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The fog of war reform : change and structure in the law of armed conflict after September 11 / Peter Margulies

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Abstract:	<p>Since the attacks of September 11, 2001, the law of armed conflict (LOAC) has been locked in a bitter conflict between utilitarians, who generally defer to state power, and protective theorists, who seek to shield civilians by curbing official discretion. However, protective theorists' scrutiny of states is burdened by hindsight bias. Failing to recognize the challenges faced by states, protective theorists have ignored the risk to civilians posed by violent non-state actors such as terrorist networks. Because of this blind spot, protective theorists have embraced changes such as the ICRC's Guidance on Direct Participation in Hostilities that exacerbate LOAC's asymmetries, creating a "revolving door" that shields terrorist bomb makers while permitting continuous targeting of state forces. Holistic signaling requires the United States to support the law of armed conflict, even when adversaries such as Al Qaeda reject that framework. Applying the structural test, a state can use a sliding scale of imminence and necessity to justify targeting Al Qaeda-affiliated terrorists in states unwilling or unable to apprehend those operatives. However, the material support charges against Hamdan signal a troubling turn to victors' justice that will ultimately harm counterterrorism efforts. Stressing a linear time horizon and holistic signaling defuses rhetoric and sharpens deliberation about post-9/11 LOAC changes.</p>
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