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ARTICLES

International Law and Alterity: The State and the Other

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Abstract
This article argues that orthodox international law is committed to the state at the expense of the Other, that which is not the state, and, at a more philosophical level, to ontology at the expense of ethics. Drawing on the philosophy of Emmanuel Lévinas, it seeks a shift from ontology, focusing on Being, to ethics, constituted by our responsibility to the Other. Section 1 argues that international law assumes the natural existence of a Being of the State and that this ontology of statehood constitutes the ontology of international law. Section 2 explains how the ontology of statehood having been transformed into an epistemology ultimately leads to the violent suppression of alterity. Section 3 proposes a number of projects and strategies through which we may pursue the ethics of alterity in international law. The article concludes with a discussion of three tensions within international law: statehood–alterity, ontology–ethics, and law–politics.

Key words
alterity; epistemology; ethics; Lévinas; non-state actors; ontology; statehood

'Darling mother,' he would reply, 'there have to be masters and servants, but let me be the servant of my servants. Let me be the same as they are to me. And let me tell you this, too, Mother: every one of us is responsible for everyone else in every way, and I most of all.' Mother could not help smiling at that. She wept and smiled at the same time. 'How are you,' she said, 'most responsible for everyone? There are murderers and robbers in the world, and what terrible sin have you committed that you should accuse yourself before everyone else?' 'Mother, my dearest heart,' he said (he had begun using such caressing, such unexpected words just then), 'my dearest heart, my joy, you must realize that everyone is really responsible for everyone and everything. I don't know

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> how to explain it to you, but I feel it so strongly that it hurts. And how could we have gone on living and getting angry without knowing anything about it?'
>
> Fyodor Dostoevsky, *The Brothers Karamazov* (trans. David Magarshack)

What is remarkable about the enduring debate regarding the primacy of the sovereign state is not so much its durability in the face of the proliferation of sub-national, transnational, and global social, cultural, political, and economic phenomena, but rather its resilience as a dominant category of human thought.

This is all the more true in the field of international law, whose basic intellectual structures are wedded to the concept of sovereign statehood. Territory, jurisdiction, and responsibility are all concepts that rest on state sovereignty, and even human rights and environmental protection norms are tied to the state as either originator, offender, or guardian. At a more fundamental level, statehood has profound implications for the nature of the international legal system. The very notion of international law implies the existence of a national space or of autonomous actors organized as states. Answering the question 'what is international law?' invariably involves the state through conventional understandings of the relationship between international law and municipal law, sources doctrine, and the basis of international legal obligation. This leads Simpson to conclude that most of the topics in international law 'could simply be reconfigured as aspects of 'The State' (what it controls, what it is, what it can do and what it is again)'.[1]

The terms of the debate about the primacy of the state largely explain the latter's lasting ideational significance in the international legal system. Critiques of sovereign statehood emphasize the multiplicity of actors in international and transnational relations, the proliferation of new forms of governance, the permeability of domestic legal orders by international norms, and the fact or necessity of interdependence. Their point is essentially that the state-centric model of international law no longer adequately reflects the realities of our complex, globalized world.[2] Discussions of the decline of the state end up by being about its ascendancy and autonomy within and beyond its borders in ways which are characterized by both a certain functionalism and a certain historicism of statehood.[3] The premises of these critiques are all the more unsatisfactory as they presuppose that these forces are new phenomena and that the sovereignty of the state was complete before their emergence.

Moreover, even when the debate appears to be ostensibly ethical or normative in character, analytical priority is still accorded to statehood as a guarantee of legitimacy, peace, or order. International lawyers display a largely unarticulated, abstract normative commitment to formal statehood as something which is inherently valuable.[4] The state thus remains the starting point and the frame of reference for

1 G. Simpson, 'The Guises of Sovereignty', paper presented at 'Sovereignty and Its Discontents' (SAID) workshop, London, January 2006, 7.
2 See, e.g., C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm of International Law?', (1993) 4 EJIL 447.
3 C. Navari, 'On the Withering Away of the State', in C. Navari (ed.), *The Condition of States* (1991), 143, at 144.
4 Simpson, *supra* note 1, at 1.

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ethical arguments in international law. This reflects the pervasiveness of the idea of the state as well as the difficulty of displacing the state within a discipline in which it assumes considerable importance as an organizing category of thought, a subject of enquiry, and a level of analysis.

This also reflects the orthodox school's commitment to the state at the expense of that which is not the state and, at a more philosophical level, a commitment to ontology at the expense of ethics. This article seeks an inversion of international law's commitments in this regard – a move from ontology to ethics. To this end, it draws upon the philosophy of Emmanuel Lévinas,[5] whose main contribution to continental philosophy was to criticize Western thought for its emphasis on Being[6] at the expense of what is otherwise than Being, the Other. Lévinas's thought represents a shift from ontology as first philosophy, focusing on Being, to ethics as first philosophy, constituted by our responsibility to the Other.

This article examines the ways in which international law has placed the state at the centre of its intellectual universe and has thereby done violence to the Other. The Other in this article refers to that which is not the State, or non-state actors.[7] Alterity in this context primarily refers to diverse kinds of human collectivity other than the state, such as peoples, inter-governmental organizations (IGOs), non-governmental organizations (NGOs), and transnational corporations (TNCs). However, alterity also includes individuals, especially in their agency at the transnational level, and international law, especially in its attempts at defining and regulating sovereignty.

In section 1, I argue that international law assumes the natural existence of a Being of the State and that this ontology of statehood constitutes the ontology of international law. In section 2, I explain how the ontology of statehood having been transformed into an epistemology ultimately leads to the violent suppression of alterity. In section 3, I propose a number of projects and strategies through which we may pursue the ethics of alterity in international law. Finally, I conclude by discussing three tensions within international law, statehood–alterity, ontology–ethics, and law–politics, which arise as a result of the arguments presented in this article.

1. Ontology: The Being of the State

1.1. Ontology

Ontology is the study of existence or being. It stems from that most basic of philosophical enquiries: what exists in the world and what are the properties of that which exists? It is for this reason that ontology has been considered by many philosophers as 'first philosophy'. Lévinas is, however, critical of the priority accorded

5 It needs to be stressed at the outset that this paper does not engage with Lévinas's political views on the state and Israel. David Campbell has, however, addressed this topic: D. Campbell, 'The Deterritorialization of Responsibility: Lévinas, Derrida, and Ethics after the End of Philosophy', (1994) 19 *Alternatives* 455.

6 In this article, I use the terms 'Being', 'Self', and 'Same' interchangeably. The term 'being' on the other hand refers to the middle or neutral term by which existence is understood and through which alterity is suppressed.

7 This reflects the way in which the language of international law and international relations is wedded to the State as a primary category of thought.

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to ontology in the Greek tradition of philosophy because of its totalitarian and totalizing tendencies.[8] According to Lévinas, ontological research is premised on the notion that understanding being as being is equivalent to existing, and thus leads thought to become part our being-in-the-world.[9] In our existence in the world, ontology therefore constitutes 'the essence of all relation with beings, and even of all relation in being'.[10] This is so because understanding involves and proceeds from being. Truth becomes equivalent to presence or existence: 'an intelligibility that considers truth to be that which is present or co-present, that which can be gathered or synchronized into a totality that we could call the world or *cosmos*'.[11]

Lévinas interprets understanding, as conceived most notably by Heidegger, as resting on the intelligibility and openness of being: 'Thus the understanding of a being consists in going beyond that being – precisely into openness – and perceiving it on the *horizon of being*.'[12] Conceptualizing a being through or along the horizon of being involves situating the being within a broader totality: 'To understand is to relate to the particular, which alone exists, through knowledge, which is always knowledge of the universal.'[13] As a result, through the primacy of ontology in the Greek tradition, there occurs a subordination of 'the relations between beings to the structures of being'.[14] In the ontological framework, Others constitute objects of knowledge first and interlocutors second.[15]

Ontology is also connected to being in that it is centred on the notion of a transcendental Being as totality, the Self. Lévinas draws a distinction between two types of beings: the living being and the thinking being. The living being is instinctive and is primarily egotistical: 'That which lives in the totality exists as totality, as if it occupied the centre of being and were its source, as if it drew everything from the here and now, but in which it is in fact placed or created.'[16] The living being is therefore oblivious to a reality which lies outside itself as it does not conceive of itself as part of a whole, but rather as preceding all comprehension – a 'consciousness without consciousness'.[17]

As a result, the living being is founded on an eternal and autonomous Self:

> The identity of a living being throughout its history contains nothing mysterious: the living being is essentially the Same, the Same determining every Other, without the Other determining the Same. If the Other did determine it – if exteriority collides with that which lives – it would kill instinctive being. The living being lives beneath the sign of liberty or death.[18]

8 É. Lévinas, *Totality and Infinity*, trans. A. Lingis (1969), 33.
9 É. Lévinas, 'Is Ontology Fundamental?', in É. Lévinas, *Entre Nous Thinking-of-the-Other*, trans. M. Smith and B. Harshav (2006), 1, at 3.
10 Ibid., at 4.
11 É. Lévinas and R. Kearney, 'Dialogue with Émmanuel Lévinas', in R. Cohen (ed.), *Face to Face with Levinas* (1986), 13, at 18–19.
12 Lévinas, 'Is Ontology Fundamental?', *supra* note 9, at 4 (emphasis in original).
13 Ibid.
14 Ibid., at 5.
15 Ibid., at 6.
16 É. Lévinas, 'The *I* and the Totality', in Lévinas, *Entre Nous*, *supra* note 9, 11 at 11.
17 Ibid., at 12.
18 Ibid., at 12.

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On the other hand, the thinking being is conscious of exteriority; however, it perceives the exterior world as existing for itself.[19] Therefore exteriority is perceived through interiority: phenomenology.[20] In his relationship with totality, the thinking being is both inside, positing himself with totality and in relation to other parts of this totality, and outside, deriving his identity by reference to himself.[21] Ontology both derives from and constitutes selfhood in Western modernity. This implies an idea of the Self as a coherent, stable, bounded, autonomous essence – a naturalized and self-referential totality.

1.2. The ontology of statehood

The rise of the sovereign state coincided with the onset of modernity.[22] In particular, the constitution of the state as a subject drew on humanist ideals: 'Made for each other, the sovereign state and the autonomous individual decisively contribute to making the world what it is – and to making it seem naturally, inevitably so.'[23] The notion of sovereignty itself can be connected with the development of first-person subjectivity,[24] as well as with the discourses of autonomy and natural rights: 'Extended by analogy to the state in its relation to other states, rights and duties give states the appearance of living beings.'[25] The discourse of the Self was thus in many ways extended to the sovereign state by early theorists, perhaps in part due to the fact that sovereignty was at one point vested in the person of the monarch. As a result, in international law the state forms a person, a totality – an autonomous, bounded Being endowed with agency and will: 'Through these human agencies, the state lives, moves, and has its being.'[26]

In international law the sovereign state as Being forms a totality and is for this reason essentially self-referential. Of course, the state is both inside and outside something broader than itself, as reflected by the debate between the constitutive and declarative theories of recognition.[27] The early publicists, however, rejected the idea that recognition played a role in the creation of states: 'just as a king owes his sovereignty and majesty to no one outside his realm, so he need not obtain the consent and approval of other kings and states, before he may carry himself like a king and be regarded as such'.[28] Moreover, the state itself does not found its existence on recognition by other states. As Crawford acknowledges, while there is a certain measure of relativity involved in the application of the criteria of statehood, 'each state is an original foundation predicated on a certain basic independence'.[29]

19 Ibid., at 12.
20 Ibid., at 13.
21 Ibid., at 14.
22 See N. Onuf, 'Sovereignty: Outline of a Conceptual History', (1991) 16 *Alternatives* 425.
23 N. Onuf, 'Intervention for the Common Good', in G. Lyons and M. Mastaduno (eds.), *Beyond Westphalia? State Sovereignty and Intervention* (1995), 43 at 43.
24 J. Ruggie, 'Territoriality and Beyond: Problematizing Modernity in International Relations', (1993) 47 *International Organization* 139, at 159.
25 Onuf, *supra* note 23, at 49.
26 A. James, 'The Practice of Sovereign Statehood in Contemporary International Society', (1999) XL *Political Studies* 457, at 459.
27 J. Crawford, *The Creation of States in International Law* (2006), 19–27.
28 S. Pufendorf, *De Jure Naturae et Gentium*, trans. B. Kennett (2005), para. 689.
29 Crawford, *supra* note 27, at 61.

The existence of the state is thus presumed to flow from within, not from without: 'Sovereignty was, in other words, primarily a matter of internal constitutional power within the state with exclusive competence therein.'[30]

Once a state achieves the 'vaguely tautological'[31] attributes of statehood – population, territory, government, and capacity – it is thus 'characterized by sovereignty'.[32] These elements are aspects of the existence of a state as well as constitutive of its sovereignty. Sovereignty and statehood essentially form conceptual equivalents for both classical authors such as Bodin, who considered that the essential characteristic of the state was sovereignty,[33] and modern authors such as Crawford, for whom 'as a matter of international law no further legal consequences attach to sovereignty than attach to statehood itself'.[34]

In its totality as Being, the state achieves what Onuf calls majesty – awe inspiring the formality and dignity of a political arrangement – later reinforced through the emergence of nationalism whereby '[t]he nation-state as a solidary entity became the primary object of popular awe.'[35] Onuf explains how the elements of statehood thus come together to form a whole:

> Agents are responsible, even finally responsible, but always on behalf of the body politic, whose being defines their purpose. When agency such as this is combined with a large measure of majesty and an uncontested claim to rule within a certain territory, they fuse not just as the state's shell but as its primary architecture. The state is the land, the people, the organization of coercion and a majestic idea, each supporting and even defining each other, so that they become indivisible.[36]

The wholeness of the state 'as a complete association of free men'[37] is what provides it with a collective identity and will; it forms 'a compound moral person, whose will, intertwined and united by the pacts of a number of men, is considered the will of all'.[38] The state as Being is therefore characterized by its indivisibility. Indeed, sovereignty is unitary – 'a sovereign state is all of a piece'[39] – and it makes the state indivisible:

> That states must be sovereign to be states underlies the categorical distinction between a confederation of states and a federal state. In the presence of sovereignty, any segmented territorial configuration must be one or the other. There can be no in between.[40]

The state must therefore possess autonomy, for it is an independent Being: 'That power is called sovereign whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another will.'[41]

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30 R. Jennings and A. Watts, *Oppenheim's International Law* (1993), 125.
31 Simpson, *supra* note 1, at 8.
32 Arbitration Commission of the European Conference on Yugoslavia, Declaration of 27 August 1991 of the European Community, (1991) Bull. EC, 7/8.
33 J. Bodin, *Six Books of the Commonwealth*, trans. M. J. Tooley (1967), 28.
34 Crawford, *supra* note 27, at 33.
35 Onuf, *supra* note 22, at 439.
36 Ibid., at 437.
37 H. Grotius, *De Jure Belli Ac Pacis*, trans. F. Kelsey (1925 [1625]), Book 1, at para. XIV.
38 Pufendorf, *supra* note 28, at para. 672.
39 Ibid., at 464.
40 Onuf, *supra* note 22, at 432.
41 Grotius, *supra* note 37.

For James, sovereignty therefore 'consists of being constitutionally apart, of not being contained, however loosely, within a wider constitutional scheme'.[42] In terms of the criteria of statehood, independence is reflected in the notions of effective government as well as the capacity to enter into relations with other states. Formal autonomy presumes at some level agencies which enable that autonomy to be exercised – government – and a relation obviously requires the existence of two independent beings. The sovereign state is thus characterized by the complete and absolute mastery of the Self by the Self – effective government. The state's autonomy is therefore indicative of its completeness as a totality: 'A perfect State of community . . . is one which is complete in itself, that is, which is not part of another community, but has its own laws and its own council and its own magistrates'.[43]

Finally, sovereignty is an absolute condition: 'Sovereignty is that absolute and perpetual power vested in a commonwealth.'[44] It is in this way that the state lives under the 'sign of liberty or death', for a state is either sovereign or it is not. The absolute character of sovereignty is meant 'not in the sense of possessing absolute power, but in the sense of not being relative, of an attribute being either present or absent, with no intermediate possibilities'.[45] The principle of absolute individuation is ultimately connected to the idea of autonomy: in the sovereign state there is one 'final and absolute political authority in the political community *and no final and absolute authority exists elsewhere*'.[46] The sovereignty of the state is indivisible in external terms, for there can only be one sovereign who speaks for the state.

The ontology of the state – the idea that states naturally existed as Beings in the world – is part and parcel of the fundamental structure of the international legal system. Indeed, early natural law theories in international law presupposed that the state's existence was as natural as that of the individual in the domestic setting: 'Since nations are free and independent of each other as men are by nature, it is a general law of their society that each Nation should be left to the Peaceful enjoyment of that liberty which belongs to it by nature.'[47] However, such naturally existing states were subject to the law of nature as derived from the law of God or from the fact of their coexistence. This represents what Koskenniemi refers to as the 'legal approach' to sovereignty shared by early theorists and later by Kelsen: '"sovereignty" is a systemic concept – not something external to but determined *within* the law. The legal order pre-exists the sovereignty of the state and remains in control thereof'.[48]

As natural law faded and positivism became the dominant account of international law, the existence of states or, to be precise, certain states of European lineage, continued to be taken for granted by international lawyers. While positivism established objective criteria for the creation of states, most notably through the process of recognition, it inherited the idea that certain states were already in

42 James, *supra* note 26, at 461.
43 Grotius, *supra* note 37, paras. 425–426.
44 Bodin, *supra* note 33, at 25.
45 Onuf, *supra* note 22, at 463.
46 F. Hinsley, *Sovereignty* (1966), 26 (emphasis added).
47 E. de Vattel, *The Law of Nations*, trans. C. G. Fenwick (1916), 6.
48 M. Koskenniemi, *From Apology to Utopia* (2006), 228 (emphasis in original).

existence. The criteria for the creation of a state were never applied to those states which formed part of the original family of nations in the middle of the nineteenth century because they were presumed to exist, and in fact the criteria of statehood were derived from their common attributes as forms of political organization. In this way, these Beings in the world became the exclusive form of being at the international level and any new beings – new states – had to be *recognized* by them. Recognition thus arose in nineteenth-century doctrine only with regard to those states which were not already in existence and had no bearing on the original beings which lay at the foundations of the international legal system.[49]

Moreover, in positivism, the idea of the existence of states, though expressed as real, not as natural, is maintained, while the idea of the existence of natural law is rejected as utopian and unscientific. International law is instead to be derived from sovereign will. The ontology of statehood is upheld while its former corollary – the existence of natural law – is not. By keeping the state, but doing away with natural law, positivism restricts the scope of application of international law to states. This is in contradistinction to natural law theorists, who conceived of international law as universal and therefore as applying to all of God's subjects or to all individuals, whether or not they were Christian or considered to be civilized.[50]

By constructing the state as an objective reality and natural law as a subjective morality, the focus of the discipline shifted from the question of deriving the law from divine will or reason to the establishment of order among sovereign equals – the familiar *problématique* of the possibility of law and community in a world of self-governing entities which cannot be bound by any law to which they have not consented. There is an assumption of the existence of states as Beings, already existing before (*avant*) the international system and its law, as opposed to being conceived as standing before (*devant*) the international legal order.[51] Indeed, the quandaries of interdependence and intersubjective normativity require prior assumptions about independence and subjectivity:

> International law, being the embodiment of state practice, might, it is clear, date from the birth time of states, or from the time when one state, become aware of its own corporate existence, found itself by the necessities of international intercourse obliged to accord recognition to the same quality in other communities.[52]

With the positivist turn, the state is conceived as a subject first and a legal subject second, and as such it is international law which is subject to the law of statehood.[53] The ontology of statehood is thus an inherently violent experience, as there is interpretative, groundless violence in the originary act of founding international law on the basis of the state. Within the boundaries of positive international law, one cannot return to a time before, or truly interrogate, the Westphalian moment. The history of international law, being the history of the state, remains a fictive

49 See section 2.2.
50 This was most notably the opinion of Vitoria: W. Grewe, *The Epochs of International Law* (2000), 145–7.
51 J. Derrida, 'Before the Law', in J. Derrida, *Acts of Literature*, ed. D. Attridge (1992), 181.
52 T. Walker, *A History of the Law of Nations* (1899), 31.
53 Jennings and Watts, *supra* note 30, at 14 (International law depends on 'the existence of an international community the common consent of whose members is that there shall be a body of rules of law.').

narrativity.[54] The ontology of the state is itself a violent performative – the speech act of the 'there is' of the state.[55] And the violence of this performative continues to characterize the development of international law. State sovereignty forms either the very possibility of international law (law through sovereign consent) or its very negation (no law between or above sovereigns). This violence also explains how, on the basis of its totality, the state came to occupy the totality of international law. In the first instance there was a presumption in natural law that the state formed a totality, a totality which flowed from itself. In the second instance positive international law, resting on and consumed by this totality, developed an ontology in which the state as Being defined the centre of being and represented the universal, a state-centric totality for understanding that which was not the state, including alterior international law. The key doctrinal moment which enabled this shift from one totality to the other was the retention of the state as a fundamental organizing concept in the discipline: 'The State – and a set of rights associated with it – is the professional *a priori*, the transcendental condition from which discourse proceeds and which is not itself subject to discussion.'[56]

As a result, the original violence of Westphalia permeates the entirety of the international legal system and lies at the origins of other instances of violence, in the context of sources of doctrine or in the assertion of the legal primacy of the state. The ontology of the state ultimately forms a fundamental part of and is inseparable from the ontology of international law. As such, the state's development as an exclusive, coercive, and hierarchical form of political community and the international legal system's development along more horizontal, though nonetheless exclusionary, lines both stem from the same narrative, that of the state existing as Being.

2. Epistemology: knowing through the state

2.1. Epistemology

Lévinas is also critical of the importance accorded to epistemology, 'knowledge of being and the Same',[57] in the Greek tradition of philosophy. In Lévinas's interpretation of Western thought, epistemology is interconnected with ontology in that the question of how one understands things is necessarily related to the question of what exists: ontology both rests on and posits a Being which is capable of knowing the Other. Ontology and epistemology are especially interconnected in the philosophical movement or field known as phenomenology – the study of phenomena as the available presentation of essences. Although Lévinas was initially supportive of the phenomenological theories developed by two of his former teachers, Husserl and Heidegger, he later developed a thorough critique of their theories. While phenomenology aims to study the encounters between consciousness and the world,

54 See Derrida, *supra* note 51. Indeed, there is evidence to suggest that the Westphalian moment is truly mythical: S. Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', (2000) 2 *Journal of the History of International Law* 148.

55 J. Derrida, 'Force of Law: The Mystical Foundation of Authority', (1990) 11 *Cardozo Law Review* 920.

56 Koskenniemi, *supra* note 48, at 132.

57 É. Lévinas, 'Philosophy and Awakening', in Lévinas, *Entre Nous*, *supra* note 9, 66 at 72.

it also suggests that the world is only ever encountered as already constituted by and within consciousness. Therefore consciousness can never meet anything truly alterior to itself because the external world is a product of its own activity:

> Phenomenological description, which by definition cannot leave the sphere of light, that is, man alone shut up in his solitude, anxiety and death as an end, whatever analyses of the relationship with the other, it may contribute, will not suffice. *Qua* phenomenology it remains within the world of light, the world of the solitary ego which has no relationship with the other *qua* other, for whom the other is another me, an *alter ego* known by sympathy, that is, by a return to oneself.[58]

Lévinas ultimately concluded that Husserl's and Heidegger's ideas were actually rather traditionally ontological. His disappointment with their work eventually developed into a critique of Western philosophy in its entirety:

> Western philosophy coincides with the unveiling of the other in which the Other, by manifesting itself as being, loses its alterity. Philosophy is afflicted, from its childhood, with an insurmountable allergy: a horror of the Other which remains the Other. It is for this reason that philosophy is essentially the philosophy of Being; the comprehension of Being is its final word and the fundamental structure of man.[59]

The thrust of this critique is Lévinas's claim that Western thought, through its focus on being, has been marked by ontological imperialism whereby the Other has been characterized as belonging to a totality, thus ensuring that it could ultimately be reconciled with the Same: 'Western philosophy has most often been an ontology: a reduction of the Other to the Same by interposition of a middle and neutral term that ensures the comprehension of being.'[60] That is not to say that Lévinas rejects phenomenology, but rather that he attempts to develop an explicitly phenomenological approach to ethics wherein exteriority cannot be understood from within or reduced to interiority. For Lévinas, the process whereby the Self or the Same understands the Other through the horizon of beings, through a phenomenology of being or consciousness, necessarily does violence to the Other by effectuating a suppression of its alterity.[61] While the Same believes that it can know the Other, it can only know the Other from within itself. As a result, the Same can never know the Other, it can only reduce the Other to the Same by the act of knowledge. And this act of suppressing the other, far from being seen as negative in Western thought, is instead seen as constructive, as something which is the 'essence of enjoyment'.[62]

2.2. The epistemology of statehood

The ontology of statehood, serving as the foundation for an epistemology of statehood, defines the way in which international law views the world. Especially with the rise of positivism, international law's way of knowing the world is state-centric, because its way of being in the world is equally so. Faced with that which is other

58 É. Lévinas, *Existence and Existents*, trans. A. Lingis (1978), 85.
59 É. Lévinas, *Discovering Existence with Husserl*, trans. R. Cohen and M. Smith (1998), 188.
60 Lévinas, *supra* note 8, at 33–4.
61 Lévinas, 'Is Ontology Fundamental?', *supra* note 9, at 8.
62 Lévinas, *supra* note 8, at 113.

than the state, international law partakes in the joy of reducing the Other to the Same by conceiving of the world as made up of sovereign states and non-states. This occurs primarily through the use of concepts such as personality, sovereignty, and statehood, each of which developed in response to encounters with different Others. From the point of view of international law, these different encounters were marked, and continue to be marked, first by the prior existence of states or certain states, as well as by the intelligibility of the Other. The different ways in which subjecthood is deployed in international law involves an exercise whereby the Self – the state – seeks to understand the Other – the non-state – but in doing so only reduces the Other's alterity.

In the rest of this section I explore three principal themes or forms of exclusion: the development of state sovereignty in an emerging European state system and its eventual equation with international legal subjecthood (exclusion from or at Westphalia), the construction of alterity in the colonial and contemporary contexts (exclusion from or at Berlin) and the violent consequences of such exclusions (exclusion from the conference and/or battlefield).

2.2.1. Subjecthood and state sovereignty

Sovereign statehood developed in response to important changes in social epistemology regarding the way in which individuals conceived of political community and its organizational basis.[63] It first acquired meaning through its identification with the Same and at the expense of the Other throughout the process of the consolidation of the state system in Europe.

As Spruyt explains, 'sovereign states preferred similar modes of organization in their environment. Actors intentionally created a system of sovereign, territorial states. They preferred a system that divided the sphere of cultural and economic integration into territorial parcels with clear hierarchical authorities'.[64] This preference was reinforced by the mimicry displayed by elites which sought to become the equals of the sovereigns,[65] a process later to be repeated at the time of decolonization. By developing in contrast to and in competition with feudalism, Christian imperialism, and city leagues, the European state acquired its principal characteristics: centralized internal and external sovereignty premised on a territorial form of organization.

At the Peace of Westphalia, for instance, the Hanseatic League was denied standing, most notably by the German principalities, which argued that

> 1. The Hanseatic cities are either intermediate cities, who are represented by their lords, or imperial cities, and in that capacity naturally represented at the conference. 2. The Hansa cities were not mentioned in the religious treaty of Augsburg of 1555. 3. One does not really know what the Hansa in essence is.[66]

63 H. Spruyt, *The Sovereign State and Its Competitors* (1994), 103; Ruggie, *supra* note 24, at 157.
64 Ruggie, *supra* note 24, at 179–80.
65 Ibid., at 171–2.
66 Spruyt, *supra* note 63, at 170 (translation of quotation from Hand-Bernd Spies, 'Lübeck, die Hanse und der Westfälische Frieden', (1982) 100 *Hansische Geschichtsblätter* 110, at 114).

This line of argument is premised on two main points: that States naturally possessed personhood and that the League did not, and that the essence of States is known, while the essence of the League is not. Meanwhile, the German principalities and the Italian city states were allowed to participate in the Peace of Westphalia as 'the result of their empowerment as equivalent actors on the international scene, because of their external similarity to sovereign, territorial states'.[67]

In addition to the exclusionary Westphalian moment, state sovereignty was also developed in response to increased contact with non-European peoples. Antony Anghie argues that the sovereignty doctrine was 'forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation'.[68] Anghie reveals how sovereignty was deployed as 'a dynamic of difference' in order to set up basic distinctions between European civilization and other civilizations, which were then used to justify the colonial project. This was true in the context of natural law[69] and all the more so in the context of positivism:

> Within the nineteenth-century positivist framework, sovereignty represents, then, at the most basic level, an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture. For the non-European world, sovereignty was the complete negation of power, authority and authenticity. This was not only because European sovereignty was used as a mechanism of suppression and management, but because the acquisition of sovereignty was the acquisition of European civilization.[70]

In this way, the Other was understood as different by the state, but only in reference to itself, thereby ensuring that alterity was understood in contrast to the Same. Koskenniemi describes this logic of inside/outside in the following way:

> It was a discourse of exclusion–inclusion; exclusion in terms of a cultural argument about the otherness of the non-European that made it impossible to extend European rights to the native, inclusion in terms of the native's similarity with the European, the native's otherness having been erased by a universal humanitarianism under which international lawyers sought to replace native institutions by European sovereignty.[71]

There is something in these two initial moments of exclusion which has repeated itself in every encounter which the state has had with the Other. Indeed, the principal ontological distinction at the foundation of international law is one which conceives of the world as being made up of states and non-state actors. Of course, doctrine today acknowledges the existence and relevance of non-state actors in the international legal system.[72] And the system itself applies to these non-state actors and has, over the course of the twentieth century, accorded them an enhanced legal status.

And yet there is the feeling that in many ways the original distinctions drawn between sovereign statehood and alterity by the early publicists is still with us. The

67 Ibid., at 176.
68 A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), 3.
69 Ibid., at 29.
70 Ibid., at 104.
71 M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), 130.
72 See, e.g., Jennings and Watts, *supra* note 30, 16–22.

fact remains that non-state actors are not full or complete subjects of international law because whatever particular form of legal personality they may have pales in comparison to that of the primary and original actor: the state.

The personality enjoyed by states is primary because it comes with the most significant array of rights and responsibilities. The procedural rights open to individuals and NGOs remain severely limited. In this regard, the symbolism of Article 34 of the Statute of the International Court of Justice is striking: 'Only States may be parties in cases before the Court' – as though only states had the required interest and standing in relation to issues on the Court's docket. Consequently, no matter what position one takes on the status of individuals under international law, one cannot help but remark with Higgins that

> [I]individuals are extremely handicapped in international law from the procedural point of view. They have little access to international arenas; and are dependent upon the nationality-of-claims rules, whereby an individual must, generally speaking, pursue a claim at the international level by getting his government to take it up on his behalf. There is, of course, a close relationship between the notion of nationality of claims and the unavailability of most international tribunals to the individual.[73]

The lack of capacity of individuals and other non-state actors results from their inclusion within the sphere of the state. Non-state actors are of domestic concern – they exist within the state and any claim they may have to personality is subsumed by it. They are moreover elements of the very Being of the state and injury to them is an injury to the state.

The international legal personality of non-state actors thus derives, both directly and indirectly, from the legal personality of states. Non-state personality is directly derived from the personality belonging to states in that states are the only entities which may create or recognize subjects of international law and accord them with rights and duties. For instance, the recognition of the existence of the legal personality of international organizations is dependent on state consent: it must be enshrined in a treaty or must be deduced from the powers and the functions attributed to the organization.[74] As well, the rights granted to individuals and the privileges accorded to NGOs all flow from interstate treaties or decisions made within interstate organizations. As Noortmann concludes, 'As opposed to the original and comprehensive legal personality of states, all other forms of international legal personality are considered to be limited by definition and are functionally defined.'[75]

The legal personality of non-state actors is moreover indirectly derived from that belonging to states, in the sense that international legal personality has been identified with the traditional indicia of statehood. Malanczuk, for instance, identifies the following as the characteristics of international legal personality: the capacity to bring claims arising from the violation of international law, to enter into relations with other subjects of international law and conclude valid international

73 R. Higgins, *Problems and Process: International Law and How We Use It* (1994), 51.
74 Ibid., 47.
75 M. Noortmann, 'Non-state Actors in International Law', in B. Arts, M. Noortmann and B. Reinalda (eds.), *Non-state Actors in International Relations* (2001), 59 at 64.

agreements, and to enjoy privileges of and immunities from national jurisdiction.[76] However, this attempt at decoupling the prerogatives of statehood from international personhood 'only reinforces the position of states and the notion that states are the only original subjects of international law'.[77]

The epistemology of statehood evinces an inability by international law to recognize the personhood of entities which are other than the state. And when such entities are given a measure of recognition, they are conceived of as existing alongside or within the horizon of the being of the state. After all, the most important right in international law – the right of self-determination – is in its ultimate form the right to be a state. During the decolonization period, the received category of the territorial state thereby closed off the available options of self-determination even as they were granted to post-colonial groups.[78] Today, as Simpson points out, self-determination is 'as a principle without a purpose – a right bereft of potential beneficiaries'.[79] The emptiness of the principle of self-determination derives from its exclusion of the right of secession and its association with decolonization,[80] implying respect for the Being of the state and reverence for its complete embodiment of the national Self. In this way, self-determination only buttresses the epistemology of statehood.[81] The epistemology of statehood is thus so well entrenched that it is shared in many ways by those who are outside the state system. In other words, those without a state generally want a state:

> Finally, given that the state system has also been produced by mutual empowerment, there are barriers for any non-sovereign form of organization that wishes to be recognized as a legitimate participant in international relations. Disaffected ethnic and religious groups seldom claim that they wish to create a form of organization that is universalistic or based on translocal affinity. Instead they wish to form a territorial and sovereign state of their own. That is, they wish to become states. New forms of identification, or previously neglected ones, may be recast within the mould of the system to become accepted within the larger community and its corresponding patterns of interactions.[82]

2.2.2. Subjecthood and recognition

Recognition in international law 'is the formal acknowledgement by the state that another exists'.[83] There is some debate as to whether recognition is necessary for a state to come into existence (the constitutive view) or if it merely confirms the fact that a state exists (the declarative view).[84] To some extent, the debate on recognition is a false one, for factual accounts of the existence of a state necessarily draw on preconceptions of the attributes of statehood. While positivism established the

76 P. Malanczuk, *Akehurst's Modern Introduction to International Law* (1997), 99.
77 Noortman, *supra* note 75, at 69.
78 V. Nesiah, 'Placing International Law: White Spaces on a Map', (2003) 16 LJIL 1.
79 G. Simpson, 'The Diffusion of Sovereignty: Self-Determinations in the Post-colonial Age', (1996) 32 *Stanford Journal of International Law* 255, at 259.
80 Ibid., at 264–5.
81 Ibid., at 260.
82 Spruyt, *supra* note 63, at 193.
83 Higgins, *supra* note 73, at 42.
84 Crawford, *supra* note 27, at 19–27.

objective criteria for statehood, it inherited the idea that certain states were already in existence. The criteria for the acquisition of statehood were thus never applied to those states which formed part of the original family of nations in the middle of the nineteenth century. In fact, the criteria in question derived from their common attributes as forms of political organization. In this way, these Beings in the world became the exclusive form of being at the international level, and any new states or other actors had to be *recognized* by them.

Increased contact with non-European Others further sharpened the meaning of sovereign statehood and coincided with the development of objective criteria for international legal subjecthood in nineteenth-century positivist scholarship. This scholarship posited that the scope of application of the law of nations was informed by the participation of states in the body of positive law. This meant that as this body of positive law had originated in Europe, it was only applicable to European states.[85] As a result, statehood was suddenly not a sufficient condition for the attainment of international legal personality – only those states which had achieved a significant degree of civilization, approximating that of western Europe, were proper subjects of international law. Simpson describes this process of exclusion in these terms: 'They were like the European powers in a functional sense (effective government, territory) but dissimilar in a cultural sense (lack of democracy/civilization/Christianity).'[86]

To begin with, the notion of a civilized state was tied to the requirement of the existence of a community of European nations. According to Martens, the foundation of the international community being the distinctive aspirations of European Christendom, non-European states were excluded from participation in this community.[87] The epistemology of statehood evolved from one which was explicitly European or Christian to one which was more subtly recast as resting on the legal doctrine of the standard of civilization.[88] Of course, European Christian states remained the principal arbitrators of the required degree of civilization for entry into the international legal system. For Walker, the term 'civilized state' referred to a more modern secular and objective standard of progress:

> International law, if it is to be at once definite and reasonably progressive, must cut adrift from the practice of laggard nations. A community becomes a state when it becomes possessed of some clearly marked characteristics: it becomes an international person when, possessing those characteristics, it makes known its ability and its intention reasonably to approximate its international conduct to the demands of the highest civilization.[89]

Above and beyond political independence expressed in the form of statehood, a certain level of behaviour was thus required of a community before it could join the law of nations.

85 P. Fauchille, *Traité de droit international public* (1922), 28–9; W. Hall, *A Treatise on International Law* (1909), 39.
86 G. Simpson, *Great Powers and Outlaw States* (2004), 238.
87 F. de Martens, *Traité de droit international*, trans. A. Léo (1883), 270–1.
88 G. Schwarzenberger, 'The Standard of Civilization in International Law', (1955) 8 *Current Legal Problems* 212, at 220.
89 T. Walker, *A Manual of Public International Law* (1895), 7.

Key to the notion of admission into the Family of Nations was the doctrine of recognition, expressed in these terms at the turn of the twentieth century: 'Recognition is the act through which it becomes apparent that an old State is ready to deal with a new State as an International Person and a Member of the Family of Nations.'[90] Before it could be admitted into the law of nations, the Other had not only to adopt a European form of political organization, but also had to be *recognized* by European states. The verb 'to recognize' had three relevant meanings in this context. First, European states acknowledged the existence of the Other and approved of its organization and degree of civilization. Second, they identified it as something that had been perceived before – they *remembered* the Other as familiar and knowable because the Other had transformed itself in accordance with the precepts of Western civilization. Third, they endowed it with legal personhood. This signified that whatever the state did not recognize was denied international legal personality. Setting up the sovereign state as the unit of the international legal system necessarily restricted the scope of application of international law to those communities which had emulated the European form of political organization known as the state or on which this form had been imposed through the colonial project.

Throughout the colonial period the communities colonized by European powers were thus initially considered to be lying outside the scope of international law. Colonies or protectorates were thus subject to the domestic law of the colonizing power; 'Colonial States have no international position whatever; they are, from the standpoint of the Law of Nations, nothing else than colonial portions of the mother country, although they enjoy perfect self-government, and may therefore in a sense be called States.'[91] This prevented local rulers from obtaining international personality, though it did not prevent European powers from concluding unequal treaties with these rulers, whereby they ceded their right to participate in the international legal system.[92] Consequently, through the notion of subjecthood, international law became complicit in the colonial project: 'the European states created a "ruler's law" for its relations with the extra-European world. Of this law, non-European, colonized people were the object rather than the subject.'[93]

Eventually, international law began to conceive of the colonial relationship less as one of ownership and more as one of wardship.[94] After the First World War certain colonial territories began to be transformed into sovereign states, to be managed under the tutelage of the West through the League of Nations mandate system. Following decolonization, the state was firmly erected as the exclusive form of political organization in international relations, once more ensuring that the Other would be transmuted into the Same:

> The internationalization of colonialism under the mandates and trusteeship systems was part of the civilizing mission in the precise sense that it reinstated Europe's role as the gatekeeper for the benefits of public diplomacy for the colonial world. It restated

90 L. Oppenheim, *International Law* (1905), 110.
91 Ibid., at 102–3.
92 T. O. Elias, *Africa and the Development of International Law*, rev. R. Akinjide (1988), 19–20.
93 B. V. A. Röling, *International Law in an Expanded World* (1960), 47.
94 Ibid.

> the logic of exclusion–inclusion that played upon a Eurocentric view about the degrees of civilization and legal status. Decolonization effectively universalized the European State as the only form of government that would provide equal status in the organized international community.[95]

Some states continue to construct Others through the discourses of human rights, modernity, democracy, liberalism, and development.[96] There is a sense in which the threshold for membership is continuously evolving, with the object of universalizing ideas and identities in ever more specific and particular ways.[97] Of interest from an ontological point of view is how these projects have the potential of redefining the notion of the state at the expense of the Other. These are the pirate states, criminal states, and failed states, which are conceived as having lost a measure of sovereignty and are thereby subject to varying forms of intervention.[98]

2.2.3. Subjecthood and violence

As an exclusionary epistemology, international legal subjecthood is thus essentially a violent concept. This form of violence may appear removed, abstract, and intellectual, but it may have very concrete and physical aspects. Ultimately it is connected to 'violence in its natural state', which, according to Tuitt, 'is the putting into practice of the claim to be first'.[99] This idea makes it quite clear how the State, as the first Being, makes the claim to be first. As the concept of subjecthood operates through the act of describing the different capabilities of various entities and then conferring different capabilities upon them, the act of description devolves into prescription. The shift to the concreteness of violence occurs in the necessity for international law to make use of its coercive and interpretative powers to do violence to informal normative orders and deny their very existence in order to ensure the supremacy of its legal meanings.[100]

International law does violence to individuals, IGOs, NGOs, TNCs, peoples, etc.[101] by subordinating them to the state. There is in fact something quite concretely violent in the act of delegitimating an Other's independent claim to subjecthood. Abstract violence becomes more concrete as well when individuals, IGOs, NGOs, TNCs, peoples, etc. are denied the justice, status, standing, rights, and recourses they seek; when they are prevented from participation in law-making, law-applying and law-interpreting mechanisms; when they are (sometimes physically) turned away from the doors of international courts and tribunals, policy-making conferences,

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95 Koskenniemi, *supra* note 71, at 174–5.

96 B. Bowden, 'In the Name of Progress and Peace: The "Standard of Civilization" and the Universalizing Project', (2004) 29 *Alternatives* 43, at 53–61.

97 This reflects the way in which international law is seen to penetrate state sovereignty more deeply and in relation to an ever greater number of areas. International law regulates not only the form that political communities must take to constitute an international act and the intercourse between political communities, but increasingly the internal political and economic characteristics of these communities.

98 Simpson, *supra* note 86; Simpson, *supra* note 1, at 13–14; G. Simpson, 'Piracy and the Origins of Enmity', in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2006), 219.

99 P. Tuitt, *Race, Law, Resistance* (2004), 96.

100 R. Cover, 'Nomos and Narrative', (1983) 97 *Harvard Law Review* 4, at 46–68.

101 The 'etc.' is necessary to denote the infinity or totality of alterity and highlights the essential non-exhaustiveness of any listing of that which is not the State.

and decision-making fora; and when they are told or made to realize that their views and existence do not matter – that they are in fact subsumed within the horizon of the state.

But the violent consequences of the transcendence of the Other by the Same do not end there. Statehood made possible the colonial experience and the very real violence involved in conquering non-European communities that were constructed as non-sovereign objects to be appropriated.[102] Strands of anti-pluralism make similar intrusions into unequal, degraded, or incipient forms of sovereignty possible today.[103] Violence is also present in the context of non-intervention, where victims of human-rights abuses or humanitarian catastrophes are conceived as internal matters for the state concerned or as some other state's problem.[104]

The violence of statehood is most obvious perhaps in the laws of war, which are premised on notions tied to conventional armed intercourse involving states. The right to use force and the status of combatant is essentially reserved for states. To use force, non-state actors must be pre-states in the exercise of their right to self-determination as part of a Protocol I war of national liberation[105] or must fight like states, possessing a structure, territory, and military capabilities similar to those of a state as part of a Protocol II internal armed conflict.[106] As a result, certain rights and privileges are reserved to some and not to others, and the act of killing is made legitimate for some and not for others.[107] Thus the rules of *jus in bello* are as much about humanitarianism and justice as they are about ensuring that armed conflicts are fought according to a state-centric model of belligerency. This view is encapsulated in the famous words of the Libyan head of state, Muammar al-Qaddafi, 'Those who use missiles or fighter planes and rockets are legitimate. Those who use explosives or small bombs are considered terrorists.'[108]

The monopoly over subjecthood is thus essentially a monopoly over violence. State sovereignty finds itself doubly strengthened, as the right to use force is conceived as a prerogative of the sovereign, while sovereignty is invariably defended as bringing about a certain measure of peace, order, and security.[109] Both international law and the sovereign state have an interest in restricting the use of violence for the sake of their preservation, as Benjamin explains: 'violence, when not in the hands of the law, threatens it not by the ends that it may pursue but by its mere existence outside the law'.[110] The current *problématique* in regard to violence is undoubtedly

102 See Anghie, *supra* note 68, chapters 1–2.
103 See *supra*, note 98.
104 Campbell, *supra* note 5, 455–7.
105 Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Non-international Armed Conflict, 8 June 1977, 1125 UNTS 609, Art. 1(4).
106 Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of Internal Armed Conflict, 8 June 1977, 1125 UNTS 3, Art. 1(1).
107 C. Af Jochnick and R. Normand, 'The Legitimation of Violence', (1994) 35 *Harvard International Law Journal* 387.
108 Quoted in M. Viorst, 'The Colonel in His Labyrinth', (1999) 78 *Foreign Affairs* 60, at 68.
109 B. Roth, 'The Enduring Significance of State Sovereignty', (2004) 56 *Florida Law Review* 1017, at 1019; James, *supra* note 26, at 471.
110 W. Benjamin, 'Critique of Violence', in M. Bullock and M. Jennings (eds.), *Walter Benjamin: Selected Writings* (1996), I, 236 at 239.

the question of the terrorist whose acts of violence pose a threat to the very structure of the international legal system:

> By construing all citizens as co-agents of the state, equally responsible for the latter's actions and policies, terrorists not only blame individuals for actions for which they are only indirectly, if at all, responsible, they also obliterate any distinction between the state and its nationals on the international stage.[111]

To paraphrase Benjamin, this is why the terrorist forms the 'great criminal' of today as his 'violence confronts the law with the threat of declaring new law'.[112]

3. Ethics: otherwise than the state

3.1. The ethics of alterity[113]

Lévinas's main concern is therefore to elaborate a philosophy of the Same and the Other in which both are preserved as independent, but are in a relation with one another. This relation must be marked by a lack of intelligibility of the Other by the Same; indeed, in order to think of the Other as Other, the Same must fail to understand the Other. The preservation of alterity begins with a description of the Self as independent and self-sufficient. The Same and Other cannot be described in terms of difference or opposition because both these notions view the Other as part of a totality also inhabited by the Same: 'If the Same were to establish its identity in simple *opposition to the Other*, it would already be part of a totality encompassing the Same and the Other.'[114]

Alterity constitutes the grounds which make the separation of the Same and the Other possible, because the Other is irreconcilable with the Same. The Other is therefore conceived as existing before the Self:

> [T]he other that is announced does not possess this existing as the subject possesses it; its hold over my existing is mysterious. It is not known but unknowable, refractory to all light. But this precisely indicates that the other is in no way another myself, participating with me in a common existence.[115]

The encounter of the Self with the Other is primarily an ethical one, as it leads the Self to realize that it must share the world with the Other. The subject therefore is constituted by his relationship to the Other:

> Conscience welcomes the Other. It is the revelation of a resistance to my powers that does not counter them as a greater force, but calls in question the naive right of my powers, my glorious spontaneity as a living being. Morality begins when freedom, instead of being justified by itself, feels itself to be arbitrary and violent.[116]

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111 See S. Jodoin, 'Terrorism as a War Crime', (2007) 7 *International Criminal Law Review* 77.
112 Benjamin, *supra* note 110, 241.
113 For reasons of space and argumentative coherence, this discussion of the ethics of alterity does not include a discussion of the 'third person'.
114 Lévinas, *supra* note 8, at 27 (emphasis in original).
115 É. Lévinas, 'Time and the Other', in É. Lévinas, *The Lévinas Reader*, ed. S. Hand and trans. R. Cohen (1989), 37 at 43.
116 Lévinas, *supra* note 8, at 84.

Thus the Self must become conscious of the injustice of its existence and freedom and must seek to justify its *right to be* in relation to the Other,[117] what Lévinas terms an 'apology'.[118] Ethics is thus a calling into question of the Same by the Other:

> A calling into question of the Same – which cannot occur within the egoistic spontaneity of the Same – is brought about by the Other. We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into question of my spontaneity, as ethics. Metaphysics, transcendence, the welcoming of the Other by the Same, of the Other by Me, is concretely produced as the calling into question of the Same by the Other, that is, as the ethics that accomplishes the critical essence of knowledge.[119]

Ethics therefore derive from the original moment when the Self is challenged by the presence of the Other. This original encounter must not be marked by violence, but by 'the antecedent and non-allergic presence of the Other'.[120] Thus the Self must embrace the alterity of the Other and sacrifice the egotistical pleasure of attempting the transmutation of the Other into the Same:

> Except for the other. Our relation with him certainly consists in wanting to understand him, but this relation exceeds the confines of understanding. Not only because, besides curiosity, knowledge of the other also demands sympathy or love, ways of being that are different from impassive contemplation, but also because, in our relation to the other, the latter does not affect us by means of a concept. The other is a being and counts as such.[121]

Alterity must therefore be preserved by the existence of a 'relation without relation' between the Same and the Other.[122] It is a relation because an encounter takes place, but it is without relation because that encounter does not establish parity or understanding – the Other remains absolutely Other. This encounter takes place 'face to face', for the Other's face – 'le visage' – forms not an object of experience, but rather an encounter with infinite expression to which meaning cannot be conferred, an encounter which is not an event and an experience which does not occur in the consciousness of any subject.[123] There is an address which the Other makes to me and which I make to the Other – 'l'interpellation',[124] producing meaning from beyond my experience and resources[125] and revealing to me that what had seemed so uniquely mine is shared with the Other.[126]

Ethics is understood as the disruption of totality of interiority through the non-ontological experience of exteriority: the face makes demands on us and exceeds our comprehension. Lévinasian ethics are therefore grounded in a responsibility to the Other in its uniqueness and alterity. This responsibility is therefore infinite, since it

117 É. Lévinas, *Otherwise than Being or Beyond Essence*, trans. A. Lingis (1981), 159.
118 Lévinas, *supra* note 8, at 40.
119 Ibid., at 33.
120 Ibid., at 218.
121 Lévinas, 'Is Ontology Fundamental?', supra note 9, at 5.
122 Ibid., at 79.
123 Ibid., at 211.
124 Ibid., at 65.
125 Ibid., at 65–6.
126 Ibid., at 189.

is to be commensurate with the infinity of the Other's alterity. Lévinas's ethics are therefore not reducible to a universal code or set of principles, as this would remove alterity from the encounter with the Other.

The ethics of alterity are all the more infinite since the Other approaches the Same from a dimension of 'height'.[127] The relationship between the Same and the Other remains asymmetrical: it cannot be founded on power or reciprocity, both of which would lead to a diminution of the Other's alterity. Within the situation of this asymmetry, Lévinas situates goodness, which 'consists in taking up a position such that the Other counts more than myself'.[128]

3.2. The ethics of statehood

The ethics of statehood stand in sharp contrast to the ethics of alterity. The former is founded upon Being, the state, from which are derived two fundamental principles: respect for the sovereign (non-intervention) and respect for his will (consensualism). The ethics of statehood are unsatisfactory for two reasons, both of which are tied to its origins in the ontology of statehood. In the first instance, these ethics have violent consequences for the Other in both intellectual and physical terms. In the second instance, these ethics are abstract, formal, and universal. Having drawn their origins in the particular, they are not substantively applicable in the same way to all situations. If ethics are our first priority, then we need to reflect on the ethical basis of sovereign statehood on an ad hoc basis. In some cases there may be good reasons to respect sovereignty, and in other cases there may be reasons not to.

Arguments in favour of sovereignty generally fail to recognize the ontological origins of the ethics of statehood. Even in the context of ostensibly ethical discourses, such as that of humanitarian intervention, the starting point of the debate is still the 'sovereignty presumption': 'In the case of Kosovo, the UK Government officials adverted to the existence of a humanitarian catastrophe or emergency capable of outweighing a commitment to the sovereignty principle.'[129] The problem with the 'sovereignty presumption' is that the ethics of the situation calling for action are not directly balanced against the ethics supporting the maintenance of sovereignty in the given case, but rather are opposed to the desirability of adhering to a principle, the ethical basis of which is presumed to exist in the abstract and to be closed off to direct reconsideration.

It is this presumption, the presumption that the state exists as a Being, which makes statehood a primarily ontological and not ethical concept. Arguments in defence of sovereign statehood are therefore general and idealistic, such as when Roth asserts that the state 'represents the only community in the name of which the ineluctable contentious decisions needed to structure social life can be effectively made and enforced' and that 'that sovereignty, as the consummation of the self-determination of peoples, [is] the *first* human right in the sense of providing a

127 Lévinas, *supra* note 8, at 297.
128 Ibid., at 247.
129 Simpson, *supra* note 1, at 7.

foundation for . . . other human rights'.[130] When one seeks to view the world from a primarily ethical point of view, one cannot stop at the general but must instead attend to the particular, for each Other is totally Other. The ontological nature of Roth's position is most evident in the following passage:

> A duty not to intervene in a foreign political community's internal conflict, so far as that duty extends, is a duty to respect patterns of coercion, and even violence, within a collectivity of which one is not a member. It is not akin to a duty to allow individuals peacefully to pursue their own good in their own way. Nor is it a matter of minding one's own business, the human costs of such conflicts are manifestly the business of all humanity. Rather, the duty of outsiders is to appreciate, in their assessment of the propriety of imposing their own will, the unshared collective stake that members of a given political community have in the outcomes of decisions about the fundamental direction of social life in the territory. Outsiders do not have standing to be partisans in another community's conflict . . .[131]

What is interesting about the above argument is not its conclusions, but rather how it operates on the basis that the state forms a collectivity through which the Other is to be understood. Instead of an infinite responsibility to the Other, there is instead a duty not to intervene in the internal revolution or civil war of the Same, with faint echoes of both the American Revolution and the Civil War in the background. Arguments in defence of statehood invariably ignore the way in which the state itself constituted and continues to constitute a form of imposition. This is most obvious in Koskenniemi's defence of the state: 'Statehood survives and should continue to survive for the foreseeable future because its formal-bureaucratic rationality provides a safeguard against the totalitarianism inherent in a commitment to substantive values, which forces those values on people not sharing them.'[132] The state exists here as a natural occurrence devoid of substance and oblivious to its own totalitarianism. In a primarily ethical frame of mind, one must contend with both forms of totalitarianism, that of the state and that of value-laden discourses, without being able to hide behind a thin veneer of formal rationalism.

3.3. Pursuing the ethics of alterity in international law

In place of the ethics of statehood, I propose that international law pursue the ethics of alterity. Our first philosophy as international lawyers should not be the attempt to understand the world by reference to the state, but should instead be the challenge of acquitting ourselves of our infinite responsibility to the Other. In this context, the state is not removed from consideration, but rather is to be considered from an essentially ethical point of view.

I shall illustrate just how the ethics of alterity might operate concretely in the context of 'humanitarian intervention'. To begin with, there is the address of the Same by the Other, whereby we bear witness to distress, pain, and suffering which lie beyond our comprehension. While we cannot understand the Other and we cannot understand his pain, we do, however, seek to empathize with him. As well, there is

130 Roth, *supra* note 109, at 1042 (emphasis in original).
131 Ibid., at 1043.
132 M. Koskenniemi, 'The Future of Statehood', (1991) 32 *Harvard International Law Journal* 397, at 407.

the feeling that we are infinitely responsible to and for the Other. This responsibility compels us to *serve* the Other. That we are beholden to the Other in this way signifies three things. First of all, we must be certain that our actions are justified in response to his frame of reference, not ours. Second of all, we cannot deny him assistance simply because we have construed him as falling under the sovereign jurisdiction of another state. But we cannot impose ourselves on him either – it is quite possible that the Other's state has an ethical basis which we must respect. We cannot suppose that sovereignty is not the sovereignty of the Other as well. Third of all, if we choose to assist him, our actions must be undertaken with an authentic concern for his well-being, in particular civilian casualties. We must therefore reconceptualize the discourse of 'humanitarian intervention' as an *attempt* at performing a service for the Other in full respect of his alterity. There can only ever be attempts, for our responsibility to the Other is infinite. The point, then, is to try in an authentic way to act in service of alterity as well as to acknowledge the reality that we are unable to do so in an absolute or perfect manner. The qualities which we must develop are empathy for the Other, modesty about our ability to understand him and a constant awareness of the injustice of our actions.

The broader question, then, is whether we can pursue such ethics within the international legal system.[133] Certainly, the ethics of alterity cannot be generalized within the whole of the system, for there is always an Other whose call we must respond to. The ethics of alterity are essentially particular in scope and application. This does not mean that any elements of progress within the formal system need not be pursued. They need only be understood as part of a necessarily incomplete process of reaching for justice. The recognition that our ethical projects are always imperfect and incomplete should free us from having to reach for a horizon of justice, for we know that any such horizon is always out of reach. There is never a moment when we can say that we have achieved justice and, as such, we need not reject projects which we conceive as moving forward in a direction we seek only because they are not moving fast enough. In everything that we do, we must always be aware of the violence which we perpetrate upon the Other. The ethics of alterity are very much part of our quest for a 'justice-to-come'.[134]

This means that we cannot reject out of hand reform projects which operate within the formal institutions and structures of the international legal system. We must work towards the elaboration of a decentred legal principle of sovereignty open to constant reconsideration.[135] We must conceive of international legal personality as plural, involving many different persons with separate and distinct forms of existence. We must improve the level and the modalities of participation of different entities in the various mechanisms and processes of international law.[136] We must

133 I address these issues at greater length in S. Jodoin, 'Critical International Theory – A Critique' (in progress).
134 See Derrida, *supra* note 55. See also S. Critchley, *The Ethics of Deconstruction* (2002).
135 C. Taylor, 'A Modest Proposal: Statehood and Sovereignty in a Global Age', (1997) 18 *University of Pennsylvania Journal of International Economic Law* 745, at 753; F. Snyder, 'Sharing Sovereignty', (2004) 54 *American University Law Review* 365.
136 See, e.g., I. Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights', (1991) 31 *Vanderbilt Journal of International Law* 211; D. Rubinton, 'Towards a Recognition of the Rights of Non-states

work towards establishing legal doctrines which can effectively remove individuals and peoples from the sub-national boxes in which they have been placed, most notably in the context of humanitarian intervention. We must expand the field of application of protections afforded to individuals, irrespective of their status or the status of their abusers.[137] These are worthwhile projects as long as they are accompanied by a healthy dose of scepticism about the level of justice they ultimately provide to the Other. It is also important that these projects be pursued with an authentic commitment to ethics, so that, for instance, the pursuit of new openings for civil society in international law be undertaken in a way which strives for the representation of diversity and alterity.[138]

Our ability to pursue an ethics of alterity within a formal, positivistic system of international law is, however, limited. What is important to recognize is that this system is not the whole of international law – it is only one aspect of it or, more appropriately, one conception of it. This is where my project connects with that of legal pluralism. Both law and international law remain haunted by the state as a dominant category of thought and both suffer from the prevalence of the ideology of legal centralism – the idea that 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.[139] International law has always been a manifestation of a form of law different from the law of the state. However, orthodox international law in founding itself on the ontology of statehood devalues itself as a form of law, one less complete, less law-like than the law of the state. There is a need to work towards reconceptualizing the discipline of international law itself, a need to redefine both the modes and sites of what counts as law within the system: bringing new voices and discourses into the formal, as well as imagining new ways and places in which we can be international lawyers. Indeed, to think in terms that are otherwise than the state is to acknowledge the multiplicity of orders, actors, and sources both within and beyond conventional international law.

Within the informal structures of international law, we must pursue strategies and projects of counter-violence. Such counter-violence does not involve physical violence, but interpretive and epistemic counter-violence. For Tuitt, such violence is '*law-preserving* violence, in the sense that it "corrects" and "represses" the excessive violence of the law that is evident in the founding of the situation that is violence in its natural state and that threatens to sever the relation between law and justice'.[140]

One set of strategies must focus on the Other. We must pursue projects which celebrate dissimilarity, decentredness, difference. This can involve consideration of

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in International Environmental Law', (1992) 9 *Pace Environmental Law Review* 475; J. Mertus, 'Considering Non-State Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application', (2000) 32 *New York University Journal of International Law and Policy* 537.

137 See, e.g., J. Moore, 'From Nation State to Failed State: International Protection from Human Rights Abuses by Non-state Actors', (1999) 31 *Columbia Human Rights Law Review* 81; I. Gunning, 'Expanding the International Definition of Refugee: A Multicultural View', (1989–90) 13 *Fordham International Law Journal* 35.

138 See J. Mertus, 'Doing Democracy "Differently": The Transformative Potential of Human Rights NGOs in Transnational Civil Society', (1998–9) *Third World Legal Studies* 205; H. Charlesworth and C. Chinkin, *The Boundaries of International law: A Feminist Analysis* (2000), 88–95.

139 J. Griffiths, 'What is Legal Pluralism?', (1986) 24 *Journal of Legal Pluralism* 1, at 3.

140 Tuitt, *supra* note 99, at 97.

international law through social movements,[141] gender,[142] cultural politics,[143] and so on. And we must also be careful not to reify the box of the Other and to celebrate diversity in NGOs, IGOs, individuals, peoples, and so on. Another way in which this may take place is through an uncoupling of sovereignty from statehood and the location of sovereignty elsewhere, nowhere, or everywhere. Most of all, we must pursue projects which make international law aware of the violence which it does to the Other: 'The most immediate and effective restraint on law is for law to recognize and reflect upon its own violence – to be presented with the horror of its own force – for law's instinct for self-preservation would balk at removing itself entirely from the claims of justice.'[144] Indeed, such counter-strategies 'give the law pause and, in that hesitation, in the minute space between the law's violence and the violence of the other – a space in which the law sees the terror of its own force – lies the space for justice'.[145]

Another set of strategies must be aimed more directly at the ontology of statehood. Although critiques of its state-centric character are commonplace, international law continues to take the natural primacy of the state as a dominant form of political organization for granted. We must oppose the idea that states exist as natural beings, for, as Campbell explains,

> [T]he greatest acts of violence in history have been made possible by the apparent natural-ness of their practices, by the appearance that those carrying them out are doing no more than following commands necessitated by the order of things, and how that order has often been understood in terms of the survival of a (supposedly pre-given) state, a people, or a culture.[146]

Therefore we must continue to engage in the task of decentring the Self of the state by putting in doubt its sovereignty and majesty in relation to sub-national actors and movements, other states, and transnational regimes, forces, and actors, and especially in relation to the law. We must explain the way in which state is socially, culturally, and legally inscribed – that is, it is bound by or in interaction with its environment and incapable of escaping this form of inscription or interaction. Most notably, we must reveal to the state the way in which it is in fact constituted by the Other, transcended by the Other, and incapable of understanding the Other. In sum, we seek to destabilize the idea that the state forms a Self.[147]

There is an implicit move here from the modern to the post-modern. Indeed, if modernity bore witness to the rise of both the Self and the state, the post-modern condition is characterized by their decline. Or, perhaps, this project need not be configured as a move to the post-modern, but as a return to the baroque: with non-exclusive, overlapping, non-territorial, dissimilar, heteronomous logics of

141 B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003).
142 See, e.g., Charlesworth and Chinkin, *supra* note 138.
143 D. Otto, 'Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference', (1996) 5 *Social and Legal Studies* 337.
144 Tuitt, *supra* note 99, at 101.
145 Ibid., at 114.
146 Campbell, *supra* note 5, at 469–70.
147 See, e.g., J. Elshtain, 'Sovereign God, Sovereign State, Sovereign Self', (1991) 66 *Notre Dame Law Review* 1355; T. Biersteker and C. Weber (eds.), *State Sovereignty as Social Construct* (1996).

organization whereby individuals were subject to multiple sovereignties and authorities.[148]

Such deconstructive strategies may be pursued in academia, politics, public policy, culture, and indeed the law itself. In the latter case, we may through a decentring of the state and a celebration of alterity engage in normative world-building.[149] By looking at international law beyond the state, we give new meaning to the law and thereby enact new forms of international law. Of course, non-state actors are not always benign forces – they may be uncivil and criminal[150] – and the international is not a space of infinite justice. In the pursuit of the ethics of alterity, we must furthermore remain open to the possibility that the state itself may also form the Other and guard against the danger of founding international law on simply a different ontology, even one which moves away from the state. Rather, new forms of law and organization must be developed in response to our ethics and remain subject to infinite reconsideration and deconstruction. Indeed, deconstruction is the primary mode through which we may pursue the ethics of alterity.[151]

4. Conclusion

Beholden to the ontology of statehood, international law remains a law for states, made by them and made for them. It remains so through its focus on the interiority of the state at the expense of the exteriority of the Other. The pursuit of the ethics of alterity in international law requires an inversion of international law's priorities in this regard. There must first be a move from the interiority of the state to the exteriority of the law. The force of international law must be conceived as anterior to, as opposed to subsumed by, the force of the state. There must also be a move towards the exteriority of the Other with the emergence of new ways of existing and viewing the world, although these new ontologies and epistemologies must remain informed by our ethical responsibilities and thus critically open to their inherent violence and arbitrariness. These two projects are complementary, for as long as international law is perceived as a legal system which governs the relations between states, then the latter is likely to remain at its centre. Likewise, as long as states serve as the models for and arbiters of international personality as well as the gatekeepers of international community and normativity, international law will be statist in orientation. Our understanding of international legal subjecthood must be reconceived on primarily ethical grounds in terms of our responsibility to the Other and deployed as the calling into question of the state through an encounter with the *legal* Other and the *human* Other:

> Ethical subjectivity dispenses with the idealizing subjectivity of ontology, which reduces everything to itself. The ethical 'I' is subjectivity precisely insofar as it kneels before the other, sacrificing its own liberty to the more primordial call of the other.

148 Spruyt, *supra* note 63, at 55; Ruggie, *supra* note 22, at 150–1.
149 See Cover, *supra* note 100.
150 O. Schachter, 'The Decline of the Nation-State and Its Implications for International Law', (1997) 36 *Columbia Journal of Transnational Law* 7, 14–15.
151 See Critchley, *supra* note 134.

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> The heteronomy of our response to the human other, or to God as the absolute other, precedes the autonomy of our subjective freedom. As soon as I acknowledge that it is 'I' who am responsible, I accept that my freedom is anteceded by an obligation to the other. Ethics redefines subjectivity as this heteronomous responsibility, in contrast to autonomous freedom.[152]

An ethical approach to subjecthood requires openness towards diversity of being and towards ever greater participation and inclusiveness, awareness of its own inherent exclusionary character, and a characterization of the legal subject as responsible *before the Law* and *before the Other*.

There are a number of tensions at play in this project: ontology–ethics, statehood–alterity, and law–politics. This last tension is likely to be invoked by international lawyers, as one constant of the discipline has been an affirmation of international law as law and not as ethics. However, the anxieties about the importance and distinctiveness of the discipline simply bring us back to ontology, while my perspective is informed by an ethical concern for legal pluralism. International lawyers should therefore also support the move to ethics for the same reason that they might strongly oppose it: they themselves have been victims of the ontological imperialism of those who deny the status of law to international law.[153] A related objection would advance the idea that this project is relativistic and political whereas international law is seen as an escape from politics into justice and objectivity. This demonstrates obliviousness to the violence which international law perpetrates on the Other as well as calls for an abdication of our responsibility to the Other in his singular alterity. There is finally an undercurrent of fear of the political, 'of the necessities of politics per se, necessities that can be contested and negotiated, but not escaped or transcended'.[154]

Moreover, moving away from the state or from ontology might also appear to the international lawyer to be naive, imprudent, or foolish. How can we have intelligent discussions about what to do and what should be without first establishing what exists in the world? But the point is not so much that ontology or statehood are irrelevant to ethical reflection, but rather that they must be apprehended from a primarily ethical perspective. States most assuredly matter at a number of levels, but they are not all that matters. As international lawyers, we must contend with the existing ontology and epistemology of statehood, but they need not be the primary schemes through which we view the world. This article has sought to establish the ethics of alterity as the pre-eminent concern of our discipline, but never in the belief that it might be possible to do away completely with the state as a category of thought, or ontology as a mode of thought. Lévinas's writing itself rests on a constant tension between the Same and the Other wherein he seeks to preserve both. Indeed, Lévinas argues that 'the interhuman is thus an interface: a double axis where what

152 Lévinas and Kearney, *supra* note 11, at 27.

153 The defensiveness of international lawyers may also stem from their own anxieties about the primacy of international law – although these anxieties would presumably flow from pre-existing narratives on the nature of law and the nature of international relations.

154 Campbell, *supra* note 5, at 478.

is "of the world" qua *phenomenological intelligibility* is juxtaposed with what is "not of the world" qua *ethical responsibility*'.[155]

This back and forth is both necessary and futile. It is necessary because the pursuit of the ethics of alterity in international law requires a constant negotiation of the tension which exists between statehood and alterity.[156] It is futile because the commitment which some have to statehood and others have to alterity are emotional, ideological, ontological, and epistemological all at once. These are two worlds with different paradigmatic points of reference whose ultimate origins lie in a certain sensibility about the world. This is why the question of alterity in international law is more than just a problem of 'source and method',[157] but in fact arises out of deeper ideas and feelings which we hold about the relationship between the 'is' and the 'ought'.

Lévinas acknowledged that establishing ethics as first philosophy was a bold move in the light of the obvious pre-eminence of ontology, but he also believed that 'approaching philosophy through this critique has at least the virtue of returning to its source, beyond the problems and pathos of literature'.[158] The same may be said of the approach adopted in this article, that by returning to the source – the ontology of statehood – we may move beyond the ontological difficulties which international law has invariably faced throughout its existence as well as better understand the violence which it has perpetrated on the Other. If Lévinas's philosophy is haunted by the memory of Auschwitz,[159] then international law today appears haunted by the memory of colonialism. But in our haste to apologize for Berlin,[160] we should not forget about the violence of the original exclusion of Westphalia. And perhaps, at a deeper level still, the origins of the tragedy of international law are not German, or American (the new sovereigntists), but irrevocably Greek.

155 Lévinas and Kearney, *supra* note 11, at 20 (emphasis in original).
156 Koskenniemi, *supra* note 48, 224–302 (on the tension between different conceptions of sovereignty).
157 Symposium, 'Passing Through the Door: Social Movement Literature and Legal Scholarship', (2001) 150 *University of Pennsylvania Law Review* 1, at 54–5.
158 Lévinas, *supra* note 8, at 1.
159 Critchley, *supra* note 134, at 221.
160 General Act of the Conference of Berlin, 26 February 1885, in A. Keith, *The Belgian Congo and the Berlin Act* (1919), 302–4.