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Superior Orders in National and International Law

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The authors are admirably equipped by background to write a first-rate treatment, and they do so. Thomas S. Estes, Ambassador to the Republic of Upper Volta from 1961 to 1966 (and State Department Adviser to the President of the Naval War College in the next 3 years) and E. Allan Lightner, Jr., former U.S. Ambassador to Libya, have 35 to 40 years of service each.

What is especially valuable about this book is that it is written by "insiders" who know their subject but who, despite long service in the Department, have a fresh perspective and are well aware that modern complexities call for some new bureaucratic solutions.

Finally, the book has the great merit of being up-to-date and accurate.

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Green, L.C. *Superior Orders in National and International Law*. Leyden: Sijthoff, 1976. 374pp.

My Lai and the Calley case apparently combined to inspire the Canadian Government to invite Professor Green to do a study of the problem of the availability of the defense of "superior orders" as a justification for illegal acts committed by members of armed forces. This book is the result. Professor Green graphically demonstrates the problem by prefacing his book with a three-box strip from *The Wizard of Id*. The Knight, Sir Rodney, orders a bowman to fire; the bowman does nothing; Sir Rodney demands to know what he is waiting for; the bowman responds: "My lawyer." This is both humorous and tragic: for, in truth, the poor serviceman is indeed sometimes placed in a position in which he must make a decision with respect to which lawyers would, and probably will, argue; and he must do this quickly and with the knowledge that he may be damned if he does and damned if he does not.

As its title indicates, the book dissects the law with respect to superior orders from two points of view: that of national courts applying national law in trials of their own nationals (the law of some 28 countries representing most of the major legal systems of the world are included); and that of courts, international or national, applying international law in an international context (the decisions of international tribunals and of the national courts of 11 countries are included).

The dilemma which confronts the serviceman is the conflict, or possible conflict, between two rules of conduct, both of which must govern his actions. A U.S. Military Tribunal at Nuremberg said: "It is basic to the discipline of an army that orders are issued to be carried out." A Navy Board of Review succinctly stated: "Predictable obedience is the essence of a disciplined military force." At the same time, international law, and most national laws, hold the individual serviceman personally responsible if, in obeying the order received from a superior, he commits a criminal act when "moral choice was in fact possible," or if, "in the circumstances at the time, it was possible for him not to comply with the order," provided that the order was "manifestly illegal" and "unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful." Professor Green suggests that "the concept of *manifest/palpable illegality or unlawfulness*, which is not a concept readily understood by the ordinary man, be replaced by that of *obvious criminality*." This latter term might well be more understandable to the average serviceman—provided that he receives instruction in which he is advised that he must obey only lawful orders and that an order requiring him to perform an act of "obvious criminality" is not a lawful order and should not be obeyed. At the other end of the spectrum, Professor Green believes that the

commander who merely acts as a "post-office," relaying to subordinates an unlawful order received from above, would have no defense if he were aware of the unlawfulness of the order. This is undoubtedly correct if we can rely on the post-World War II cases involving the transmittal of such orders.

The author properly points out that there is a general and erroneous tendency to regard war crimes trials as "victor's justice," something to which members of the victor's own armed forces are not subjected, although individual members thereof may be just as guilty as the members of the defeated enemy's armed forces who are tried. As he indicates, the victor's personnel are tried under national law and without publicity. Few members of the American public could name anyone but Calley as having been tried by a U.S. court-martial for an offense which, although charged as an offense under national law, would be a war crime from the point of view of international law; but such trials have been held in most wars.

Two final notes: The author places considerable reliance on a lesson plan which was prepared at the Army JAG School for the use of its instructors, referring to its contents as indicative of the attitude of "the United States military authorities." I am sure that the personnel of the JAG School would be the first to admit that such a document represented nothing more than the views of the then School authorities. It *might* represent U.S. military doctrine—but it might not. And, the Dutch publisher, Sijthoff, has produced yet another volume with the footnotes hidden at the end of each chapter where the reader can locate them only after a frustrating and time-consuming procedure. Certainly, reasonably inexpensive methods exist, or could be devised, whereby the footnotes would be more readily available to the reader. It is particularly unfortunate that such an

excellent and informative volume as that of Professor Green must suffer under this infirmity, since this study is unquestionably one which should be owned by everyone with a concern for or an interest in military law or the law of war.

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Guillermaz, Jacques. *The Chinese Communist Party In Power, 1949-1976*. Trans. by Anne Destenay. Boulder, Colorado: Westview Press, 1976. 614pp.

The West, someday the world, is and will be indebted to this senior French historian, with considerable experience in China, for this judiciously interpretative survey of mainland China since the Communist Party attained national power. It is the sequel to his already well-respected *A History of the Chinese Communist Party, 1921-1949* (London: Methuen; New York: Random House, 1972).

In his foreword the author explains his purpose: "... I have tried as far as possible to adopt a viewpoint situated within the Chinese system... [not to justify but] to share the ideas and reasoning of its leaders and to understand the feelings and the behavior of the masses." Actually he is more objective than this deeply felt sympathy and admiration has permitted in some others. He accords their due to the CCP, its leaders and cadres, the new institutions and the people while not falling into the uncritical euphoria of the wishful or unprincipled.

The treatment is divided into four parts: The first dealing with the consolidation of the new regime, 1949-53; then the period of the First Five-Year Plan, 1953-57; followed by the Great Leap Forward, communization and readjustments (1958-62); finally a 244-page analysis of the Socialist Educational Campaign, the Cultural Revolution, and