NUREMBURG AND THE ROLE(S) OF ACCOUNTABILITY IN THE LAW OF ARMED CONFLICT[*]

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Thanks so much. This is a fantastic day, and I have learned a tremendous amount; I hope you have, too. It is an honor to share the stage with people who know as much about international law as my co-speakers do.

Unlike the preceding speakers, I am not going to tell you much that you do not already know. What I am going to do is to put things together in a slightly different way and to think about these topics in a different way. Those differences start with where I start, which is not actually in international law at all but in the application of domestic constitutional law by the United States Supreme Court.

On 2 November of this year, the United States Supreme Court granted a petition for certiorari in a case called *Taylor v. Riojas*.[1] That case involved prison guards who had kept Taylor in a series of disgusting prison cells, the first covered, "nearly floor to ceiling, in 'massive amounts of feces'"[2] and the second one frigidly cold and in which the only drain, which was in the floor, had been blocked.[3] As a result, because the cell had no bunk, Taylor had to sleep in his own waste.[4]

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[*] This is an edited transcript of remarks delivered on 19 November 2020 at "The International Military Tribunal at Nuremberg: Examining Its Legacy 75 Years Later," a symposium hosted by the National Security Law Department of The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. See The Judge Advoc. Gen.'s Legal Ctr. & Sch., *Nuremberg@75 Part 3 Legacy for Great Power Competition*, YOUTUBE (Nov. 20, 2020), https://youtu.be/v3HNKlfabY0?t=2780, for a video recording of these remarks.

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[1] Taylor v. Riojas, 141 S. Ct. 52 (2020).

[2] *Id.* (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019), *vacated*, *Taylor*, 141 S. Ct. 52).

[3] *Id.*

[4] *Id.*

Taylor sued for violations of his constitutional rights under 42 U.S.C. § 1983, and the trial court granted summary judgment to the prison officials on the basis of qualified immunity.[5] Qualified immunity, as I am sure most of you are aware, is a requirement that, in order to be subject to damages under Section 1983, constitutional violations have to be clearly established.[6] The district court held that, while keeping Taylor in those cells might be a constitutional violation, it was not a clearly established one, and therefore the case should be dismissed.[7]

Now, that seems plainly wrong. I think a reasonable prison official would know that it is unconstitutional to keep a prisoner in those conditions. And, so, the Supreme Court held per curiam, with only Justice Thomas dissenting.[8] It might be remarkable, then, that Justice Alito actually wrote his own opinion in the case, agreeing on the merits but disagreeing with the decision to grant certiorari in the case.[9]

In this regard, Justice Alito had a pretty good argument. Supreme Court Rule 10 describes the types of cases for which the Supreme Court grants certiorari,[10] and while the Court has discretionary authority (that is, the Court is not bound by Rule 10), this kind of case was not the kind of case covered by Rule 10. The district court had arguably applied the correct legal standard—it had done so incorrectly, as the Court concluded—but the Supreme Court does not generally hear those kinds of cases.

That goes to a larger tradition about the Supreme Court: that it is generally uninterested in correcting the misapplication of law and is much more interested in managing the development of the law in U.S. courts.[11]

My point is not that that is the right approach, but rather to emphasize the different things that courts do. They decide individual cases (they issue judgments about what happened and allocate legal rights and duties between parties) and they explain why (they render opinions that explicate

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[5] *Id.*
[6] Pearson v. Callahan, 555 U.S. 223, 231 (2009).
[7] Taylor, 141 S. Ct. at 52.
[8] *Id.*
[9] *Id.* at 52, 54, 56.
[10] U.S. SUP. CT. R. 10.
[11] *See* Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 L. & SOC'Y REV. 443, 446–47 (1993) (book review).

the content of the law). Those are different things that courts do, although they are often conflated.

My talk today is going to focus on that distinction and its relationship to the legacy of Nuremberg and the development of the law of armed conflict (LOAC) (which I am going to use in its generic sense to describe the law applicable in this area generally as opposed to *jus in bello* or *jus ad bellum*[12]) in the context of great power competition. I am largely going to tell a story that is the flipside of Geoff Corn's talk from earlier today[13] and, I think, dovetails nicely with Andrea's talk.[14] Geoff talked about how the failure of the United States to codify war crimes in the Uniform Code of Military Justice has led to stagnation in the development of the LOAC and raised questions of legitimacy.[15] I am going to come at the question from the other side: to talk about how accountability mechanisms can improve the content of the LOAC and why that would be an advantage to the United States in an era of great power competition.

This being an Army-sponsored event, I feel obligated to provide a roadmap. My thesis is that the United States needs to engage judicial processes for the development of the content of the LOAC. My key takeaways are that the real risk to the United States in the context of great power competition comes from the fragmentation of the substantive rules of the LOAC and that the United States' approach to the LOAC should reflect that risk from fragmentation. Essentially, I am going to argue that the LOAC needs more case law, and the question is how to generate that case law. Nuremberg made it possible to think of reliable accountability mechanisms for LOAC violations, but today, the greatest thing that might be standing in the way of LOAC accountability mechanisms might be the concept of accountability itself.

In support of this argument, I am going to try to make three-and-a-half points. The first is that stable and well developed LOAC is an advantage

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[12] *See* OFF. OF GEN. COUNS., DEP'T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL § 1.3.1.1 (2016).
[13] Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021).
[14] Andrea Joy Harrison, Guidelines on Investigating Violations of International Humanitarian Law *and Practical Mechanisms for Accountability—Today and Beyond*, 229 MIL. L. REV. 221 (2021).
[15] *See generally* Corn, *supra* note 13.

to the United States in great power competition, which I take to be a period of increased competition from other major powers, specifically China and Russia.[16] The second point is that we need judgments in order to develop a stable LOAC, and this is going to take us on a hopefully brief journey into jurisprudence and what it says about the legitimacy of law. The third point is that accountability is paradoxically at least in some tension with the development of stable LOAC, depending on how that accountability comes about. This, to some extent, is the strongest connection I am going to draw to Nuremberg and the various approaches to accountability in the International Military Tribunal and the subsequent proceedings. Here, I am going to try to distinguish between different forms of accountability and, indeed, between accountability and accounting. My half point will be some thoughts about how to do that, but I am going to be asking for your participation both here today and after, as you think about these problems in the future.

As I mentioned before, I am both a law professor and an Army judge advocate. I will try to recognize those different roles and how they are connected. I am clearly speaking in my professorial capacity, which will become clear as I wander through theories of jurisprudence, but I cannot help, as a professor, to be influenced by my experience as a judge advocate. I hope that that experience informs my approach and does not cloud it. Also, as a Soldier in the U.S. Army Reserve, I am someone with a distinctly pro-American viewpoint. My approach is not a detached and analytical one; mine is an argument about how I think America can best succeed in great power competition, a competition in whose outcome I am not indifferent.

II. Well Developed Law of Armed Conflict Benefits the United States More Than Its Great Power Competitors

I am probably telling you something that you already know, but I take a robust LOAC to be a matter of U.S. advantage in great power competition. This is really a point that underlies the rest of the argument that it is going to be easier in the United States to comply with any likely set of LOAC

[16] RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS (2021).

rules than it will be our great power competitors. As a result, strong LOAC disproportionately benefits the United States in great power competition.

I would offer two versions of this argument—a weaker and a stronger one.

The weaker version is that the United States is better with a settled, and maybe suboptimal, LOAC than a contested LOAC that aspires to the best possible rule. Here, I am talking about the consistency and durability of the law apart from the content of the rules, and so, to some extent, the real threat is from fragmentation itself. The problem of fragmentation from an American standpoint is particularly strong. I think America is going to be capable of adjusting to practically any set of LOAC rules that are likely to be produced in the international order, partly because our domestic democratic order is generally consistent with any likely set of rules. The U.S. position on the LOAC is roughly aligned with the international position. We frequently write about tensions between U.S. and other interpretations of the LOAC[17] because our tendency is to focus on the points of disagreement. Maybe this is because we are all lawyers and this is what lawyers tend to do: focus very heavily on the points of disagreement that we have with other sources of law in the LOAC. But the points of disagreement are far outweighed by our overall embrace of the LOAC.

What I am really arguing for is a greater degree of engagement in service of providing a more systematic approach to the LOAC and one that travels across jurisdictions better than the current disputes do. I went to school at The Judge Advocate General's Legal Center, and I know how the class goes: "This is the U.S. position and this is the other position." I think that we should be trying harder to close that gap in order to come up with a "single" position, but my argument really is more about the value of consistency itself and how that is in service of U.S. interests. So, that is the weaker argument: that consistent, suboptimal—or mediocre from a U.S. standpoint—LOAC is better for us than the quest for the perfect LOAC. And I think that that means that the United States should be comparatively willing to compromise on interpretations of the LOAC if we think it will create more durable legal rules.

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[17] *See, e.g.*, NAT'L SEC. L. DEP'T, THE JUDGE ADVOC. GEN.'S LEGAL CTR. & SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 41–43 (2020) (describing the "U.S. view" on various aspects of the law of armed conflict (LOAC)).

The stronger version is that any likely form of LOAC likely to be adopted in the international community will likely be more consistent with American approaches and values than those of our great power competitors. I can make this as a practical argument that it is just hard to make consistent LOAC internationally without the involvement of the United States,[18] and I think that is why we have seen as much fragmentation as we have seen—to the extent the United States disagrees with a legal rule in the LOAC, it is hard to say that it actually is the law.

More centrally, I think America is particularly careful with the way that it fights wars. I think a lot of the conversations that we are having about the LOAC are actually the result of the great care that the United States has taken in fighting wars over the last twenty years or so, and I would say even before that, and the possibility that such standards of care might be built into the LOAC in ways that represent other values and approaches to conducting war.[19]

While I recognize that there are challenges to U.S. views on the LOAC, I do not think since Nuremberg has the United States faced a military adversary whose conduct has more closely complied with any reasonable interpretation of the LOAC than has our own. We are a particularly compliant nation, and I think that compliance runs both through domestic political understandings and also through international law. The norms of Nuremberg reflect the norms of the United States, and we can only benefit from their development and vigorous enforcement in international law.

III. Judgments Will Facilitate the Development of a Stable Law of Armed Conflict

My second claim is that we need judgments in order to develop that law. Here, I would take a step back to think a little more fundamentally

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[18] *Cf.* Deborah Pearlstein, *Armed Conflict at the Threshold?*, 58 VA. J. INT'L L. 369, 379–80 (2019) (explaining that "the practice of the United States is indisputably important to the development of customary international law" and that disagreement between the United States and other governments regarding non-international armed conflict has generated considerable legal confusion).

[19] *Compare* Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745 (2009) (arguing that counterinsurgency practice reflects changes to the LOAC), *with* David E. Graham, *Counterinsurgency, the War on Terror, and the Laws of War: A Response*, 95 VA. L. REV. IN BRIEF 79 (2009) (arguing that Sitaraman confuses counterinsurgency strategies and the LOAC).

about what law is and about how the international legal order fits into our conceptions of law. I am going to suggest that, as international lawyers working this area, we might have more to learn from H. L. A. Hart than we do from Vattel.

As asked by modern approaches to jurisprudence, there is a sort of fundamental tension among jurisprudes between different conceptions of law. On the one side, there are positivists who believe that the law is what the duly constituted authority says the law is,[20] and on the other extreme, there are the natural lawyers. Natural lawyers argue that what makes law is the connection between the rule and some sort of fundamental conception of morality.[21] Most people sit somewhere in between the positivist and natural lawyers. And that is why the Nuremberg laws—not the tribunals, but the adopted laws of Germany that the Nazi regime used as the legal basis for the Holocaust[22]—produce a common argument and common discourse among jurisprudents about whether or not those actually constitute law[23] because, even though they were duly adopted, they lacked any kind of connection to morality. You can see the positive/natural law divide in domestic U.S. law as well. The common law looks comparatively natural; modern statute law is largely positivist.

I would contend that the modern international legal order falls very heavily on the positivist side. There really are very few international norms that drive the content of international law. The preferred form of making the international is treaty law[24] and while there are *jus cogens* norms, they are the exception, not the rule. Almost all international law is made through the positivist act of agreement. I would say that international law is almost hyper-positivist in the sense that it is states that are agreeing to be bound by the law.

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[20] *See* H. L. A. HART, THE CONCEPT OF LAW 94–95 (2d ed. 1994).
[21] *See, e.g.*, Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).
[22] Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, RGBL I at 1145 (Ger.); Reichsbürgerschaftsgesetz [Reich Citizenship Law], Sept. 15, 1935, RGBL I at 1146 (Ger.).
[23] *See* Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 632–33 (1958).
[24] Christopher Greenwood, *Sources of International Law: An Introduction*, UNITED NATIONS 1–2, https://legal.un.org/avl/pdf/ls/greenwood_outline.pdf (last visited July 12, 2021).

In order for that agreement to form a legitimate basis of law, it has to have some teeth. You have to have something to lose. I think we recognize that as well. A state enters into a treaty and when the treaty does not go quite the way they want it to, they just withdraw.

We want to be concerned about that. We certainly feel that way about private contract law that gets formed between individuals—you cannot just get out of a contract when it is no longer beneficial to you. That bite in the law is what makes it legitimate.[25]

Given those features of international law (i.e., that it has to be agreed to and it has to be binding to be legitimate), I think we should back away a little bit from underlying substantive rules. As lawyers, we tend to focus on what the content of the law is, but the real question for contested LOAC is, "What makes the rules legitimate?" The rule in any legal system is the rule for recognizing what are and are not binding rules.[26] What makes law that is viewed as legitimate by the relevant players, which, in this case, includes nations and, after Nuremberg especially, individual soldiers and fighters who are going to be bound by that law.

This is where I get to judicial action. Because of the state-centric, assent-based approach, the preferred form of international lawmaking is by treaty. I do not think that a comprehensive treaty on the content of the LOAC is likely. I have been hearing talk about a next Geneva Convention for a long time,[27] but it does not seem like we are heading in that direction. That leaves other fora, such as the opinions of scholars and other non-state actors, who, despite their best intents and wisdom, are not fantastic sources of law in this area. This is a very Westphalian, state-centric area of law. Because only states really are able to engage in armed conflict,[28] certainly as a practical matter, it is states who have to make the kinds of compromises embodied in the LOAC. It is states that we have to think about in terms of accountability. This is rightly a state-centric area of

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[25] *See* HART, *supra* note 20, at 86 (describing the internal perspective of an actor toward law). The lack of an internal perspective led Hart, the leading positivist, to reject international law as "law." *See id.* at 214.

[26] *See id.* at 94–95.

[27] *See, e.g.*, Callin Kerr, *Mexico's Drug War: Is It Really a War?*, 54 S. TEX. L. REV. 193 (2012) (collecting references).

[28] *See* Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253, 255 (2011).

international law because states are the ones who face the balance of rights and responsibilities of the LOAC.

There are ways states participate other than by treaty. They make unilateral pronouncements of law,[29] and many would like to rely on those as a *source* of law. I do not want to underestimate the value of unilateral pronouncements, but they contribute little to the settled meaning of international law. A problem with unilateral pronouncements of law by states is that they rarely resolve contested issues of law; they often explain contested positions of law, but they do not tend to resolve them. Even that explanation of a consistent position of law can be valuable in the formation of law over time—it feeds the conversation. Part of my argument is that the United States should take more advantage of unilateral pronouncements, but it is clearly a second best.

Given the alternatives, judicial development seems the most promising. For legitimacy, it is important that states have something to lose. It is often hard to get states to completely specify what their obligations are going to be by treaty,[30] and courts can help resolve those disputes and help to further specify what wind up being relatively vague standards. The LOAC is a perfect example. When you study the conventions and you study other aspects of international law related to armed conflict, you wind up a lot of indeterminate or relatively vague terms.[31]

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[29] *E.g.*, John O. Brennan, Assistant to the President for Homeland Sec., Nat'l Sec. Council, The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) ("There is nothing in international law that bans the use of remotely piloted aircraft for this purpose or that prohibits us from using lethal force against our enemies outside of an active battlefield, at least when the country involved consents or is unable or unwilling to take action against the threat."); Ari Shapiro, *U.S. Drone Strikes Are Justified, Legal Adviser Says*, NAT'L PUB. RADIO (Mar. 26, 2010, 2:45 AM), https://www.npr.org/templates/story/story.php?storyId=125206000 (quoting State Department Legal Adviser Harold Koh as stating, "The U.S. is in armed conflict with al-Qaida as well as the Taliban and associated forces in response to the horrific acts of 9/11 . . . and may use force consistent with its right to self-defense under international law.").

[30] *See* Cindy Galway Buys, *Conditions in U.S. Treaty Practice: New Data and Insights on a Growing Phenomenon*, 14 SANTA CLARA J. INT'L L. 363 (2016) (describing not only "reservations" but also the "murky" practice of Senate conditions on treaty ratifications).

[31] JEAN S. PICTET ET AL., INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 183 (Ronald Griffin & C. W. Dumbleton trans., 1958) (explaining that the terms in paragraph 2 of Article 23 of the Third Geneva Convention regarding the right of free passage in

If the point of legitimacy is to feed the development of rules, the question then is how to provide legitimately in a way that states will accept. Here is a place where one of Nuremberg's innovations, which certainly has been taken up by military tribunals like the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the former Yugoslavia, and International Criminal Court, might actually be a barrier: individual liability. While the law has to have bite in order for its content to be viewed as legitimate, it is not clear that individual accountability is the kind of consequence we need for the development of the law.

I am cautious in saying this because I do think that what Nuremberg did was incredibly important and I am not pushing against the overall concept of individual liability at all. I just want to point out that two distinct points about the relationship between individual and national accountability. There is the initial question about whether individual liability is itself legal. What Nuremberg did was defeat the defense to individual liability that one was relying on national authority, but you can defeat that *defense* of relying on national authority and continue to subject individuals to liability without having individual liability be the only way to develop the law. The existence of individual liability and the focus on individual liability has been a barrier to at least U.S. participation in some international legal fora,[32] and I think that the United States' absence has harmed both the content and the legitimacy of the LOAC.

Along those lines, I would make two observations regarding individual and national accountability. The first is that we should expand a model of national accountability that is predicated on the failure to provide individual accountability for war crimes. The nation has the obligation to provide individual accountability, and its failure to do can certainly form the basis for national accountability. The second is that our heavy emphasis on ad hoc tribunals that tend to focus on the very worst LOAC violations has led to a LOAC applicable only to those least likely to follow it. It is not clear to me that individual accountability itself does a lot of work in those worst cases—that budding dictators or war criminals are thinking about the likelihood that

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relation to a blockade was made intentionally vague because "the Diplomatic Conference of 1949 had to bow to the harsh necessities of war; otherwise they would have had to abandon all idea of a general right of free passage."); *id.* at 625 (noting paragraph 4 of Article 158 is "vague, and obviously deliberately so").

[32] *See* JENNIFER K. ELSEA, CONG. RSCH. SERV., RL31495, U.S. POLICY REGARDING THE INTERNATIONAL CRIMINAL COURT (2006).

an as-yet-non-existent ad hoc tribunal might be formed to try them—it is not clear that that is providing substantial deterrence to their behavior. Given the way the law is being applied, it is really not clear what individual accountability is buying us because the impulse toward individual accountability is prompted by egregious violations, and egregious violators are the ones unlikely to comply regardless of the legitimacy of the system. The current approach to individual liability thus seems to ignore the value of building compliance rather than punishing bad acts.

In the context of great power competition, with the possibility of applying these rules to great powers in a way that has not really happened since Nuremberg, we should be thinking more about designing systems for nations who are interested in the benefits of compliance. And I think the benefits of compliance are many, especially to more developed nations or nations with more heavily developed foreign policy. More importantly, from the standpoint of legal development, it is not clear to me why a system of national accountability cannot provide the substantive rules of the LOAC to do the work the system needs to do.

IV. The Relationship Between Accountability and Legitimacy

My third point is to distinguish between accountability and accounting, and, specifically, to focus on how accountability might contribute to legal development in ways that accounting does not. The LOAC presents a great area of the law to ask about the relationship between accountability and legitimacy. Here, I go back to Nuremberg to talk about two different accomplishments.

The first thing that Nuremberg did was make it possible for me to stand on the stage and have this conversation in the first place. Before Nuremberg, we were in a completely different world when it came to accountability for war crimes, and the history of tribunals before Nuremberg shows that.[33] Nuremberg inaugurated an era of credible international accountability for violations of the LOAC. Although Nuremberg started that process, it did not finish it.

The question is, "How do you develop the law from then on?"—a prospective understanding about the law, which takes further tribunals and

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[33] *See* Fred L. Borch III, *The Nuremberg Military Tribunals: A Short History*, 229 MIL. L. REV. 159, 161–62 (2021).

further conversations. Accountability, at some level, is inherently backward-looking—it is hard to hold someone "accountable" for something they have not done yet. Tribunals develop the law retrospectively—with reference to what has happened—not prospectively, and Nuremburg is exhibit number one for the retrospective application of the LOAC. That itself creates problems of legitimacy, thus, the conversations that we have had today about *ex post facto* concerns and innovation in the law.[34]

More importantly for my purposes, though, is that Nuremberg solidified and legitimized the rule of ad hoc tribunals. Andrea talked about the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone,[35] all of which were and are ad hoc tribunals. Ad hoc tribunals do a lot of different things, but their existence as ad hoc tribunals makes it hard to develop the law over time.

The second thing that Nuremberg did was legitimize the concept of an accounting more generally—it created a record. Nuremberg provided accountability for the Nazi regime as a whole, which might have been necessary for a variety of reasons: in recognition of the harms they did more generally, as a matter of reconciliation for Germany moving forward, and, of course, as a matter of justice. The creation of a record or an accounting can be important for a variety of reasons. I think we have started to confuse what some of those reasons might be and, as lawyers, we need to be careful about that.

My concern is about the confusion that can arise from the conflation of accountability and accounting. Investigations, for instance, can be useful not only to determine whether there has be a LOAC violation but also useful for other purposes, such as evaluating civilian casualties more generally in ways that might not implicate whether there is a LOAC violation. I would suggest that the approach to amends, or solatia,[36] highlights some of this tension. Amends can be paid as a policy matter to further some objective, in recognition of some legal wrong, or in recognition of some non-legal

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[34] *See* Lieutenant General Charles N. Pede, *The Significance of the Nuremberg International Military Tribunals on the Practice of Military Law*, 229 MIL. L. REV. 253, 265 (2021).
[35] Harrison, *supra* note 14, at 229–30.
[36] 32 C.F.R. § 536.145 (2020) ("Payment of solatia in accordance with local custom as an expression of sympathy toward a victim or his or her family is common in some overseas commands.").

wrong.[37] It is hard to specify just from the existence of the payment what the underlying understanding was. The same is true of investigations and other mechanisms of providing an account, which can serve multiple purposes, many of which can become easily confused.

I think it is important that we distinguish mechanisms of legal accountability from mechanisms of providing an account—to recognize that they do different things and to evaluate the distinct value of legal development and decide whether it is a good idea to invest in institutions that do that, perhaps at the cost of either an accounting or accountability. Just as we might push toward institutions that focus on developing an account without providing accountability, as happens with some truth and reconciliation commissions, we might also push towards legal institutions that provide development, even though they provide imperfect accounting or accountability.

With all this complexity, and given the perils of confusing accountability and accounting, my half point of suggestions might seem out of the blue (and they are certainly incomplete), but I think they follow naturally from my earlier points.

First, given the history and barriers to international application, the United States should be looking for application of the LOAC in its national courts. This is really picking up Geoff Corn's argument from earlier today: we should be looking for opportunities to include LOAC in our national law.[38] We saw it happen in *Hamdan*,[39] which I would be tempted to call the high point of LOAC accountability and enforceability in U.S. national law, when the Supreme Court applied the law against the preferences of the executive branch; in Geoff's proposal for the codification of war crimes in the Uniform Code of Military Justice;[40] the Military Commissions Act[41]

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[37] "An offering of solatia seeks to convey personal feelings of sympathy or condolence toward the victim or the victim's family. Such feelings do not necessarily derive from legal responsibility; the payment is intended to express the remorse of the person involved in an incident." U.S. DEP'T OF ARMY, PAM. 27-162, CLAIMS PROCEDURES para. 10-10*a* (21 Mar. 2008).

[38] Corn, *supra* note 13, at 191–92; Geoffrey S. Corn & Rachel E. VanLandingham, *Strengthening American War Crimes Accountability*, 70 AM. U. L. REV. 309 (2020).

[39] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[40] Corn, *supra* note 13, at 191–92.

[41] 10 U.S.C. §§ 948a–950t.

and the appellate court decisions that have followed[42] are a tremendous source of development in the LOAC; and there are even other venues, like the Alien Tort Claims Act[43] and the Torture Victim Protection Act.[44]

Second, the United States needs to take a more active role in announcing its position on LOAC application. There are too many statements on the LOAC that are being made without rebuttal or address by the United States.[45] I think it is hard to do this at the interagency level, to get everybody together to make a joint statement, but I would recommend that these become the bread and butter of U.S. foreign policy engagement on the LOAC, especially given the lack of other international fora like regular international courts.

Third, and far more complicated, is to suggest that we should be thinking more about national accountability as a general matter. Individual accountability is attractive, but it is costly for a nation to subject its nationals to individual accountability to international tribunals. An emphasis on national accountability might provide the space to develop the law, even if it falls short as a matter of complete accountability for violations.

V. Conclusion

Nuremberg was a hugely important and perhaps a historically singular event. It made it clear that the world was not going to permit these kinds of crimes to go unpunished, and I do not think I could make any of the arguments I have made today but for the existence of Nuremberg. The commitment to accountability displayed at Nuremberg and the subsequent proceedings fundamentally changed world perceptions of aggressive war, crimes against humanity, and human rights violations like genocide. But,

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[42] *E.g.*, Al-Bihani v. Obama, 590 F.3d 866, 884–85 (D.C. Cir. 2010) (Williams, J., concurring) (applying the LOAC to determine whether Al-Bihani is detainable).
[43] 28 U.S.C. § 1350.
[44] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).
[45] *E.g.*, NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009). The United States has not accepted the International Committee of the Red Cross's *Direct Participation in Hostilities* study, but neither has it published a formal response challenging the International Committee of the Red Cross's interpretation. *See* Major Ryan T. Krebsbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT'L SEC. L. & POL'Y 125 (2017).

while the use of extraordinary tribunals like Nuremberg can provide critical accountability, when they are the only form of accountability, they can stifle legal innovation and development. I think a durable and more consistent understanding of the LOAC would benefit the United States in great power competition, and it is hard to get that kind of durable understanding from the kind of ad hoc tribunals that have focused on individual accountability.

In terms of great power competition, my argument is that the United States needs to find a way back into the ongoing dialogue regarding the development of the LOAC. That dialogue is happening all over the world in a variety of fora, and the United States, I would argue, needs to engage it before it winds up with a LOAC that is hopelessly fragmented or it does not find favorable to fit U.S. interests or U.S. morality. While Nuremberg represented the beginning of what I think could be a robust and widely enforced international LOAC, our generation has the responsibility to take that beginning and carry it forward.