About the dialectical historiography of international law

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Institute for Advanced Studies in the Humanities, University of Queensland, Brisbane, Australia

ABSTRACT

Currently there is a widely held view that international law and its historiography did not emerge until the nineteenth century, with earlier forms of *jus gentium* or *Völkerrecht* being consigned to the status of a superseded 'pre-history'. It is not widely understood that this view itself belongs to a particular kind of historiography – the dialectical historiography of international law – that was born in 1840s Germany, and wielded this viewpoint as a cultural-political weapon to exclude its rivals from 'modernity'. In outlining a history of this dialectical historiography, the present article focuses on the reception of Kantian and Hegelian philosophies, understood as species of Protestant rationalist metaphysics, in the juridical-political arena of the German *Vormärz*. Dialectical histories and theories of international law were the effects and instruments of this reception, which gave rise to the new academic subculture of philosophical international law. This subculture in turn permitted the fashioning of a new intellectual persona, the philosopher-jurist, who could claim to transcend positive treaty-based international law through personal insight into a 'common international legal consciousness', and to treat this insight as the threshold of 'modern' international law.

1. Introduction

In their introduction to the first named handbook on the historiography of international law – *The Oxford Handbook of the History of International Law* – the editors make this confident assertion:

> In a modern sense, the history of international law has been academically treated since the first half of the 19th century. However, much of that history writing was either based on an assumption of linear progress which strikes most contemporary observers as almost naïve, or it was essentialist, assuming that international law was eternal and immutable … The concept of a critical historiography, which relies on sources (in particular written documents) and on a critical analysis of those sources, which dismisses the idea of a grand narrative of progress, and which recognizes as inescapable the particular perspective of an individual historian, was accepted in the historiography of international law only belatedly.[1]

While it is by no means unchallenged, this claim that 'critical' histories of international law were first written in the later nineteenth century is currently widespread. So too is the mutually supportive claim that the discipline of international law itself did not emerge

until this time. We find this double viewpoint embedded in the topics of conferences and anthologies,[2] presumed in the frameworks of prestigious research programmes,[3] and advanced in the works of leading scholars in the field. Ingo Hueck, a leading member of the Max Planck Institute for European Legal History, thus identifies the historiography of international law with the twentieth-century emergence of a named academic subject – the 'history of international law' – thereby consigning early modern international law and its historiography to the historical dustbin. Without citing any evidence, he claims that early modern international law was divided between natural law and *jus gentium*, and that since the former was 'philosophy' and the latter a 'positivist' legal science, neither could produce an independent discipline or historiography of international law.[4] But the Finnish philosophical historian of international law, Martti Koskenniemi, has been the most influential exponent of this viewpoint. Koskenniemi has thus argued that it was not until the 1870s that 'modern' international law emerged from its so-called 'pre-history' when it had been a mere diplomatic instrument of territorial states.[5] And he has further argued that like international law itself, its early modern historiographies could not overcome the division between idealizing cosmopolitan teleologies and 'positivist' diplomatic histories serving state interests. This meant that a historiography of international law could not emerge until the twentieth century, where it would still remain divided between 'utopian' and 'realist' philosophies.[6]

It is all the more remarkable then that this viewpoint is presently quite unsubstantiated and will in all likelihood prove to be incapable of historical justification. There are two crucial bodies of evidence to be considered. First, far from being a historiographical wasteland, eighteenth-century German scholar-jurists produced highly sophisticated histories of international law – *Völkerrecht*, *jus gentium*, law of nations. As the tip of a bibliographic iceberg, let us simply cite the three-volume *Historische Entwickelung der heutigen Staatsverfassung des Teutschen Reichs*, by Johann Stephan Pütter (1725–1807), with its extensive discussions of the Treaties of Augsburg and Westphalia, the role of guarantor states, and the impact of religious conflicts and great-power rivalries on the imperial constitution.[7] Alongside Pütter brief note can be taken of the voluminous historical international law works of Johann Jacob Moser (1701–1785), including a 2-volume introduction,[8] several important specialized studies,[9] and a massive 12-volume overview – covering everything from the European state system, sovereignty and embassy, religious and military affairs, police and cameralism, treaties and leagues, complaints, negotiations, and war, and neutrality, truces, and peace.[10] It is thus flies in the face of the evidence to claim that histories of international law first appeared during the nineteenth century – or not until the mid-twentieth century! And it traduces the work of Pütter and Moser to imply that their histories were linear, 'essentialist', and not based on documents. In fact they viewed treaty regimes as wholly historical phenomena, subject to unforeseeable changes of historical fortune and direction, and accessible only through the relevant treaty documents, enactments, and juridical decisions which they painstakingly interrogated.[11] The fact that Moser does not appear even in the index of the *Oxford Handbook* makes it worth asking exactly whose history is not based on documentary evidence.

There is also a second and no less important body of evidence destructive of claims that the history and historiography of international law date from the second half of the nineteenth century (or later), but this evidence relates to a very different kind of theoretical and historiographical literature. After some tentative publications in the first decades of the

nineteenth century, this new literature first achieved prominence in 1840s Protestant Germany. From a flurry of publications we can pluck as examples: Johannes Fallati, 'Die Genesis der Völkergesellschaft. Ein Beitrag zur Revision der Völkerrechtswissenschaft' (1844), Hugo Philipp Egmont Hälschner, 'Zur wissenschaftlichen Begründung des Völkerrechts' (1844), and Carl Kaltenborn von Stachau, *Kritik des Völkerrechts* (1847).[12] As these titles suggest, this literature arose from a specific juristic reception of Kantian and (especially) Hegelian philosophy, and it represented a militant 'scientific' contestation of the historical approach to *Völkerrecht* taken by Moser and Pütter and their nineteenth-century heirs Georg von Martens and Johann Ludwig Klüber. For the moment let us say that if Moser and Pütter approached *Völkerrecht* in terms of the treaty regimes entered into by empires and states under the pressure of historical circumstance, then the 1840s writers viewed *Völkerrecht* in a manner that was both different and new: namely, as a domain in which the human mind sought to become conscious of itself through an exemplary struggle with its material (historical, political, social) 'conditions'. Nonetheless, this did not mean that the 1840s *Völkerrechtler* were guilty of essentialism or the linear historicization and eternalization of international law complained of by the editors of the *Oxford Handbook*. To the contrary, they insisted that *Völkerrecht* was driven by a series of radical internal divisions – between philosophy and positive law, its subjective and objective forms, its ideal cosmopolitan aspirations and its real grounding in state interest – and that its history took the form of a relentless movement between these poles towards an 'international legal consciousness'. In short, the 1840s writers were the first exponents of the dialectical historiography of international law. They were also the first theorists to look back on the eighteenth century and declare that international law and its history did not exist there, because the likes of Moser and Pütter had been stranded between 'philosophy' and 'positive law'.

But now something remarkable begins to dawn in our understanding of the dialectical oppositions through which the 1840s *Völkerrechtler* excluded the eighteenth-century scholar-jurists from the history of international law. For it starts to appear that these oppositions are in fact the prototypes of those through which twentieth- and twenty-first-century theorists have sought to exclude both groups – the eighteenth-century historical jurists and the 1840s philosophical jurists – by claiming that prior to the late-nineteenth-century international law had been stranded between 'philosophy' and 'positive law',[13] natural law and diplomacy,[14] or a rationalist moral cosmopolitanism and an instrumentalist or 'realist' statism.[15] If this turns out to be true, then it will be necessary to radically revise our understanding of recent claims that the history and historiography of international law only began in the late nineteenth century. These are much more than claims about the emergence of a profession or an academic discipline. After all, the claim that the historiography of international law did not exist in early modernity because there was no university discipline with that name is the kind of thing that gives anachronism a bad name. In fact the periodization claim is only an instrument of a far more powerful figure of thought, namely, the figure that divides all 'pre-modern' *jus gentium* or *Völkerrecht* into opposed 'diplomatic' and 'philosophical', factual and normative, realist and idealist kinds; for it is this dialectical figure that leads modern scholars to claim that international legal thought could not emerge until material conditions permitted it to become conscious of itself, and legal consciousness permitted the ideal transformation of these conditions.

But this figure of thought first arose from the juristic reception of Kantian and Hegelian philosophy in 1840s Protestant Germany. Here it was used in a cultural-political coup that sought to displace the eighteenth-century scholar-jurists' practice of historiography – using treaties to document and investigate authoritative treaty regimes and constitutional orders – with a quite different one: that of interpreting treaty regimes as symptoms of the struggle of an international legal mind to become conscious of its historical determinations. If this is the case, then far from representing a 'new departure' or 'new trends and methods', the arguments about the 'modern' birth of international law associated with the *Oxford Handbook*, the Max Planck project, and the works of writers like Hueck and Koskenniemi will assume a quite different complexion. They will in fact amount to a replay of the 1840s dialectical historiography of international law, once again deploying a philosophical hermeneutics as a cultural politics against the treaty-based historiography of international law.

2. A modern dialectician

The contemporary dialectical historiography of international law finds its most elegant and influential exposition in the works of the Finnish philosophical historian, Martti Koskenniemi. In his early work on the 'structure of argument' of international law, Koskenniemi characterizes this structure in terms of a particular dialectical opposition. This is between a view of international law as an 'apology' for the political interests of territorial states and a view of it as projecting a 'utopian' supra-state cosmopolitan legal order, with this opposition in turn being structured by the philosophical opposition between facts and norms: 'In a sense, the whole of international legal "talk" is an extended effort to solve certain problems created by a particular way of understanding the relationship between description and prescription, facts and norms in international life'.[16] Borrowing a model from 1960s linguistic structuralism, Koskenniemi argues that these oppositions constitute a *langue* or 'code' for discourses on international law, and, crucially, that achieving a 'critical understanding' involves reaching a dialectical mediation between them: 'The line drawn in the midst of the universe of normative statements which has separated "subjective" politics from "objective" law will appear without foundation'. The way forward thus lies through mediation of the oppositions: 'By thus "politicizing" law (but equally "legalizing" politics) an analysis of its structure might point a way towards an alternative way of understanding the relationship between law and its neighbouring discourses, social description and political prescription'.[17] This then leads to Koskenniemi's fundamental dialectical construction:

> A law which would lack distance from State behaviour, will or interest would amount to a non-normative apology, a mere sociological description. A law which would base itself on principles which are unrelated to State behaviour, will or interest would seem utopian, incapable of demonstrating its content in any reliable way. To show that an international law exists, with some degree of reality, the modern lawyer needs to show that the law is simultaneously normative and concrete – that it binds a State regardless of that State's behaviour, will or interest but that its content can nevertheless be verified be reference to actual State behaviour, will or interest.[18]

By identifying the existence of natural law with the philosophical imperative that it mediate between the normative governance of state conduct and the facts of state

behaviour, Koskenniemi can declare that an international law not obeying this imperative cannot be regarded as existing. The historical reality of formidable doctrines and histor-iographies of international law during the seventeenth and eighteenth centuries can thus be retrospectively erased, through the extraordinary insistence that international law can only pass into historical existence through the portals of dialectical philosophy.

Without altering its basic operation, in subsequent writings Koskenniemi has launched a cascade of variants of this philosophical dialectic, declaring that the history of inter-national law has been structured by the oppositions between its positivist and naturalist forms,[19] its 'managerialist' and 'formalist' 'mindsets',[20] its realist and idealist commit-ments,[21] and its filiations to the opposed disciplines of sociology and philosophy.[22] In the classical philosophical-historical manner, Koskennieimi then uses this dialectical architecture to narrativize the history of international law as a series of stages, each repre-senting a particular level of mediation of the oppositions. This stadial historiography in turn provides the basis for Koskenniemi's striking 'before and after' periodization, accord-ing to which the history of international law does not begin until the work of the 1870s liberal internationalist jurists, while the early modern law of nations is consigned to the shadow existence of a 'prehistory'.[23]

Once he has identified the historical existence of international law with its mediation of the philosophical oppositions between facts and norms, statist sociology and cosmopoli-tan philosophy, then it is easy for Koskenniemi to declare that, in 'failing' to mediate these oppositions, the early modern the law of nations had not been admitted to this 'history'. According to Koskenniemi, the law of nations advanced by such early moderns as Grotius, Pufendorf, and Vattel had lost sight of the formal and universal norms of legal right, thereby assuming a non-normative 'instrumentalist' and 'managerial' relation to state interests and relations.[24] In particular, the early moderns viewed sovereignty as internal to territorial states, which meant that treaties between them were regarded as subservient to state interest, and consequently that international law as the 'universal nor-mative order' of an international moral community did not yet exist.[25] For this view to be plausible, however, one must ignore the fact that the early moderns seem to have been fully aware of various (scholastic) forms of *jus gentium* that laid claim to a 'universal nor-mative order', since writers like Gentili, Grotius, Pufendorf, and Vattel in fact devoted considerable intellectual energy to discussing and rebutting this claim.[26]

It comes as no surprise that such eighteenth-century *Völkerrechtler* as Moser and Pütter, and their nineteenth-century inheritors – Georg Friedrich von Martens and Johann Ludwig Klüber – suffer the same fate as their early modern predecessors in Kos-kenniemi's dialectical history. Despite the fact that these writers produced an extraordi-nary body of technical, engaged, and historiographical work in public international law, Koskenniemi seeks to exclude them too from the history of international law, implying that they also should have been attempting to reconcile facts and norms, diplomacy and cosmopolitan justice, and so on. He thus argues that, like the seventeenth-century writers, Moser and Martens had lost touch with the norms of international right and com-munity. Apparently this means that their positive *Völkerrecht* can be regarded as 'realist' and 'positivist', with Koskenniemi failing to observe that he is using a term, *Positivismus*, invented by Hegelians in the 1830s as a means of attacking scholar-jurists like Moser for failing to follow Hegel's dialectical script.[27] According to Koskenniemi, their so-called 'failure' to mediate between diplomatic facts and formal juridical norms meant that

Moser and Martens could only produce empirical treaty compilations and commentaries, suited to the 'instrumental' training of diplomats and statesmen, but incapable of normative critique and hence of historical existence as international law.[28] Again, Koskenniemi's view makes perfect sense if one adopts the entirely unwarranted assumption that Pütter, Moser and Martens were (or should have been) interested in establishing the philosophical norms of an international moral community, as opposed to interpreting and executing the historical norms agreed to by the parties to various peace treaties as a means of regulating unremitting confessional and political conflicts.[29] Such a view can be adopted only if one has decided that the historical existence of seventeenth- and eighteenth-century *jus gentium* or *Völkerrecht* was dependent on its obedience to a philosophical imperative that was not invented until the 1840s.

Given this, it might seem odd that Koskenniemi should pass over the 1840s dialectical jurists and identify the historical emergence of international law with the work of the 'liberal internationalist' jurists of the 1870s. Yet this is less surprising than it seems. As with the alleged 'failure' of the early moderns to mediate the oppositions between statist facts and universal norms, realism and idealism, sociology and philosophy, so too the claim that this mediation began with the 1870s liberal internationalists is not a falsifiable historical hypothesis. Rather, it is a hermeneutic template designed to imbue history with a certain kind of philosophical or spiritual meaning, as will be discussed in more detail below. Dialectical philosophy of this kind is a means of interpreting historical institutions in terms of the asymptotic struggle of the human mind to bring its material conditions under the sway of moral consciousness. In the case of international law this means to bring its statist facticity under the sway of a cosmopolitan moral consciousness, which is never fully achieved owing to the dialectical reassertion of the historical conditions of this consciousness.

Koskenniemi thus argues that, on the one hand, the international law thought of the post-1870s German liberal internationalists had philosophical grounds. These lay either in a Kantian conception of cosmopolitan right formed from the agreement of a global community of rational beings, or in a Hegelian conception of the dialectical mediation of national sovereignty and world community.[30] On the other hand, though, liberal internationalism also had sociological grounds, which lay in international institutional networks of liberal and socialist jurists, and in the emerging institutions of international governance that would issue in the League of Nations. Situated at the point where sociological institutions of international governance became aware of themselves in philosophies of cosmopolitan moral self-consciousness, the liberal internationalists could supposedly transcend the statism of the early modern public lawyers and the 'positivism' of the eighteenth-century *Reichspublizisten*, conceiving themselves as articulating the 'rational will' of an emerging international community.[31]

In keeping with the dialectical hermeneutic template, however, this achievement of historical self-consciousness in international law thought can only be partial and temporary. Koskenniemi thus narrates that while the movement of liberal internationalism had charted a normative philosophical path beyond 'managerialist' statism and *jus gentium* 'positivism', articulating a genuinely international juridical order, the counter-movement of the dialectic meant that this order would be undermined by the nationalist allegiances of the liberal jurists themselves. Fracturing under the pressure of war between their homelands, it appears that the liberal internationalists faltered at just the moment when

cosmopolitan right could have been realized in an historical juridical order.[32] A philosophical-juridical outlook in which a cosmopolitan legal consciousness is won through the moralization of its statist material conditions, is thus also an outlook in which this consciousness can be lost through the dialectical reassertion of those conditions; although it will be shown below that this outlook was not invented until the 1840s.

Finally it can be observed that this hermeneutic regimen allows Koskenniemi to view the present condition of international law as an outcome of the liberal internationalists' failed mediation of the dialectic. And this permits him to situate his own work as the point where the struggle to again win international legal consciousness from its material conditions can be resumed. Koskenniemi thus presents the present condition of international law as an unresolved dialectical oscillation. On the one hand, international law has fractured into a fragmented jurisdictional array under the technical management of statist experts. On the other hand, there is a utopian attempt to impose supra-state legal norms by those seeking to 'constitutionalize' the state-based treaty regime, or else dissolve it into a pre- or para-state legal pluralism.[33] Understandably, Koskenniemi finds no ready exit from this oscillation, since it is a product of the dialectical template that he employs. In fact rather than seeking its resolution, Koskenniemi requires that the dialectical oscillation be maintained, as it is the means by which he opens a discursive and intellectual space of transcendence, typically in the last few pages of his essays. This permits him to suspend empirical history altogether and adopt a speculative or prophetic stance, prospecting the possible overcoming of the historical impasse by envisaging an array of supervening possibilities. He thus speculates that the impasse between instrumentalist legal fragmentation and utopian constitutional unification might be breached through such supervening moments as the intervention of unscripted 'experiences' or Heideggerian 'events';[34] the relegation of intellectual coherence in favour of postcolonial emancipatory action;[35] the renovated capacity of international lawyers to negotiate and unify all legal languages and jurisdictions;[36] and, as the condition of this capacity, the 'moral regeneration' of international jurists as the moral voice of humanity, accompanied by a 're-theologization of law'.[37] The dialectical hermeneutic thus seems to issue in an exalted kind of intellectual persona: that of the philosophical international jurist whose mediation of cosmopolitan legal consciousness and its statist material conditions permits this figure a flickering prophetic glimpse of the future spiritualized form of international law.

3. The birth of dialectical international law

In the course of his own discussion of the historiography of international law, Koskenniemi consigns an array of early nineteenth-century jurists to a superseded past: 'But Wheaton and Kaltenborn, Martens, Klüber, and Heffter were lawyers of an old world. After 1848, liberal activists sought increasingly to use the law to influence the course of European modernity'.[38] On the face of it this is an anomalous list, since while Martens and Klüber continued to develop positive public international law in the manner of Pütter and Moser, Heffter and Kaltenborn belonged to the dialectical philosopher-jurists of the 1840s. Of course a world is only 'old' when seen from the perspective of someone declaring the discovery of a 'new' one, such as that which Koskenniemi claims to have prospected in the works of the 1870s liberal internationalists. From this

perspective Koskenniemi can lump together the 1840s dialecticians and the positive public international jurists, because he has rather arbitrarily identified the threshold of 'European modernity' with 1870s liberal internationalism, understood as the first form of international law to begin the mediation of facts and norms, state interest and cosmopolitan right, and so on. The crucial fact to be observed, however, is that Koskenniemi's mediational threshold was invented by the 1840s dialectical jurists themselves. They did this in order to locate the onset of modernity in the 1840s, and thereby consign such eighteenth-century scholar-jurists as Pütter and Moser to a superseded 'positivist' past.

Koskenniemi's twenty-first-century discovery of the threshold of 'modern international law' is thus a recycling of the 1840s threshold, which had been invented as a cultural-political weapon designed to undermine the doctrine and historiography of positive public international law. In locating this threshold in the 1870s Koskenniemi not only ignores its invention by the 1840s dialecticians, he also obscures the fact that their construction of international law – as riven by unreconciled oppositions yet pregnant with their still-unknown future overcoming – is actually the prototype of his own construction and of modern philosophical approaches to international law more broadly. It is thus striking to observe that the basic form of this construction seems to have first emerged, rapidly and without evident precursors, in a series of articles and books published by German philosophical jurists in the 1840s. It was at this time that international law or *Völkerrecht* was first characterized in terms of a series of fundamental oppositions: between its positivist and naturalist, or factual and normative kinds, and between its role in defending the sovereignty of states and reconciling this sovereignty with the norms of an international community. It was also at this time that the dialectical mediation of these oppositions was first advanced as the threshold separating the 'modern science' of international law from its 'pre-history' in the literature of *jus naturae et gentium*.

So there was something new about 1840s dialectical international law. This novelty, though, did not signify that for the first time in its history international law began to become conscious of its own material conditions and thence to moralize them. Rather, the novelty of dialectical international law consisted in the fact that it emerged as the instrument and effect of the historical reception of Kantian and Hegelian philosophies within a subculture of German academic law. As a symptom of this reception, the idea that international legal consciousness would emerge from the mediation of political facts and juridical norms thus was not something that the positive public international jurists 'failed' to grasp; for this idea was the product of a reception culture that the eighteenth-century positive *Völkerrechtler* did not live to see, and that their nineteenth-century heirs could see but live without. The emergence of dialectical international law and historiography in the 1840s thus was not grounded in the idea of the winning of international legal consciousness from its material conditions. Rather, it was grounded in the historical formation of a new intellectual persona – that of the dialectical philosopher-jurist – whose thinking of this idea was a subcultural exercise, and a means of attacking those who continued to cultivate the persona of the scholar-jurist of public international law. That development is the focus of the present section.

In establishing a workable corpus of texts by the 1840s dialecticians, the earlier-cited works by Fallati, Hälschner, and Kaltenborn can be augmented with the following: Hans Christoph von Gagern, *Critik des Völkerrechts. Mit practischer Anwendung auf unsre Zeit* (1840); Johann Joseph Rossbach, *Die Perioden der Rechts-Philosophie* (1842); Karl Theodor Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (1843);

August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart auf den bisherigen Grundlagen* (1844); Heinrich Bernhard Oppenheim, *System des Völkerrechts* (1845); and Heinrich Lintz, *Entwurf einer Geschichte der Rechtsphilosophie, mit besonderer Rücksicht auf Socialismus und Communismus* (1846). In order to focus on the 1840s dialecticians I will leave to one side earlier works by such Kantian philosophical jurists as Schmalz and Krug,[39] despite the fact that these are important early instances of the juridical reception of the new metaphysics, and even though this earlier Kantian reception flowed into the later Hegelian one. This narrowing of focus is justified by the fact that the identity and novelty of the 1840s writers was recognized at the time, when various configurations of the cohort were characterized as the 'modern' or 'philosophical' or 'Hegelian' school of *Völkerrecht*. Moreover, they were characterized in these related ways by the members themselves,[40] their opponents,[41] and the period's most erudite and impartial commentator on these matters, Robert von Mohl.[42]

It will become clear that these writers differed among themselves about how Hegelian they were and, indeed, ought to be, so it is important not to over unify them in this regard. And of course Hegel himself did not write on international law, limiting his dialectic to the ceiling of the 'ethical state'. Setting aside for the moment the question of how Hegelian they were, and approaching them initially as a self-conscious group of dialectical legal philosophers and historians, then it is possible to identify two broad features that set the 1840s writers apart. First, with the partial exception of von Gagern, who remained tied to the Kantian approach, all of these writers structured their histories and philosophies of *Völkerrecht* around a series of fundamental philosophical oppositions. These oppositions included those between objective and subjective legal orders, mechanical and organic state forms, empirical and abstract (thence 'speculative') legal philosophies,[43] positive and natural (or 'philosophical') law,[44] positivist and idealist legal sciences (the former advanced by 'Positivisten'),[45] practical and theoretical (or philosophical) jurists, and other permutations of these oppositions, including that between independent sovereign states and an organic international community or 'society of nations'.[46]

Heinrich Lintz exemplifies a fairly standard dialectical itinerary in his account of the 'three ways' of providing a philosophical foundation for law in general:

> The first way results in empirical legal philosophy. It assumes that there is a rational law but may not derive it from the concept of law, or via the path of reason, but treats as the source of law the nature of man, as this is given in experience, hence posits an aposteriori proof for law.

The second path takes the shape of an 'abstract' positivism that denies the rational spirit of law: 'The second way is that of abstract legal philosophy. The spirit of law, its reason, is denied. There is no rational law, but what man calls law arises from positive will'. With the dialectical opposition established, Lintz then shows how the impasse can be resolved 'in thought' by a third way:

> By virtue of a third type, the question is resolved through a speculative legal philosophy. This also assumes that there is a rational law, but will obtain it not via the path of experience but through that of thought. Thus it derives [rational law] from the concept. This way is actually the only philosophical one.

Lintz then concludes with the observation that the first two paths represent those taken respectively by English and French legal philosophy, both of which wrongly assume

that law cannot be derived from its concept, and that human nature can be investigated without reference to the 'whole of philosophy':

> For Germans, though, legal philosophy is so tightly bound to philosophy in general that someone who posits a new philosophical system as a whole, simultaneously grounds a new system of legal philosophy, because the concept cannot be discovered in isolation but results only from the totality of concepts, that is from the whole system of philosophy.[47]

Lintz thus gives authentic expression to the fact that in 1840s Germany a new philosophical-juristic subculture had emerged that sought to derive legal concepts from 'philosophy in general', although this was true only for the cohort of philosopher-jurists who had chosen to generate concepts of law from Hegelian philosophy rather than from historical constitutional and treaty sources. Some among the cohort explicitly traced the dialectical oppositions back to their ultimate metaphysical source in Hegel's account of the self-objectifying world-spirit, according to which spirit posits its negative material form in order to diversify itself and then reintegrate at a higher level of self-consciousness and becoming. Fallati and Hälschner were particularly assiduous in this regard.[48] Generally, though, there was no need for the philosophical jurists and juristic philosophers to be card-carrying Hegelians and, while adopting dialectics as a fundamental figuration of their thought, most of the 1840s cohort were also quite prepared to incorporate Kantian teachings in the new philosophical form of *Völkerrecht*. This applied in particular to Kant's notion of international legal norms arising from the universal agreement of a community of rational beings, for this promised to transcend the actual norms of international law that had arisen from historical treaty agreements between not-so-rational states. Like Lintz, most of the dialectical jurists were thus happy to tap into the metaphysical sources downstream, in the form of the oppositions between empirical and abstract legal philosophy, positive and philosophical *Völkerrecht*, and so on, so long as this permitted them to conceive of international law in terms of the winning of legal consciousness from its material historical conditions. In this regard too they anticipated Koskenniemi, in whose works the footprints of the dialectical giants are rarely seen precisely because he is walking in their seven-league boots.

The second broad feature that these writers shared, again to varying degrees, was their use of these oppositions to structure histories of *Völkerrecht* as a series of stadial reconciliations, with the appearance of dialectical mediation setting the threshold of 'modern' international law. Here, some of the writers drew directly on the big race-based histories that Hegel advanced in his *Lectures on the Philosophy of Religion* (1821–1831) and *Lectures on the Philosophy of World History* (1822–1830). This permitted them to oppose the 'subjective' 'oriental' peoples to the 'objective' peoples of classical Western antiquity, the former encasing subjective freedom in a ritual religion and the latter excluding it from the objective order of the state. On this view, neither kind of peoples could develop a true international law, for that required recognition of the free personhood of other nations, which only became possible with the advent of Christianity.[49] Others though, demonstrating the plasticity of the dialectical threshold of modernity, pushed it further forward, again identifying the 'objective' principle with the statism of the Greeks and Romans, but now shifting the 'subjective' principle to the Christian middle ages, where once again it was stifled by a ritualistic hierarchical religion.[50] In this Protestant adumbration it was Grotius and his followers who first approached the threshold of modernity

which, however, they could not cross. This is because they were not able to negotiate a fundamental opposition: that between an abstract natural law that grounded the state in an unmediated idea of human nature, and an empirically based positive international law that consisted of theoretically unintegrated fragments.[51] Here we encounter a draft form of Koskenniemi's characterization of an international law stranded between abstract formalism and instrumental fragmentation.[52]

Once this oppositional architecture had been erected, all preceding *Völkerrechtler* could be depicted as stranded between the subjective freedom of consciousness and the objective necessity of the state, or between philosophical and positive international law. This then allowed the threshold of 'modernity' to be established in terms of the emergence of an international law thought capable of realizing free consciousness and morality within the objective order of the state, or an international community of states. Having invented this dialectical-philosophical threshold, the 1840s philosopher-jurists could claim to be the first international lawyers to cross it, passing from a 'pre-history' into history and modernity, as the first jurists to show how positive international law could be grounded in the norms of a national or universal legal consciousness.[53] In fixing the onset of modern international law in this manner, the philosophical jurists of the 1840s instituted a new periodization and a new way of writing the history of *Völkerrecht*. Self-serving though this periodization clearly was, for the first time a historiography of international law appeared in which the early modern exponents of *jus naturae et gentium*, and the eighteenth- and nineteenth-century scholar-jurists of public international law were all consigned to a 'one-sided' 'pre-history' of international law. In the condescending words of Karl Theodor (not to be confused with Johann Stephan) Pütter:

> Since, no matter how highly one values their service, the older works by Hugo Grotius and Vattel, von Martens and Klüber, Schmalz und Schmelzing, Saalfeld and others will no longer meet the demands of science and the needs of practice, we have evidently risen to a higher developmental level of public and international law and their science.[54]

In this way, by embedding a philosophical programme in an historical threshold, the dialecticians of the 1840s created the periodization that would allow the editors of the *Oxford Handbook* to declare that international law and its historiography did not exist until the nineteenth century.[55]

Not all contemporaries, however, were as convinced as Pütter that the new philosophical international law represented the dawning of a form of consciousness that superseded positive public international law. Some, including the period's most acute observer, Robert von Mohl, had a more ambivalent and finally nuanced outlook. On the one hand, like many, von Mohl did think that the new Kantian and Hegelian philosophies represented a fundamental break with the past, and, in conjunction with the new diplomacy surrounding the Congress of Vienna, were responsible for a new epoch of international law thought, which he dated to the 1830s.[56] In this regard, and particularly prior to 1848, von Mohl himself adopted a dialectical view of the relation between positive and philosophical international law, arguing that positive jurists lack the philosophical concepts necessary to discern the rational order governing inter-state relations, while, in attempting to ground these relations in the free subjective agreement of states, philosophical jurists like Pütter lack all sense of an objective normative order. This means that Pütter should

use 'dialectical arts' (*dialectische Künste*) to provide subjective freedom with an 'inwardly necessary objective content' of norms and duties.[57]

On the other hand, von Mohl was sceptical of much of the new philosophical international law, arguing that, despite criticizing the positive public-law jurists for their lack of concepts, writers like Hälschner and Pütter in fact did little more than plunder the earlier authors for materials that could be translated into the conceptual idiom of Hegelianism.[58] Even more importantly, in his *Encyklopädie der Staatswissenschaften*, especially those parts written after the failed hopes of 1848, von Mohl took a more sceptical view of Hegelianism and adopted a non-dialectical view of the relation between positive and philosophical *Völkerrecht*. He thus argued that not only was Hegel's account of the reconciliation of law and morality in the 'ethical state' impossible but also, were it to be possible, would be undesirable: 'Since the atrophying and unjust enforcement of a secular (*weltlicher*) philosophy is just as unbearable as that of a religious dogma'.[59]

Eventually von Mohl came to argue that the positive and philosophical forms of public and international law should not be dialectically resolved because each had its own foundations and purpose. It was the responsibility of positive public law to declare the norms that had arisen from an 'authoritative power' or through historical treaties between a plurality of powers – for example, the norm of religious pluralism in the Prussian legal system – regardless of whether such norms agreed with the principles of philosophy.[60] For its part, philosophical public law has its own principles and purpose and hence does not supply the foundations for positive public law. The purpose of philosophical international law is thus to provide a moderating perspective, based on 'European moral culture', for viewing positive treaty-based law, although this perspective remains external to the principles of positive law.[61] In short, von Mohl came to treat the positive and philosophical forms of international law as independent intellectual cultures, and this, coupled with his warning about Hegelianism assuming the form of a religious dogma, foreshadows the concerns of the next section.

4. The history of dialectical history

I have shown the reception of Kantian and Hegelian philosophy in public international law cannot be understood as the onset of a period in which international law thought became conscious of itself through a moralization of its material conditions. Rather than being an epochal transformation of European legal consciousness, this reception was a regional institutional and cultural phenomenon. It consisted in the rapid uptake of Kantian and Hegelian philosophical teachings within an array of academic law and philosophy faculties in the period between 1800 and 1848 – the so-called *Vormärz* – and in the elaboration of the new dialectical histories and theories of *Völkerrecht* that were the instrument and effect of this uptake. In order to develop an historical understanding of the dialectical historiography of international law, the crucial thing is thus to understand how and why such otherwise esoteric metaphysical philosophies as Kantianism and Hegelianism entered the juridical-political domain, first passing into academic law and theology faculties, and thence into the arena of political and juridical contestation that lay adjacent to them.

Before following this path, however, it is necessary to deal with the fact that dialectical historiography purports to provide a history of its own emergence. It does so by applying

the dialectical-philosophical template to its own genesis. The birth of the dialectical histor-iography of international law has thus been located in the mediation between 'idealist' and 'realist' historiographies, this in turn being a moment in the mediation between formalist and instrumentalist types of international law and, ultimately, between norms and facts, consciousness and its material conditions, and so on. Somewhat magically it is held that a historiography based on dialectical oppositions was born because the history of international law itself is driven by such oppositions, which gave birth to just the kind of oppositional historiography required to think them. It is never considered that the history of international law might appear to consist of dialectical oppositions because of the adoption of a dialectical historiography. Koskenniemi thus argues that the historiogra-phy of international law assumes two forms, 'idealist' and 'realist', and that it does so because international law itself is divided between its ideal aspirations to a cosmopolitan normative order and its historical role as an apology for European imperialism and colo-nialism, which is expressed in the 'Eurocentric' character of international law.[62] This means that for Koskenniemi, as too for Ingo Hueck, 'realist' or 'contextualist' histories of international law, of the sort written by Wilhelm Grewe and Karl-Heinz Ziegler are themselves Eurocentric intellectual constructs tied to imperialism and colonialism.[63] In contextualizing international law as a negotiating instrument of great-power rivalry and warfare, these historians supposedly fail to grasp the emancipatory consciousness through which international law can transcend its empirical-imperial context, thereby rendering their histories complicit with this context.[64]

In dividing histories of international law into opposed idealist and realist forms, and in positing dialectical history as the means of mediating this opposition – through its capacity to win normative consciousness from historical context – Koskenniemi is not of course providing a history of dialectical historiography. He is simply reiterating dialectical history itself, in the form of a reflexive theory of its self-genesis. In this regard, despite characterizing him as one of the 'lawyers of an old world', Koskenniemi's 'history' of dia-lectical international law has not moved beyond Kaltenborn's. Kaltenborn thus posited a dialectical relation between the ideal 'science of international law' and what he called the 'practical life of international law' (*praktische Völkerrechtsleben*) or 'practical international life'. This permitted him to argue that 'theoretical consciousness of international legal life' had not been possible until this life assumed the historical form of relations between free sovereign states. At the same time, once this set of historical relations had thrown up the new science of international law in order to become conscious of itself, this science could then reciprocally transform those relations, reshaping them in accordance with the prin-ciples of legal consciousness into a normatively governed state system.[65] According to Kaltenborn and most of his 1840s cohort, this dialectical development reached its apogee with the dual appearance of an organic international community in the form of the Congress of Vienna (1814–1815), and the new dialectical science of international law through which this community became conscious of itself. Similarly, as already noted, in discussing the emergence of modern liberal international law thought in the 1870s, Koskenniemi establishes a dialectical pairing between the Kantian and Hegelian philosophies of international law advanced by the liberal internationalists, and the 'socio-logical' underpinning of these philosophical ideals. Grounded in an institutional network of internationalist associations leading up to the League of Nations, the philosophies of international law permitted these new relations to be brought to brought to normative

cosmopolitan consciousness, even if this consciousness failed to fully reshape those relations owing to the unripe nationalism and belligerence of the historical times.[66]

These dialectical histories of dialectical history presume that a dialectical historiography of international law came into historical existence in part because of the normative truth of the (Kantian and Hegelian) philosophies that it embodied, and in part because history was itself evolving towards the realization of this truth. Such histories are useless for investigating the concrete reception of Kantian and Hegelian philosophies within the discipline of international law – the reception that gave birth to dialectical historiography in the 1840s – because they are themselves creatures of that reception. From this arises two insuperable problems. First, in presuming that Kantian and Hegelian philosophies entered empirical history by virtue of their theoretical ideality or normative truth, the dialectical approach cannot investigate such philosophies as concrete institutional-intellectual activities that take place in empirical history regardless of their truth or falsity. Second, in presuming that the history of international law evolves in order to give birth to concepts for thinking and moralizing it, this approach over-unifies and over-rationalizes that history, imbuing it with a rational goal that occludes its unplanned, accidental, and uncontrollable character, even if (or especially if) it is said that this goal is never reached. Dialectical histories of the genesis of dialectical or 'modern' histories and theories of international law in the 1840s (or 1870s) thus fail to inquire into what kind of intellectual practices Kantian and Hegelian philosophies were, and thence how and why such practices should have suddenly entered a juridical and political domain from which they had been previously kept at arms length by the German constitution. In very briefly sketching the contours of some answers to these questions, what becomes clear is how profoundly we must reorient our understanding of dialectical history and philosophy in general, and the dialectical history of international law more specifically.

In approaching the philosophies of the 1840s as empirical historical phenomena it is important to situate them within their specific institutional-intellectual context. Be they Kantian, Fichtean, Schellingian, or Hegelian, the crucial thing to observe is that all of these philosophies emerged in Protestant universities and seminaries as variant forms of Protestant rationalist metaphysics. It all began with Kant. In recasting Protestant academic metaphysics into a dualistic noumenal and phenomenal architecture, and then treating this as the structure of human subjectivity, Kant set the cultural frame for all post-Kantian metaphysical philosophies.[67] This includes Hegel's dialectical history which may be regarded as a spiritual machinery for allowing the noumenal to eventually become manifest in the phenomenal world, through the dialectical stages of the absolute spirit's coming to consciousness in history.[68] What has been occluded by a good deal of modern commentary on this academic philosophical subculture is its fundamentally religious context and theological character.[69] Scholars sensitive to this context, however, have shown that Kant's construction of man's double-sided noumenal and phenomenal nature may be regarded as an improvization on Christian metaphysical anthropology and Christology.[70] The central historical significance of the Kantian and Hegelian forms of theological rationalism, however, is that they were intended to transform confessional or 'positive' Christianity into 'secular' moral philosophy while, at the same time, restraining 'positive' sciences in a net of transcendental ideas or dialectical oppositions. In this regard, they constituted a powerful cultural politics. A good deal of modern commentary fails to investigate Kantian and Hegelian cultural politics because it is their direct inheritor. It thus

presumes that Kantian or Hegelian philosophy did indeed amount to the rational super-session of confessional Christianity, and to the discovery of the transcendental or dialectical grounds of such 'positive' sciences as international law.[71]

In order to avoid this anachronistic presumption, and to recapture the cultural and political disposition of the philosophies received by the 1840s philosopher-jurists, two reorienting observations are necessary. First, despite their claims to represent the rational supersession of confessional Christianity, during the 1830s and 1840s Kantian and Hegelian philosophies were themselves overwhelmingly received as heterodox or sectarian forms of Christian philosophy or theosophy, not just in Catholic Germany but also in leading Protestant circles.[72] In fact they were frequently attacked by both liberals and conservatives for proselytizing on behalf of a religious rationalism that amounted to a pantheism or atheism, for example, in Hegel's case, by forcing God to become self-conscious via the spiritual development of man in history.[73] While not themselves capable of universal justification, these confessional Christian attacks nonetheless show the degree to which the Kantian and Hegelian thought – particularly the thought of a dualistic noumenal-phenomenal subjectivity that might be redeemed through reflection or dialectics – did indeed function as a redemptive spiritual exercise in competition with similar exercises taught in the churches.[74]

Second, it is crucial to observe that far from being open to the rational unification or supersession of the confessional churches, the fundamental historical premise of the German religious constitution was that a plurality of legally recognized confessional churches would be maintained in perpetuity.[75] For this reason, the juristic and political implications of Kantian and Hegelian religious rationalism were often viewed as contrary to the constitutional order. This applied in particular to Hegel's construction of the 'ethical state'. In sublimating the church into a moralized state, Hegel's construction was reasonably thought to undermine the legally recognized plurality of confessional religions guaranteed by the post-Westphalian constitution, and to threaten to install Hegelian philosophy as a secular state religion.[76] Robert von Mohl was thus far from being alone in his diagnosis of the Hegelian ethical state as a threat to Germany's pluralistic religious constitution. This same sense of Hegelianism as a factional subculture informed von Mohl's insistence that positive public international law could not be dialectically subordinated to philosophical international law without threatening a constitutional order that was based not on philosophical principles but on authoritative powers and treaties.

In other words, in their reception of Kantian and Hegelian philosophies during the 1840s, the philosophical jurists were taking on something quite other (and far more consequential) than a source of ideal norms that could be dialectically mediated with the facts of positive law and politics. They were in fact aligning themselves with a militant religious and political subculture. Having emerged in Protestant universities as a rationalist meta-physical rival to confessional Christianity, this subculture sought to remake constitutional law and politics – including public international law – in accordance with a factional meta-physics of rational self-governance or of dialectical evolution towards this goal. This at least begins to provide the rudiments of an account of Kantian and Hegelian philosophies as empirical phenomena within history, rather than as custodians of ideal norms towards which history is supposedly unfolding.

If Kantian and Hegelian philosophies were themselves something like rationalist meta-physical confessions or subcultures, initially contained within a relativistic and pluralistic

public-law constitution, then it cannot have been their normative truth – abetted or retarded by sociological conditions – that permitted them to enter the law faculties and thence the juridical-political arena. How, then, did this take place? In addressing this second major axis for reorienting our understanding, there are two broad factors to consider. In the first place, as the academic instantiation of a powerful spiritual pedagogy or psychagogy, deeply rooted in the history of Christian theological culture, the metaphysics taught in early modern German universities possessed a specific spiritual-social authority.[77] Within this culture it was accepted that the spiritual exercises of this metaphysical pedagogy permitted metaphysicians to acquire an illuminated persona through which they obtained privileged access to the hidden transcendent grounds of worldly and historical appearances, thence to interpret these appearances for the uninitiated.[78] In early modern Germany, this culturally powerful metaphysical hermeneutics had initially been an adjunct to theological training in Catholic and Protestant scholasticism, where the claims of philosophers to rational participation in the divine mysteries were in tension with the insistence of clerical theologians that access to the mysteries was achieved through faith and revelation.[79]

The successive reconstructions of this metaphysics by Kant and Hegel, however, meant that its spiritual exercises and transcendent insights could be transferred to extra-ecclesial (and in this limited sense) 'secular' academic philosophers.[80] These philosophers could then bite the hand that fed them by turning this powerful metaphysical hermeneutics against the Christian churches, treating them as the mere historical appearances of a transcendent rational capacity,[81] or as superseded stages in the dialectical self-objectification of an absolute idea or spirit.[82] They could also bite the hand that governed them, turning this hermeneutics against positive law and politics, with Kant and Hegel treating Germany's multi-confessional religious constitution as an illegitimate attempt to block the rational or historical transformation of biblical Christianity into philosophical moral self-governance.[83] In portraying Moser's positive treaty-based construction of the German constitutional and public international law as a 'one-sided' 'positivist' failure to grasp the hidden transcendental-dialectical conditions of a future 'international legal consciousness',[84] the philosophical jurists of the 1840s were thus engaged in something far more consequential than developing a normative theory. As sorcerer's apprentices to the modern metaphysical masters, they were appropriating a socially powerful academic subculture, using its dialectical spiritual exercises to transform historical treaty regimes into stadial appearances of a self-developing legal consciousness – their own. In doing so they adumbrated and cultivated a new institutional-intellectual persona, the academic philosopher-jurist, whose illuminated insight into the projected transcendental conditions of law could be used to undermine the historical treaty mastery of the eighteenth-century scholar-jurists.

The second factor bearing on the entrance of the metaphysical philosophies into law faculties and thence into the juridical and political domain was the manner in which the German Empire was dissolved and the imperial constitution suspended in 1806. This did not occur as a result of an indigenous revolution in which philosophical ideas of freedom were joined to radical political change. Rather, it resulted from the external military conquest of the Empire and its most powerful states by Napoleon's revolutionary army.[85] Despite all attempts to link Kant's religious and political philosophy to the French Revolution and thence to the dissolution of the German Empire, there is no evidence that

the new metaphysics played any role in the end of the empire.[86] What permitted the new metaphysical philosophies to become juridically and politically consequential was not an ideal truth that might be enacted (or retarded) by a material history, but something else altogether: namely, the military and political destruction of the constitutional order that had kept these philosophies confined to the domain of spiritual pedagogies by treating them in effect as minority religious confessions. In banning rationalist proselytizing and insisting that the clergy of the public churches preach within their respective confessions, the Prussian Religious Edict of 1788 had been a typical expression of the pluralist religious constitution. In the first instance it had targeted Socinianism and Unitarianism, but then, quite unexceptionally, Kant's rationalist 'religion of pure reason', which was no less inimical to constitutional religious pluralism.[87] In suspending the public-law constitution that had kept them in their role and place as academic spiritual pedagogies, the Napoleonic dissolution of the German Empire made it possible for anti-constitutional Kantian and Hegelian philosophies to enter adjacent faculties of confessional theology and 'positive' law, on the basis of their subcultural claims to transcendental insight. From here it was a short step into the tumultuous domain of juridical-political experimentation of the *Vormärz*, fractured by highly factionalized struggles to reshape the former empire as a federation of states.[88]

This was the itinerary followed by the 1840s cohort of dialectical philosophers of international law. But the authority with which the philosopher-jurists spoke in their new domain – declaring the supersession of 'positivist' eighteenth-century treaty-based *Völkerrecht* and the advent of a new dialectical legal consciousness – derived neither from the truth of their newfound philosophical ideas nor from the maturity of a material history that was ripe to receive them. This authority came instead from a spiritual pedagogy and academic subculture that had long groomed the metaphysical persona for charismatic insight into the transcendental conditions of historical appearances. Due to the unforeseen military suspension of the constitutional restraints on this academic subculture in the first decades of the nineteenth century, the spiritual insights and charismatic authority invested in the metaphysical personage could migrate from Protestant philosophy and theology faculties, transiting via the law faculty into the factionalized world of juridical, political, and religious reform. This occurred by virtue of the manner in which the emerging philosophical-juridical subculture seemed to imbue a certain cadre of juristic officials and political faction leaders with unimpeachable transcendental insight into the manner in which a dialectical history was secretly acting to rationalize religion, moralize the state, and harmonize the international community. Hegel's own discussion of the German constitution, written during the French occupation between 1798 and 1802, is a typical product of this expansion of metaphysical hermeneutics into a disrupted juridical, political, and religious domain. Hegel thus claimed that the French dismemberment of the empire and the redistribution of its territories and populations were products of an 'inner spirit' in relation to which they were 'merely the external and necessary appearances'.[89] This spirit was in fact the German 'drive for freedom' which had long prevented German peoples from coalescing into an organic nation state, and meant that they were held together only by a 'purely legal' constitution and a 'mechanical' state. Hegel could thus treat religious division as a prime symptom of this unripe drive for freedom, and, in defining religious entitlements through positive law rather than the 'higher natural rights of freedom of conscience', the post-Westphalian religious constitution could be regarded as 'legalized barbarity'.[90]

Positive public-law jurists such as Johann Ludwig Klüber continued to play leading roles in the constitutional debates surrounding the short-lived Confederation of the Rhine (1806–1813) and the longer-lived German Confederation (1815–1866), but in the period before 1848 they were joined and militantly contested by a constellation of philosophical jurists.[91] Among this constellation the cohort of dialectical international jurists played a prominent role. In cultivating the new persona of the philosopher-jurist, this cohort sought to supersede positive constitutional and international law by deploying a dialectical legal hermeneutics. This permitted its members to view treaties not as authoritative enactments grounded in great-power agreements, but as stadial manifestations of an evolving national, European, or global legal consciousness that only the philosopher-jurist could decipher. Confronted with Klüber's detailed account of the Congress of Vienna, as an agreement formed at the nexus of great-power diplomacy and the great imperial peace treaties,[92] the dialectical jurists felt no qualms in dismissing it as superficial in comparison with their account of the Congress as coming to consciousness of itself in the new dialectical science of international law, where it was styled as the first normative juridical international community.[93]

Dialectical histories and theories of international law thus emerged in the 1840s because political circumstances permitted a previously academic philosophical spiritual pedagogy to become available as a qualification for charismatic leadership of an array of factions engaged in the cultural and political contestations of the *Vormärz* period. Through the dialectical exercises by which it subjected historical law, politics, and religion to transcendental-hermeneutic reinterpretation, this subculture was the formative discipline for a new intellectual persona, the philosopher-jurist. It also permitted the formation of a network of politically engaged philosophical jurists who could view the history of international law in terms of the dialectical unfolding of a theoretical legal consciousness driven by the formation of an organic community of nations, thereby purporting to supersede the treaty-based view of the scholar-jurists of public international law.

5. Philosophical history as factional cultural politics

It is now possible to revisit the central features of the dialectical historiography of international law – its dialectical structure, epochal periodization, and hermeneutic method – and to redescribe them as components of a factional intellectual subculture. The dialectical structure of the new international law thought did not arise because history itself enacted the struggle of the human mind or 'international legal consciousness' to become conscious of its material conditions, since the Hegelian dialectic was a spiritual exercise designed to allow history to be viewed as the theatre of such a struggle. In dividing the history of international law between facts and norms, positive and philosophical law, diplomatic instrumentalism and juridical normativity, the dialectical structure not only allowed this history to simulate the struggle for self-consciousness, it provided a powerful discursive weapon that could be used against positive public international law. In confining writers like Pütter, Moser, and Klüber to the factual, positive, and instrumentalist side of the dialectic, the dialecticians could treat them as 'positivists' whose 'one-sided' failure to grasp the ideal normative side of the dialectic prohibited them from achieving legal self-consciousness, consigning them to a superseded past.

Despite its twenty-first-century currency noted at the beginning of this article, this view of the positive international jurists represents a tendentious mangling of the historical record and is in fact a factional cultural politics rather than scholarship. It is indeed true that the positive jurists worked with historical treaty collections, diplomatic histories, constitutional enactments, and law reports, often self-consciously eschewing philosophical, theological and natural law sources. This had nothing to do, however, with them being one-sided positivists lacking in normative self-consciousness, and was instead a way of working rooted directly and deeply in the German constitutional order itself. Owing to the profound religious antagonisms of the estates that signed-up to the great religious peace treaties – Augsburg in 1555 and the Westphalian treaties of 1648 – these treaties could not be based on agreed philosophical or theological norms. Rather, they were grounded in a whole series of technical measures designed to achieve parity of treatment for two antagonistic confessional blocs – the *Corpus Evangelicorurm* and the *Corpus Catholicorum* – in the imperial high courts and parliaments, including measures to remove the incendiary question of theological truth from treaty negotiations.[94] When Moser began his treatises on *Völkerrecht* and the religious constitution by declaring that international law could not be grounded in theological or philosophical truths, and had to be derived from the existing historical treaties and associated legal enactments, this was because the constitutional order itself had developed by suspending or relativizing such truths. In Moser's own words:

> Because we Germans must still live together, and because this grievous religious division has brought so much misery to Germany for so long, it was thus finally understood that wherever religious or ecclesiastical matters arose, no other way was left than to abstract from the truth or falsity of any given religion, and to consider only how one could get along with others in external common life and intercourse, as also in political and legal matters.[95]

This did not mean that Moser was adopting some kind of positivistic non-normative outlook. On the contrary, he treated constitutional and international law as thoroughly norm-infused. It was just that he viewed the relevant norms as arising from the treaty regime and constitutional order itself, rather than from a philosophical subculture dedicated to norms of rational self-consciousness and self-governance. A crucial case in point was the *Normaljahr*, or standard-year provision of the Osnabrück treaty, according to which, after 1648, the religious rights, territories, properties, and populations of the rival confessions would be restored to the *status quo ante* of 1624.[96] For Moser, the *Normaljahr* was a prime and decisive example of a constitutional and international legal norm, and he tracked its utilization throughout the eighteenth century in a myriad of cases brought before the imperial high courts, and in an array of diplomatic cases that threatened foreign state intervention in German confessional-political conflicts.[97]

The epochal periodization introduced by the 1840s philosopher-jurists – treating the advent of dialectical jurisprudence as marking the beginning of a 'modern' legal consciousness – may also be regarded as the instrument of a factional cultural politics. In incorporating Kantian and Hegelian philosophies into their juridical-political outlook, the 1840s writers adopted the philosophical-historical stance of Protestant metaphysical rationalism in two specific regards. In the first place they assumed, quite wrongly as it turned out, that the 'positive', constitutionally recognized confessional religions were in the process of being historically superseded, either through their conversion into Kantian moral

philosophy, or through Hegel's treatment of them as a primitive stage in the absolute spirit's coming to historical self-consciousness in (Hegelian) philosophy.[98] Second, as already noted, this led them to view the seventeenth-century exponents of *jus naturae et gentium*, and the eighteenth-century scholar-jurists of positive *Völkerrecht*, as consigned to a superseded 'pre-history' by virtue of the onset of dialectical legal consciousness in the 1840s. In combination, these two viewpoints meant that the actual historical role of German public law in regulating persistent, ferocious, and unremitting confessional conflict was wiped from the professional memories of the 1840s philosopher-jurists. So too it was erased from the new dialectical histories of *Völkerrecht*, to be replaced by a futural vision in which confessional conflict and the public-law constitution that contained it had no place. Instituting the new periodization for 'modern' international law was thus an exercise in cultural and political amnesia that played a key role in the grooming of the new prophetic persona of the philosopher-jurist.

As a result of this jointly amnesic and prophetic periodization, the dialectical historians lost touch with the earlier Protestant historiographies of the law of nature and nations, in which the line of thinkers stretching from Gentili and Grotius through Pufendorf and Thomasius to Wolff and Vattel had represented the victory of civil reason and freedom over scholastic theocratic intolerance.[99] More importantly, though, they also lost touch with the detailed diplomatic and public-law historiographies in which Pütter, Moser, Martens, and Klüber had tracked the development of Germany's religious constitution: from its beginnings in Augsburg's provision of a juridical *modus vivendi* for the two confessional blocs, to the post-Westphalian constitutional and international jurisprudence that had regulated confessional-political conflict right up the dissolution of the empire, and would do so again after 1848. The new dialectical historians sought to displace this rich and concretely pertinent historiography with a doctrinaire philosophical history. Here, the 'failure' of the seventeenth- and eighteenth-century *Völkerrechtler* to reconcile a series of philosophical oppositions that had never crossed their minds would consign them to the 'pre-history' of international law. Identifying the threshold of modernity with the onset of the dialectical reconciliation of these oppositions should thus be regarded as a factional intellectual instrument or weapon. It was the means by which the coterie of dialectical legal historians sought to displace an account of the emergence of international law from confessional-political peace treaties with an account of its emergence from the struggle of 'international legal consciousness' to manifest itself in history. This helped to form a subcultural viewpoint and persona that has remained current in academic philosophical and philosophical-juridical circles right up to the present, as can be seen in those writers discussed at the beginning of this article, who continue to treat pre-nineteenth-century positive *Völkerrecht* as the 'pre-history' of 'modern' international law.

Finally, the adumbration of international law in the form of a philosophical-historical hermeneutics should also be ascribed to the emergence of the factional subculture and persona of the philosopher-jurist. Throughout the eighteenth century, led by Pütter and Moser, Protestant *Reichspublizisten* and *Völkerrechtler* had assiduously collected and interpreted the major constitutional peace treaties, their enabling enactments, the conflicts to which they had given rise, and the ensuing adjudications of the imperial high courts.[100] Driven by their fear that Protestantism might be overwhelmed by an imperially backed Catholicism, the aim of the Protestant jurists had been to maintain the empire's precarious confessional-political order, which was continually disrupted by a myriad of local

confessional disputes and the threat of foreign intervention.[101] This was the context in which Pütter and Moser insisted on the crucial role of the *Normaljahr* provision of the Osnabrück treaty. In making this case, Moser in particular pointed out that the redistribution of religious jurisdictions and properties embodied in the *Normaljahr* was reached by suspending the question of the truth of the religions adhered to by the treaty parties. This meant that the norms of the supporting constitutional and international law came not from the doctrines of theology, philosophy, or natural law – all of which were irretrievably contentious – but solely from the historical institution of the treaty itself. Were confessional-political disputes to be adjudicated on the basis of the truth of particular theological or philosophical doctrines, Moser argued, this would destroy Germany's constitutional order and disrupt the international network that supplied it with guarantees.[102]

It is all the more striking then that, like the Kantians of the 1790s, the dialectical jurists of the 1840s adopted a quite different stance towards the work of collecting, transmitting, and commenting on Germany's fundamental treaties and laws. To the limited extent that they discussed the Augsburg and Westphalian treaties, they refused to treat them as just, or as the foundation of a *rechtlich* constitutional order. Instead they viewed these treaties as the partial or flawed surface appearances of an underlying dialectical rationality, evolving *Völksgeist*, or 'collective legal consciousness', hence at best political 'conveniences' serving state interests, and at worst, in Hegel's eyes, as unjust 'legalized barbarity'.[103] If 1840s philosopher-jurists discussed confessional-political conflict at all, it was only to treat it as a symptom of unripe times, destined to be overcome through the rationalization of religion and a self-harmonizing international community or state system which they claimed to see emerging in the Congress of Vienna and its 'pentarchy' of treaty states.[104] In other words, rather than working through the treaty collections as instruments of confessional-political dispute resolution for an evolving constitutional and international order, the dialectical historians annexed them to a practice of philosophical hermeneutics, treating them as partial instantiations of a spiritual truth uncovered by and within the dialectical historians themselves.

The transcendental rationality or evolving national or international 'legal consciousness' that the dialectical historians purported to decipher beneath the historical treaty regime and constitutional order thus were not truths that might be realized in an international legal system. They were in fact hermeneutic projections of a factional metaphysical subculture, discernable only by those cultivating the prophetic persona of the philosopher-jurist. Hälschner thus provides an exalted exemplification of this visionary persona in his declaration that:

> One might well say that the European state system rests on the treaties of the Westaphalian Peace and the Congress of Vienna, but it was not created by them; it was there before them, and for it to live and work nothing more was required than for individual states to join it and to respect its laws, or to annihilate themselves. But one might ask, if the state system is the legislative power of international law – that is, not the individual treaty-making and negotiating states but the spiritual totality, the overarching ethical unity that absorbs their wills and desires – then from whence would this law be proclaimed, which is the actual source of international law? … [In fact] the final and only source of international law is the common legal consciousness of the nations, and this is in turn only possible and extant by virtue of the system-building nations, [themselves] formed from the same elements and legal consciousness.[105]

I have argued that the charismatic purchase of this subcultural persona in the *Vormärz* period depended on the military suspension of the historical constitution that had previously contained metaphysical schools as tolerated philosophical confessions. Despite their faux gratitude to Moser for bequeathing them the historical materials they needed for a proper philosophical history of positive constitutional law and *Völkerrecht*, this is not in fact what the 1840s dialectical historians actually provided. Rather, in purporting to decipher a transcendental rationality or dialectical legal consciousness beneath the historical treaty regime and constitution, the dialecticians were mounting a factional cultural-political attack on it. For this amounted to an attempt to undermine a constitutional treaty order premised on the relativizing of all absolute theological and philosophical truths by installing a new absolute philosophical truth: namely, the one that claimed to show that the historical treaties and constitutions were only 'appearances' of the underlying truth or Idea of a self-developing universal legal consciousness.

The characterization of Pütter and Moser and their nineteenth-century descendants – Martens, Klüber, Mohl – as *Positivisten* or positivists was itself a symptom of this factionalized subcultural attack. In using the newly minted terms *Positivist* and *Positivismus* as a means of characterizing the 'failure' of the positive jurists to grasp the dialectical underpinnings of positive laws and treaties, the 1840s philosophical jurists were deploying a pejorative combat concept, for these dialectical underpinnings were in fact nothing more than hostile projections of the new juridical metaphysics.[106] The fact that twenty-first century historians of international law continue to characterize Moser and Martens as positivists is a further sign of the depth and durability of this ongoing cultural-political conflict.

6. Conclusion

I have argued that when dialectical histories and theories of international law entered the German juridical and political arena in the period between 1840 and 1848 this was not because they embodied philosophies whose truth brought the ripe times to consciousness, or else failed to do so because the times were still not ripe. This occurred, rather, as a result of the unplanned confluence of two disparate factors: first, the fact that dialectical philosophies supplied metaphysical figures of thought that permitted the cultivation of an authoritative intellectual persona which viewed historical law and politics as 'appearances' of transcendental reason or history; and, second, the military interruption of the German constitutional order, which permitted some of those cultivating this persona to assume charismatic leadership roles in the ensuing explosion of cultural and political factions during the *Vormärz* period. Dialectical histories of *Völkerrecht* or international law were one of the characteristic intellectual products of this unplanned and uncontrolled interaction of metaphysical cultivation and political disintegration. Their central features – the dialectical spiritual exercise, the periodization of international law that relegated positive treaty-law to a 'pre-history', and the annexation of positive constitutional and international law to a practice of transcendental hermeneutics – first emerged as intellectual weapons intended to undermine Germany's historical religious constitution and reshape it in accordance with the cultural politics of a new philosophical-juridical subculture and persona. The political stalemate of the 1848 National Assembly, followed by the reinstatement of the suspended religious constitution in 1849, appears to have portended

the withdrawal of the dialectical history of international law into the university and its adjacent discussion contexts, at least in Germany. Here its factional weapons of dialectical argument, epochal 'modernist' periodization, and philosophical hermeneutics were transposed back into a largely academic intellectual register, undergoing a sea change, thence to reappear in the arsenal of academic anti-positivism.

Notes

1. Fassbender and Peters, "Introduction," 19–20.
2. Nuzzo and Vec, eds., *Constructing International Law*. This volume contains papers presented at a conference in Lecce in 2009, whose 'starting point' the editors declare was 'the assumption that international law was born as a legal science in the 19th century'. See the editors' introduction, 'The Birth of International Law as a Legal Discipline in the 19th Century', in Nuzzo and Vec, *Constructing International Law*, XVI.
3. The Max Planck Institute for European Legal History (Frankfurt/Main) thus nominated 1789–1914 as the periodization for its project on the 'Theory and Practice of International Law'. The Institute and its project were in turn closely associated with the Lecce conference whose programme declared that 'the process through which the international law became a science, different from the diplomacy or the natural law started only in the second half of the 19th century'. For a bluntly sceptical discussion of this set of assumptions, see Carty, "Did International Law really become a Science at the End of the 19th Century?"
4. Hueck, "The Discipline of International Law."
5. Koskenniemi, *The Gentle Civilizer of Nations*, 3–4, 19–24.
6. Koskenniemi, "A History of International Law Histories."
7. Pütter, *Historische Entwickelung der heutigen*. This work was translated into English as *An Historical Developement of the Present Political Constitution of the Germanic Empire*, 3 Vols. (London, 1790), with the English preface arguing that the French Revolution made it important for English statesmen to overcome their insularity and learn about European politics and international relations.
8. Moser, *Grund-Sätze des jetzt üblichen*; and Moser, *Grund-Sätze des europäischen*.
9. These included an analysis of the Peace of Teschen, Moser, *Der Teschenische Fridenschluss*; and a remarkable historical account of the German religious constitution: Moser, *Von der Teutschen Religions-Verfassung*.
10. Moser, *Versuch des neuesten Europäischen*.
11. For an important study that sheds light on Moser's work as a scholar-jurist of *Völkerrecht*, and that provides insights into the reasons for his neglect by later theorists of international law, see Wendehorst, "Johann Jacob Moser."
12. Fallati, "Die Genesis der Völkergesellschaft"; Hälschner, "Zur wissenschaftlichen Begründung des Völkerrechts"; von Kaltenborn, *Kritik des Völkerrechts*.
13. Hueck, "Discipline of International Law," 198, 200–203.
14. Nuzzo and Vec, "Birth of International Law," VIII-IX.
15. Koskenniemi, "History of International Law Histories," 951–965.
16. Koskenniemi, *Apology to Utopia*, 4.
17. Koskenniemi, *Apology to Utopia*, 13.
18. Koskenniemi, *Apology to Utopia*, 17.
19. Koskenniemi, "Georg Friedrich von Martens (1756–1821)."
20. Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization."
21. Koskenniemi, "History of International Law Histories," 958–969.
22. For Koskenniemi's view of Grotius, Hobbes, and Pufendorf adopting a 'sociological' conception of law as a means to the realization of state interests and extrinsic 'happiness', see Koskenniemi, "International Law and *raison d'état*," 320–335. For his view of Kant as

providing a moral philosophical conception of law in terms of action governed by the universal form or idea of law, independent of consequences, and requiring 'moral regeneration', see Koskenniemi, "On the Idea and Practice for Universal History," 139–143.

23. Koskenniemi, "International Law and *raison d'état*," 297–299. See also, Koskenniemi, "The Advantage of Treaties," 47–53.

24. Koskenniemi, "International Law and *raison d'état*," 323–329.

25. Koskenniemi, "International Law and *raison d'état*," 298.

26. On the self-conscious and sophisticated manner in which early modern Protestant jurists engaged with political-theological claims regarding the existence of a supra-state normative order, see Panizza, "Political Theory and Jurisprudence in Gentili's *De Iure Belli*"; Döring, "Säkularisierung und Moraltheologie bei Samuel von Pufendorf"; Haakonssen, "Protestant Natural-Law Theory"; and Hunter, "Natural Law as Political Philosophy."

27. Koskenniemi, "Into Positivism," 190. In fact without renouncing the term or grasping its history, Koskenniemi does attempt to modify the use of 'positivism', but only by arguing for its dialectical relation to 'naturalism', with natural law providing the unmediated philosophical framework in which positivist law operates. Here too he was anticipated by the 1840s dialecticians.

28. Koskenniemi, "Georg Friedrich von Martens (1756–1821)," 16–20. In keeping with the dialectical narrative of stadial mediations, Koskennieimi does allow Martens a partial immunity from these charges, arguing that Martens accepted Kant's distinction between law and morality and that this permitted him to temper his 'realism' with a 'Kantian' teleology of cosmopolitan right (27–29). This argument is unconvincing, however, since Martens did not adopt Kant's metaphysical view of history as mankind's dialectical evolution towards rational universal self-governance. Instead, he opted for a view of civilization as a matter of the historical customs of European peoples.

29. For accounts indicating that early modern exponents of *jus naturae et gentium* and eighteenth-century public international lawyers were indeed fundamentally preoccupied with treaties as a source of norms for regulating continuous confessional-political conflict, see Lesaffer, "Gentili's *ius post bellum* and Early Modern Peace Treaties"; Lesaffer, "Peace Treaties and the Formation of International Law"; Haug-Moritz, "Kaisertum und Parität"; Kleinhagenbrock, "Konservierung oder Weiterentwicklung des Religionsfriedenssystems von 1648"; and Wendehorst, "Johann Jacob Moser."

30. Koskenniemi, *The Gentle Civilizer of Nations*, 183–188.

31. Koskenniemi, *The Gentle Civilizer of Nations*, 188–194.

32. Koskenniemi, *The Gentle Civilizer of Nations*, 228–238, 261–265.

33. Koskenniemi, "The Fate of Public International Law"; and Koskenniemi, "Legal Fragmentation(s) — An Essay on Fluidity and Form."

34. Koskenniemi, "Histories of International Law: Significance and Problems," 239–240.

35. Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," 169–170.

36. Koskenniemi, "The Fate of Public International Law," 29–30; Koskenniemi, "Formalism, Fragmentation, Freedom. Kantian Themes in Today's International Law," 21–24.

37. Koskenniemi, "On the Idea and Practice for Universal History with a Cosmopolitan Intent," 143.

38. Koskenniemi, "A History of International Law Histories," 954.

39. Schmalz, *Das reine Naturrecht*; Schmalz, *Das europäische Völker-Recht*; and Krug, "Philosophisches Rechtslehre."

40. Pütter, "Recensionen," 769–770; Kaltenborn, *Kritik des Völkerrechts*, 127–132.

41. See the brilliant polemic by Scheidler, "Hegel'sche Philosophie und Schule."

42. von Mohl, "Uebersicht der neuern völkerrechtlichen Literatur."

43. Lintz, *Entwurf einer Geschichte der Rechtsphilosophie*, 24–26.

44. Kaltenborn, *Kritik des Völkerrechts*, 47–53.

45. Fallati, "Die Genesis der Völkergesellschaft," 160–169.

46. In this latter regard, it was Hälschner in particular who set out to 'complete' Hegel's legal system by extending it from the sovereign will to the general will of a 'political society of

nations' or 'state sytem'. See, Hälschner, "Zur wissenschaftlichen Begründung des Völker-rechts," 46–48.

47. Lintz, *Entwurf einer Geschichte der Rechtsphilosophie*, 24–25.
48. Fallati, "Die Genesis der Völkergesellschaft," 173–177; Hälschner, "wissenschaftlichen Begründung," 57–58.
49. Hälschner, "wissenschaftlichen Begründung," 26–31; Oppenheim, *System des Völkerrechts*, 10–32.
50. Lintz, *Geschichte der Rechtsphilosophie*, 4–8.
51. Lintz, *Geschichte der Rechtsphilosophie*, 24–26.
52. Koskennieimi, "The Fate of Public International Law."
53. Kaltenborn, *Kritik des Völkerrechts*, 127–132; Oppenheim, *System des Völkerrechts*, 1–9; Hälschner, "wissenschaftlichen Begründung," 64–66.
54. Pütter, "Recensionen," 769–770. For almost identical statements, see Hälschner, "wis-senschaftlichen Begründung," 43–44; Kaltenborn, *Kritik des Völkerrechts*, 20–21, 93–95; and Heffter, *Das Europäische Völkerrecht*, 10–12, 19–21.
55. For a different periodization, according to which 'classical' international law began not in the 1870s but the 1500s, in the context of the emergence of independent sovereign states capable of negotiating war and peace, see Lesaffer, "Peace Treaties and the Formation of International Law." And for an appreciation of the manner in which period boundaries shift with the his-torical context and interests of those who draw them, see Digglemann, "The Periodization of the History." Diggleman observes that a good deal of the modern historiography of inter-national law adopts a 'progressivist' outlook and a modernist periodization, arguing that this reflects its anti-statist and cosmopolitan interests, a 'consoling' optimism about the role of international law itself, and the influence of a 'philosophy of history' that combines 'belief in rationality with spiritual relics of the Christian tradition' (1008–1009).
56. von Mohl, *Geschichte und Literatur der Staatswissenschaften*, 376.
57. von Mohl, *Geschichte und Literatur der Staatswissenschaften*, 381–382.
58. von Mohl, *Geschichte und Literatur der Staatswissenschaften*, 382.
59. von Mohl, *Encyklopädie der Staatswissenschaften*. For von Mohl's increasingly sceptical view of Hegelianism, see 78–81, and 83–84, note 5.
60. von Mohl, *Encyklopädie der Staatswissenschaften*, 377–383.
61. Von Mohl, *Encyklopädie der Staatswissenschaften*, 402–405.
62. Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," 161–167. For an another variation on the theme, see Orford, "The Past as Law or History?"
63. Koskenniemi, "Histories of International Law: Dealing with Eurocentrism"; Hueck, "The Discipline of International Law," 194–199.
64. Koskenniemi, "Histories of International Law: Dealing with Eurocentrism," 169–170.
65. Kaltenborn, *Kritik des Völkerrechts*, 23–34.
66. Koskenniemi, *The Gentle Civilizer of Nations*, 228–238, 261–265.
67. For a more detailed exemplification of this approach to Kant, see Hunter, *Rival Enlighten-ments*, 274–363. See also, Hunter, "Kant's Political Thought."
68. For a discussion of Hegel's historicizing reception and transformation of Kant's dualistic philosophy, in the context of arguments over religious 'orthodoxy', see Baur, "From Kant's Highest Good."
69. Understandably, for the most part it is theologians who read Kant and Hegel in this manner, but thereby providing an approach that is much closer to the context in which their works were initially composed and received. For a balanced overview of this approach, written from a liberal Catholic perspective, see Rossi, "Reading Kant through Theological Spectacles." For another view, written from a moderate Hegelian perspective, see di Giovanni, "Faith without Religion, Religion without Faith." See also, Dorrien, *Kantian Reason and Hegelian Spirit*.
70. For insight into the Christological background to Kant's dualistic construction of subjectivity, see Sparn, "Kant's Doctrine of Atonement"; and Ricken, "Homo noumenon und homo phae-nomenon." See also, Yerkes, *The Christology of Hegel*; and Ward, "How Hegel became a

Philosopher." For an account of the Christian context of Hegel's and Schelling's cosmogonies – albeit written from a Schellingian standpoint – see, Laughland, *Schelling versus Hegel*.

71. See, for example, Pinkard, *German Philosophy 1760–1860*, 58–65, 242–245, 300–304. Some commentary simply presumes the truth of Kant's conception of a noumenal subjectivity capable of moral self-governance, which of course renders ecclesiastical Christian salvation redundant. So, Crites, "Three Types of Speculative Religion." Other commenators assume that a Hegelian or Schellingian philosophical explication of religious concepts will overcome the gap between knowledge and faith, thereby superseding fideistic confessional religions. See, for example, Adams, "Introduction."

72. For a contemporary survey of the blizzard of texts attacking and defending Kant's claims to have provided a rational supersession of confessional Christianity in his philosophy and rational theology of moral self-governance, see Erdmann, *Die Entwicklung der deutschen Speculation*, 249–250, 257–260, 268–276, 288–291.

73. For a liberal version of this attack, see Scheidler, "Hegel'sche Philosophie," 611–618. For conservative versions, Leo, *Die Hegelingen*; and Stahl, *Geschichte der Rechtsphilosophie*, 458–470. For an important collection of papers on the multifaceted Catholic reception of Norbert Fischer, ed., *Kant und der Katholizismus*.

74. For more, see Hunter, *Rival Enlightenments*, 337–363.

75. See the exemplary discussion in Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*. See also, Hunter, "Religious Freedom in Early Modern Germany."

76. For a blistering diagnosis of the constitutional threat posed by Hegelian academics, jurists, and state officials during the political turbulence of the 1830s, published in Rotteck and Welcker's 'Bible' of Protestant political liberalism, see Scheidler, "Hegel'sche Philosophie," 626–646.

77. The deep cultural background is clarified in studies of the cultural and political authority exercised by Christian metaphysicians in late antiquity. See Brown, *Authority and the Sacred*. On the use of Christian metaphysics as a 'psychagogy' or spiritual pedagogy in early Christian theology schools, see Hainthaler, "The 'School of Antioch' and Theological Schools."

78. Brown, *Augustine of Hippo*, 101–114.

79. On the tensions and controversies surrounding attempts to reintroduce metaphysics to Protestant universities in Germany at the beginning of the seventeenth century, see the classic study by Sparn, *Wiederkehr der Metaphysik*. For a detailed study of the way these tensions played out in a particular regional controversy, see Friedrich, *Die Grenzen der Vernunft*.

80. Hunter, *Rival Enlightenments*, 274–316.

81. Kant, *Religion within the Bounds of Bare Reason*, 165–222.

82. Hegel, *Lectures on the Philosophy of Religion*, 391–470.

83. Kant, "On the Common Saying," 302–303. Hegel, "The German Constitution (1798–1802)." For a discussion of Kant's strategy in this regard, see Hunter, "Kant's *Religion* and Prussian Religious Policy."

84. See, Kaltenborn, *Kritik des Völkerrechts*, 94–95.

85. For a helpful overview of Napoleon's dissolution of the empire, see Whaley, *Germany and the Holy Roman Empire*, vol. 2, 614–644.

86. This was not least because the central preoccupation of the philosophers and theologians was with inner moral regeneration, first of the individual and then of the people or nation, rather than with the economic, diplomatic, and military problems that would be thrown up by the French conquest and subsequent recasting of the empire. In this regard, see the illuminating discussion of Herder's political outlook by Dreitzel, "Herders politische Konzepte." See also the balanced discussion of the political role of German intellectuals during this period in Whaley, *Germany and the Holy Roman Empire: Volume II*, 592–601.

87. For a detailed discussion, see Hunter, "Kant's *Religion* and Prussian."

88. For an instructive account of this period of juridical and political reform see Stolleis, *Public Law in Germany, 1800–1914*, 1–160.

89. Hegel, "The German Constitution," 7.

90. Hegel, "The German Constitution," 50–53.
91. Stolleis, *Public Law*, 41–56, 90–106.
92. Klüber, *Uebersicht der diplomatischen*.
93. Hälschner, "wissenshaftlichen Begründung des Völkerrechts." 48–50, 55–66.
94. For this view of the German religious constitution I am indebted to the work of the pre-eminent historian of German *Staatskirchenrecht*, Martin Heckel. For a selection of relevant papers, see volume 1 of Heckel, *Gesammelte Schriften*. And for an overview of the main historical argument, see Heckel, *Vom Religionskonflikt zur Ausgleichsordnung*.
95. Moser, *Teutschen Religions-Verfassung*, 11.
96. On the crucial role of this rule, see Fuchs, *Ein "Medium zum Frieden"*.
97. Moser, *Teutschen Religions-Verfassung*, 138–162, 212–225. For Pütter's similar treatment of the *Normaljahr*, see Pütter, *Geist des Westphälischen Friedens nach dem innern Gehalte und wahren*, 355–361, 386–451.
98. For an account of the actual condition of the confessional religions in the wake of 1848, which was characterized not by rational supersession and decline but by organizational innovation and political resilience, especially in the case of political Catholicism, see the important essays by Clark, "Confessional Policy and the Limits of State Action"; The Napoleonic Moment in Prussian Church Policy; and From 1848 to Christian Democracy.
99. On these earlier Protestant 'histories of morality', see Hochstrasser, *Natural Law Theories in the Early Enlightenment*, 65–72, 135–141. Helpful overviews of this line of development can be found in Haakonssen, "Protestant Natural-Law Theory"; Panizza, "Political Theory and Jurisprudence in Gentili's De Iure Belli"; and Lesaffer, "Peace Treaties."
100. On the manner in which Moser's enormous output combined imperial public law and international law, including an account of the occlusion of his work during the nineteenth century, see Wendehorst, "Johann Jacob Moser."
101. For an overview of the eighteenth-century confessional-political disputes, see Luh, *Unheileges Römisches Reich*. On the role of the Westphalian treaties in generating a critical conflict between the desire of the Catholic estates to reform or re-Catholicise their territories, and the insistence of the Protestant estates on the maintenance of the confessional balance prescribed in the treaties, see Haug-Moritz, "Kaisertum und Parität." And on the nexus between the governance of the empire under public law and the impact of great power rivalry and diplomacy, see Milton, "Imperial Law versus Geopolitical Interest."
102. Moser, *Teutschen Religions-Verfassung*, 166–192.
103. See, Heffter, *Europäische Völkerrecht*, 17–18; Kaltenborn, *Kritik des Völkerrechts*, 31–33; and Hegel, "German Constitution," 50–53.
104. Hälschner, "wissenschaftlichen Begründung des Völkerrechts," 62–64.
105. Hälschner, "wissenschaftlichen Begründung des Völkerrechts," 59–60.
106. It should thus be clear that neither Moser's defence of positive law nor the pejorative characterization of him as a positivist had anything to do with Comte's theory of positive knowledge. Moser's defence of positive law arose from the suspension of theological and philosophical truths in the German constitutional order, while the characterization of him as a positivist was a weapon used in a cultural-political campaign to undermine this order. For a different view, see Neff, "Jurisprudential Polyphony."

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Notes on contributor

Ian Hunter is an Emeritus Professor in the Institute for Advanced Studies in the Humanities at the University of Queensland. His work in intellectual history covers both early modern topics, *Rival Enlightenments* (2001), and modern thinkers, 'Heideggerian Mathematics' (*Representations* 2016).

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