

## The Injustice of the Current Incantation of Jus Post Bellum

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**Abstract:** Jus post bellum was originally conceived as an extension of modern just war theory. Specifically, it was aimed at examining the justness and morality of actions during war, jus in bello, in relationship to negotiations for peace in the post-war setting. Under the initial conception of jus post bellum, considerations of distinction of enemies from civilians, for example, takes on a more pointed meaning as one has to calculate how much collateral damage, even if allowed for in just in bello, is appropriate given the longer-term end-goal of successful and beneficial peace negotiations. Unfortunately, jus post bellum has been expanded to mean that the victor in the war is now responsible for the well-being of the people and/or nation it has defeated. This has led to a concerted cry for post-war nation-building which neither leads necessarily to successful negotiations nor ensures a better or lasting peace. In fact, current conceptions of jus post bellum remove national interest from the equation altogether replacing all military endeavors with one monolithic national interest; liberal imperialism<sup>1</sup>. Further, current incantations of jus post bellum obviate the possibility of a punitive strike or punitive expedition even though this might be exactly what is needed in certain cases to create a better peace than existed prior to conflict.

This paper will explore the genesis and evolution of the jus post bellum concept. This paper will focus on the current form of jus post bellum exploring the operational and strategic implications if modern just post bellum is accepted as an international norm. This paper concludes with a warning arguing that the United States should reject jus post bellum in its current form and insist that an international norm instead be set around the previous formation of

this concept. If just post bellum does become a forceful international norm, this norm along with the current movement toward Mass Atrocity Response Operations (MARO), and liberal imperialism, in the form of increasing intervention and nation-building, will lead to an era of American political and economic decline and have the opposite effect than envisioned by proponents of jus post bellum.

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<sup>1</sup> Dan G. Cox, "The Age of Liberal Imperialism: Twenty-Five Years of a Flawed U. S. Foreign Policy," Vol. 57, Iss. 4, (Autumn 2013), 643-52.

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This paper is an exploration of the current incantation of jus post bellum. The concept of an incantation was chosen purposively as proponents of jus post bellum are engaging in a dogmatic approach to war termination oblivious to the complexities and realities of conflict and, in fact, in violation of just war theory itself. In particular, jus post bellum violates the just war tenant of the state entering into war having a reasonable chance of success. Because jus post

bellum is so prescriptive and, thus, so strategically constrictive, almost no military intervention can be justified. Perhaps this is the intent of jus post bellum theorists but if it is not, the current manifestation of this addition to just war theory is simultaneously unrealistic and dangerous.

This paper will begin with a brief examination of the development of jus post bellum with special emphasis placed on its liberal imperialist tendencies. This is followed by an explanation of the links between jus post bellum and responsibility to protect. After this, jus post bellum is exposed for not properly considering the complexities of war through a brief case studies: the unsuccessful intervention in Somalia in 1992-93. This builds to the conclusion that jus post bellum is unjust because it underestimates the complexity and reality of war and post-war reconstruction and will therefore create more violence over the long-term rather than creating a lasting peace. *Jus post bellum* also violates the *jus ad bellum* notion of “probability of success” as the post-war undertaking is so massive and so invasive that it unlikely to succeed.

#### *The Development of Jus Post Bellum: The Historical Antecedents*

Currently there are two main areas of theoretical concern that are addressed in the just war theory literature. These are *jus ad bellum* and *jus in bello*. *Jus ad bellum* deals with the justness of a war, especially emphasizing the just declaration of war. *Jus in bello* applies to the way in which the war is fought. The predominant thought currently is that there needs to be a third area of just war theory dealing with the post-conflict and rebuilding and reconstruction phase of war.<sup>2</sup> This area has been dubbed *jus post bellum*.

Philosophers and international legal scholars argue that a tradition of a just peace or justice after combat has ended is not new. They correctly note that early notions of *jus post bellum* extend back to Saint Augustine and Hugo Grotius. However, modern theorists have drawn a distinction between Saint Augustine’s and Hugo Grotius’ conception of a just peace.

Carsten Stahn argues that Saint Augustine was one of the first to link war to a concept of “post-war peace” in the book *City of God* but it was Hugo Grotius who refined the concept.<sup>3</sup> This is a common and important distinction to explore. The reason Grotius is given primacy over Saint Augustine is because Saint Augustine was exploring the concept from a state’s interest viewpoint leading to arguments of being mindful of the destruction of war in order to increase the odds of a successful surrender or peace negotiations once hostilities have ended.

Hugo Grotius is more often linked to concepts such as the responsibility to protect and the current form of *jus post bellum*. Stahn argues Grotius is one of the first to address post war concepts such as just war termination, rules of surrender, and how peace treaties should be interpreted.<sup>4</sup> Grotius is also one of the first to argue that punitive wars can be undertaken to stop another sovereign ruler from violating the human rights of his people.<sup>5</sup> While there is an obvious corollary between Grotius punitive wars and the notion of responsibility to protect, there is a more nuanced implication which is germane to our investigation of *jus post bellum*. Grotius’ comment on punitive strikes implies that post hostilities, the victor has a duty to ensure that the society it leaves behind respects its citizen’s human rights. As we will see below, this becomes the crux of the *jus post bellum* argument and also major part of the problem with this concept from a just war perspective.

To these two most oft-cited predecessors of *jus post bellum* theory, Brian Orend adds a third, Immanuel Kant. Kant argues that when there is a clear belligerent, aggressor state which is successfully defeated, the winning state or coalition has a duty to establish a more peaceful and progressive social order within the defeated state.<sup>6</sup> Further Orend argues Kant is warning that war is not aimed solely at resolving the current conflict but that it must also “contribute to and

strengthen the peace and justice of the international system more broadly”.<sup>7</sup> This, too, has been brought forward into the current conception of *jus post bellum* almost verbatim.

There are other historical theorists who have been linked to *jus post bellum* but these are the most often cited and most relevant to the current conception. The next section of this paper will examine the current state of *jus post bellum* in detail in order that the dangerous flaws with this conception become apparent.

### *Modern Jus Post Bellum and the Liberal Imperialism Contained Within*

Modern justice after war arguments are often linked back to the peace treaties after the Second World War. For one of the first times “the peace settlements after WWII contained human rights clauses and provisions for the punishment of human rights abuses.”<sup>8</sup> The key here is the emphasis on human rights and more specifically modern scholars assertions that international law has matured enough to successfully impose human rights standards and constrain or even outlaw most wars.<sup>9</sup> Carsten Stahn even argues that the historical war/peace dichotomy has lost its meaning “with the outlawry of war and blurring of boundaries between conflict and peace.” The point Stahn makes regarding the blurring of the boundaries between war and peace is salient. This point is echoed in a broader way by Everett Dolman in his book *Pure Strategy*. In his book, Dolman defines strategy as a plan for seeking continuing relative advantage in a process that never ends.<sup>10</sup> If one accepts this definition of strategy, then it would imply that Stahn and others are correct in asserting that there is no hard line between war and peace. However, it does not necessarily follow that a state ought to be *obligated* to attempt to create a lasting peace by seizing the commanding heights and re-engineering a society. This point will be expanded upon further but what is important to note is that *jus post bellum*

proponents have correctly discerned a problem with past conceptions of a clear split between war and peace. They have just extrapolated from this fact incorrectly.

*Jus Post Bellum* is aimed at addressing broad concepts of conflict termination, peacemaking, and the post-war peace.<sup>11</sup> When conflict actually ends can be hard to discern and often extremist factions from the losing side will not abide by peace treaties signed by leaders they recently followed. However, assuming that hostilities have ended, Rebecca Johnson correctly argues that “all become noncombatants and have (or ought to have) their peace-time right to life restored.”<sup>12</sup> This is an uncontroversial statement but most proponents of justice after war go further arguing that more than the simple restoration of the basic human right to life is necessary.

Justice after war, according to proponents, has to produce a higher level of human rights protections than existed *prior to war*.<sup>13</sup> The proponents of a better post-war human rights standard do not even engage in the debate between economic and social rights and western notions of individual human rights. Despite that fact that two separate UN protocols deal with each of these types of rights separately,<sup>14</sup> proponents of justice after war clamor only for individual civil and political human rights. They blithely ignore not only any local cultural context that might exist but also any reference to non-western notions of human rights. Ironically, their arguments fly in the face of the UN covenant on civil and political rights which begins in part 1, article 1, section 1 by stating “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” Apparently, since a conflict ensued, this right to self-determination no longer applies. There is another insidious assumption with the justice after war movement, namely that the victor will be just. Once a standard of post-war

reconstruction of society is engendered, there will be no way to stop an unjust but more powerful society from appealing to it and using it. Justice after war proponents will argue this does not apply to their abstract philosophical claims but once philosophy is applied to the real world, it will become a very real concern.

### *Imposing Democracy as Well as Human Rights*

Most arguments for *Jus Post Bellum* go further than simply arguing for an imposition of western civil and political human rights. There is also a call for transforming the conquered nation into a western-style democratic republic. Inger Osgterdahl and Esther van Zadel argue that the only goal of any military intervention should be to leave the state in which an individual state or coalition of forces has invaded in “a higher level of human rights protection, accountability, and good governance [sic].”<sup>15</sup>

Similarly, Rebecca Johnson argues that the occupier must create a “durable peace” in which the defeated state can maintain human rights standards, many argue better rights standards, independently from outside aid or intervention.<sup>16</sup> Orend echoes this sentiment forcefully arguing that one the main goals of *jus post bellum* is “coercive rehabilitation of a defeated aggressor” in the form of regime change.<sup>17</sup> Orend briefly seems to flirt with the complex reality of socially constructed communities when he notes that the goal should not be to strive for perfect democratic governance but instead what he calls a “minimally just political community.” Unfortunately, Orend defines a “minimally just political community” as one that would avoid violating the rights of other such communities, this amounts to the new community refraining from warfare or other invasive interventions in like communities, to gain and keep international recognition as a just community, and to fully realize the rights of all its citizens.<sup>18</sup> Far from being a minimal standard, this is actually an exceedingly high standard that few, if any,

states have achieved. This again speaks at the unrealistic and mono-solutional aspects inherent in arguments laid out by *jus post bellum* advocates. States in the world containing myriad complex cultures, peoples, terrain, and levels of economic development are unlikely to willingly acquiesce to a foreign invader even after being defeated. Further, there is no evidence that complex problems are often or even ever successfully dealt with by applying the same solution to every situation. In fact, attempting to force western-style democracy and human rights standards on non-western states and peoples could bring about a state of lasting conflict. But even Michael Walzer would lead us down a far more interventionist path. He argued in his seminal work, *Just and Un-Just Wars*, that any state that has the ability to stop a mass atrocity or genocide has a right to do so.<sup>19</sup> When this is taken even more forcefully to the modern limits of the responsibility to protect argument, right turns into duty and any known mass atrocity must be stopped by outside states with the might to do so. If the logic presented so far is followed through to its natural conclusion, then the United States would be bound to intervene in dozens of developing states *and* force lasting democratic and human rights changes on these peoples whether the local people wanted them or not.

Some scholars on *jus post bellum* do not subscribe to the post-war intervention outlined above and should be mentioned here. Doug McCready correctly notes that democratic governance is the most desirable end-state but that it may not be achievable in many countries currently. He even argues that forcing democracy on a state could be detrimental to long-term peace and stability. Unfortunately, while he admits that forcing democracy on a system might not work, he still contends that the post-war peace must bring about a “more just society” than existed prior to the war.<sup>20</sup>

Eric De Brabandere is one of the only scholars to acknowledge there can be different reasons and goals for military intervention. He argues that not all intervention implies a post-conflict responsibility. He notes that a war of self-defense not only does not imply a post-war reconstruction responsibility, but the whole notion in this situation becomes incomprehensible.<sup>21</sup> Brabandere is one of the few post-war scholars who acknowledges at least some level of complexity in warfare.

Punitive military actions also come to mind as a form of warfare between states that may not imply a post-war responsibility. Since the goal of the punitive military action is to punish the other state, rebuilding that state seems contradictory. Also, the punitive strike can have a particular military capability as its target and once this capability is destroyed, there is often little reason to attempt to occupy or to continue occupation.

Cyberwarfare, too, seems problematic under this current conception. For example, should the western nations responsible for the Stuxnet cyberattack have occupied Iran and forced democratic and human rights reforms? This seems ludicrous but under the current majority scholarly opinion it is not outside the bounds of responsibility.

Even if one leaves the concerns of varying forms of warfare out of the debate, the complexity of warfare and the social systems that engage in warfare make the strong claims of *jus post bellum* proponents fall apart. In order to exemplify this, we will briefly examine the U.S.-led, United Nations intervention in Somalia.

#### *Somalia and Jus Post Bellum.*

One of the most egregious assumptions of *jus post bellum* proponents is that nation building is easy and that it is appropriate for every post-conflict situation. This false assumption mirrors what one finds in the Responsibility to Protect camp.<sup>22</sup> The recent history of armed

nation-building has shown that it can sow as much disruption and violence as the actual military intervention itself. In some cases, especially in peacekeeping and humanitarian military intervention, forcing democracy and western human rights standards on the fragile state system can cause more lasting violence than the military intervention. Somalia is a good example of this worst case scenario and a clear indication of what is likely to happen post-conflict if *jus post bellum* adherents begin to have a larger influence on U. S. foreign policy.

Somalia has had a short but very turbulent post-colonial history. Suffering a long dictatorship under Siad Barre from 1969 to 1991 which did little to increase the economic prosperity of Somalia, the underlying clan hatreds were ready to boil over almost immediately after his ouster.<sup>23</sup> The level of deterioration of Somalia by 1992 caused many to label Somalia as the world's first modern failed state. The economic privation coupled with a drought caused malnourishment and starvation to become widespread in Somalia.

U. S. President, George H. W. Bush, was moved by the calamity in Somalia and authorized U. S. forces to intervene and distribute much needed food aid into a violent and chaotic situation on the ground. The United States eventually sent 28,000 troops to lead a multinational coalition called Operation Restore Hope.<sup>24</sup> The 1992-93 U. S.-led Somalia mission began as a food aid, humanitarian assistance mission in August 1992 and transformed into a large multinational military mission by December 1992.<sup>25</sup> Even though the commitment to humanitarian aid expanded over time, the result was largely successful as normalcy began to return to Somalia and the starvation ended.

Unfortunately, besides starvation being alleviated, a multipronged internal conflict had been raging which also began to subside at around the same time that the food crisis was ending. In the Somali capital, Mogadishu, one particularly brutal warlord, Mohamed Farrah Adid had

gained primacy and the people of Somalia were slowly beginning to recognize Aidid as a national political leader.

In the United States, President Bush was leaving office and his successor, President Bill Clinton, wanted to enact what amounted to *jus post bellum*. Even though the term had not been coined in 1993, the actions of the Clinton administration and the U. S.-led nation-building mission UN Operations in Somalia II (UNOSOM II) mirrored exactly what proponents of justice after war have advocated.<sup>26</sup>

Despite wanting to rebuild and democratize Somalia, President Clinton desired some political cover in his first major foreign policy foray after having taking office. Control of the mission transitioned to the United Nations. UNSC Resolution 814 dealing with this change in mission was unanimously passed and UN Operations in Somalia II (UNOSOM II) commenced. Chapter VII of the UN Charter was invoked to continue the foreign military occupation and the violation of Somali sovereignty was justified given massive human rights abuses and a total breakdown of national governance. This is exactly the situation and response that justice after war proponents clamor for.

UN Resolution 814 was a unique watershed resolution declaring the instability and human rights abuses in Somalia were a threat to international security. Resolution 814 was also unique in tasking a peacekeeping/peacemaking mission with broad economic, social, and political goals. Resolution 814 was a nation-building mandate in Somalia but President Clinton felt that the warlords had to be kept from fighting first. Ironically, President Clinton also desired cutting the number of U. S. forces in Somalia and ended up leaving a little more than ten percent of the original 25,000 U. S. troops in place for the post-conflict nation-building and disarmament phase of the operation.<sup>27</sup>

Unfortunately, the post-conflict, nation-building phase soon erupted into violence. One of the main reasons U. S. and coalition troops under the UN mandate were attacked was that President Clinton and the United Nations refused to allow Aidid to participate in the nation-building effort. Since Aidid's recent military and political gains were tenuous, he saw this slight as a direct threat to his aspirations of becoming the Somali president<sup>28</sup>. Aidid began to portray the UN troops, especially the U. S. soldiers, as colonizers. He was able to convince his supporters to violently resist the UN occupation. The ironic thing about these events is that President Clinton and the United Nations did exactly what *just post bellum* argued must occur post-conflict. The UN coalition attempted to reform the economy, democratize the Somali state, and at least refused to acknowledge leaders like Aidid because of their wartime human rights abuses. If anything, justice after war proponents would argue that Aidid should have been hunted down and tried for his crimes immediately.

After an attack orchestrated by Aidid which resulted in the deaths of four U.S. Army military policemen, Clinton decided to increase up the effort to capture or kill Aidid. But CENTCOM General Joseph P. Hoar worried that the odds of capturing and killing Aidid were low and that his capture would only result in another brutal warlord would filling the void Aidid left behind.

President Clinton ordered in a Special Operation Force (SOF) consisting of Delta Force commandos, a helicopter detachment, and Army Rangers to capture or kill Aidid. Nation-building had turned into offensive operations against Aidid and his militia. Aidid continued to ramp up the pressure on the UN mission and the United States leadership through indirectly attacking affiliated peacekeepers.<sup>29</sup>

Aidid continued to fight the UN forces. In one particularly heinous attack, 24 Pakistani peacekeepers were killed at two separate aid locations on the same day by a mob of Aidid's supporters. The United Nations and President Clinton were shocked at this attack for UN peacekeepers had been considered off limits from direct attack while on peacekeeping missions. Clinton ordered the Special Forces in Somalia to ramp up their attempts to capture or kill Aidid.

Aidid and his military advisors correctly identified the black hawk helicopters as a key vulnerability in U. S. missions. Not only were black hawks lightly armored, the U. S. military was flying them low, near building rooftops, and allowing them to linger there to provide supporting fire. Aidid thought that he could bring one down and that U. S. forces would rush in to aid their fallen comrades. Aidid then planned to shoot at U. S. forces from above creating enough casualties that the United States would consider leaving. Aidid's forces experienced monumental success on 3 October 1993 which resulted in two downed black hawks and firefight with U. S. forces that lasted almost two days.

In the end, 18 U.S. soldiers were dead and dozens wounded. Hundreds of Aidid's forces were killed and over one thousand more wounded. After the attack, Aidid ordered his supporters to drag dead U.S. soldiers in front of CNN news cameras in an attempt to shock the American public and American leaders into withdrawal. This media operation worked and President Clinton ordered the immediate withdrawal of all remaining U.S. forces.<sup>30</sup> A token UN peacekeeping force would remain until 1996 and even though Aidid won the day, Somalia has never recovered and remains the penultimate example of a failed and fractured state. The application of *jus post bellum* tenets actually made things worse in Somalia.

*Conclusion*

Most *jus post bellum* advocates argue for occupying military forces imposing a western human rights standard, economic growth, and western-style democratic republic. Despite any cultural, economic, historical, or other pre-existing conditions within the occupied state, justice after war adherents believe that all post-war situations can be dealt with the same way. Not only does this prescription fly in the face of the complexity of social systems, it denies the recent history of armed nation-building. Somalia serves as a case in point of what can happen when the current incantation of *jus post bellum* is forcefully applied. Somalia also shows that what happens post-conflict can actually trigger more violence if improperly handled. By refusing to deal with the next most likely political leader, no matter how distasteful, the UN mission was doomed to fail. The United States and United Nations could have left Somalia after the starvation was alleviated without enraging local leaders but that violates everything currently argued in *jus post bellum*.

For the reasons outlined above, *jus post bellum* is itself unjust. By forcing a single solution on all complex post-war situations, the risk of the post-conflict phase going horribly wrong is extremely high. This means that adhering to the *jus in bello* tenet of “reasonable chance of success” becomes an almost impossible expectation prior to almost any military conflict. Further, restructuring an entire state’s society regardless of the people’s wishes hardly seems proportional in every case of military intervention. Therefore, *jus post bellum* violates the *jus in bello* tenet of proportionality of response.

Beyond this, *jus in bello* assumes there is a silver bullet solution which will create lasting peace within every state. It is a denial of complexity that is hard to comprehend. Often there are no “good guys,” those who have not violated human rights by western standards, after a

protracted internal conflict. Still, justice after war is unmoved by the reality of the complexity of modern conflict and the diversity in world cultures.

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<sup>1</sup> Dan G. Cox, "The Age of Liberal Imperialism: Twenty-Five Years of a Flawed U. S. Foreign Policy," vol. 57, no. 4, (Autumn 2013), 643-52.

<sup>2</sup> See for example, Carsten Stahn, "Jus Post Bellum: Mapping the Disciplines," *American University Law Review*, vol. 23, no. 2 (2007), 311-46; Robert R. Williams and Dan Caldwell, "Jus Post Bellum: Just War Theory and the Principles of Just Peace," *International Studies Perspectives*, no. 7 (2006), 309-20; and Kristen E. Boon, "Obligations of the New Occupier: The Contours of Jus Post Bellum," *Loyola of Los Angeles International Comparative Law Review*, vol. 31, no. 57 (2009), 57-84.

<sup>3</sup> Stahn, 2007, 313.

<sup>4</sup> Ibid.

<sup>5</sup> Hugo Grotius, *The Rights of War and Peace*, Richard Tucker, editor (Indianapolis, Indiana: Liberty Fund Publishers, 2005), 154.

<sup>6</sup> Brian Orend, "Jus Post Bellum: The Perspective of a Just-War Theorist," *Leiden Journal of International Law*, vol. 20 (2007), 575.

<sup>7</sup> Ibid.

<sup>8</sup> Stahn, 2007, 318.

<sup>9</sup> See for example Annalisa Keoman, "A Realistic and Effective Constraint on the Resort to Force? Pre-Commitment to the *Jus in Bello* and *Jus Post Bellum* as Part of the Criterion of Right Intention," *Journal of Military Ethics* (vol. 6, iss. 3, 2007), 199-200 for an argument of pre-commitment constraining war making abilities of the state and Orend, 2007 for a broader explanation of the alleged legal constraints of war between states.

<sup>10</sup> Everett Dolman, *Pure Strategy: Power and Principal in the Space and Information Age* (London, UK: Routledge, 2004), 4.

<sup>11</sup> See Orend, 2007 and Stahn, 2007.

<sup>12</sup> Rebecca Johnson, "Jus Post Bellum and Counterinsurgency," *Journal of Military Ethics* (vol. 7, no. 3, 2008), 219.

<sup>13</sup> Inger Osterdahl and Esther van Zadel, "What Will Jus Post Bellum Mean? Of New Wine and Old Bottles,"

*Journal of Conflict and Security Law* (vol. 1, no. 0, 2009), 5; Johnson, 2008, 220; Orend, 2007, 581; and Doug McCready, "Ending the War Right: Jus Post Bellum and the Just War Tradition," *Journal of Military Ethics* (vol. 8, no.1, 2009), 73 although it should be noted that McCready is arguing broadly for a more "just society."

<sup>14</sup> See the International Covenant on Economic, Social, and Cultural Rights. Adopted by the General Assembly of the United Nations on 16 December 1966 and the International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966.

<sup>15</sup> Inger Osterdahl and Esther van Zadel, "What Will Jus Post Bellum Mean? Of New Wine in Old Bottles," *Journal of Conflict and Security Law* (vol. 1, no. 0, 2009), 5.

<sup>16</sup> Johnson, 2008, 220.

<sup>17</sup> Orend, 2007, 581.

<sup>18</sup> Orend, 2007, 582.

<sup>19</sup> Michael Walzer, *Just and Un-Just Wars*, 4<sup>th</sup> edition (New York, NY: Basic Books, 2006).

<sup>20</sup> McCready, 2009, 73.

<sup>21</sup> Eric De Bradandere, "The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept," *Vanderbilt Journal of Transnational Law* (vol. 43, no. 119, 2009), 134.

<sup>22</sup> See for example arguments made by Responsibility to Protect proponents in Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, D.C.: Brookings Institution, 2008) and Sarah Sewell, Dwight Raymond, and Sally Chin, *Mass Atrocity Response Operations: A Military Planning Handbook* (Harvard, MA: Harvard Kennedy School Publishers, 2010).

<sup>23</sup> Martin Meredith, *The Fate of Africa: A History of the Continent Since Independence* (New York, NY: 2011).

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