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## Introduction

### Begin

To begin a book is to perform a paradoxical act. There is always a lead-up to the beginning, a history before the history of the start. This book, for example, grew out of my experiences with problems and puzzles in international law over the past few years – or longer. It began when I first looked up the text of a Security Council resolution. I expected to find decisions and recommendations, in line with the formal powers and mandate of the Council. And indeed, I found all of these things. However, I was most of all struck by something else: the lengthy preamble of the resolution, which extensively recalled, reiterated, reaffirmed and recognized previous resolutions. What was going on here? What does it mean to begin a resolution by calling upon the past, by reaffirming and recognizing your own previous work? This book began when I was coach of a team of students for an international moot court competition. I had been coaching and supervising moot court teams for a couple of years and, while I truly enjoyed the experience, there was also always a yawning uneasiness about it. During the competition there was little to no room for the critical and reflexive attitude that I try to foster in the rest of my teaching. Instead, I largely followed the format of the competition during the preparatory sessions, mostly focusing on the strategic use of international law in order to win a case. Increasingly, I started to wonder whether there might be different, more reflexive and experimental ways to rehearse international law. This book began when I first saw Rithy Panh’s documentary films on the atrocities committed by the Khmer Rouge. I was especially moved by the reenactments of traumatic experiences that were shown on screen. Watching these reenactments gave me a different sense of one of the core concepts of the Statute of the International Criminal Court: “unimaginable

atrocities.”<sup>1</sup> Panh’s films made me wonder whether the pictured reenactments might have something important to say about that which the International Criminal Court labels as “unimaginable” and others as “unspeakable.”

I could go on with the list of potential beginnings, because it is simply impossible to trace a definite point in time, to say: “this is where the book actually began. Before this moment, no beginning can be detected; thereafter, the rest is history.” And yet, as Leander rightly observes, “books and other narratives . . . really do begin.”<sup>2</sup> To begin is to cut off, to make an incision in time. No matter what came before, from now on *this* story follows from *that* beginning.<sup>3</sup> Beginnings, therefore, cannot exist as such. Their existence depends on what comes next: if nothing follows, there is no beginning; if something follows, there must have been a beginning. To quote Leander once more: “The beginning of a story . . . will then also have to be the story of a beginning.”<sup>4</sup>

The story of this book is about “repetition,” broadly understood as a family of practices where something is presented as pre-given because it is said, done or called upon again. This can take a discursive form, as in the first four chapters of the book. In these chapters, I set out how scholars, expert committees, judges and the Security Council restate, reactualize, recall or reiterate rules of law that are thereby presented as preexisting. It can also take a bodily form, as illustrated by the last two chapters. In Chapter 5, I set out what it means, and what it *could* mean, to rehearse the role of international lawyer in moot court competitions. In Chapter 6 I focus on reenactments in documentary films on atrocious acts, in an attempt to show what it means for crimes to be “unimaginable” or “unspeakable.”

<sup>1</sup> The term “unimaginable atrocities” appears in the second sentence of the preamble to the Rome Statute of the International Criminal Court: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.” United Nations, Treaty Series, vol. 2187, No. 38544.

<sup>2</sup> Niels Buch Leander, “To Begin with the Beginning: Birth, Origin and Narrative Inception,” in Brian Richardson (ed.), *Narrative Beginning: Theories and Practices* (Lincoln and London: University of Nebraska Press, 2008), 15–29, at 15.

<sup>3</sup> Edward Said, *Beginnings: Intention and Method* (New York: Columbia University Press, 2012, originally published by Basic Books, 1975). My sentence paraphrases Said, at 5: “[When] we point to the beginning of a novel, for example, we mean that from *that* beginning in principle follows *this* novel.”

<sup>4</sup> Leander (2008), at 26.

I am not the first to study repetition. One of my greatest sources of inspiration dates back to 1843, to the short novel *Repetition*, narrated by Constantin Constantius, one of the pseudonyms of Søren Kierkegaard.<sup>5</sup> I will come back to this novel in the sections and chapters that follow. For now, let me just recall the way in which Constantius underlines the crucial function of repetition for (human) life: “Indeed, what would life be if there would be no repetition? Who could want to be a tablet on which time writes something new every instant . . . ?”<sup>6</sup> Along the same lines, but this time reflecting on Nietzsche’s idea of eternal return, Milan Kundera argues that life without repetition would be “unbearably light,” as one would be “as free as . . . insignificant” and moral responsibility would be fatally undermined: “How can we condemn something that is ephemeral, in transit? . . . in a world that rests essentially on the nonexistence of return . . . everything is pardoned in advance and therefore cynically permitted.”<sup>7</sup> However, Kundera is quick to add that a life fully determined by repetition would also be unbearable, unbearably heavy: “If every second of our lives recurs an infinite number of times, we are nailed to eternity . . . In the world of eternal return the weight of unbearable responsibility lies heavy on every move we make.”<sup>8</sup> Bearable life, one could infer from Kundera’s reflections, requires imperfect repetition, the constant return of not quite the same. This comes close to one of the central messages of Constantius’ story: repetition not only creates identity, it also breeds difference; it not only constitutes continuity, it also implies change – as illustrated by the name of the narrator, Constantin Constantius. Repetition is not about copy-pasting the past into the present, but about retaking, reappropriating what is presented as pre-given. Whenever humans repeat without reappropriation, they operate in a world without movement and agency. This idea is central to the psychological condition of “compulsory repetition,”<sup>9</sup> to which I shall return in the final chapter of this book. It is

<sup>5</sup> Søren Kierkegaard, *Fear and Trembling and Repetition* (Princeton: Princeton University Press, 1983; original work from 1843).

<sup>6</sup> Kierkegaard (1983), 132.

<sup>7</sup> Milan Kundera, *The Unbearable Lightness of Being* (New York: Harper Perennial, 2009), 2 (original from 1984).

<sup>8</sup> Kundera (2009), at 3.

<sup>9</sup> Sigmund Freud (1961), *Beyond the Pleasure Principle*, edited and translated by James Strachey (New York: W.W. Norton & Company, 1961). Paul L. Russell, “Trauma, Repetition, and Affect,” *Contemporary Psychoanalysis*, 42 (4) (2006), 601–620. Deirdre Boyle, “Shattering Silence: Traumatic Memory and Reenactment in Rithy Pahn’s S-21: The Khmer Rouge Killing Machine,” *Framework*, 50 (1–2) (2009), 95–106.

also central to several of Samuel Beckett's novels and plays. Novels such as *Molloy*, *Malone Dies* and *the Unnamable* or plays such as *Waiting for Godot* seem to go nowhere, as do their main characters. The characters have lost grip on their world as well as on the meaningful use of language, which is further underlined in the repetitive structure of the works and the frequent use of repetition in the text. I will come back to the role of repetition in *Waiting for Godot* in Chapter 2 of this book.

The topic of repetition has also been taken up in a wide variety of academic disciplines. Music, for example, has been studied as the “canonical domain of repetition,”<sup>10</sup> while other disciplines have researched the role of repetition in matters such as the formation of religion,<sup>11</sup> psychological coping-mechanisms,<sup>12</sup> the creation of identity of social systems,<sup>13</sup> storytelling and film,<sup>14</sup> rhetorics,<sup>15</sup> the development of subjectivity,<sup>16</sup> metaphysics,<sup>17</sup> or theories of representation.<sup>18</sup>

In legal theory, several authors have drawn attention to the ways in which repetition in law can bring about change.<sup>19</sup> In the field of

<sup>10</sup> Elizabeth Margulis, *On Repeat: How Music Plays the Mind* (Oxford: Oxford University Press, 2013), 4.

<sup>11</sup> Roy Rappaport, *Religion and Ritual in the Making of Humanity* (Cambridge: Cambridge University Press, 1999).

<sup>12</sup> Freud (1961); Russell (2006); Boyle (2009).

<sup>13</sup> Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1993).

<sup>14</sup> Bruce Kawin, *Telling It Again and Again: Repetition in Literature and Film* (Chicago: Dalkey Archive Press, 2015). Sarah Gendron, *Repetition, Difference and Knowledge in the Work of Samuel Beckett, Jacques Derrida and Gilles Deleuze* (New York: Peter Lang, 2008).

<sup>15</sup> Jo Allen, “Thematic Repetition as Rhetorical Technique,” *Journal of Technical Writing and Communication*, 21 (1) (1991), 29–40. Jane Davison, “Rhetoric, Repetition, Reporting and the “Dot.com” Era: Words, Pictures, Intangibles,” *Accounting, Auditing & Accountability Journal*, 21 (6) (2008), 791–826.

<sup>16</sup> Søren Kierkegaard, *Fear and Trembling and Repetition* (Princeton: Princeton University Press 1983; original work from 1843).

<sup>17</sup> Mircea Eliade, *Cosmos and History, The Myth of the Eternal Return* (New York: Harper & Brothers, 1954, translated from French by Willard R. Trask).

<sup>18</sup> Gilles Deleuze, *Difference and Repetition* (New York: Columbia University Press, 1994). Joe Hughes, *Deleuze's “Difference and Repetition”: A Reader's Guide* (New York and London: Continuum, 2009).

<sup>19</sup> Andreas Philippopoulos-Mihalopoulos, “Repetition or the Awnings of Justice,” in Oren Ben-Dor (ed.), *Law and Art: Justice, Ethics and Aesthetics* (London: Routledge, 2011), 45–58. For a Deleuzian reading of law and jurisprudence, see also Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford: Stanford University Press, 2008). Martin Krygier, “Law as Tradition,” *Law and Philosophy*, 5 (2) (1986), 237–262. Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), comparing constitutional interpretation to chain novel writing.

*international* law, repetition has mainly been studied in relation to the formation and identification of customary law. Most theories of customary (international) law today hold that rules of customary law can only emerge as a result of the evolution of repeated patterns of behavior that get accepted as law. In other fields of international law the role of repetition has been studied less extensively. There are notable exceptions though. Anne Orford has examined repetition in relation to the impossibility of closure in (international) law, referring back to David Kennedy’s analysis of the compulsion to repeat in international law.<sup>20</sup> Jean d’Aspremont has studied cross-referencing between the International Court of Justice and the International Law Commission in the area of state responsibility, a process he labeled “canonical cross-referencing.”<sup>21</sup> Another example is the study of Todd Allee and Manfred Elsig, on the practice of copy-pasting provisions in the field of international trade law. As Allee and Elsig have set out, at least 100 preferential trade agreements “take 80% or more of their contents word-for-word from an earlier treaty, with many copying 95% or more.”<sup>22</sup> Practices of repetition have also been examined in relation to international organizations. The study by Freistein and Liste studies how acts of repetition help to thicken legitimacy claims by international organs, whereas Gifkins has examined how the responsibility to protect has been constantly “reaffirmed” in Security Council Resolutions, despite the often-voiced opinion that consensus on the concept was lost after 2011.<sup>23</sup>

### Repetition and the “Something”

I am indebted to many of the works I mentioned before, and several of them will return in the chapters that follow. However, my intention is not

<sup>20</sup> Anne Orford, “The Destiny of International Law,” *Leiden Journal of International Law*, 17 (3) (2004), 441–476. David Kennedy, “When Renewal Repeats: Thinking Against the Box,” *New York University Journal of International Law and Politics*, 32 (2000), 335.

<sup>21</sup> Jean d’Aspremont, “Canonical Cross-Referencing in the Making of the Law of International Responsibility,” in Serena Forlati, Makane Mbengue and Brian McGarry (eds.), *The Gabčíkovo-Nagymaros Judgment and Its Contribution to the Development of International Law* (Leiden: Brill/Nijhoff, 2020), 22–40.

<sup>22</sup> Todd Allee and Manfred Elsig, “Are the Contents of International Treaties Copied-and-Pasted? Evidence from Preferential Trade Agreements,” NCCR Working Paper No. 8 2016, available at: <https://www.boris.unibe.ch/89220/3/Are%20the%20Contents%20of%20International%20Treaties.pdf> (accessed January 22, 2019).

<sup>23</sup> Katja Freistein and Philip Liste, “Organisation-im-Kommen: Intertextualer Institutionalismus in der Analyse von Weltorganisation,” in Martin Koch (ed.), *Weltorganisationen* (Wiesbaden: Springer, 2012), 71–100. Jess Gifkins, “R2P in the UN Security Council: Darfur, Libya and Beyond,” *Cooperation and Conflict*, 51 (2) 2016, 148–165.

to write on repetition as such. This book is specifically focused on practices of repetition as they occur in international law. However, my intention is not to write on any possible practice of repetition in international law. The focus of this book is more specific. It examines contexts where repetition takes place in relation to something that is absent, unattainable or unspeakable.

What this “something” is differs from context to context. Chapter 1, for example, zooms in on scholarly debates on the possible rise of new sources in international law. These debates constantly refer to something that cannot be understood in the language of positive law: the ultimate grounds for the existence of international law’s sources such as acceptance, justice or the conscience of the legal community. Chapter 2, to mention another example, studies how scholars and expert committees make sense of the existence of rules of customary law. Across a wide variety of theoretical schools, I argue, this is done by expressing the belief that the rule in question is already valid within the legal community. As a result, rules of customary law are presented as having begun already, which means that the first, original rule of customary law will necessarily be absent or unattainable. To mention a final example, discussed in Chapter 6: according to the Statute of the International Criminal Court, the Court exists to address “unimaginable atrocities.” This term echoes earlier descriptions of trauma caused by international crimes, such as “unspeakable crimes.” The very nature of these crimes is that they resist full articulation in language, that they escape human imagination. As per its own Statute, the Court is thus held to address something that by definition escapes its own vocabulary and powers of imagination.

However diverse the “something” may be, in every chapter in this book it stands in the same dialectic relation to a specific discourse or practice. On the one hand, the “something” that is absent, unattainable or unspeakable is crucial for the practice to make sense. Debates on the rise of new sources, for example, only make sense if one assumes that the identification of sources can be traced back to more foundational or original categories that by definition go beyond existing law, defined as it is by its sources. This is echoed, *inter alia*, in Herbert Hart’s famous argument that the ultimate rule of recognition, while validating rules of the legal system, is neither valid nor invalid itself.<sup>24</sup> Or take the example of customary law. As rules of customary law are not created in sacred, eternal time, it only makes

<sup>24</sup> Herbert Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 107. See also the discussion of Hart’s adoption in international legal theory in Chapter 2 of this book.

sense to speak of a rule of customary law if one assumes it has actually begun to exist at some point in time. The fact that the actual beginning will always remain unreachable does not mean it has lost its importance for discourses on the existence and identification of rules of customary law. On the other hand, for the practice to make sense, the “something” *must remain* absent, unattainable or unspeakable. If it were possible, for example, to ground international law directly on notions such as “justice,” “acceptance,” or “the conscience of the legal community” there would be no need for a separate doctrine of sources. It is precisely because such notions remain too intangible and ungraspable that they have to be translated into something they are not: positively valid sources of law. Or take the second example: if it were possible to determine a point in time when a rule of customary law began, it would lose its communal, evolutionary nature. It would be transformed from a rule of custom into an agreement, decision or piece of legislation.

Repetition reflects the dialectical relation between a practice and the something that is absent, unattainable or unspeakable. Not only that, it is also a way to deal with this dialectics, to put it to work for different political, professional and aesthetic purposes. In order to study how repetition reflects and expresses this dialectics, I return to Kierkegaard’s (or rather: Constantius’s) novel *Repetition*. One of the core distinctions introduced in *Repetition* is that between “recollection” and “repetition.” Recollection, as the narrator of *Repetition* explains, is a form of “repetition backward.” Under this conception of repetition, the present becomes real because it is turned into an instantiation of the past.<sup>25</sup> This form of repetition can be found in Plato’s theory of knowledge, which holds that learning is all about retrieving pure ideas that were implanted in the soul before birth. Plato’s idea of knowledge as recollection, Constantius explains, is a form of “repetition backward” as it seeks to model the present after what came before: “When the Greeks said that all knowledge is recollecting, they said that existence, which is, has been . . .”<sup>26</sup> I will revisit the concept of recollection in more depth in the first chapter of this book, where I delve into the myth of eternal return. For now, let’s move to the second form of repetition, called “repetition forward” or simply “repetition.” Repetition forward does not view the present as an

<sup>25</sup> Stephen Crites, “‘The Blissful Security of the Moment’: Recollection, Repetition and Eternal Recurrence,” in Robert L. Perkins (ed.), *International Kierkegaard Commentary: Fear and Trembling and Repetition* (Macon, GA: Mercer University Press, 1993), 232.

<sup>26</sup> Kierkegaard (1983), 149.

instantiation of something pregiven, but rather focuses on how acts of repetition create continuity and change (novelty) at the same time. In *Repetition* this is illustrated by the name of the narrator, Constantin Constantius, as well as by the stories he tells. Constantius is befriended by a young man, who seeks to “become himself,” not through the copy-pasting of a pregiven personality, but through a constant retaking or reappropriation of himself. Repetition here is about becoming someone new through retaking oneself. Constantius summarizes the dialectics of repetition forward as follows: “The dialectics of repetition is easy, for that which is repeated has been – otherwise it could not be repeated – but the fact it has been makes repetition into something new.”<sup>27</sup> The idea of “repetition forward” paves the way for a third conception of repetition, which I call, following Vincent Descombes, “repetition as dress rehearsal.”<sup>28</sup> It builds on Kierkegaard’s idea that repetition not only brings the pregiven into the present, but also presents the pregiven as no longer, or not yet there – as absent and present at the same time. In Derrida’s reflections on repetition, this dialectics of repetition affects the very idea of an “original.”<sup>29</sup> The logic of repetition, Derrida contends, questions the hierarchical pairing of original and copy, of foundation and derivative. It is a mistake to assume that the original comes first, and the act of repetition only comes after. After all, something can only be an original if it has the potential to be repeated, if there is a copy that could follow it. The original thus “petitions” to be repeated, to be turned into something that is both similar and different. As Descombes summarized Derrida’s position:

In a way that is perhaps a little dialectical, but not at all improper, it must be said that the first is not the first if there is not a second to follow it. Consequently, the second is not that which arrives, like a latecomer, after the first, but that which permits the first to be the first. . . . The second time thus has priority of a kind over the “first time”: it is present from the first time onwards as the prerequisite of the first’s priority without itself being a more primitive “first time” of course . . . . Origin must therefore be conceived as a dress rehearsal . . . , in the theatrical sense of these words: the reproduction of the first public performance, yet prior to this performance.<sup>30</sup>

<sup>27</sup> Kierkegaard (1983), 146.

<sup>28</sup> Vincent Descombes, *Modern French Philosophy* (Cambridge: Cambridge University Press, 1998), 145.

<sup>29</sup> Jacques Derrida, *Writing and Difference* (Chicago: Chicago University Press, 1978, translated by Alan Bass).

<sup>30</sup> Descombes (1998), 145.



Let me make this more concrete by way of an example. I first encountered the topic of repetition and absence in 2014, when I developed an interest in so-called manuals in the field of international humanitarian law. At the time, the most recent example was the “Tallinn Manual on the International Law Applicable to Cyber Warfare,” which later was turned into a manual on cyber operations more generally.<sup>31</sup> The Tallinn Manual, in its own words, contains “restatements” of international law. It does not seek to make new law, but limits itself to stating again those legal rules already in existence. At some level, it is perfectly clear what the Manual is about: faced with new technological challenges, legal experts are called in to spell out how rules of international law apply. In this way, they also confirm *that* rules of international law apply to the newly developing world of cyber. However, precisely for this reason the Manual reflects and works with the dialectical relation between repetition and absence. The experts are called in because there is insufficient state practice, treaty law and jurisprudence pertaining to cyber operations. It is their job to lift the uncertainties and doubts that result from this lack of rules specifically dealing with cyber operations. The restatement is thus predicated on the absence of (clear) rules as derived from one of the established sources of international law. However, if law were truly absent, what would there be to restate? To restate a rule is to present it as preexisting. Faced with the absence of legal regulations of cyber, experts present them as preexistent through acts of restatement. If these restatements are subsequently accepted as correct by states or law-applying agents, the restated rule is validated as if it preexisted the restatement. The Tallinn Manual thus employs the dialectics of repetition by presenting a rule as the original, which predates the act of restatement.

### Begin Again

The example of the Tallinn Manual takes me back to the beginning of my introduction. This book grew out of my encounters with concrete puzzles and problems in the field of international law. These puzzles and problems are its central topics. While repetition is the *recurring* story across the book, the *central* stories are to be found in the individual chapters.

<sup>31</sup> *Tallinn Manual on the International Law Applicable to Cyberwarfare* (Cambridge: Cambridge University Press, 2013); *Tallinn Manual on the International Law Applicable to Cyber Operations*, 2nd ed. (Cambridge: Cambridge University Press, 2017).

These stories were the result of what Charles Sanders Peirce called the “irritation of doubt,” the annoying feeling that something just doesn’t fit our established beliefs.<sup>32</sup> Confronted with this feeling of unease, I developed stories about repetition, in an attempt to turn irritation into insight. In order to do so, I make two moves in every chapter. First, I compare and link a discourse or practice in international law to one in a different field. Scholarly debates on sources, for example, are compared to religious practices revolving around the myth of eternal return; the identification of customary law is compared to Beckett’s *Waiting for Godot*; preambles to Security Council resolutions to prologues in theatre; manuals in humanitarian law to product manuals and manuals of etiquette; moot court training to rehearsal traditions in European theatre; and international criminal law is linked to reenactment in documentary film. Of course, the point of these links and comparisons is not to claim identity. Precisely because the practices differ on so many counts, I argue, it is interesting to study them in relation to one specific element: the dialectics of repetition. The second move, therefore, is to analyze the initial thing that caused the irritation of doubt in terms of the relation between repetition and the absent, unattainable or unspeakable. This has resulted in the following chapters.

**Chapter 1** starts out from my embarrassment when teaching sources of international law. Following conventional wisdom I inform students that international law is grounded on a limited set of sources. However, at some point I also have to explain that it is possible for new sources of international law to emerge. Moreover, I have to explain that it is possible for international lawyers to have meaningful disagreements on the question whether a new source of international law has come about. How is this possible, given that international law is grounded on a limited set of sources? I try to deal with this uneasiness by comparing discourses on sources to rituals that prevail in what I call “cyclical societies,” organized around the belief in the eternal return of transcendental ideas, acts, or events. To apply sources, I argue, is to perform a double act of repetition. First, historically contingent events are turned into manifestations of pre-given and repeatable categories. Secondly, sources are used as

<sup>32</sup> As Peirce puts it: “the irritation of doubt is the only immediate motive for the struggle to attain belief”; “with the doubt . . . the struggle begins, and with the cessation of doubt it ends.” Charles Sanders Peirce, “How to Make Our Ideas Clear,” *Popular Science Monthly*, 12 (1877), 1–15, 5. The text is also available at: [www.bocc.ubi.pt/pag/peirce-charles-fixation-belief.pdf](http://www.bocc.ubi.pt/pag/peirce-charles-fixation-belief.pdf) (accessed November 10, 2020).