Religion is commonly deemed to have returned to public life in ways that call attention to legal frameworks and judgments. Comparative studies of the laws of religion in Europe are being written for the classroom. The meaning of toleration is being discussed with reference to religious diversity and anti-discrimination legislation. Questions are being asked about whether and/or how to accommodate Shari’a law in Europe. Churches are concerned that new equality laws could force them to go against their faith when hiring and managing staff. In all of these headline topics, and more, the complex relationship of law and religion comes into play. Relatively little attention has been paid to law and religion internationally, however. A new journal in Law and Religion affords opportunity not only for consideration of an increased case law in anti-discrimination and freedom of expression legislation but a range of issues in international law too.
As a theologian attempting to engage with issues in international law, I cannot but recall Hans J Morgenthau's citation from John Chipman Gray in the opening pages of a chapter on international law in *Dilemmas of Politics*: ‘On no subject of human interest, except theology... has there been so much loose writing and nebulous speculations as on international law’. There is a double risk of nonsense! Mindful of Morgenthau’s chastisement, this essay offers initial observations about requirements for success in the dialogue between law and religion, and also the need for members of the Abrahamic faiths especially to reason together and with international lawyers, whether believers or not, about legal order in the international arena. Particular reference is made to what it might mean in ‘Protestant Thomist’ perspective to affirm the ‘rule of law’ and how the inclusion of religious voices in contested debates about the meaning of the ‘rule of law’ may assist deliberation in diverse international contexts—in the context of targeted killings, including in the territories of other states by armed combat aerial vehicles or ‘drones’, especially. My intention, in part, is to move issues of international law higher up the agenda of political theology, ethics and moral reasoning.

1. Law and Religion

Several difficulties present themselves immediately. It is very difficult for members of diverse faith traditions to engage across disciplines from the non-place that is ‘religion’. Religion cannot be reduced to a singular, abstract entity without dissociation from lived practice. The term is ‘the most barren and desert-like of all abstractions’. Its use typically assumes the reduction of religion to a natural human phenomenon. Jacques Derrida makes the point most clearly when linking the question of religion to the sickness or deracination of abstraction, and suggests that, today, the question of religion is emerging in a new and different light. The abstraction ‘religion’ cannot be reckoned, he warns, in contextless and impersonal ways but only in an idiom inseparable from lived experience, ‘from the political, familial, ethnic, communitarian nexus, from the nation and from the people... from the ever more problematic relation of citizenship and to the state’. To think religion adequately is to think the name(s) of God as well as patterns of observable behaviour. With Derrida, this essay warns against grouping too quickly under the one category

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7 David Hume’s posthumously published *The Natural History of Religion* (1757/1779) and complementary *Dialogues Concerning Natural Religion* (1776) mark something of a beginning in the story of the reduction of religion to a natural human phenomenon. Hume’s sceptical method merged a scientific approach to ethnology and anthropology with a psychological approach to the philosophy of religion. This, in effect, made human experience the true object of the study of religion. Most starting points and end points in philosophico-historical movements can be disputed. Arguably, however, this particular history of modern discourse about religion burnt itself out in John Hick and Paul F Knitter (eds), *The Myth of Christian Uniqueness: Toward a Pluralistic Theology of Religions* (Orbis Books 1987) in which the truth of the myth was measured as a kind of practical truth consisting in the appropriateness of the attitude it evokes. The plurality of religions was deemed to undermine the credibility of the truth-claims of any. Questions about truth-claims were deemed inappropriate. Instead, Hick drew upon Wilfred Cantwell Smith’s book *The Meaning and End of Religion* (Fortress Press 1962) in which the latter encouraged members of religious communities to see their faith ‘as an outsider’, that is, to see their own piety and faith, obedience and worship, as abstract and impersonal patterns of behaviour.
8 Derrida (n 6) 44.
'religion' all that is connoted by Athens, Jerusalem, Rome, Byzantium, Graeco-Roman Christianity, Islam, Islamicism, fundamentalisms of varying description, and so much more. To speak of 'religion' in the singular as significant again in the public arena and yet unknown in its abstractness risks reinforcing the prejudice that this unknown still requires the 'lights' of enlightenment if new wars of religion are not to be unleashed over all the earth.

A more adequately dialogical relation between law and religion means taking seriously the fact that diverse faith traditions have different, and indeed incompatible, conceptions of truth pertaining to the divine nature, the meaning of salvation and more. The problem is that Western societies are ill-equipped to handle this aspect of the relation between law and religion. Derrida states this problem as follows:

Why is this phenomenon, so hastily called the 'return of religions,' so difficult to think? Why is it so surprising? Why does it particularly astonish those who believed naively that an alternative opposed Religion, on the one side, and on the other, Reason, Enlightenment, Science, Criticism (Marxist Criticism, Nietzschean Genealogy, Freudian Psychoanalysis and their heritage), as though the one could not but put an end to the other? On the contrary, it is an entirely different schema that would have to be taken as one's point of departure in order to try to think the 'return of the religious'.

Western societies find the 'return of the religious' difficult to handle because our (albeit diverse) enlightenment heritage typically opposes religion to reason, autonomy to faith, scientific method and belief in reason and progress to piety. Kant forced religion and reason through a series of contrasts that assumed the hostility of religion to the promise of humanly sourced enlightenment:

Enlightenment is man's emergence from his self-incurred immaturity... Sapere aude!... For enlightenment of this kind, all that is needed is freedom. And the freedom in question is the most innocuous form of all — freedom to make public use of one's reason in all matters. But I hear on all sides the cry: Don't argue! The officer says: Don't argue, get on parade! The tax-official: Don't argue, pay! The clergyman: Don't argue, believe!

Still today, major scholars in the Kantian tradition work with general epistemological assumptions that contrast the truth claims of religion with the conditions of rational communication available universally. Consider the contrast drawn by neo-Kantian philosopher Jürgen Habermas between religious between secular discourse, that is, between discourse which claims to be 'accessible to all men' [sic] and that which is 'dependent upon the truths of revelation'. Validity claims outside religion are open to criticism because based on concepts that presuppose conditions of communication that are

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9 ibid 45.
10 ibid 61.
11 ibid 45.
12 Immanuel Kant, 'An Answer To The Question: "What is Enlightenment?"' [First publ. 1784 and dedicated to Frederick the Great], in H Reiss (ed), Kant's Political Writings (HB Nisbet trans, Cambridge University Press 1970) 54–55.
13 Jürgen Habermas, 'When the societal bond breaks... Excursus' in Jürgen Habermas and Joseph Ratzinger, The Dialectics of Secularization: On Reason and Religion (Ignatius Press 2005) 42.
identical for all possible participants and observers. This world of meaning—which is supposedly shared by all and deemed to an abstract form that is free from specific content—is different supposedly from the kind of discourse employed by believers when speaking from faith. It is still very difficult, in other words, for disciplines such as philosophy and law to have what they perceive as rational communication with religion where metaphysics plays an important role. At issue is what it means to say that learning processes between law and religion are possible only through the formality of reason and the conditions of rational communication that are available universally.

The journal is launched at a time, however, when leading methodological atheists are open to opportunities to learn from religious traditions about conceptions of common good, intuitions about error and redemption, salvific exodus from a life experienced as empty of salvation, and more.14 ‘Postmetaphysical thought is prepared to learn from religion while remaining strictly agnostic’.15 Habermas et al. are loosening the rigid Rawlsian requirement of ‘public reason’ whereby believers are to refrain from expressing and justifying any political arguments by appeal to religious language or teaching. The secularization theories advanced by sociologists in the 1970s and 1980s are no longer deemed to be persuasive; the supposed links between modernization and the progressive decline of religion do not fit the facts of the matter. It is important at this time, says Habermas, to foster mentalities in which this learning will be possible. It remains difficult for believers to speak into this context about the ethical significance of the space that opens between divine and human law. If, however, the return of religion(s) to public life is to produce more than an increased case law in anti-discrimination and freedom of expression legislation, believers must seize this opportunity to think rigorously and publicly from particular faith traditions, and together, about the requirements of human justice.

2. Interpreting the ‘Rule of Law’

This essay is an attempt to think through some ethical and political implications of Christian belief with respect to the need for stable legal regimes, whilst, simultaneously, provoking disquiet about confidence in human law as justice.16 Prophets throughout the bible are ambivalent about the achievements of human law and judicial procedures. Habakkuk, one of the 12 minor prophets of the Hebrew bible, lamented the weakness of the legal system in Jerusalem in the mid- to late 7th century BCE, shortly before the Babylonians laid siege to the city and captured its inhabitants.

O LORD, how long shall I cry, And You will not hear?

14 ibid 43.
16 For an excellent account of precisely this kind of questioning, see Theodore W Jennings Jr, Reading Derrida / Thinking Paul (Stanford University Press 2006) ch 2, esp 25.
Even cry out to You, ‘Violence!’
   And You will not save.
Why do You show me iniquity,
   And cause me to see trouble?
For plundering and violence are before me;
   There is strife, and contention arises.
Therefore the law is powerless,
   And justice never goes forth.
For the wicked surround the righteous;
   Therefore perverse judgment proceeds.
But the LORD is in His holy temple.
   Let all the earth keep silence before Him.

(Habakkuk 1:2-4; 2:20)

Habakkuk’s point is not merely that human legal systems could do better. Where faith is interpreted as the acknowledgment of divine justice beyond human law, divine justice necessarily exceeds, questions and destabilizes the human law’s provisional legitimacy. The justice of human law is always a process of becoming and thinking of justice ‘outside, beyond, and even against law’. Human law and divine justice are distinguished qualitatively from any human formulation of the meaning of ‘justice before the law’ or ‘rule of law. The ‘impossibility’ of human justice before God introduces an instability into claims made for the justice of any and all human law, whilst demanding nevertheless that human law is law only by reference to the ‘beyond’ of justice that takes the form of a call upon humans in their sociality. Human law is unable to produce true justice and can, indeed, say little more than ‘the LORD is in His holy temple / Let all the earth keep silence before Him’ (Habakkuk 2:20). Nevertheless, human law remains a necessity implied by confession of justice before and beyond the law. Human law is practiced in answer to, or before, another law that functions as a kind of limit or ‘beyond’ before which complex interactions of answerability are lived.

The qualitative gap between human law and divine justice means that few, if any, in Christian tradition take the notion of the ‘rule of law’ or a duty of respect for, or compliance with, the positive law as unlimited. A pressing issue for Christian people thinking about law and governance remains why many were silent when the Nazi regime took over the church in the early 1930s. Most will be mindful of the seeming inconsistency of New Testament texts: Paul’s instruction in Rom 13:1-7 to ‘be subject to the governing authorities’ because they are ‘God’s servants’ sits uneasily with texts that appear to designate earthly governors as destroyers of the earth set themselves for
destruction (Rev. 4:2-11, 5:6-10). Christianity has served too often as vehicle for political myth, apocalyptic beliefs that evil can be destroyed and hasten the eschatological condition, and the embodiment in secular regimes of a perverted religious desire to remake humanity by force. Many, myself included, think it necessary to repeat Judith Shklar’s observation that the rule of law serves typically as an enforcement mechanism within a particular ideology: ‘Legalism is the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationship to consist of duties and rights determined by rules.’ Many are uncomfortable using the phrase because inter alia Friedrich Hayek understood the ‘rule of law’ too narrowly to be a protection for individuals against arbitrary decisions by government officials, or because, in Philip Pettit’s more recent Republicanism: A Theory of Freedom and Government, ‘the rule of law’ is associated exclusively with the equal status of citizens under the law thereby delimiting debate. Many are aware that Michael J Trebilcock and Ronald Joel Daniels have exposed how the ‘rule of law’ has become a mantra in international development studies whilst remaining elusive in meaning and operation. At the least, the rhetoric will be used advisedly.

It also means, however, that for many Christian people appeal to the ‘rule of law’ remains integral to the living out of their faith. Augustine also wrote in De Ordine, his response to a trilogy of dialogues by Cicero, about the divine ordering of the world and why human problems living in the world are the result of failure to comprehend rather than God’s lack of design. Understanding what order entails, he writes, is a way that human beings can come to God: ‘order is that which will lead us to God, if we hold to it during...’

19 Some New Testament texts affirm the need for earthly government to deal with wrongdoers and repeat the injunction to believers to be subject to rulers and authorities (eg Titus 3:1; 1 Peter 2:13-19). In the gospels, Jesus’ reply to the Pharisees and Herodians about the payment of taxes implies that some kind of earthly rule is part of the universal human experience of divine providence: ‘Render to Caesar...’ (Mark 12:17 par). Jesus gives little ground to the Zealot politics of violence (John 18:11 cf Luke 22:35-38) implying rather that earthly government has a justifiable place within divine providence. He appears to accept the right of government to expect its citizens to meet certain obligations for the sake of good order. The Mark 12:17 saying depends for its effectiveness on a distinction between the limited jurisdiction of earthly government and the supreme authority of God. By contrast, other texts call the Churches to oppose the ‘beast rising out of the sea’ (Revelation 13:1) and the harlot of Babylon (Revelation 19:2)—figures commonly understood to represent the political tyranny and economic exploitation of Rome. Paul describes civil magistrates as those ‘of no account’ (Gr exouthenou 1 Corinthians 6:4) in the Church. Earthly government is ‘doomed to perish’ (1 Corinthians 2:6). His presentation of Jesus Christ as almost an anti-Caesar, the promise of whose coming again in glory carries a huge political charge, seems to delegitimize rather than legitimate earthly government. The letter to the Romans, says the scholar of Judaism, Jacob Taubes, opens with a declaration of Jesus Christ as ‘Son of God with power’ (Romans 1:4). This is reminiscent of Psalm 2, an enthronement Psalm: ‘You are my son... Ask of me, and I will make the nations your heritage, and the ends of the earth your possession’ (Psalm 2:7-8). Such allusions, says Taubes, present the gospel as a declaration of war against Rome; Jesus’ political order is universal but based on love and forgiveness not law or ethnicity. The Political Theology of Paul (Dana Hollander trans, Stanford University Press 2004) 24. John Gray’s, Black Mass: Apocalyptic Religion and the Death of Utopia (Penguin Books 2007) is open on my desk as I write.

20 John Gray’s, Black Mass: Apocalyptic Religion and the Death of Utopia (Penguin Books 2007) is open on my desk as I write.


22 The rule of law means that ‘the government is bound in all its actions by rules fixed and announced beforehand so that it is possible to foresee with fair certainty how authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge’. Friedrich A Hayek, The Road to Serfdom (G Routledge 1944) 39.


24 Michael J Trebilcock and Ronald Joel Daniels, The Political Economy of Rule of Law Reform in Developing Countries (Edward Elgar Publishing 2009).
Calvin spoke of the ‘order of nature’ as nothing else than obedience to the divine will, the authority of which shines forth before heaven and earth. Aquinas’ jurisprudence informed traditions of international law (Vitoria, Grotius, Suarez, Pufendorf and more) that tended to defend an account of moral judgment as a rational process that attends to the relation between the good of ‘the whole’ and that of ‘the part’. Humans are capable, they all assume, of connecting what they have learned through life’s experiences. Reason uses rules of grammar that presuppose God’s ordering of the universe and the ethical work of understanding and restating this order for practical ends. Appeal to the ‘rule of law’ resonates positively with Vatican advocacy of the ‘force of law’ as distinct from the ‘law of force’. Indeed, the Vatican has appealed at the international level for something analogous to the rule of law in nation states.

More specifically, in Thomist tradition, the ‘rule of law’ may be associated with humankind’s participation in the Eternal Law through reason and will. Every human good enjoys a graced participation in God’s absolute goodness that includes providential ordering of creatures towards their proper end. To the extent that human law gives specificity and codification to the natural law, is oriented to the common good, is fully public, stable and practical, then it is the duty of citizens to obey and judges to adhere to it.

The spiritual man, by reason of the habit of charity, has an inclination to judge aright of all things according to the Divine rules; and it is in conformity with these that he pronounces judgment through the gift of wisdom: even as the just man pronounces judgment through the virtue of prudence conformably with the ruling of the law (L. iudicium ex regulis iuris).

The ‘rule of law’ is not the application of fixed precepts to cases before the courts but the proper functioning of human capacity for rational judgment given that human life is informed by objective values and aspects of goodness that we discover and shape but do not create. The emphasis is on law functioning in good order whereby the authority of the courts is rooted in the will of God and also the customs and rules that allow diverse associations to co-exist and cohere. The ruling of law is an expression of humans living in accordance with divine providence and instantiation of common good. It is inseparable for Aquinas from the virtues connected with justice in general, but also the virtues of religion which offer to God due devotion and reverence, seek after truth, friendliness, prodigality and equity, and evade the vices of perjury, sacrilege and simony. Discussion of the ruling of law is not possible without these virtues. The intention of the law is to make people

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25 Augustine, On Order (Silvano Burruso trans, St Augustine’s Press 2007) 1.9.2.7.
28 Aquinas, ST I-II, q 94, a 1-2.
29 Aquinas, II-II, q 60, a 1, ad 2. See also ST I-II, q 90, a 2-4.
30 Aquinas, ST II-II, q 80.
31 Aquinas, ST II-II, q 81–84.
32 Aquinas, ST II-II, q 109–119; II-II, q 120; II–II, q 98–100.
virtuous. Judicial precepts are the determination of moral precepts, insofar as they are directed towards one's neighbour and pertain to justice.

Precisely because of this (proper) tension, I attempt to write from the perspective of what has been called 'Protestant Thomism'. Some Protestant Thomists emphasize with Roman Catholic colleagues the need to press forward the theological developments of Vatican II. Some want to read Karl Barth with a 'revisionist' Aquinas in mind and to show that differences between them are more apparent than real. Following John Bowlin and Eric Gregory, I understand the phrase to refer to Protestant thinkers shaped by Barthian sensibilities and yet experiencing a renewed influence of Aquinas's account of the natural law. The effort is to read both together without caricature. The assumption is that human law has some participation in divine law whilst knowing that, although human law is not true justice, the very possibility of human law is found in this negation that is not destructive of human possibility but creative of space for the possible in the very experience of the impossible. I find this negation expressed best by Derrida:

These two regimes of law, of the law and the laws, are thus both contradictory, antinomic, and inseparable. They both imply and exclude one another simultaneously. What matters is the ethical significance of this gap between the two regimes of law, divine and human, especially the dynamic of answerability that opens in the world of human action before God in the relation of earthly law to divine justice.

For the believer, this answerability bears upon every person in their unique, unrepeatable position before God. In this sense, the ‘rule of law’ is a task to be accomplished wherein answerability is actualized in the uniqueness and irreplaceability of every person for all of their actions. There is, to use Bakhtin’s phrase, a ‘non-alibi in Being’ [Russ. ne-alibi v bytii]. No one can escape their own unique answerability in their own unrepeatable place in Being. Humanity in general has no meaning apart from acknowledgement of the never-repeatable, irreplaceable uniqueness of personal being as experienced relation to the similarly once-occurrent answerability of our fellow-beings. Significantly, in Christian tradition, this answerability extends to the nations.

33 Aquinas, ST II-II, q 122, a 1, ad 1.
35 John Bowlin, 'Contemporary Protestant Thomism', in Paul van Geest, Harm Goris and Carlo Leget (eds), Aquinas as Authority (Peeters 2002) 243.
36 Gregory (n 34) 50. To the extent that it is a single outlook or perspective, Protestant Thomism shares Barth’s conviction that Christian ethics is concerned with God incarnate, the Word made flesh, before it is concerned with anything else, and remains intensely mindful of his warning against ‘the attempt to establish and justify the theologico-ethical inquiry within the framework and on the foundation of the presuppositions and methods of non-theological, of wholly human thinking and language’. [Karl Barth, Church Dogmatics (G Bromiley trans, T and T Clark 1957) II/2, § 36, 520.] Protestant Thomism is alert to Barth’s complaint against 19th-century Thomist construal of nature and supernature, reason and revelation, man and God [CD II/2, 530] and his concern that, unless ethical reflection takes its starting point in the command of God, it has nothing to do with the truth of God [CD II/2, 519]. Protestant Thomism is also mindful, however, of Jean Porter's observation that aspects of Barth’s challenge to the scholastics fail because they never claimed to speak of 'unaided natural reason' outside of a Christian theological context; contemporaries of Aquinas never intended natural law to be understood as an alternative to belief in the incarnation and the saving grace of God. Natural law for most scholastics was a theological concept, grounded in a particular reading of Scripture. [Jean Porter, Natural and Divine Law: Reclaiming the Tradition for Christian Ethics (Eerdmans 1999) 170.]
New Testament witness is that the Son of Man will judge the nations against several requirements:

When the Son of Man comes in his glory, and all the angels with him, then he will sit on his glorious throne. Before him will be gathered all the nations, and he will separate them one from another as a shepherd separates the sheep from the goats. Then the King will say to those at his right hand, ‘Come, O blessed of my Father, inherit the kingdom prepared for you from the foundation of the world; ... I was a stranger and you welcomed me. (Matthew 25: 31-35 RSV)

As eschatological judge, the Son of Man assumes a role that normally belongs to God himself. ‘Coming with “all the angels”’, writes New Testament scholar Craig S Keener, ‘alludes to various versions of refers to Zechariah 14:5 where God is in view’. In other words, the Son of Man is deemed worthy of the accolades due to the divine being. Like the judgment alluded to in Zechariah, the Son of Man’s judging of the nations is based on the good or evil they have done. Imperatives familiar to readers of the Old Testament (Deuteronomy 10:19; Psalm 146:9) are taken up into this vision of the Son of Man’s judgment when he comes in glory. Matthew 25: 31–35 implies not only that individual persons will be judged against their reception of the gospel and fulfilment of the law in these respects but that the nations or peoples of the earth (Gr. ta ethne) will appear before his throne.

Against this complex backdrop, the elusive and contested phrase the ‘rule of law’ still serves as a meeting place for discussion about the ethical ends and political objectives of the law. The motif of the rule of law—or, preferably, the ruling of law—still has an important role to play in debates around targeted killings, and more, not least as bridge to dialogue between Christianity and Islam. I use the gerund form of the noun, that is, the form which retains verb characteristics and functions simultaneously as noun and verb, to indicate much of what has been implied above about the impossibility of human justice.

38 Craig S Keener, A Commentary on the Gospel of Matthew (Eerdmans 1999) 602. He cites Jewish eschatological texts from the Old Testament Pseudepigrapha in support of this claim, eg, Sibylline Oracles 4.183-84, 1 Enoch 9:4; 60:2; 62:2; Testament of Abraham 14A.
39 ibid 602-03.
41 The tension between the representative role of the nations and the personal responsibility of members of the nations is maintained in the anonymous patristic Incomplete Work on Matthew which speaks of every person acting according to their faith and being judged according to the type of their souls. [Anonymous, Incomplete Work on Matthew in Manlio Simonetti (ed), Ancient Christian Commentary on Scripture, New Testament 1b Matthew 14-28 (Intervarsity Press 2001) 46–47.] Wicked and righteous persons are intermingled and the Son of Man will distinguish the merits of each. Even so, witness in Christian tradition to the subjection of the nations to the Son of Man’s judgment is strong. John Chrysostom speaks of Jesus raising the sights of his hearers to the final judgment seat ‘with all the world gathered around him’. [John Chrysostom, The Gospel of Matthew, Homily 79.1 in P Schall and others (eds), Nicene and Post-Nicene Fathers (Eerdmans 1952–56), First Series, vol 10, 475.] The lowliness of Jesus’ earthly ministry is contrasted with his appearance in glory to confront, reproach and pass judgment on the entirety of humanity gathered as nations before him. Epiphanius the Latin wrote in the late 5th or early 6th-century CE that every people on earth will see him: ‘All nations will be gathered together by the angels from the foundation of the world, beginning first with Adam and Eve down to the last person on earth.’ [Epiphanius the Latin, Interpretation of the Gospels, 38 in A Hamman (ed), Patrologia Latinae Supplemetum (Garnier Frère 1958) 3:899. Cited in Simonetti (ibid) 231.]
before the divine law and the simultaneous ‘nevertheless’ of answerability for legal order. A primary consequence is that talk of the ‘rule of law’ (in the singular) multiples into talk of laws, rulings, rights and judgments (in the plural) as the discussion gets practical. At issue in the concluding sections of this article is what kind of answerability the religions, Christianity especially, might seek to call forth from politicians and the military concerning the ruling of law that currently governs targeted killing.

3. Targeted Killing and a Call to Answerability

Targeted killing is understood to be ‘the intentional, premeditated and deliberate use of lethal force, by States or their agents acting under colour of law, or by an organized armed group in armed conflict, against a specific individual who is not in the physical custody of the perpetrator’. I take this definition from Philip Alston’s addendum to the Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and refer especially to his concerns about the ‘highly problematic blurring and expansion of the boundaries of the applicable legal frameworks — human rights law, the laws of war, and the law applicable to the use of inter-state force’ and ‘the displacement of clear legal standards with a vaguely defined licence to kill, and the creation of a major accountability vacuum’. Like missiles fired from helicopters or gunships, the use of drones for targeted killings results in indiscriminate killings of civilians in the vicinity of the targeted person. The greater concern with drones, says the Report, is that ‘because they make it easier to kill without risk to a State’s forces, policy makers and commanders will be tempted to interpret the legal limitations on who can be killed . . . too expansively’. The refusal by States who conduct targeted killings to provide transparency about their policies ‘violates the international legal framework that limits the unlawful use of lethal force against individuals’. As Philip Alston and Hina Shamsi wrote 3 months earlier in an article for The Guardian newspaper, the use of drones is shrouded in secrecy; ‘the accountability mechanisms that apply to regular warfare are simply absent’.

The issue of immediate concern for our purposes with respect to the ‘ruling of law’ is answerability in the international arena for legal order. I broadly suppose in this section that existing international law rules for responding to terrorism and asymmetric warfare are clear enough and satisfactory for immediate purposes; international humanitarian law has well-developed sets of rules that govern the lawfulness, or otherwise, of state-sponsored targeted killing, and that these rules are being undermined by North American practice.

43 Alston ibid G 79, 24.
especially. The problem is not primarily the need for revision of the Geneva Conventions to take account of new weaponry. Even Kenneth Anderson, legal scholar and defender of the US drone campaign, accepts this point: ‘American domestic law has long accepted implicitly at least some uses of force, including targeted killing, as self-defense toward ends of vital national security that do not necessarily fall within the strict terms of armed conflict in the sense meant by the Geneva Conventions and other international treaties on the conduct of armed conflict’. Of concern is how to effect the conditions wherein questions about the ‘rule of law’ can be engaged with all due seriousness; of concern is the wall of secrecy behind which unmanned drone programmes are operated and the seeming reluctance to submit to minimum levels of international accountability.

I make little attempt at neutrality about US and UK use of combat drones in Pakistan and Afghanistan but, rather, align myself with the kind of questioning pursued by Philip Alston and Hina Shamsi. Drones, they say ‘are a relatively cheap way of killing people in areas that are otherwise largely inaccessible. The lives of troops are not put at risk. Remote pilots carry out an apparently clinical operation, with none of the gore and messiness of military combat’. It is not surprising, they comment, that the British Ministry of Defence responds with bland assurances that every effort is made to ensure that drones are used in compliance with the laws of war. American law professor and Roman Catholic scholar Mary Ellen O’Connell writes similarly of attacks by the United States weaponized drones in the border area between Afghanistan and Pakistan resulting in ‘hundreds of unintended victims, including children’. She cites counter-terrorism experts David Kilcullen and Andrew Exum who estimate that, in early 2009, drones were killing 50 people for every intended target, and speaks of how the United States is using the CIA, which is not part of the armed forces and not bound by the Uniform Code of Military Justice to respect the laws and customs of war. Even without killing, drones terrify people as they fly overhead filming and threatening to strike at any time. O’Connell and others cite numerous breaches of existing international law.

The call to answerability in this context is an appeal, then, not only for the application of existing international law to the use of weaponized drones but a reminder of the procedural requirements of justice. The rule of law with
respect to targeted killings has normative content that remains vitally important in safeguarding the international community from descent into arbitrariness and uncontrolled use of brute force, but is not our primary focus here. Before more detailed engagement with the normative content of the rule or ruling of law with respect to targeted killing is possible, preliminary procedural requirements of answerability must be met. Where nation-states are reluctant to submit to minimum levels of international accountability, thereby evading the procedural requirements of the compliance of states with international law, normative standards cannot be applied. Nils Melzer makes the point as follows:

While it may be permissible and even necessary to periodically challenge the adequacy of the law in force, it would be a catastrophic failure of civilization to allow the demise of the fundamental principle according to which collective power and authority must be exercised in accordance with predictable, reliable and generally binding rules.\(^52\)

Normative standards demand that prior procedural requirements are met. The repeated witness of United Nations (UN) Special Rapporteurs is that procedural requirements are being avoided. In a report to the UN General Assembly human rights committee in October 2010, Philip Alston’s successor Christof Heyns called for a halt to CIA-directed drone strikes on al-Qaeda and Taliban suspects in Afghanistan and Pakistan until serious concerns about violations of international human rights and humanitarian law can be investigated.\(^53\) The CIA contested Heyns’ concerns and claims that its operations unfolded ‘within a framework of law and close government oversight’. Of concern in this essay is how this framework of oversight is conceived.

In classic just war tradition, there has always been recognition of the need for a framework of oversight or structure of authorized arbitration. Oliver O’Donovan’s *Just War Revisited* drew attention to the ‘judicial structure’ of this framework especially, that is, the assumption that just war is never to be conceived as *duellum* or an unmediated right of self-defence following attack but, rather, acknowledgement of the ‘right’ that lies beyond *duellum* and requirement of the judgment of a third-party with respect to that ‘right’.\(^54\) For O’Donovan, the pursuit or prosecution of any act of warfare or, indeed, any use of lethal force, must be in the judicial spirit. A judicial posture is required by the belligerent before an appropriate third-party or, in the absence of any such third-party, in their own decision-making. Even in extreme situations where an appropriate third-party might not be available, the issue is whether the belligerent acts as though they are not merely defending their own interests but deciding an issue between claimants. The criteria of adequate authority, just cause, last resort, prospect of success, and more, must be considered in the judicial spirit which, for the believer, entails reference to the justice that lies

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\(^52\) Melzer (n 46) 420.


beyond law; all just war is mediated by the judgment of God. In Protestant Thomist tradition, where the ruling of law is oriented towards common good, this requires that a ‘framework of law and close government oversight’ takes international as well as national shape.

Nor am I concerned primarily to make a theological or moral point. Aquinas’s attention to the relationship between the good of ‘the part’ or ‘the one only’ to the good of ‘the whole’ was not an over-easy moralizing but, rather, a realistic engagement with the recognition that the good of every living creature are interrelated. The requirement of answerability makes pragmatic as well as theological sense. At a time when the United States, UK and other countries can afford disregard for the legal order in the international arena less than may have been supposed hitherto, the prudent realist needs a more complex and subtle appreciation of the relation between the good of ‘the one’ and ‘the many’ than is offered by any narrowly statist or unilateral thinker. I have written elsewhere about why and how the realist challenge from the Thomist tradition entails getting beyond outdated dismissals such as ‘nations have no moral obligation to comply with international law’ and rethinking a new realism for the global order today. Here the point is similar. Given that the consequences of militarized drone attacks in Afghanistan, Pakistan and other countries look to be increasingly serious and unpredictable, countering the violent lawlessness that is terrorism with anything less than strict adherence to the requirements of international law looks to be increasingly counter-productive. To repeat a phrase from O’Connell, the application of existing international humanitarian law makes ‘common sense and legal sense’.

Whether members of the Abrahamic faiths can make this call to answerability together remains to be seen. It is as much a challenge for believers amongst themselves as for non-believers to engage meaningfully—both separately and together—around questions in international humanitarian law of just cause, last resort, the ethical imperative to minimize lethal force, the requirements of necessity and proportion, the killing of civilians, compliance with international law, and other considerations of *jus ad bellum*, *jus in bello* and *jus post bellum*. Christians disagree about the US-led invasions of Iraq and Afghanistan. Moderate Muslims decry the attacks of 11 September 2001, argue that Islam condemns attacks against civilians, and denounce al-Qaeda’s *jihad* as directed against innocents. John Kelsay, James Turner Johnson, et al., have shown that it is possible conceptually, if not always possible personally or politically, to engage these issues across our different traditions. As Kelsay says, there is a considerable degree of overlap regarding the principles of just war in the traditions of Christianity and Islam: ‘both the traditions of the Islamic world and those of western culture share concerns that can be classified within the categories of the just war tradition: just cause, right authority, right

56 O’Connell (n 49) 26.
intention, and so forth’. Even so, the challenges of framing a debate about answerability before God and neighbour between Christian (so-called) just war traditions and *jihad* traditions at a time when the United States is the primary user of armed drones against targets in predominantly Muslim countries are considerable. Perhaps this, not the debate between law and religion, will be the impossible dialogue.

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