Prosecuting Condoleezza Rice

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Is Condoleezza Rice a war criminal? From the available evidence, with more continually emerging, the case is strong. However, she has not yet been held accountable; so, for the time being, it is better to say that she is, to borrow a legal archaism, a *prima facie* ("at first glance") war criminal. This qualification, however, means little to the victims of policies she has aided and abetted. But the question then arises how to remove this qualification, and hold Rice accountable. This article will consider not the case against Rice, but the various possibilities for accountability.

This question does not arise out of spite, or a desire for vengeance. Rather, when a grievous wrong is committed within a society, that society must find a way to deal with it, by holding the perpetrators of that wrong accountable, and seeking to build a better society in which such wrongs are rendered impossible. If we do not hold accountable the perpetrators of terrible crimes, we offer no deterrence to future crimes. If we tolerate the crimes of the present, we enable the crimes of the future. And those — like us — who work, live or study at the same institution as a perpetrator have a special responsibility to ensure accountability; otherwise, we become associated with the crimes,ourselves.

In this extremely brief article, we cannot go into any legal technicalities, or even present a thorough overview; but we can mention some issues.

We consider two principal crimes against humanity for which a strong *prima facie* case can be made against Rice. First, for *aiding and abetting aggressive war* — the supreme crime against international law, the same crime for which the Nazis were hanged at Nuremberg. In the words of the Nuremberg tribunal, "To initiate a war of aggression... is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Second, for *torture*, a crime against humanity prohibited under international and US laws.

In any criminal prosecution, the prosecutor must be willing to initiate proceedings — and when the defendant has held high political office, there is a problem of political will. Here, however, we shall focus on legal questions.

Proceedings against Rice might be initiated in several fora: US domestic courts; the International Criminal Court (ICC); foreign courts (e.g. in Germany); local bodies such as faculty disciplinary tribunals; or whatever the Stanford community might deem necessary.

1 The ICC and Invading the Netherlands

The ICC, based in the Hague, is empowered to prosecute individuals when domestic courts will not. However, before a trial can begin, jurisdiction must be established — and that will be difficult while neither the US nor Iraq is not a party to the treaty. Moreover, a US law, commonly known as the "Hague invasion act", authorizes "all means necessary and appropriate to bring about the release" of US officials facing trial at the ICC. This is not a joke: this bill passed Congress in 2002, with the support of an overwhelming majority of Republicans and almost a majority of Democrats.

2 Aggressive war not a crime?!

The general illegality of force in international relations is not in doubt, under many treaties, court decisions, and much else. It has attained the status of *customary international law* — binding on the entire world — and a rule of *jus cogens* ("compelling law"), a peremptory norm from which no derogation is permitted. There are exceptions for self-defence or UN Security Council authorization, but the general idea is clear: peace is not only the way, peace is the law.

However, while the use of force in international relations is illegal, the precise definition of the specific crime of "aggression" is not clear. For instance, while a war over a disputed territory would constitute unlawful use of force, it is not clear whether it would constitute aggression. For this reason, the ICC's founding treaty says that it will carry out prosecutions for aggression as soon as an agreed definition is found — and although work is being done, this has not been achieved yet. Whatever the definitional issues, they are irrelevant to the invasion of Iraq — which is one of the clearest examples of aggressive war since Nazi Germany invaded Poland.

A separate difficulty arises in domestic courts. The US War Crimes Act only criminalizes "grave breach[es] of the Geneva Conventions", which regulate the conduct of war — not the initial act of starting a war.

We thus have the incredible situation that the supreme crime against international law is not yet a crime at the ICC, and not a crime in the US. Therefore, prosecutions of Rice would most likely focus on her involvement in torture.

3 Foreign courts and universal jurisdiction

In general, a court in a country unrelated to a crime cannot hold a trial for that crime — it has no *jurisdiction*. However, there is an argument that some crimes are so outrageous that any court, anywhere, is empowered to hold proceedings on them — this is the concept of *universal jurisdiction*. A form of universal jurisdiction over torturers is already recognized in the US: as the 2nd circuit held in 1980 (*Filartiga v Pena-Irala*), "the torturer has become, like the pirate and the slave trader before him, *hostis humani generis*, an enemy of all mankind."

Several countries have laws on universal jurisdiction, including Germany. In 2004 (and again in 2006) the New York-based Center for Constitutional Rights initiated criminal proceedings against Donald Rumsfeld for torture — however the German Federal prosecutor declined to open an investigation; apparently a lack of political will.

Thus, one strategy for concerned Stanford students would be to encourage Rice to attend as many conferences in Germany as possible — but this is rather an indirect approach!

4 State immunities

As a criminal defendant, Rice would no doubt argue that she is immune from prosecution. There is a doctrine of "State immunity" which holds that officials are immune from prosecution for acts of State. Historically this probably derives from the medieval legal maxim, "the king can do no wrong" — if your crimes are sufficiently vast, you escape the law.

Rice might also have relied on s.7 of the Military Commissions Act, which immunized US officials from any action relating to treatment of alien "enemy combatants" — however this law was struck down by the Supreme Court in 2007 as unconstitutional.

Legal developments are promising. The most famous recent case on point, in 1999, involved Augusto Pinochet, the US-approved dictator of Chile, who came to power following a US-supported coup in 1973. While Pinochet visited London, a Spanish magistrate issued an arrest warrant and sought his extradition. The House of Lords (the UK's highest court) held that, for the specific crime of *torture*, no immunity is available to former heads of state.

Whatever Pinochet's arguments as a former Head of State, Rice's arguments for immunity as a former state official, accused also of torture, can be no stronger.

5 Get out of jail free cards

After clearing these preliminary hurdles, at trial the main defense offered by Rice would presumably be the infamous "torture memos". That, of course, is why they were written: so that they could be used for exonerating perpetrators.

There is another way to look at these memos. Producing fallacious legal documents, so as to reinterpret the law to justify conduct that was previously clearly torture, and doing so knowing that such conduct was likely to be carried out, can be called by another name: aiding and abetting torture. From this perspective, the memos will get nobody out of jail, but might get some lawyers into jail.

This is by no means an unprecedented legal argument. In the "Justice Case" at Nuremberg, the defendants administered laws in blatant violation of the Geneva Conventions. Several were convicted. As the judges concluded,

the "prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes."

6 The court of last resort?

From the above, we see that if all legal options are exhausted, it is not a matter of lack of culpability. Rather it might be a failure of prosecutorial will; a triumph of arcane immunity doctrine; legalistic trickery; jurisdictional technicalities; US subversion of the International Criminal Court; or the embryonic nature of international law. This raises serious questions for the Stanford community — Stanford itself might then become a forum of last resort.

One option is to hold faculty disciplinary hearings. But the Stanford Faculty Handbook is a rather curious document. Taken literally, it would allow Hitler to remain on faculty, provided he did not plagiarize, engage in sexual harassment, or commit similar offenses "in association with... academic duties and responsibilities". That is a good reason not to interpret it literally: and one hopes that faculty would be willing to read it so as to include respect for basic standards of human rights and international law. In the 1970's, H. Bruce Franklin, a tenured Stanford professor, was dismissed for encouraging students to engage in civil disobedience. Such activity pales in comparison to that of Rice.

Another option is for the Stanford community to conduct its own public trial, although without the full coercive powers of the State. Prosecutors could be hired, evidence filed, witnesses examined, defenses heard, as in any recognized trial. Given the allegations not just against Rice, but other Hoover appointees, one could even make the case for a standing "Hoover prosecution bureau" as a "court of last resort" for crimes against international law that cannot be prosecuted elsewhere.

What the Stanford community chooses to do is up to the community itself.