingness to present as true a picture of the reality of international law as it is possible to give.'

to anxieties, discontents, crises, and the po-faced manufacture of mountains out of molehills. It tickled his fancy so much that he submitted it to the *European Journal of International Law*'s 'Roaming Charges' section, which, in keeping with the impeccable standards of editorial transparency for which the journal was famed, published it immediately. It looked like this:



It was a call—albeit one expressed in the imperative mood, rather than the hortative subjunctive—to which, Salamander imagined, that crafty old reformed playboy Augustine, Saint Augustine, the original one, would have responded with a single word: Amen.

\* \* \*

*This story is dedicated to the memory of Fr Charles Fraser SJ, 'Jesuit, classicist, benign larrikin' (Sydney Morning Herald, 23 February 2004), who stopped to smell the roses, knew the value of play, and was partial to a drop of the water of life.*

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## NOTES

'*PACTA VIRUMQUE CANO*': 'I tell of treaties and a man.' See Virgil (Publius Vergilius Maro), *Aeneid*, Book I, line 1 ('*Arma virumque cano*', 'I tell [literally, 'sing'] of arms and a man') and Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, 1155 UNTS 331, article 26 ("'*Pacta sunt servanda*'", 'Treaties must be observed').

'A long time ago in a hemisphere far, far away': See *Star Wars* (20th Century Fox 1977), opening crawl ('A long time ago in a galaxy far, far away').

‘home girt by sea’: See the national anthem of Australia, ‘Advance Australia Fair’ (1878, composer Peter Dodds McCormick), verse 1, line 4 (‘Our home is girt by sea’).

‘a creature of both water and fire’: Although the salamander is amphibious and in some cases wholly aquatic, legend long associated it with fire.

‘Calliope, Euterpe, Erato or Thalia’: In ancient Greek mythology, Calliope, Euterpe, Erato, and Thalia were the Muses respectively of epic poetry, lyric poetry, love poetry, and idyllic or pastoral poetry.

‘*Der Volksgeist*’: The term ‘*Volksgeist*’—wrongly ascribed to Johann Gottfried Herder (1744–1803), who nonetheless developed the idea embodied in it—refers to the supposedly unique spirit or character of a people. The concept was applied to the philosophy of law by Friedrich Carl von Savigny (1799–1861).

‘*Der Rechtsgeist*’: ‘the spirit of the law’.

‘*L’esprit des lois*’: See Montesquieu, *De l’esprit des lois* (1748) (‘*The Spirit of the Laws*’).

‘*La solidarité sociale*’: See eg Georges Scelle, ‘Règles générales du droit de la paix’ (1933) 46 *Recueil des cours* 327, especially 339–46, 431, 475, 619–21, 643, and 678.

‘*Le dédoublement fonctionnel*’: See eg *ibid*, especially 358–9, 382, 426–7, 430, 439, 452, 516–17, 546, 576, 625, and 657.

‘Forlorn! The very word was like a bell to toll him back from the sibilant fricative of article 36(6) of the Statute of the International Court of Justice to his sole self!’: See John Keats, ‘Ode to a Nightingale’ (1819), lines 71–2 (‘Forlorn! the very word is like a bell/To tell me back from thee to my sole self!’). Article 36(6) of the Statute of the International Court of Justice (‘In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.’) vests the ICJ with the jurisdiction to determine whether it enjoys jurisdiction over a case, a power known in French as ‘*la compétence de la compétence*’.

‘Eunomia was a demanding mistress.’: In ancient Greek mythology, Eunomia was the goddess of law and good order.

‘*apologia pro vita sua*’: See John Henry Newman, *Apologia Pro Vita Sua* (Longman *et al* 1864).

‘*ars finis*’: Dog (or cod or macaronic) Latin for ‘fine art’.

‘In the beginning ... in that order’: See Genesis 1–3, especially 1:1 and 1:9–10 (New International Version).

‘as many as the stars in heaven and as the grains of sand on the seashore’: See Genesis 22:17 and Hebrews 11:12.

‘thrones, dominions, principalities, and powers’: See Colossians 1:16 (King James Version). See also Ephesians 1:21 and 3:10 (King James Version). The terms were used in respect of both temporal and heavenly authority. In the latter case they formed the basis in Pseudo-Dionysius the Areopagite and medieval Christian thought of an elaborate hierarchy of angels.

‘apes (aquatic or otherwise)’: See eg Elaine Morgan, *The Aquatic Ape* (Stein & Day 1982) and *The Aquatic Ape Hypothesis* (Souvenir 1997).

‘a square-jawed lass called Lucy’: ‘Lucy’ is the more familiar name for fossil AL 288-1, a collection of hundreds of bone fossils making up around 40% of a female *Australopithecus afarensis*, unearthed in the Afar Depression in Ethiopia in 1974.

‘some ... good, some bad, some happy, some sad’: See Al Green, ‘Let’s Stay Together’ (Hi Records 1972) (‘... let’s stay together/Lovin’ you whether, whether/Times are good or bad, happy or sad’).

‘no common judge’: See eg Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (text of 1646, trans Francis W Kelsey, Clarendon Press 1925) Book 2, chap 12, s 26 and Book 3, chap 20, s 47; Emer de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (text of 1658, Carnegie Institution 1916) Book III, chap 12, para 190 and chap 18, para 293 and Book IV, chap 4, para 40.

‘or, courtesy of the auto-iconic Mr Bentham, international law’: The English philosopher Jeremy Bentham—whose ideas inspired the establishment of University College London, where his embalmed,

dressed and seated body, or ‘auto-icon’, preserved on his death in accordance with his instructions, is displayed—is credited with coining the term ‘international law’.

‘in the words of the two international covenants’: See, identically, International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, 993 UNTS 3, article 1(1) and International Covenant on Civil and Political Rights, New York, 16 December 1966, 999 UNTS 171, article 1(1) (‘All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.’)

‘to make them as simple as possible, though no simpler’: Albert Einstein is reputed to have said that ‘[e]verything should be made as simple as possible, but no simpler’, although the line appears nowhere in his writings, and the ascription remains a matter of conjecture.

‘a trundling medium-pacer in the midst of their fast, fierce bouncers or fizzing flippers and googlies’: The reference is to ways of bowling the ball in the sport of cricket, an especially sacred form of play.

‘Pace the immortal Austrian, it was not really a science at all.’: See eg Hans Kelsen, *Principles of International Law* (Rinehart & Co 1952) viii (‘a scientific theory of international law’).

‘In the pungent words of the Faustian German, quoting an imprudent Frenchman, they wanted to cheat.’: See Carl Schmitt, *The Concept of the Political* (expanded edn, trans George Schwab, University of Chicago Press 1996) 54 (‘Here one is reminded of a somewhat modified expression of Proudhon’s: whoever invokes humanity wants to cheat.’).

‘dark ... pleasure’: The name ‘Schwarzenberger’ means ‘from the black mountain’.

‘true bearer of light’: The name ‘Lucifer’ means ‘bearer of light’. Cf ‘the Faustian German’.

‘Vitruvian beauty ... *venustas* ... *firmitas* and *utilitas*.’: See Vitruvius (Marcus Vitruvius Pollio), *De architectura libri decem* (first century BCE), popularised in the Renaissance by Leon Battista Alberti, *De re aedificatoria* (1452). Vitruvius maintained that a building should combine ‘*firmitas*’ (solidity), ‘*utilitas*’ (utility), and ‘*venustas*’ (beauty).

‘*homo ludens*’: See Johan Huizinga, *Homo Ludens: A Study of the Play-Element in Culture* (Routledge & Kegan Paul 1949). The term translates as ‘man the player’.

‘who, with Chesterton, believed that the true object of all human life was play’: See ‘Oxford from Without’ in G K Chesterton, *All Things Considered* (John Lane 1909) 89, 96 (‘It might reasonably be maintained that the true object of all human life is play.’).

‘lost sense of the dancer for the dance’: See W B Yeats, ‘Among School Children’ (1927), lines 63–4 (‘O body swayed to music, O brightening glance,/How can we know the dancer from the dance?’).

‘Or “dahncer” for the “dahnce”. Let’s call the whole thing off.’: See George Gershwin & Ira Gershwin, ‘Let’s Call the Whole Thing Off’, from the film *Shall We Dance?* (RKO Radio Pictures 1937), lines 13–16 (‘You like pot-ay-to and I like pot-ah-to/You like tom-ay-to and I like tom-ah-to/Pot-ay-to, pot-ah-to, tom-ay-to, tom-ah-to/Let’s call the whole thing off.’).

‘*homo faber*’: The term, encapsulating a venerable philosophical and anthropological trope, translates as ‘man the craftsman’/‘man the artisan’/‘man the maker’.

‘the virtuoso landscape architect, even if he lacked the capability’: Lancelot ‘Capability’ Brown (1715 or 1716–1783) was the most famous of English landscape architects.

‘All human life was there!’: See ‘The Madonna of the Future’ in Henry James, *Collected Stories. Vol. I (1866–91)* (Everyman’s Library 1999) 143, 173 (‘Cats and monkeys,—monkeys and cats,— all human life is there!’).

‘The agony and the ecstasy’: See Irving Stone, *The Agony and the Ecstasy* (Doubleday 1961).

‘the tragedy and farce’: See Karl Marx, ‘The Eighteenth Brumaire of Louis Bonaparte’ in Terrell Carver (ed and trans), *Marx: Later Political Writings* (CUP 1996) 31, 31 (‘Hegel observes somewhere that all the great events and characters of world history occur twice, so to speak. He forgot to add: the first time as high tragedy, the second time as low farce.’).

‘*visibilium omnium et invisibilium*’: See Roman Catholic Mass Ordinary, *Credo*, opening sentence (‘*Credo in unum Deum, Patrem omnipotentem, factorem caeli et terrae, visibilium omnium et invisibilium.*’, ‘I believe in one God, the Father Almighty/creator of heaven and earth, of all things visible and invisible.’) Cf Colossians 1:16 (‘*quia in ipso condita sunt universa/in caelis et in*

*terra/visibilia et invisibilia/sive throni/sive dominationes/sive principatus/sive potestates* (Vulgate), 'For by him were all things created, that are in heaven, and that are in earth, visible and invisible, whether they be thrones, or dominions, or principalities, or powers' (King James Version)).

'the bringer of plurabilities, its song be sung, its rill be run!': See James Joyce, *Finnegans Wake* (OUP 2012) 104 ('In the name of Annah the Allmaziful, the Everliving, the Bringer of Plurabilities, haloed be her eve, her singtime sung, her rill be run, unhemmed as it is uneven!').

'death, the destroyer of worlds': See Julius Robert Oppenheimer's translation from *Bhagavad Gita* 11:32, spoken in the documentary film *The Decision to Drop the Bomb* (Encyclopaedia Britannica Films, Inc 1965) ('Now I am become death, the destroyer of worlds.').

'Assyrian, wolf and fold': See Byron, 'The Destruction of Sennacherib' (1815), line 1 ('The Assyrian came down like the wolf on the fold').

'The divine comedy!': See Dante Alighieri, *La Divina Commedia* (c 1304–1321).

'The encyclopaedia satanica!': Cf the *Encyclopaedia Britannica* (15th edn 2010).

'He sang the corpus eclectic.': See Walt Whitman, 'I Sing the Body Electric' (1855), line 1 ('I sing the body electric').

'Out of this Dionysian frenzy, ... to discern and to elaborate with Anzilottian clarity a normative logic.': See eg Dionisio Anzilotti, *Corso di diritto internazionale. Vol. 1: Introduzione, teorie generali* (Athenaeum 1928).

'the fury and the mire of human veins': See W B Yeats, 'Byzantium' (1933), line 8 ('The fury and the mire of human veins.').

'There was no use indicting laws. They were no shoddier than what they peddled.': See Samuel Beckett, 'Malone Dies' in *Three Novels by Samuel Beckett* (Grove Press c 1958) 177, 195 ('There is no use indicting words, they are no shoddier than what they peddle.').

'If the rules were warped, the blame lay with the crooked timber.': See Isaiah Berlin's translation of the line '[A]us so krummem Holze, als woraus der Mensch gemacht ist, kann nichts ganz Gerades gezimmert werden' from Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' (1784), sixth proposition, quoted in Isaiah Berlin, *The Crooked Timber of Humanity: Chapters in the History of Ideas* (2nd edn, Pimlico 2013) viii ('Out of the crooked timber of humanity, no straight thing was ever made.').

'Eunomia remained a demanding mistress. She also remained a demanding read, or at least her namesake did': See Philip Allott, *Eunomia* (OUP 1990).

'(or trinity)': Professor Philip Allott, Professor Emeritus of International Public Law, University of Cambridge, has been a Fellow of Trinity College, Cambridge, since 1973.

'So much to write, so little time, to borrow from Wonka.': See *Willy Wonka & the Chocolate Factory* (Paramount Pictures 1971) ('We have so much time and so little to see. Wait a minute. Strike that. Reverse it.'). The line does not appear in Roald Dahl, *Charlie and the Chocolate Factory* (Alfred A Knopf, Inc 1964), on which Dahl himself based the screenplay for the film.

'Tomorrow and tomorrow and tomorrow crept in this petty pace from day to day.': See William Shakespeare, *Macbeth*, Act V, scene 5, lines 19–20 ('To-morrow, and to-morrow, and to-morrow, Creeps in this petty pace from day to day').

'Just when he thought it was safe to go back in the water': See *Jaws 2* (Universal Pictures 1978), tagline ('Just when you thought it was safe to go back in the water ...').

'Polako polako! Doucement! Festina ... lente!': Serbian, French, and Latin respectively for 'Slow down!'/ 'Easy does it!'/ (US) 'Whoa there, little doggie!'.

'Professors Fangio, Gonzáles, Runner, and Bolt': See Juan Fangio (1911–1995), five-time world Formula 1 racing car champion; Speedy Gonzáles, 'The Fastest Mouse in All Mexico', and The Road Runner, the high-speed exemplar of *Geococcyx californianus* perennially pursued by Wile E Coyote, in Warner Brothers' *Loony Tunes* and *Merrie Melodies* cartoon series; and Usain Bolt (1986–), three-time triple Olympic gold medallist in the 100m, 200m, and 4 x 100m sprint.

'or out of what Joe Orton would have called their ears': See John Lahr, *Prick Up Your Ears. The Biography of Joe Orton* (Knopf 1978), borrowing an allusive title considered by Orton himself.

‘Where had fled his youthful ...?’: See Lorenzo de’ Medici, ‘Trionfo di Bacco e Arianna’ (c 1490), lines 1–2 (‘*Quant’è bella giovinezza/che si fugge tuttavia*’, ‘How beautiful is youth/ever fleeing!’).

‘*sprezzatura*’: See Baldassare Castiglione, *Il Libro del Cortegiano* (1528) 1:26, translation in Baldesar Castiglione, *The Book of the Courtier. The Singleton Translation. An Authoritative Text Criticism* (ed Daniel Javitch, W W Norton & Co 2002) 32 (‘to practise in all things a certain *sprezzatura* [nonchalance], so as to conceal all art and make whatever is done or said appear to be without effort and almost without any thought about it’).

‘*pasticcaccio brutto*’: See Carlo Emilio Gadda, *Quer pasticciaccio brutto de via Merulana* (Garzanti 2007), translated into English as *That Awful Mess on the Via Merulana* (trans William Weaver, New York Review Books 2007).

‘without so much as a sponge soaked in vinegar by way of mercy’: See Mark 15:36 (New International Version) (‘One man ran, filled a sponge with wine vinegar, put it on a stick, and offered it to Jesus to drink.’). See also Matthew 27:48.

‘*ELOI, ELOI, LAMA SABACHTHANI?*’: See Mark 15:34 (New International Version) (‘And at the ninth hour Jesus cried out in a loud voice, “*Eloi, Eloi, lama sabachthani?*”—which means, “My God, my God, why have you forsaken me?”’). See also Matthew 27:46.

‘O God! O Montreal!’: See Samuel Butler, ‘A Psalm of Montreal’, refrain (‘Oh God! oh Montreal!’), in *The Spectator*, 18 May 1878, 16.

‘that Lusophone ... 1,876 pages!’: See Judge Antônio A Cançado Trindade, *The Construction of a Humanized International Law: A Collection of Individual Opinions (1991-2013)* (Brill 2014), 1876 pp.

‘Jesus wept.’: See John 11:35 (King James Version and New International Version).

‘*Quo usque tandem abutere, Catilina, patientia nostra?*’: Cicero (Marcus Tullius Cicero), ‘Oratio in L. Catalinam Prima In Senatu Habita’, line 1, translated in Cicero, *Orations. In Catilinam 1–4, Pro Murena, Pro Sulla, Pro Flacco* (trans C Macdonald, Loeb Classical Library 1976) 32, 33, as ‘In heaven’s name, Catiline, how long will you take advantage of our forbearance?’.

‘*Primus ... Secundus ... Tertius ... Quadragesimus quintus*’: ‘First ... Secondly ... Thirdly ... Forty-fifthly’. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Merits, Judgment*, 3 February 2015, diss op Cançado Trindade, paras 525–547. The forty-five propositions in question are posited in the final section of Judge Cançado Trindade’s dissenting opinion, entitled (ibid para 525) ‘Epilogue: A Recapitulation’.

‘Words, words, words!’: See William Shakespeare, *Hamlet*, Act II, scene 2, line 183.

‘The miracle of the loaves and footnotes!’: Cf Matthew 15:29–39, Mark 6:30–44, Luke 9:10–17, and John 6:1–15.

‘Full many a flower was born to blush unseen and waste its sweetness on the desert air’: See Thomas Gray, ‘Elegy Written in a Country Churchyard’ (1751), lines 55–56 (‘Full many a flower is born to blush unseen,/And waste its sweetness on the desert air.’).

‘in the beginning was the Word’: See John 1:1. Here ‘Word’ is a translation, via the Latin Vulgate (‘*Verbum*’), of the original Koine Greek term ‘λόγος’ (‘Logos’), with its richer nuance.

‘*lux et pocula sacra*’: See the motto of the University of Cambridge, ‘*Hinc lucem et pocula sacra*’ (‘From here light and sacred draughts’), alluding to the light and divine inspiration of knowledge.

‘a dolphin-torn, a gong-tormented sea’: See W B Yeats, ‘Byzantium’ (1933), line 40 (‘That dolphin-torn, that gong-tormented sea’).

‘a snotgreen sea, a scrotumtightening sea’: See James Joyce, *Ulysses* (Bodley Head 2008) 4 (‘The snotgreen sea. The scrotumtightening sea.’)

‘the righteous overthrow of the tables of the moneychangers and the seats of them that sold doves’: See Matthew 21:12 (King James Version) (‘And Jesus went into the temple of God, and cast out all of them that bought and sold in the temple, and overthrew the tables of the money-changers, and the seats of them that sold doves’). See also Mark 12:15 (King James Version).

‘what of the drowned child in the here and now?’: Press photographs of the dead body of three year-old Syrian refugee Alan Kurdi, found face-down, drowned, on a Turkish beach on 2 September 2015, shocked the conscience of humankind, as the hallowed phrase has it, although seemingly not of certain

European leaders.

‘with a fine disregard for the rules of the game as played at the time, picked up the ball and ran’: See the stone plaque at Rugby School ‘commemorat[ing] the exploit of William Webb Ellis’, ‘who with a fine disregard for the rules of football as played in his time first took the ball in his arms and ran with it [.] thus originating the distinctive feature of the rugby game’.

‘judicial decisions and the teachings of the most highly qualified publicists ... were no more than subsidiary sources for the determination of rules of international law.’: See Statute of the International Court of Justice, article 38(1)(d).

‘For every *Tadić* there was an *Ayyash*.’: Compare states’ acceptance, as evidenced in article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 3, of the assertion of *lex ferenda* or even *lex ficta* as *lex lata* in *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 96–137, with the general incredulity that greeted a similar assertion in *Prosecutor v Ayyash et al*, STL-11-01/IIAC/R176bis, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, paras 83–113.

‘For every *Tadić* there was an *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* waiting to trash it.’: See *Prosecutor v Tadić*, IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 115–145, in which the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) rejected the view of the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)*, *Merits, Judgment*, ICJ Rep 1986, 14, 64–5, para 115, as to the degree of state control required for the attribution to a state under what is now article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts, GA res 56/83, 12 December 2001, Annex, of conduct by non-state armed groups; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, *Merits, Judgment*, ICJ Rep 2007, 43, 207–211, paras 398–407, where the ICJ in turn rejected the view of the ICTY Appeals Chamber and affirmed the test laid down in *Nicaragua*.

‘mind forg’d manacles’: See William Blake, ‘London’ (1794), line 8 (‘The mind forg’d manacles I hear.’).

‘Like Dr Rieux ... what one had seen.’: See Albert Camus, *The Plague* (trans Robin Buss, Penguin 2013) 31, 40.

‘What an impossible fellow I am, he sighed with the whisky priest, and how useless.’: See Graham Greene, *The Power and the Glory* (Vintage 2010) 209.

‘if only fail better’: See ‘Worstward Ho’ in Samuel Beckett, *Nohow On* (John Calder 1989) 99, 101 (‘All of old. Nothing else ever. Ever tried. Ever failed. No matter. Try Again. Fail again. Fail better.’).

‘Play up, then, he thought to himself, play up, and play the game’: See Henry Newbolt, ‘*Vitai Lampada*’ (1892), lines 8, 16 and 24 (‘Play up! play up! and play the game!’). The title of the poem, a variant of ‘*vitae lampada*’, means ‘the torch of life’, and is taken from Lucretius (Titus Lucretius Carus), *De rerum natura*, Book II, line 79 (‘*et quasi cursores vitai lampada tradunt*’, translated in Lucretius, *On the Nature of Things* (trans W H D Rouse, rev Martin F Smith, Loeb Classical Library 1924) 101 as ‘and, like runners, pass on the torch of life’).

‘*Joga bonito*’: Literally, ‘play beautiful’, the avowed ethos of Brazilian football.

‘the sea, the sea’: See Iris Murdoch, *The Sea, The Sea* (Chatto & Windus 1978).

‘the murderous innocence of the sea’: See W B Yeats, ‘A Prayer for My Daughter’ (1921), line 16.

‘*Aqua vitae*’: ‘water of life’.

‘*Uisce beatha*’: ‘water of life’, the first word of the expression—the monastic rendering into Irish of ‘*aqua vitae*’—giving rise in English to ‘whiskey’.

‘he assumed the posts of Comptroller-General of the Integrity of the Normative System and, on retirement, Poet in Residence at the *European Journal of International Law*’: See Roger O’Keefe, ‘Once Upon a Time There Was a Gap ...’ in James Crawford & Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law. Volume 3, 2010* (Hart 2011) 401, 405.