The Crime of Government (Part I)

by Louis Rossetto, Jr. & Stan Lehr

Looking back, it was a long time coming.

At last, even the Senate had come to know what many in the nation already knew: that the war which had claimed the lives of over 250,000 civilians was a monstrous blot on the record of the United States.

"How old was he," the anti-war Senator asked the witness testifying before the closed-door committee meeting.

"I should judge that he was a man of about forty or forty-five years," replied Charles S. Riley, a former Army sergeant and two-year veteran of the war.

"When you saw him, what was his condition?"

"He was stripped to the waist; he had nothing on but a pair of white trousers and his hands were tied behind him . . . ."

"What else did you observe being done with him?"

"He was then taken and placed under the [water] tank, and the faucet was opened and a stream of water was forced down or allowed to run down his throat; his throat was held so he could not prevent swallowing the water, so that he had to allow the water to run into his stomach . . ."

"Was anything done besides forcing his mouth open and allowing the water to run down," queried the Senator.

"When he was filled with water," replied Riley, "it was forced out of him by pressing a foot on his stomach or else with their hands . . ."

"About how long was that continued?"

"I should say from five to fifteen minutes."

"'During the process what oficers were present, if anybody?"

"A Lieutenant Conger was present practically all the time. Captain Glenn walked back and forth from one room to the other, and went in there two or three times. Lieutenant Conger was in command of water detail; it was under his supervision."

Anti-war groups had been charging the U.S. government with atrocities for years, but only as the war was being ended were their stories accepted. Manifestos with titles like "The Hell of War and Its Penalties" and "The Cost of a National Crime," and declarations decrying the "criminal aggression" of the United States participation in the war had been in circulation for years. But all protests had been futile, for even now that the Senate had come to realize the full nature of the war, they were still unprepared to vote for its cessation.

In desperation, some anti-war activists turned to illegal acts. An attempt was made, for instance, to undermine the morale of the army; pamphlets denouncing the war and urging soldiers not to reenlist were sent to combat troops. The action, however, brought only government resistance. The Postmaster-General ordered the pamphlets seized from the mails and the Attorney General fumed that the perpetrator "could be prosecuted and sentenced to a large fine and ten years of imprisonment because of his seditious writings."

Although the actions brought the anti-war groups notoriety, they did little to end the war. In the Senate, anti-war Senators could only give vent to their tempers and attempt to clarify the issues. One Senator blasted the undeclared nature of the war: "We are engaged in a war. You may quibble about it as you will, call it by whatever name you will—it *is* a war; and a war of conquest on our part at that—a war of bare-faced, cynical conquest. Now, I ask any fair minded man whether the President, before beginning that war, or while carrying it on, has ever taken any proper steps to get from the Congress, the representatives of the people, any proper authority for making war." The Senator from Massachusetts, breaking with his party, railed that by participating in the war, "We vulgarized the American flag. We introduced perfidy into the practice of war. We inflicted torture on unarmed men to exact confessions. We put children to death. We established [concentration] camps. We devastated provinces. We baffled the aspirations of a people for liberty."

It was a brutal, terrible war fought over 10,000 miles from our shores.

Civilians were killed, a country was ravaged, all in the name of the United States.

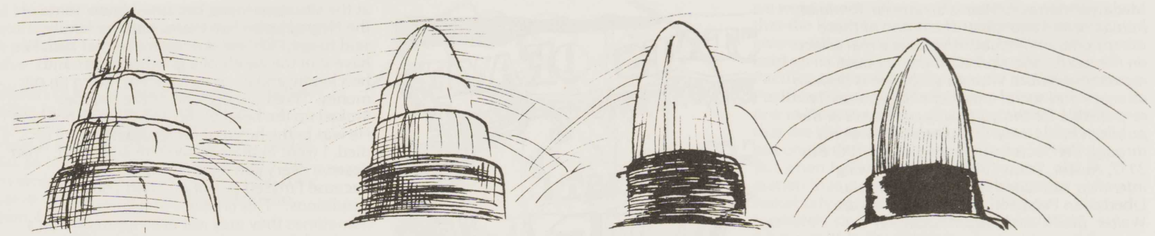
It was the "President's war," as one Senator put it.

It was the American suppression of the Philippine Insurrection, fought from 1900 to 1902.

The principles of war crimes or governmental crimes against peace are not new. Based on practices and customs developed and accepted over centuries, as well as on a small number of international agreements concluded since the turn of this century, they are analogous to the common law in their origin and nature. Before World War II the concept of war crimes was barely understood; but since the dramatic and highly publicized Nuremberg trials, the idea of war crimes has won general acceptance.

In addition to publicizing the general issue of war crimes, the Nuremberg proceedings (and the Pacific Theater trials) enforced, for the first time on a large scale, the concept that anyone who knowingly participates in an action judged to be criminal may be held culpable and subject to just retribution. This includes not only the actual participants in atrocities, but also those who direct, administer or even fail to prohibit criminal policies. Furthermore, the trials established that the concept of war crimes includes the planning and launching of aggressive war.

Ranking in importance with the principles laid down at Nuremberg are those which were *denied*. The Nazi's defense against the charges, that they had been acting under lawful orders, was found to be no justification for their acts. War crimes or crimes against peace could not be



legitimized by governmental sanction. Another Nazi objection to the charges, that the alleged crimes were not crimes because they violated no recognized, binding statute, was also held to be invalid. That Nazi behavior had violated the war crime "common law" was self-evident. In short, in rejecting these two arguments, the tribunals emphasized that legal acts can be criminal; that, by extension, certain illegal acts, especially the refusal to participate in legal crime, are *not* criminal; and that criminality can be adjudged without statutory foundation.

More than two decades after the landmark Nuremberg trials, Lieutenant William Calley murdered 22 Vietnamese peasants, including women, children and babies. Following his sentencing for this crime, a great public outcry ensued which indicated the existence of a widespread belief that Calley was merely a scapegoat for other, more powerful men. The Calley case forced the American public to confront wider issues, issues which had hitherto been raised by dissident minorities. These questions concern not only the acts of individual soldiers, but the entire conduct of the war. For, as Neil Sheehan has written in the *New York Times Book Review*, "Lieutenant Calley and the soldiers who did join him in the massacre were doing with their rifles what was done every day with bombs and artillery shells." Not surprisingly, many believe that if Calley is guilty of war crimes, so are those who planned, ordered, executed or allowed the military strategies which necessarily entailed the killing of many noncombatants. In addition, many Americans have at last come to doubt the validity of the explanations given for the war itself, and wonder whether high American leaders are not guilty of war crimes on the additional grounds, established at Nuremberg, that plotting or participating in an aggressive war is criminal.

The findings of Nuremberg are based on the primacy of higher laws, or natural law. This concept antedates the Nuremberg tribunals by many centuries and is deeply rooted in the American political tradition. The English philosopher John Locke had argued that natural law "obliges everyone, and reason, which is that law, teaches all mankind . . . that being all equal and independent, no one ought to harm another in his life, health, liberty or possessions . . . . Every one as he is bound to preserve himself, and not quit his station willfully, so by the like reason, when his own preservation comes not in competition, ought he as much as he can to preserve the rest of mankind, and not unless it be to do justice to an offender, take away, or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another."

American acceptance of Locke's doctrine is as old as the Republic itself. The Declaration of Independence, for instance, affirmed "that whenever any Form of Government becomes destructive to these Ends, it is the right of the People to alter or to abolish it . . . ," thereby affirming the American Revolution's foundation on the supremacy of natural law. Resistance to the crime of rulers, begun with the revolution, is a fundamental part of the American experience. In fact, the first great modern advocate of civil disobedience in the face of government immorality was not Gandhi, but an American, Henry David Thoreau, who was jailed for refusing to pay taxes to finance the Mexican War.

The doctrine of natural law was formulated and gained acceptance in reaction to the prevailing concepts of absolutism, which held that kings' rule was unlimited and always moral. While the divine right of kings was, by 1850, generally dead, absolutism was far from buried. Indeed, cloaked in the garb of legal positivism, absolutism has lived on. Today, virtually all law and order politicians can be found in the ranks of its exponents.

Legal positivism holds that absolute obedience to the sovereign power, as embodied in statute law, is necessary to avoid chaos. An exponent of this doctrine, the English legal philosopher John Austin, wrote that "to proclaim generally that all laws which are pernicious or contrary to the will of God are void and not to be tolerated is to preach anarchy, hostile and perilous to much wise and benign rule as to stupid and galling tyranny."

What the legal positivists have failed to see, however, is that absolute obedience to the state carries greater dangers than no obedience at all, since it permits the existence of what Karl Hess has called the "lawless state." It took the horrors of Nazi Germany to demonstrate clearly that legal positivism is not only folly, but exceedingly dangerous folly.

The fallacies of legal positivism are increasingly recognized today in the United States. While no one questions that laws governing attacks against persons and property are just, a great many people feel that certain illegal acts are justified, and in some cases even morally obligatory. Thus we see government employees, on every level, striking in spite of laws which prohibit them from doing so; the strikers include schoolteachers, who supposedly inculcate respect for law among their charges, and even New York City policemen. Drug and sex laws are flouted with almost complete abandon, despite the risk of draconian penalties. Draft resistance has risen to unprecedented proportions, and some resisters have based their defense on the grounds that participating in the Vietnam war would be a criminal act on their part. And political protest is now regularly manifested in such illegal forms as telephone tax resistance and the attempted closing of Washington in May, 1971. Thus, millions of Americans are practicing the doctrine that statutory law must give way at certain points to higher principles.

The concern of present Americans with natural law confirms that the Nuremberg trials and the principles there secured—the accountability for immoral leadership—have been well received by the American public. Although legal positivism is far from dead, the Nuremberg trials left a lasting impression

GO TO 19