

**Liberty University**

---

**From the Selected Works of Jeffrey C. Tuomala**

---

Fall 1994

# On War and Justice

Jeffrey C. Tuomala, *Liberty University*



Available at: [https://works.bepress.com/jeffrey\\_tuomala/7/](https://works.bepress.com/jeffrey_tuomala/7/)

# On WAR and



by Lieutenant Colonel Jeffrey C.  
Tuomala, U.S. Marine Corps Reserve

**F**EW ETHICAL DECISIONS are more weighty or gain greater national media attention than the decision to use military force. More often than not the debate over such use has focused exclu-

sively on whether military involvement is in our national interest. While there may be an uneasiness with such an approach, the only alternative generally offered is one based on humanitarian impulse fueled by intense media coverage of places like Bosnia and Somalia.

There are two fundamental errors made in nearly every discussion concerning the use of force. The first error is the failure to distinguish two inherently different methods of decision-making, one being legal in nature and the other prudential or political. The "national interest" approach, in particular, views the use of force purely as prudential in nature. The second error is the failure to recognize any jurisdictional limits on the

authority of states and international organizations to use force. The "humanitarian impulse" approach would seem to license force to right any wrong anywhere in the world.

## The Failure to Distinguish Between Legal and Prudential Judgments

The distinction between a legal and prudential methodology can be demonstrated by considering the two common ways in which we use the word "judgment." We speak of a judge in a court, or a commanding officer in an Article 15 proceeding, as rendering a judgment. A legal judgment is backward-looking. It determines what happened, or who did it, and whether a standard of conduct was violated. If the law was broken, the judge awards punishment or compensation in order to satisfy the demands of justice, thus restoring the wronged party.

But we also speak of judgment in another sense, as when we assess an officer's judgment on a fitness report. This kind of judgment, which is prudential in nature, is forward-looking. In making prudential judgments an officer applies what he has learned in the past and what he knows about people and his current situation. He uses this know-

ledge not to judge whether someone committed an offense, but rather, to accomplish a particular objective or further the mission. The officer who acts most appropriately and effectively in making decisions is said to exercise good judgment.

Is the decision to use military force primarily a prudential or a legal issue? According to Clausewitz, whose writings on war are in such vogue today, war is simply a prudential or political instrument whose distinguishing trait is violence, "We see, therefore, that war is not merely an act of policy, but a true political instrument, a continuation of political intercourse, carried on with other means. What remains peculiar to war is simply the peculiar nature of its means." [Carl von Clausewitz, *On War*, p. 87 (Michael Howard & Peter Paret trans., eds. 1976) (1st ed. 1832).]

This view complements the "national interest" approach to decision-making. For example, it asks only whether it is in the national interest to have a canal connecting the Atlantic and Pacific Oceans, lower prices on Mideast oil or political stability in Europe. If the answer is yes, and the objectives can't be achieved by peaceful political intercourse, then the use of force is legiti-

mized. The political approach does not ask whether a legal wrong has been committed against the United States. The only limitation on action is whether the political costs outweigh the expected benefits.

The view that the use of military force is first and foremost a political issue, although seldom if ever challenged, is fundamentally flawed. James Kent, the preeminent commentator on American law, presented a very different view. He believed that military force should be used primarily to execute a judicial judgment, not a political one. "War. . . is one of the highest trials of right, for, as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God by an appeal to arms." [James Kent, *I Commentaries on American Law*, p. 58 (10th ed., 1826).]

Kent's view is reflected in the "Marine's Hymn," which affirms that the first reason for which we fight is "right and freedom." Unfortunately, it is the Clausewitzian view, that war is primarily a political instrument, which forms the philosophical basis for the Marine Corps' FMFM 1, *Warfighting*.

All of this is not to say that prudential or political judgment has no place in the equation. Once there is a legal judgment that a wrong has been committed against the nation (i.e., that there is a just cause), two distinct but closely related types of prudential judgment must be made. The first is *whether to use military force at all*. It may not be the wisest way to remedy a wrong. The wrong may be too slight or the offender too powerful to make an appeal to arms prudent. The second type of prudential judgment that must be made is *how best to prosecute the war effort*. These decisions are designed to most

***Justice, not national interest  
and expediency, must be the  
primary focus in the decision  
to use force.***

---

effectively accomplish the mission at the least cost in lives and resources.

Our Constitution entrusts the decision to go to war to Congress. This entails both the legal judgment that there is a just cause and the political judgment that it is a wise decision. Since there is no superior neutral tribunal to which nations can routinely refer cases, nations must in effect judge their own causes. The Constitutional Framers believed that Congress, a large and deliberative body, was more likely to render impartial decisions. Additionally, if the nation is to commit its blood and wealth to war, the people's representatives are most fit to make that choice. James Madison noted that "the power to declare war, including the power of judging the causes of war, is fully and exclusively in the legislature." [Quoted in Thomas M. Franck and Michael J. Glennon, *Foreign Relations and National Security Law* 576 (2nd ed. 1993).] Once the nation is committed to war, however, the Constitution entrusts the prudential decisions involved in prosecuting the war effort to the president. In case of armed attack on the nation the president must act immediately in self-defense. Because a state of war would already exist, prior congressional authorization is then unnecessary.

The Framers designed the Constitution to avoid the problems England experienced, where both the powers to declare and prosecute war were in the King. As a

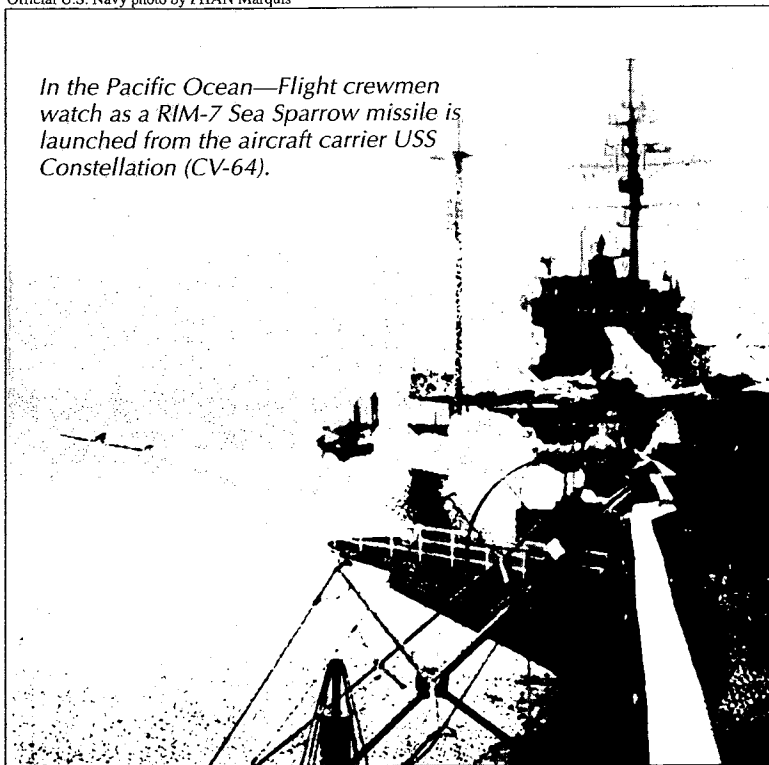
result, England was all too frequently engaged in war for slight cause and at great expense to the nation. David Hume's observation, that such a foreign policy was financed by mortgaging the public revenues and entrusting posterity to pay off the encumbrances, is instructive for us today. [D. Lange, *Foreign Policy in the Early Republic*, p. 42 (1985).]

Our constitutional arrangement reflects a distinction made in customary international law between just offensive and defensive war. Nations wage just offensive war to inflict reprisals (punishment) for wrongs done or to exact reparations (compensation) for injury or damage. Offensive acts require a declaration of war in order to give the offender an opportunity to provide satisfaction peacefully. Nations wage defensive war in response to armed attack, and in such cases a declaration is unnecessary. The normal domestic legal system makes similar distinctions between offensive and defensive force. Only after a legal judgment may the state punish a person or force him to make compensation. However, a person may use force immediately in self-defense without judicial authorization. Our Constitution and international law both require a declaration of war, which is based on a legal judgment, prior to using offensive force.

Presidents have frequently engaged the nation in war without congressional authorization. In the aftermath of Vietnam, Congress made an effort to maintain control over the president through the ill-conceived War Powers Resolution. In 1984 the executive branch formulated a policy statement known as the "Weinberger Doctrine" to ensure the prudent commitment of U.S. forces abroad. This doctrine is an excellent set

Official U.S. Navy photo by PHAN Marquis

*In the Pacific Ocean—Flight crewmen watch as a RIM-7 Sea Sparrow missile is launched from the aircraft carrier USS Constellation (CV-64).*



of criteria for making the prudential judgment to use force. For this reason it protects us from foreign ventures fueled primarily by misguided humanitarian impulse. However, it exhibits two glaring weaknesses. First, it virtually ignores the constitutional role of Congress in the decision process. Second, it fails to make any mention of a just cause requirement. Surprisingly, despite the fact that it excludes Congress and focuses exclusively on national interests, attempts have been made to equate the "Weinberger Doctrine" with the "Just War Theory" of Aquinas. Aquinas wrote that three things are essential to just war: a just cause, authorization by proper authority and right intention. [*The Summa Theologica*, Part II of Second Part Q. 40. Art. 1.] At least the first two essentials of "Just War Theory" are missing from the "Weinberger Doctrine."

Justice, not national interest and expediency, must be the primary focus in the decision to use force. Our model for civil justice, be it domestic or international, is Christ's atonement, which is the supreme demonstration and archetype of justice (Romans 3:25). His death was a vicarious satisfaction of the demands of justice, being both punishment (1 Peter 2:24) and payment (1 Peter 1:18-19) for our offenses. It also defeated the enemy (Colossians 2:15), ensuring our protection. Furthermore, justice demands that we remain faithful to our covenants, including our national covenant, just as Christ is faithful to us. War must be waged only on just cause as authorized by the proper

governmental authorities. In a world governed by the providential care of our Lord, we can remain confident that lawful decisions are always in the national interest.

### **The Failure to Recognize Limits on Human Government**

So far, I have identified the two fundamental ethical errors made in decisions to use force and have examined the first error at length. The first error involves a *failure to distinguish two inherently different types of ethical judgment—the legal and the prudential or political*. Treating the decision to use force solely as a prudential judgment generally leads to policy decisions based simply on national interest and expediency. I argued that priority must be given to the legal judgment which requires a determination of just cause.

Now, I will deal with the second error, which entails *the failure to recognize any jurisdictional limits on the authority of states or international organizations to use force*. This error becomes particularly prominent with current calls for military intervention in numerous places around the world for the purpose of establishing democracy and protecting human rights. The emergence of military intervention is driven by two forces: the desire of

certain policy makers to create a new world order, and an amorphous humanitarian impulse responding to tragedies in places like Bosnia, Somalia and Haiti.

God instituted civil government for our good and authorized it to use force as an agent of justice.

However, He limits the jurisdiction of civil government in two fundamental ways. First, the state has a limited subject-matter jurisdiction. Second, it has limited territorial jurisdiction.

The state is not the only government that God instituted among men. In addition, He instituted self-government, family government and church government. Each institution has jurisdiction over, and primary responsibility for, different human activities. God gave the state the authority to use force to impose sanctions for civil wrongs and to protect us. To individuals, families and the church he gave jurisdiction over such activities as the care and education of children, economic enterprise, charity and the sacraments. The state's role, however important, is primarily negative (see Genesis 9:4-6; Romans 13:1-7). The other institutions have the positive role and jurisdiction to fulfill the dominion mandate (see Genesis 3:15, Matthew 28:18-20).

As a direct consequence of mankind's pretension to build a single world order centered on Babel, God dispersed the nations (Genesis 11:1-9). In so doing He established a multiplicity of nations with limited territorial jurisdiction and the mission to do justice within their boundaries (Deuteronomy 32:8; Acts 17:26). To the church alone among

***Treating the decision to use force solely as a prudential judgment leads to policy decisions based simply on national interest and expediency.***

---

human institutions He gave a worldwide mission and jurisdiction to spread the Gospel, administer the sacraments and disciple nations (Matthew 28:18–20). There have been repeated attempts throughout world history to establish a single world government without territorial or subject-matter limitations (Daniel 2). But it is the Kingdom of God alone which has total jurisdiction (Isaiah 2:1–5, 9:1–7). Families, nations and the church have limited missions with corresponding jurisdictional authority as parts of the Kingdom of God.

Our Founding Fathers shared a biblical view of man and government implementing principles of limited jurisdiction in our federal system. They limited subject-matter jurisdiction to certain enumerated powers. Furthermore, the system contains a multiplicity of territorially-based state jurisdictions. The federal government has no jurisdiction over most religious, educational, family, criminal and civil law matters. Similarly, the government of one state has no jurisdiction over matters of another state. Jurisdictional limits exist in regard to both subject-matter and territory.

In our own federal system we have experienced a dissolution of both principles. Justice is no longer primarily a matter of restoring the situation of parties by punishing criminals and

enforcing civil judgments. The byword has become social justice—what kind of social order shall we create? Justice has little to do in such a case with legal judgment and nearly everything to do with prudential judgment. The subject-matter jurisdiction of the federal government has become increasingly comprehensive. Not only does it take matters originally in the jurisdiction of individual states, but also takes up matters that are properly in the jurisdiction of individuals, families and the church. Nearly every area of human activity has become a state matter—child care, mental health, economics, education, welfare, medical care.

The United Nations Charter appears to recognize jurisdictional limitations on nation states and international organizations. Article 2 (7) says that the U.N. is not authorized “to intervene in matters which are essentially within the domestic jurisdiction of any state.” However, almost from its inception the U.N. has attempted to make nearly everything an international issue. In Articles 55 and 56 the members pledge to promote human rights. These human rights, as “codified” in numerous treaties, are expansive in scope—covering matters as diverse as marriage, education, vacations, religion, labor relations, criminal procedure and suffrage. In effect they make every area of life an international matter and breach of these “rights” a threat to peace. Ultimately, threats to peace are to be dealt with by U.N. imposed or authorized force.

The Naval Justice School materials on human rights, used to train U.S. and foreign personnel, teach that human rights have gone through three generations. The first generation of rights is labeled “civil, political,” focusing on

freedoms from the state. Such rights as religion, assembly and fair trial protect the individual from an oppressive state. “Social, economic, cultural” is the second generation. Here, needs such as social security, education and health, are presented as claims on the state. The third generation is “brotherhood, planetary” rights. The essence of these rights is solidarity with the state, the specific rights being peace, development, humanitarian assistance and “benefit from the common heritage of mankind.” In this last generation, human rights talk becomes little more than political rhetoric in a campaign to create a unitary world order.

The promotion of human rights has become a major component of our national security strategy. The “Reagan Doctrine” alleged that nations may unilaterally use force in other nations to promote democracy, freedom and self-determination in the event of the U.N.’s default. [Jean J. Kirkpatrick and Allan Gerson, “The Reagan Doctrine, Human Rights and International Law,” in *Right v. Might: International Law and the Use of Force*, p. 19 (2nd ed. 1991).] The Bush Administration justified our invasion of Panama, in part, as an effort to establish democracy and protect human rights. Use of force in such a view is legitimate even in the absence of a wrong done to the U.S., or, for that matter, any other country. “World policeman” takes on a new meaning. Not only does it mean policing disputes between nations but also disputes *within* nations. This is a pretension of universal jurisdiction.

Until operations in Somalia, claims that the U.S. intervened in other countries for humanitarian reasons were

(continued on page 45)

***Throughout Scripture, God expects that governments should act with justice, integrity and peaceful intention toward their own citizens as well as other nations.***

nation, but sin is a disgrace to any people" (Proverbs 14:34).

Throughout Scripture, God expects that governments should act with justice, integrity and peaceful intention toward their own citizens as well as other nations. I am thankful that in my twenty-five years of service for the U.S. government, I never once had to fire a weapon in anger or to lie in the course of my official duties. But I would have done it if my duties compelled me to do so. We should be very thankful for Christians in government, in the U.S.A. and elsewhere in the world who work to insure that righteousness is maintained in areas of civic affairs over which they have an influence.

Deception and killing, while necessary in some cases in the pursuit of national survival or civic tranquillity, are the rare exceptions in most actions by governmental officials. Hence, Christians, while they sometimes must do such things with honor and a clear conscience, should never take such actions lightly. They should grieve over loss of life or loss of credibility, then work to create situations where such severe actions need not be repeated. Our Lord wants us to be "salt and light" (Matthew 5:13-16) and agents for peace wherever we are, even in the midst of a cumbersome governmental bureaucracy. †

*David Gaylord Chizum retired as a senior analyst from the National Security Agency in 1991 after 25 years of DoD service and is now a student at the University of Denver, where he is pursuing a Ph.D. in international studies. He and his wife, Ruth, intend to enter a college-based "tentmaking" ministry to students and faculty overseas or in small-town U.S.A. after he completes his studies.*

## **War and Justice** (from page 33)

looked upon with a jaundiced eye. Opponents of intervention claimed that the real motivation was national interest, not humanitarian concern. There was little national interest in our intervention in Somalia. Many people view this as morally positive, for it would appear that our motives were pure, not being based on selfish national interest. However, one should question the morality of sending his neighbor to die for someone far away in order to satisfy his own humanitarian sentiments. Those following the "brotherhood, planetary" view of human rights would argue that Somalia sets a precedent for a new world order in which intervention anywhere is in the national interest.

God's plan for the extension of peace and human rights is the conversion of peoples through the preaching of the Gospel and discipleship of nations in God's law. This is the church's mission, one for which it alone has been equipped. It is a worldwide mission,

accomplished not by military force but through the power of the Holy Spirit (Zechariah 4:6; 2 Corinthians 5:11-21). Civil power, as important as it is in God's economy, is jurisdictionally limited both as to subject-matter and territorial application. Nebuchadnezzar dreamed of a universal order with humanitarian pretensions to shelter and feed even the animals and birds (Daniel 4:10-12). God rebukes the nations who so conspire (Psalm 2), because His plans are not our plans. He has chosen to exalt His Son, not the kings of this world. †

*This article is based on a paper presented at the 1993 OCF International Relations Conference at the U.S. Naval Academy*

*Lieutenant Colonel Jeffrey C. Tuomala is currently an Associate Professor at Regent University School of Law in Virginia Beach. He is also in the U.S. Marine Corps Reserve as a member of the Law of War Teaching Detachment at the Marine Corps University.*

# **Take COMMAND**

*... the magazine written by and for the military Christian.*

**Subscribe today, renew your subscription or give a gift subscription to someone who needs a Christian perspective on life in the military.**

**Call 1-800-424-1984,**

**Use the subscription form on the mailing cover**

**or**

**Write to Command, Box 1177, Englewood, CO 80150-1177**

**One year—\$15 Two years \$25 Three years \$35  
(credit cards not accepted)**