Restoring America's Human Rights Reputation

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Introduction

Where does the United States' human rights reputation stand six years after September 11? In releasing the State Department's 2006 Annual Country Reports on Human Rights Practices, Assistant Secretary of State for Democracy, Human Rights and Labor Barry Lowenkron called 2006 "the year of the pushback."[1] "[A]s the worldwide push for greater personal and political freedom grows stronger," he noted, "it is being met with increasing resistance from those who feel threatened by change."[2] What he did not fully analyze, however, is precisely why that pushback is occurring.

Let me suggest that this global pushback can be traced in part to the world's reaction to the current U.S. Administration's obsessive focus on the War on Terror, which has taken an extraordinary toll upon U.S. global human rights policy. Six years of defining our human rights policy through the lens of the War on Terror have clouded our human rights reputation, given cover to abuses committed by our allies in that "war," and blunted our ability to criticize and deter gross violators elsewhere in the world. Unnecessary, self-inflicted wounds—such as our counterproductive policies on Guantanamo, torture, denial of habeas corpus for suspected terrorist detainees, military commissions, the International Criminal Court (ICC), and the U.N. Human Rights Council—have diminished gravely America's standing as the world's human rights leader.[3] Our government's shortsighted actions have undermined America's longstanding commitment to human rights principle as a major source of our "soft power." In the next few years, this Administration and the next must recognize this failing and return to a consistent set of human rights policies that are true to our enduring principles.

Let me first analyze the ways in which our approach to the War on Terror has undermined the strength and effectiveness of America's efforts to promote human rights over the past few years; second, troubling trends in the human rights practices of particular governments that can be traced to the United States' weakened human rights efforts; and third, ways in which this Administration and the next can and should reverse that trend through enhanced bilateral efforts and increased engagement with multilateral human rights mechanisms.

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1. Barry F. Lowenkron, Assistant Sec'y of State for Democracy, Human Rights, & Labor, On-The-Record Briefing on the State Department's 2006 Country Reports on Human Rights Practices (Mar. 6, 2007), *available at* http://www.state.gov/g/drl/rls/rm/2007/81468.htm#bfl.

2. *Id.*

3. The Introduction to this year's reports indirectly acknowledges this, stating, "We recognize that we are writing this report at a time when our own record, and actions we have taken to respond to the terrorist attacks against us, have been questioned." *See* U.S. DEP'T OF STATE, INTRODUCTION TO 2006 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78717.htm [hereinafter COUNTRY REPORTS INTRODUCTION]. The Introduction concedes that "U.S. laws, policies and practices governing the detention, treatment and trial of terrorist suspects have evolved considerably over the last five years." *See id.*

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I. How the War on Terror Has Undermined Our Human Rights Policy

At the dawn of the twenty-first century, a viable global human rights strategy for the United States seemed to be emerging. That strategy combined four factors:

1. Diplomacy Backed by Force: Diplomacy backed by force in service of human rights;
2. Power Based on Principle: A recognition that consistent adherence to human rights principles and standards constitutes a major source of our "soft power;"
3. A Simple Approach to Human Rights Enforcement: based on telling the truth and taking a consistent approach to the past, present, and future. The approach toward the past: promoting accountability. The approach toward the present: addressing ongoing abuses. The approach toward the future: forestalling future abuses through preventive strategies such as democracy-building; and
4. Using Cooperation Among Global Democracies to Solve Global Problems: Encouraging both international and national and public and private institutions to work together to set universal standards for the consistent implementation of human rights and humanitarian norms.[4]

Tragically, the last six years have deeply disrupted that strategy. As evidenced by Afghanistan and Iraq, we have shifted from a strategy of diplomacy backed by force to force backed by diplomacy, seeking to build democracy from the top down rather than from the bottom up. The United States has deployed hard power at the expense of its commitment to human rights principle as a source of soft power and now finds itself in a position of military overstretch.[5]

As I elaborate below, we now fail to tell the full truth about our human rights conduct and that of our allies in the War on Terror. Increasingly, we avoid application of universal standards, whether Common Article 3 of the Geneva Conventions or the rules against torture and cruel inhuman or degrading treatment.[6] But the United States cannot lead the world with moral authority unless we hold ourselves to the same high standards that we demand from others. The United States has put its own human rights practices center stage by promoting double standards for our allies and arguing in favor of "law-free zones" (like Guantanamo), "law-free practices" (like extraordinary rendition), "law-free persons" (who are dubbed "enemy combatants"), and "law-free courts" (like the system of military commissions, which have failed to deliver credible justice and are currently being challenged in our courts for legislation recently stripping detainees on

4. *See* Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293 (2002).

5. *E.g.*, *Strains on Ground Forces Limit U.S. Options in Iraq*, USA TODAY, April 13, 2007, at A10.

6. *See* Editorial, *The Failed Attorney General*, INT'L HERALD TRIB., Mar. 12, 2007, at 6 (discussing United States policies that have "repudiated the Geneva Conventions").

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Guantanamo of the writ of habeas corpus).[7] Through these misguided policies, the Administration has shifted the world's focus from the grotesque human rights abuses of the terrorists to America's own human rights misconduct, leaving other, equally pressing issues elsewhere ignored or unaddressed.

Similarly, we have abandoned a consistent approach to past, present, and future abuses. By unwisely opposing the ICC, we have lost our focus on accountability for past abuses. The Bush Administration has regularly opposed efforts to redress human rights abuses through civil liability under the Alien Tort Claims Act, although both the Carter and Clinton Administrations had filed briefs in support of victims' claims.[8] Ironically, despite its avowed hostility toward international criminal adjudication, in the past few years, the Bush Administration has retreated from outright opposition toward international criminal adjudication to a *de facto* policy of benign coexistence with mechanisms of accountability. Recently, for example, the Bush administration consented to the U.N. Security Council's referral of the Darfur genocide case to the ICC,[9] passively supported ICC prosecutions in Congo and Uganda,[10] called for prosecution of Charles Taylor before the Special Court for Sierra Leone (and indicted his son, Chuckie),[11] and strongly supported the prosecutions of both Slobodan Milosevic before the International Criminal Tribunal for the former Yugoslavia[12] and Saddam Hussein before the Iraqi Special Tribunal.[13]

As I elaborate below, the United States has proven notably ineffective in curbing ongoing abuse in four situations: (1) in the face of genocide in Darfur, (2) as committed by our major allies, especially those in the War on Terror, such as Saudi Arabia and Pakistan, (3) in the so-called "Axis of Evil" countries—North Korea, Iran, and Iraq—as well as in Afghanistan, notwithstanding our military interventions, and (4) in such traditional geopolitical rivals as China, Russia, and Cuba.

Finally, we have not built our capacity for preventing future abuse. Around the world, our democracy-building efforts have stalled. We have counterproductively weakened multilateral and regional institutions for global cooperation in the implementation of human rights and humanitarian norms—the ICC, the United Nations, the Human Rights Council—even while shying away from closer collaboration with democratic coali-

7. For a fuller elaboration of these points, see Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006).

8. *See, e.g.*, Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 169 (2004).

9. *See* Nora Boustany & Stephanie McCrummen, *Sudan Official Accused of War Crimes*, WASH. POST, Feb. 28, 2007, at A13.

10. See Let the Child Live, ECONOMIST, Jan. 27, 2007, at 48, 48.

11. *See id.*

12. *See* Press Release, Tom Casey, Acting Spokesman for the U.S. Dep't of State, Death of Slobodan Milosevic (Mar. 11, 2006), *available at* http://www.state.gov/r/pa/prs/ps/2006/63002.htm.

13. *See* Jacquelyn S. Porth, Coalition Official: Saddam Hussein's Trial to Be Fair, Transparent (Dec. 19, 2003), http://usinfo.state.gov/dhr/Archive/2003/Dec/22-428537.html.

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tions in Europe, Latin America, and Africa. This year, the United States refused to join the International Convention on the Protection of All Persons from Enforced Disappearance, apparently because its own practices arguably violate the terms of the Convention.[14] In addition, the United States refused to participate meaningfully in the negotiation of the Convention on the Rights of Persons with Disabilities even though our country has significant expertise in this area, could have contributed importantly to the content and implementation of the Convention, and exhibits among the best disability practices in the world.[15]

II. Troubling Trends and Ineffective Responses

These broader patterns become evident upon a close reading of the 2006 State Department Annual Country Reports on Human Rights Practices. For thirty years, these reports have formed the heart of American human rights policy by providing the official information base upon which all branches of the federal government can make policy judgments.[16] Although characteristically thorough, this year's reports reflect a number of troubling trends that illustrate the problems I have identified above.

A. Troubling Changes in Terminology

When I was Assistant Secretary of Democracy, Human Rights and Labor, I gave only one directive regarding these reports: Tell the truth. Reasonable minds may differ about what policy consequences should flow from the same truthful reporting about human rights conditions, but they

14. *See* AMNESTY INT'L ET AL., OFF THE RECORD: U.S. RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE "WAR ON TERROR" (2007), http://hrw.org/backgrounder/usa/ct0607/ct0607web.pdf (describing recent U.S. record of disappearances).

15. *See* Stephen R. Concklin, Letters, *Absent on Disabilities*, SACRAMENTO BEE, April 15, 2007, at E3.

16. The first of these reports, issued in 1977, ran only 137 pages and covered only a fraction of the world's countries. The last volume of the twentieth century covered 194 countries and totaled approximately 6,000 pages in typescript. When the State Department placed the 1999 reports on the world wide web, well over 100,000 people read or downloaded parts of the reports on the first day that they appeared. *See* U.S. DEP'T OF STATE, INTRODUCTION TO 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2000), *available at* http://www.state.gov/www/global/human_rights/1999_hrp_report/overview.html. The Country Reports now are supplemented by the annual State Department Country Reports on Religious Freedom and Trafficking. The 2006 Country Reports add assessments of the important work of human rights defenders; the Guiding Principles on Non-Governmental Organizations, announced by Secretary Rice in December 2006, which sets forth important guidelines to assess the U.S. government and other governments' treatment of human rights NGOs; and the new Global Internet Freedom Task Force's reporting on issues of internet freedom in every country. *See* U.S. Dep't of State, *Guiding Principles on Non-Governmental Organizations (NGOs)*, 9 INT'L J. NOT-FOR-PROFIT L. 79, 79-80 (2006). I heartily applaud my former colleagues at the Bureau of Democracy, Human Rights and Labor and throughout the Foreign Service for their extraordinary diligence in producing these reports, which I can attest from personal experience entails a huge collective annual effort. I do not hold the career staff who authored or edited these reports responsible for most of defects in the Reports that I criticize in the text that follows, which almost certainly resulted from decisions made at higher political levels.

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should not differ materially about what the true facts are. Yet in too many respects, this year's Country Reports show that our Government is not telling the full truth either about our human rights conduct or that of our allies in the War on Terror.

For example, this year's Country Reports evidence both troubling changes in terminology and noticeable underreporting of human rights violations. In the Syria, Libya, and Pakistan reports, for example, the State Department now describes acts that it had previously described as "torture" under the broader linguistic category of "torture *and abuse*."[17] This change hardly seems accidental. In the Department of Justice's infamous 2002 "Torture Memo," the Office of Legal Counsel argued in favor of an absurdly narrow definition of torture: "[inflicting] physical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."[18] Yet as I have noted elsewhere, under that definition, many acts committed in Saddam Hussein's Iraq would not have counted as "torture" even though the Bush White House had previously condemned those very acts as "torture" when Saddam's regime committed them.[19] Recently, the Administra-

17. U.S. DEP'T OF STATE, LIBYA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 1(c) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78858.htm [hereinafter LIBYA]; U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 1(c) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78874.htm [hereinafter PAKISTAN]; U.S. DEP'T OF STATE, SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 1(c) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78863.htm [hereinafter SYRIA] (emphasis added). In the Syria Report, horrific torture techniques are listed in the exact same wording and order in both the 2006 and 2005 reports, but techniques that were previously described as "torture methods" in 2005 are now described as "methods of torture and abuse" in the 2006 report. *Compare* SYRIA, *supra*, § 1(c), *with* U.S. DEP'T OF STATE, SYRIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2005 § 1(c) (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61699.htm. Similarly, the Libya Report lists the identical litany of torture techniques in 2005 and 2006, but the 2005 list of "methods of torture" is now called "methods of torture and abuse." *Compare* LIBYA, *supra*, § 1(c), *with* U.S. DEP'T OF STATE, LIBYA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2005 § 1(c) (2006), *available at* http://www.state.gov/g/drl/rls/hrrpt/2005/61694.htm. Likewise, the Pakistan Report in 2005 referred to methods of "torture," but the identical methods in the 2006 Report are referred to as "severe abuse." *Compare* PAKISTAN, *supra*, § 1(c), *with* U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2005 § 1(c) (2006), *available* at http://www.state.gov/g/drl/rls/hrrpt/2005/61710.htm.

18. Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzalez, Counsel to the President, Regarding Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2004), at 1, *available at* http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf.

19. Such acts include "branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons, and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives." *See* A DECADE OF DECEPTION AND DEFIANCE 12 (2002), *available at* http://www.whitehouse.gov/news/releases/2002/09/iraqdecade.pdf. Yet paradoxically, these acts would not fall under the umbrella of torture as defined by the infamous "Torture Memo." *See* Harold Hongju Koh, *Can the President Be Torturer-in-Chief?*, 81 IND. L.J. 1145, 1150 (2006).

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tion has denied that it is engaged in or supports torture,[20] but one might read the linguistic shift in the reports to suggest that the Administration still wants to preserve its freedom—as well as the freedom of the Syrians, Libyans, and Pakistanis—to commit actions that it now calls "abuse" as part of the War on Terror.[21]

B. Underreporting of Violations

Furthermore, the reports exhibit significant underreporting of human rights violations, especially when committed by U.S. allies. For example, the report on Indonesia fails to mention possible human rights violations committed by the United States-supported police anti-terrorism unit, Detachment 88.[22] Likewise, the report on Afghanistan notes human rights abuses committed by government forces, including extrajudicial killings and torture, but claims that "elements of the security forces acted independently of government authority"[23] even though President Karzai has appointed a number of warlords and known human rights abusers as regional police chiefs.[24] The report on Afghanistan mentions that some organizations "reported the presence of secret or unofficial prisons through 2005"[25] but fails to mention the U.S. role in detention operations in Afghanistan, particularly the well-known U.S. detention center at Bagram Air Force Base, where over 600 individuals are believed to be detained.[26]

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20. Last year, President Bush told an interviewer: "I don't think a president can . . . order torture . . . Yes, there are clear red lines." Interview by Bob Schieffer with George W. Bush, President of the U.S., in Wash. D.C. (Jan. 27, 2006), *available at* http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml.

21. With respect to covered persons, who after the Supreme Court's recent decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), plainly include suspected Al Qaeda detainees, Common Article 3 of the Geneva Conventions prohibits "at any time and in any place whatsoever . . . violence to life and person, in particular . . . cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1946, 6 U.S.T. 3316, 75 U.N.T.S. 135. This prohibition simply confirms the existing legal obligations of American officials under the McCain Amendment (the Detainee Treatment Act), see Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified as amended in scattered sections of 10, 28, & 42 U.S.C.), and two other treaties that the United States has ratified: (1) Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 1-4, 16, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85, and (2) International Covenant on Civil and Political Rights arts. 7, 10, Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171.

22. Human Rights First, State Department's Human Rights Reports Omit U.S. Involvement in Abuses Abroad (March 7, 2007), http://www.humanrightsfirst.org/media/usls/2007/statement/316/index.htm [hereinafter Human Rights First].

23. *See* U.S. DEP'T OF STATE, AFGHANISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm [hereinafter AFGHANISTAN].

24. HUMAN RIGHTS WATCH, WORLD REPORT 2007 239 (2007), *available at* http://hrw.org/wr2k7/wr2007master.pdf [hereinafter WORLD REPORT 2007].

25. AFGHANISTAN, *supra* note 23, § 1(c).

26. Human Rights First, *supra* note 22.

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Similarly, the report on Iraq omits any reference to the detention and interrogation activities of the United States in-country. The report counts only non-coalition force detainees and fails to mention the numerous American-run Multi-National Force detention facilities in Iraq, which as of October 2006 held approximately 14,000 detainees throughout the country.[27] The Jordan report estimates that 500,000 to 700,000 Iraqis are living in Jordan and notes that "[t]he government has tolerated the prolonged stay of many Iraqis beyond the expiration of the visit permits, under which they entered the country."[28] The report, however, makes little or no mention of the often miserable conditions in which Iraqi residents of Jordan live or the recent difficulties that Iraqis fleeing the war zone have had in gaining entry to Jordan.[29]

In the same vein, the report on Egypt is overly positive about the multiparty elections that took place in 2005.[30] The report fails to mention that during the presidential election, President Mubarak had accepted greater press freedom and relaxed intimidation of opposition forces, only to reverse course in 2006 and extend the Emergency Law until 2008.[31] In March of 2007, Egypt essentially constitutionalized the Emergency Law by enacting antiterrorism amendments to its Constitution to give the President permanent emergency powers, in what appears to have been a rigged vote.[32] The government also postponed municipal elections, originally scheduled to take place last year, and cracked down on dissidents and judges seeking greater independence.[33] Additionally, the Egypt report does not mention that Italy has just indicted Italian and U.S. officials for their role in the abduction and transfer of an Egyptian cleric, Osama Hassan Mustafa Nasr, to Egypt where he allegedly was tortured.[34]

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27. *Compare* U.S. DEP'T OF STATE, IRAQ: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 1(d) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm (limiting its detainee totals only to those held by noncoalition forces), *with* Human Rights First, *supra* note 22 (noting that the United States operates detention facilities holding approximately 14,000 detainees).

28. U.S. DEP'T OF STATE, JORDAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 2(d) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78855.htm.

29. A Human Rights Watch Report from November 2006, entitled *"The Silent Treatment": Fleeing Iraq, Surviving in Jordan*, concludes that "hundreds of thousands of Iraqis living in Jordan face a daily threat of arrest, fines and deportation because the Jordanian government treats them as illegal immigrants rather than refugees" and that "[n]ow Jordan is refusing many Iraqis entry at its border." *See* HUMAN RIGHTS WATCH, "THE SILENT TREATMENT": FLEEING IRAQ, SURVIVING IN JORDAN 2-6 (2006), *available at* http://www.hrw.org/reports/2006/jordan1106/jordan1106web.pdf.

30. *See* U.S. DEP'T OF STATE, EGYPT: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm.

31. *See* Michael Slackman, *In Egypt, Emergency Law Gets Two More Years, Opposition Criticizes Measures as Too Broad*, INT'L HERALD TRIB., May 2, 2006, at 7.

32. *See* Michael Slackman, *Charges of Vote Rigging as Egypt Approves Constitution Changes*, N.Y. TIMES, March 27, 2008, at A8.

33. *See id.*

34. *Italy Indicts 31 Linked to CIA Rendition Case*, INT'L HERALD TRIB., Feb. 15, 2007, at 1. In addition, Human Rights Watch reports that two Egyptian asylum seekers living in Sweden were summarily expelled by Swedish authorities, transported to Egypt on a

The Pakistan report makes scant mention of Pakistan's role in detaining, interrogating, and transporting detainees, even though a European Union parliamentary investigation and Human Rights Watch have chronicled several cases of torture and abuse of terrorist suspects on Pakistani soil.[35] Pakistani officials arbitrarily have arrested and detained hundreds of people suspected of links to al-Qaeda or the Taliban, and subjected scores of victims to enforced disappearance and unlawfully transferred others to the custody of other countries, including the United States.[36] Still, the United States has noticeably muted its criticism of Pakistan in recent years, apparently because of Pakistan's support in the "War on Terror." The Pakistan report cites a comprehensive report by Amnesty International,[37] but nowhere acknowledges specific findings in the Amnesty report that forced disappearances of individuals believed to be members of Al-Qaeda or the Taliban soared after 2001; that hundreds have been arbitrarily arrested and detained; that some have been unlawfully transferred to the custody of other countries, notably to the United States for detention at Guantánamo; and that U.S. intelligence personnel appear to have known of or participated in the arbitrary detention and enforced disappearance of some terror suspects in Pakistan.[38]

Similarly, the reports on a number of the Council of Europe member states contain no reference to the 2006 Report of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights on the "alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states."[39] That damning report notes:

CIA-leased aircraft, and tortured in Egypt. *See* HUMAN RIGHTS WATCH, BLACK HOLE: THE FATE OF ISLAMISTS RENDERED TO EGYPT 4 (2005), *available at* http://hrw.org/reports/2005/egypt0505/egypt0505.pdf. One was released without charge in October 2003, while the other was sentenced to twenty-five years in prison by a military tribunal that failed to meet basic fair trial standards. *See id.*

35. An EU parliamentary investigation found that Murat Kurnaz, a Turkish citizen and German resident, was tortured after his arrest in Pakistan in 2001 as well as during his subsequent detention in Afghanistan and Guantánamo Bay. Temp. Comm. on the Alleged Use of European Countries by the CIA for the Transp. & Illegal Det. of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, at ¶ 83 (March 1, 2007), *available at* http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf [hereinafer EUR. PARL. REPORT]. He was released without charge on August 24, 2006 after five years of extralegal detention. *See id.* According to Human Rights Watch, "As the US State Department's annual human rights report for 2004 describes, security forces in Pakistan 'held prisoners incommunicado and refused to provide information on their whereabouts, particularly in terrorism and national security cases.' What the report does not say is that the Pakistani authorities carried out these abuses with the full knowledge and participation of American intelligence agents. Indeed, the degree of US control may have been so great, in some cases, that it constituted a form of proxy detention." HUMAN RIGHTS WATCH, GHOST PRISONER: TWO YEARS IN SECRET CIA DETENTION 2 (2007), *available at* http://hrw.org/reports/2007/us0207/us0207web.pdf.

36. AMNESTY INT'L, PAKISTAN: HUMAN RIGHTS IGNORED IN THE "WAR ON TERROR" (2006), *available at* http://web.amnesty.org/library/Index/ENGASA330362006.

37. *Id.*

38. *See id.*

39. *See* Eur. Parl. Ass., Comm. On Legal Affairs & Human Rights, *Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe*

> The United States, an observer state of our Organisation, actually created this reprehensible network, which we criticise in light of the values shared on both sides of the Atlantic. But we also believe . . . that it is only through the intentional or grossly negligent collusion of the European partners that this 'web' was able to spread also over Europe.[40]

The Council of Europe report identifies as playing varying roles in violating the rights of specific named persons: Sweden, Bosnia-Herzegovina, the United Kingdom, Italy, Macedonia, Germany, and Turkey.[41] The European report also singles out Poland and Romania for helping to run secret detention centers and Germany, Turkey, Spain. and Cyprus for serving as staging points for flights involving the unlawful transfer of detainees.[42]

Likewise, the report on Canada is notably deficient in its coverage of the notorious extraordinary rendition case involving Maher Arar. The report omits any mention that the case arose in the anti-terrorism context. Although the report refers to the findings of the Canadian Commission of Inquiry convened to investigate Arar's case,[43] the report does not mention the Commission's conclusions that: (1) Arar very likely was detained and rendered to Syria by the United States because of incorrect intelligence suggesting that he posed a terrorism threat due to his suspected links and sympathies with extremist Islamic organizations,[44] (2) Arar's account of his torture in Syria was "completely credible,"[45] (3) no evidence existed that Arar posed any kind of national security threat, and (4) U.S. officials misled Canadian officials about their treatment of Arar and very likely bear much of the blame for Arar's ordeal.[46] The report also fails to mention that the "United States . . . declined [the Canadian Commission's] invitation to give evidence or otherwise participate in the hearings."[47] Furthermore, the report does not mention that after the Commission's findings were announced: the Prime Minister issued a formal apology to Arar and his family,[48] the Government of Canada compensated Arar with a multi-million dollar payment,[49] and the former RMCP (police) Commissioner resigned the day after testifying before a House of Commons committee

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Member States (June 12, 2006), *available at* http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf.

40. *Id.* ¶ 284.

41. *See id.* ¶ 288.

42. *See id.* ¶ 289.

43. *See* U.S. DEP'T OF STATE, CANADA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 4 (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78883.htm [hereinafter CANADA].

44. *See* COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 13 (2006) [hereinafter ARAR COMMISSION OF INQUIRY].

45. *Id.* at 61.

46. *See id.* at 9, 361.

47. *See id.* at 11.

48. *See* Press Release, Office of the Prime Minister, Prime Minister Releases Letter of Apology to Maher Arar and His Family and Announces Completion of Mediation Process (Jan. 26, 2007), *available at* http://news.gc.ca/web/view/en/index.jsp?articleid=270739.

49. *See id.*

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about the Arar affair.[50] Finally, the report downplays the Commission's remedial suggestion to create an entirely new agency for reviewing the RCMP's national security activities in order to ensure that similar travesties do not occur in the future.[51]

The Introduction to the report on Turkmenistan, called one of the "world's most repressive and closed countries" by Human Rights Watch,[52] focuses primarily on press freedoms, not on the multitude of other serious human rights violations committed in the country.[53] Similarly, the Morocco report severely downplays abuses in Western Sahara.[54] The report also fails to chronicle several well-documented cases in which individuals arrested in Pakistan were rendered to Morocco, detained, and allegedly tortured.[55] In short, the Country Reports are as significant for what they omit as for what they report and do not tell the whole truth and nothing but the truth.

C. Ineffective Responses

Most fundamentally, the Country Reports tell a story of the repeated failure of current U.S. human rights policy. They attest to our striking ineffectiveness in curbing abuses in four categories of countries: (1) in the face of genocide in Darfur, Sudan, (2) as committed by our major allies, especially those in the War on Terror, (3) in the so-called "Axis of Evil" countries—North Korea, Iran, and Iraq—as well as in Afghanistan, notwithstanding our costly military interventions in two of those countries, and (4) in such traditional geopolitical rivals as China, Russia, and Cuba.

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50. *See RCMP's Embattled Chief Quits over Arar Testimony*, CBC NEWS, Dec. 6, 2006, http://www.cbc.ca/canada/story/2006/12/06/zaccardelli.html.

51. *See* CANADA, *supra* note 43, § 4; ARAR COMMISSION OF INQUIRY, *supra* note 44, at 364.

52. *See, e.g.*, WORLD REPORT 2007, *supra* note 24, at 430.

53. *Compare* COUNTRY REPORTS INTRODUCTION, *supra* note 3, *with* WORLD REPORT 2007, *supra* note 24, at 430-35.

54. *Compare* U.S. DEP'T OF STATE, MOROCCO: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 1(a) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78859.htm, *with* WORLD REPORT 2007, *supra* note 24, at 502-04 (listing several human rights violations relating to Western Sahara).

55. German citizen Mohammad Zammar was arrested without formal charge on December 8, 2001 at Casablanca Airport and was apparently detained and tortured in Morocco and Syria. *See* EUR. PARL. REPORT, *supra* note 35, ¶ 89. Italian citizen Abou Elkassim Britel, arrested in Pakistan in March 2002 by the Pakistani police and interrogated by U.S. and Pakistani officials, subsequently was rendered to the Moroccan authorities and imprisoned in the Temara detention facility, where he remains detained. *Id.* ¶ 62. According to Human Rights First, Binyam Muhammad was arrested in Karachi, Pakistan in April 2002, charged with conspiring with Jose Padilla, hung from the ceiling of his cell with leather straps and whipped by his Pakistani jailers, and flown to Morocco where he spent fourteen weeks and underwent torture by means of a razor being used to make incisions on his chest and his genitals. *See* The Case of Binyam Ahmed Muhammad, http://www.humanrightsfirst.org/us_law/detainees/cases/ahmed-muhammad.htm (last visited Aug. 8, 2007). He was then transferred to what he believes was a CIA-run prison in Afghanistan, before his subsequent transfer to Guantanamo. *See* Jose Padilla's Motion to Suppress Physical Evidence and Issue Writs Ad Testificandum at ¶ 18, United States v. Padilla, No. 04-60001-CR, 2007 WL 188146 (S.D. Fla. Jan. 22, 2007).

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1. Sudan

The Sudan report is admirably thorough and unflinching in its condemnation of the Sudanese government in Khartoum. It appropriately refers to events in Darfur as "genocide," attributes primary responsibility to the government militia, and accurately portrays the escalating violence toward the end of last year.[56] Sadly, however, this reporting only raises more sharply the question: If this is our frank assessment of the ongoing human rights crisis in Sudan, what is the United States now doing to stop what we called "genocide" several years ago?

2. Allies

As noted above, the Country Reports persistently underreport, selectively report, or simply omit description of human rights violations committed by our perceived allies in the War on Terror. Even where the reports do accurately report human rights abuses, the dismal record only attests to our reduced or ineffective efforts at human rights advocacy in those countries.

In perhaps the starkest example, Pakistan, President Pervez Musharraf continues to rule with an iron fist despite his broken promises to put Pakistan on the road to democratic reform.[57] Despite the passage of the Women's Protection Bill, gender-based violence, including honor killings, recurred frequently during the past year, forced disappearances increased substantially, arbitrary arrest and lengthy pretrial detention are pervasive, and an increasing number of journalists are being targeted for harassment, intimidation, and arrests.[58]

The Saudi Arabia report accurately calls the human rights situation in that country "poor"[59] but pulls its punches by omitting several accounts of abuse in prisons that can be found in the Human Rights Watch 2007 Report.[60] Significantly, the report acknowledges press accounts claiming that Saudi Arabia "did not imprison persons on political grounds, but because they were terrorists or collaborators with terrorists."[61] The report also underplays the Saudi government's significant oppression of human rights defenders (ten of whom were arrested in February 2007)[62] and the persistent government denial of access to prisons for human rights

56. *See* U.S. DEP'T OF STATE, SUDAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78759.htm.

57. *See* U.S. DEP'T OF STATE, PAKISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78874.htm.

58. *See id.* § 1(d).

59. *See* U.S. DEP'T OF STATE, SAUDI ARABIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78862.htm [hereinafter SAUDI ARABIA].

60. *Compare id.* § 1(a), *with* WORLD REPORT 2007, *supra* note 24, at 509-10.

61. SAUDI ARABIA, *supra* note 59, § 1(e).

62. *See* International Commission of Jurists, *Saudi Arabia: ICJ Calls on Saudi Arabia to Cease Harassement of Human Rights Lawyers and Defenders*, ICJ LEGAL RES. CTR, Feb. 20, 2007, http://www.icj.org//news.php3?id_article=4122.

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monitors,[63] a continuing, major barrier to accurate human rights monitoring and reporting in Saudi Arabia.

Systematic underreporting of violations does not seem limited to the security context and U.S. allies in the War on Terror. For example, in 2005, the International Labor Organization (ILO) published three reports documenting the widespread existence of forced labor in Peru, Bolivia, and Paraguay.[64] In Peru and Bolivia, where this problem is most acute, the ILO estimated that tens of thousands of individuals were subjected to debt bondage.[65] Although levels of forced labor are comparable in Peru and Bolivia, the U.S. State Department's reporting of these findings on Bolivia are expounded at length, but the Peruvian case is relegated to a single sentence in the Peru report,[66] perhaps because of the Administration's desire to secure prompt passage of the Peru-U.S. Trade Promotion Agreement (TPA), which currently contains weak labor provisions and whose legislative fate may be decided this year.[67]

3. *The "Axis of Evil" (Iraq, Iran, North Korea) Plus Afghanistan*

Despite the Administration's aggressive rhetoric—and in some cases, even military intervention—in Iraq, Iran, North Korea, and Afghanistan, their human rights record seems to be deteriorating. According to the Afghanistan report, for example, the security situation there has deteriorated and basic human rights are not guaranteed even though it has been more than five years since the fall of the Taliban.[68] Weak central institutions and a deadly insurgency contributed to the ineffectiveness of the gov-

63. *See* WORLD REPORT 2007, *supra* note 24, at 509.

64. *See* Eduardo Bedoya Garland & Alvaro Bedoya Silva-Santisteban, *El Trabajo Forzoso en la Extracción de la Madera en la Amazonía Peruana* (Int'l Labour Org., Working Paper No. 40, 2004), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=4748; Eduardo Bedoya Garland & Alvaro Bedoya Silva-Santisteban, *Enganche y Servidumbre por Deudas en Bolivia* (Int'l Labour Org., Working Paper No. 41, 2004), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=4845; Alvaro Bedoya Silva-Santisteban & Eduardo Bedoa Garland, *Servidumbre por Deudas y Marginación en el Chaco de Paraguay* (Int'l Labour Org., Working Paper No. 45, 2005), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5616.

65. *Forced Labour in Latin America*, FACT SHEETS ON FORCED LABOR IN LATIN AMERICA & THE CARIBBEAN (Int'l Labour Org., Geneva, Switz.), *available at* http://www.ilo.org/dyn/declaris/DECLARATIONWEB.DOWNLOAD_BLOB?Var_DocumentID=5156 (last visited Aug. 8, 2007).

66. *Compare* U.S. DEP'T OF STATE, BOLIVIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 6(c) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78881.htm, *with* U.S. DEP'T OF STATE, PERU: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 § 6(c) (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78902.htm.

67. *See* Doug Palmer, *March 31 Looms Large on U.S. Trade Agenda*, REUTERS, Mar. 26, 2007, http://www.reuters.com/article/reutersEdge/idUSN2643248220070326.

68. U.S. DEP'T OF STATE, AFGHANISTAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm.

ernment to secure basic rights.[69] The Taliban, Al-Qaeda, and other extremist groups stepped up attacks against government, aid personnel, and unarmed civilians, and the number of suicide bombings rose dramatically during the year.[70] According to the report, the United States-supported government in Afghanistan also committed its own share of human rights abuses, including arbitrary arrests and detention, extrajudicial killings, torture, and poor prison conditions.[71] It remains unclear how much the United States Government is meaningfully doing to reverse this trend.

As the daily headlines chronicle, the human rights situation in Iraq deteriorates by the day.[72] As the Iraq Study Group reported, the internal situation is descending into chaos, as the insurgency has wreaked havoc on the government's ability to ensure that the people of Iraq can enjoy even basic rights.[73] Recently, extrajudicial killings markedly increased, and terrorist groups and death squads killed thousands of Iraqis in Baghdad alone.[74] Given the precarious security situation, human rights issues have moved to the backburner in Iraq and will be increasingly at risk, especially in the area of detainee treatment, as the United States asks the Iraqis to assume a greater role in security operations.

The human rights situation in Iran remains increasingly disturbing.[75]

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69. *Id.*

70. *Id.* § 1(a).

71. *Id.*

72. *See Iraq Torture 'Worse After Saddam'*, BBC NEWS, Sept. 21, 2006, *available at* http://news.bbc.co.uk/2/hi/middle_east/5368360.stm; *Human Rights in Iraq 'Much Worse'*, CNN, Jan. 18, 2006, *available at* http://edition.cnn.com/2006/WORLD/meast/01/18/humanrights.iraq/.

73. JAMES A. BAKER, III ET AL., THE IRAQ STUDY GROUP REPORT xiii-xiv (2006).

74. The Iraq Report notes the following human rights problems:

> Pervasive climate of violence; misappropriation of official authority by sectarian, criminal, terrorist, and insurgent groups; arbitrary deprivation of life; disappearances; torture and other cruel, inhuman, or degrading treatment or punishment; impunity; poor conditions in pretrial detention facilities; arbitrary arrest and detention; denial of fair public trial; an immature judicial system lacking capacity; limitations on freedoms of speech, press, assembly, and association due to terrorist and militia violence; restrictions on religious freedom; large numbers of internally displaced persons (IDPs); lack of transparency and widespread corruption at all levels of government; constraints on nongovernmental organizations (NGOs); discrimination against women, ethnic, and religious minorities; and limited exercise of labor rights.

U.S. DEP'T OF STATE, IRAQ: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm.

75. As the Iran Report notes:

> Human rights problems included severe restriction of the right of citizens to change their government peacefully unjust executions after reportedly unfair trials; disappearances; torture and severe officially sanctioned punishments such as death by stoning; flogging; excessive use of force against demonstrators; violence by vigilante groups with ties to the government; poor prison conditions; arbitrary arrest and detention; lack of judicial independence; lack of fair public trials; political prisoners and detainees; severe restrictions on civil liberties including speech, press, assembly, association, movement, and privacy; severe restrictions on freedom of religion; official corruption; violence and legal and societal discrimination against women, ethnic and religious minorities, and homosexuals; incitement to anti-Semitism; severe restriction of workers' rights,

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Although a great percentage of the Iranian people support democratic reform, the country remains in the hands of the conservative clerics, who closely monitor and restrict the opposition and the press, punish human rights defenders, and impose a strict form of Sharia law that denies basic rights to women and minorities.[76] This year, the Iranian government shut down two independent newspapers and blocked access to many media internet sites.[77] Yet the United States' saber-rattling approach has blunted its ability to gain human rights leverage. In criticizing Iran for its "severe restriction of the right of citizens to change their government peacefully,"[78] the report uses visibly stronger language than is found in the reports for Syria and Saudi Arabia, which have arguably similar levels of restrictions on the right to change the government.[79] Moreover, our criticism of Iranian "[s]ecurity forces [who] monitored the social activities of citizens, entered homes and offices, monitored telephone conversations, and opened mail without court authorization"[80] is hard to square with our own National Security Agency's sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents.[81] Futhermore, the United States cannot stand on strong footing attacking Iran for "illegal detentions" when similar charges can be and have been lodged against our own government.[82]

Nowhere is the picture more depressing than North Korea, which I visited as a State Department official in the Fall of 2000. As the report

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including freedom of association and the right to organize and bargain collectively; and child labor.

U.S. DEP'T OF STATE, IRAN: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78852.htm [hereinafter IRAN].

76. *See id.*

77. *See id.* § 2(a).

78. *Id.* at intro.

79. *See* SAUDI ARABIA, *supra* note 59; SYRIA, *supra* note 17.

80. IRAN, *supra* note 75, § 1(f).

81. Many lawyers of all political stripes have challenged the legal basis for the National Security Agency's surveillance program. *See, e.g., Wartime Executive Power and the NSA's Surveliance Authority II: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Harold Hongju Koh), *available at* http://judiciary.senate.gov/testimony.cfm?id=1770&wit_id=3938. Yet ironically, the report on Venezuela accuses the Chavez government of "illegal wiretapping" in its list of human rights violations. U.S. DEP'T OF STATE, VENEZUELA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78909.htm.

82. The Iran Report notes:

> [I]n recent years authorities have severely abused and tortured prisoners in a series of 'unofficial' secret prisons and detention centers outside the national prison system. Common methods included prolonged solitary confinement with sensory deprivation, beatings, long confinement in contorted positions, kicking detainees with military boots, hanging detainees by the arms and legs, threats of execution if individuals refused to confess, burning with cigarettes, sleep deprivation, and severe and repeated beatings with cables or other instruments on the back and on the soles of the feet.

IRAN, *supra* note 75, § 1(c); *see* Jerry Markon, *U.S Can Confine Citizens Without Charges, Court Rules*, WASH. POST, Sept. 10, 2005, at A1.

chronicles, no human rights progress has been made there despite our aggressive rhetoric.[83] The country remains one of the most repressed, closed, and isolated countries in the world. The regime tightly controls the lives of its citizens, denying them freedom of speech, press, assembly, and association, and restricting freedom of movement and worker rights.[84] The North Korean government detained an estimated 150,000 to 200,000 people, including political prisoners and returned refugees from China, many of whom suffered from torture, starvation, disease, and exposure.[85] Forced abortions of pregnant female prisoners were reported, as were cases in which babies were killed upon birth in prisons.[86] In short, tough U.S. rhetoric and even military intervention have not yielded noticeable human rights improvement in countries that have been targeted for American human rights criticism.

4. Traditional Geopolitical Rivals

A similar pattern of ineffectiveness emerges from examination of the Country Reports of three traditional geopolitical rivals: China, Russia, and Cuba.

a) China

Happily, the China report continues to be frank and detailed. The report forthrightly reports on the Chinese government's tight grip on the press and civil society, its tight controls upon NGOs and the media, its suppression of political dissent, and its continuing harassment, detention, and imprisonment of political and religious activists, journalists, writers, and lawyers.[87] The report also notes the continual stalling of long-promised legal reforms, that executions often took place the day after appeals, that China has continued its illegal repatriation of North Korean refugees, and the Chinese government's severe cultural and religious repression of minorities in Tibet as well as Uighur Muslims.[88]

Despite this abysmal record, China undoubtedly has exploited the Bush Administration's human rights record to charge that the United States lacks standing to criticize China's human rights performance. "As in previous years, the State Department pointed the finger at human rights conditions in more than 190 countries and regions, including China, but avoided touching on the human rights situation in the United States," the Chinese government said in a report that Premier Wen Jiabao's office

83. U.S. DEP'T OF STATE, DEMOCRATIC PEOPLE'S REPUBLIC OF KOREA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78777.htm.

84. *Id.*

85. *Id.* § 1(c).

86. *Id.*

87. U.S. DEP'T OF STATE, CHINA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 intro. (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm [hereinafter CHINA].

88. *Id.* § 5.

recently issued.[89] The report continued, "We urge the U.S. government to acknowledge its own human rights problems and stop interfering in other countries' internal affairs under the pretext of human rights."[90] China also has not hesitated to charge democracy activists with "terrorism," as it did in the case of Wang Bingzhang, the founder of the democracy magazine *China Spring*, who a Chinese court sentenced to life imprisonment for "organizing and leading a terrorist group."[91]

The report enumerates an array of limitations that the Chinese government imposed upon internet freedom.[92] It also lists the names of several individuals who were detained or imprisoned for their internet writing during the year.[93] Unfortunately, however, the report neither highlights the role of private multinational corporations in supplying the Chinese government with equipment and technology that can be used to block sites[94] nor does it fully call to account foreign content providers, such as Yahoo, AOL, Google, and Skype, who abide by PRC government wishes, including having internal content monitors, in order to be able to operate within mainland China.[95] As a number of human rights and media NGOs have noted, these content-provider companies have in many respects effectively assumed the government's role as censor to stifle access to information.[96] The U.S. government plainly must do more both to press the Chinese government to relax its restrictions and to persuade private companies to stop contributing to the Chinese authorities' censorship efforts.

b) Russia

The Russia report makes clear that President Vladimir Putin has further consolidated power in the executive branch, cracking down on opposition groups and the media.[97] Putin has shrewdly exploited the American antiterrorist rhetoric, declaring as early as September 12, 2001 that the United States and Russia "have a common foe" because Osama bin Laden's

89. *China Issues Human Rights Record of the United States*, PEOPLE'S DAILY ONLINE, Mar. 8, 2007, http://english.people.com.cn/200703/08/eng20070308_355469.html.

90. *Id.*

91. Harold Hongju Koh, *Rights to Remember*, THE ECONOMIST, Nov. 1, 2003, at 23, 23-25.

92. CHINA, *supra* note 87, § 2(a).

93. *Id.*

94. *See* Eric Harwit & Duncan Clark, *Shaping the Internet in China: Evolution of Political Control over Network Infrastructure and Content*, 41 ASIAN SURVEY 377 (2001).

95. Worldwide, government approval of internet service providers is increasingly becoming a means to control internet freedom. *See generally* Eric J. Stieglitz, *Anonymity on the Internet: How Does it Work, Who Needs it, and What are its Policy Implications?*, 24 CARDOZO ARTS & ENT. L.J. 1395 (2007). I am informed that in the Central African Republic (CAR), for example, internet freedom has recently declined, because the government's requirement that users use a single approved internet service provider now makes it impossible to use Skype or other Voice Over Internet Protocol (VOIP) programs.

96. *See* Xeni Jardin, Op-Ed, *Exporting Censorship*, N.Y. TIMES, Mar. 9, 2006, at A23.

97. U.S. DEP'T OF STATE, RUSSIA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES - 2006 (2007), *available at* http://www.state.gov/g/drl/rls/hrrpt/2006/78835.htm [hereinafter RUSSIA].

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people were connected to events in Chechnya.[98] Soon thereafter, the U.S. government added three Chechen groups to its list of foreign terrorist organizations.[99]

Disturbingly, a human rights defender known for her criticisms of the Putin regime on Chechnya, Anna Politikovskaya, was murdered at point blank range, and it still remains unclear who ordered her death.[100] In addition, Russian government forces continue to commit serious human rights violations in Chechnya and other areas of the North Caucasus, including unlawful killings, arbitrary detention and arrest, and torture.[101] Nevertheless, the report on Russia downplays incidences of torture committed by Russian forces in Chechnya, which Human Rights Watch describes as "systematic" and widespread.[102] The Second Operational Investigative Bureau (ORB-2), which is responsible for some of the worst torture in the Chechen region, is only mentioned in one sentence of the Russia report.[103] Human rights abuses committed by Chechen Prime Minister Ramzan Kadyrov's forces misleadingly are blamed on individual soldiers rather than upon governmental leaders or systemic causes.[104]

c) Cuba

The Introduction to the Country Reports correctly notes that Cuba's longtime dictator Fidel Castro "continued to violate virtually all the rights of its citizens."[105] Along with former Congressman Sam Gejdenson, I recently visited Havana, with all appropriate U.S. governmental licenses, where I met with the leading Cuban dissident, Oswaldo Payá Sardiñas and his courageous family. As Payá noted in a *Washington Post* op-ed piece, from March 18-20, 2003, Cuban dissidents marked the fourth anniversary of "Cuban Spring," when Castro's state security fanned out across Cuba and arrested seventy-five independent journalists, librarians, labor unionists, human rights activists, and other dissidents, many of whom were tried on charges of "anti-state" activities, sentenced to lengthy prison terms, and

98. Susan B. Glasser & Peter Baker, *Putin, Bush Weigh New Unity Against A 'Common Foe,'* WASH. POST, Sept. 13, 2001, at A25.

99. Press Release, Richard Boucher, Spokesman for the U.S. Dep't of State, Terrorist Designation Under Executive Order 13224 Islamic International Brigade, Special Purpose Islamic Regiment, and Riyadus-Salikhin Reconnaissance & Sabotage Battalion of Chechen Martyrs (Feb. 28, 2003), *available at* http://www.state.gov/r/pa/prs/ps/2003/18067.htm.

100. *See* Thomas de Waal, Comment, *The Chechen Silence: Anna Politkovskaya's Death Should Awaken Us to the Vicious Injustices in the Northern Caucasus Region*, GUARDIAN (London), Oct. 12, 2006, at 32.

101. *See* HUMAN RIGHTS WATCH, WIDESPREAD TORTURE IN THE CHECHEN REPUBLIC: HUMAN RIGHTS WATCH BRIEFING PAPER FOR THE 37TH SESSION UN COMMITTEE AGAINST TORTURE (2006), *available at* http://hrw.org/backgrounder/eca/chechnya1106/chechnya1106web.pdf [hereinafter WIDESPREAD TORTURE]

102. *Compare id.* at 1, *with* RUSSIA, *supra* note 97, § 1(c).

103. Russia, *supra* note 97, § 1(c).

104. *Compare id.* § 1(a), *with* WIDESPREAD TORTURE, *supra* note 101, at 1, 9-10.

105. COUNTRY REPORTS INTRODUCTION, *supra* note 3.

remain imprisoned today.[106]

Plainly, the United States must listen to the voices of Cuban democrats on the island, like Payá, and should stand behind their courageous efforts to seek democracy, particularly as Castro's health declines. When I asked a Cuban citizen recently how effective the U.S. government has been in objecting to the continued detention of the Cuban Spring activists, however, he sighed and told me, "Whenever they raise these issues, the Castro government can now rebut with just one word: 'Guantánamo.'"

III. Repairing the Damage

The sobering trends in this year's reports indicate a desperate need for this U.S. Administration and the next to recommit the United States to promoting and protecting human rights throughout the world. Although an exhaustive survey of necessary actions would fill a book, we should begin, at a minimum, with four crucial steps: (1) taking immediate action against genocide in Darfur, (2) taking further measures to tell and disseminate the truth, (3) putting America's own house in order by closing Guantanamo, renouncing torture and extraordinary renditions, ending military commissions, reaffirming our commitment to the Geneva Conventions, and reengaging with multilateral institutions, especially the United Nations Human Rights Council and the ICC, and (4) promoting democratic transitions and supporting democratic movements within authoritarian societies.

A. Preventing Genocide

The crisis in Darfur remains an international disgrace. The United States sadly has failed to lead the way in preventing what Secretary of State Colin Powell forthrightly called a "genocide" several years ago.[107] "Never again" should not mean "Never again, except in Africa."

I would therefore suggest that the United States initiate immediate action on Darfur based on "the 4 Ps:" first, initiating a Peace Process; second, calling for immediate deployment of Peacekeepers into Darfur—with a deadline for Khartoum's acceptance of such a force—to help achieve an enforceable ceasefire that could lead to a sustainable political settlement; third, Protecting People, both the mass of trans-border refugees and the internally displaced; and fourth and finally, Punishing Perpetrators, by promoting four kinds of accountability: (1) new targeted sanctions, such as travel bans and assets freezes, upon individuals named in the U.N. Commission of Inquiry Report on Darfur[108] and Sudanese companies that rul-

106. *See* Oswaldo José Payá Sardiñas, Op-Ed., *Four Years in the Other Guantanamo*, WASH. POST, Mar. 19, 2007, at A15; Oswaldo José Payá Sardiñas, Op-Ed., *The Unstoppable Cuban Spring*, WASH. POST, July 1, 2006, at A25.

107. Rick Hampson, *Darfur Crisis Has Activist 'Angry All the Time,'* USA TODAY, Mar. 20, 2007, at 7A.

108. Int'l Comm. of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004* (January 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

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ing party officials doing business abroad own, (2) sanctions targeted at revenue flows from the "blood oil" sector, (3) capital market sanctions imposed upon foreign firms who deal with Khartoum, and (4) mechanisms for sharing information with the ICC to accelerate indictments against responsible Khartoum officials.[109]

B. Telling and Disseminating the Truth

I have chronicled above a number of ways in which this year's Country Reports unfortunately shade or underreport the truth. In addition to correcting these defects, the State Department should ensure that these Country Reports are made more widely available in the very countries whose human rights conduct is being described. In February 2006, Secretary Rice established the important Global Internet Freedom Task Force,[110] which deserves credit for including new reporting in this year's reports on the means by which internet restrictions occur in each country.[111] Unfortunately, the Department is not living up to its own mission by making translations of the Country Reports available in as many places and in the most visible ways possible, including linking translated versions of the reports to the main State Department website so that they are available to citizens in the countries themselves. Some governments, for example the Chinese, are believed to block these translated versions, although eventually, under pressure, they have seemed to allow them to be posted. Congress should ensure that the State Department is not deliberately avoiding linking these translated reports to its main website in order to minimize friction with the governments it criticizes. The Country Reports represent a massive undertaking, containing much valuable information, but they will have little value unless they are widely disseminated, particularly in countries where, because of government repression, much of the information remains opaque to the general public.

C. Putting America's House in Order

In addition to exerting pressure on other nations, America should take immediate and visible steps to put its own human rights house in order. Four necessary steps immediately come to mind. First, the United States should move as expeditiously as possible to close Guantanamo as a detention facility, an idea currently actively being discussed within both the leg-

109. For a summary of Darfur legislative proposals, see Darfur Legislation (July 31, 2007), http://www.darfurscores.org/darfur-legislation. For an insightful discussion of Darfur strategy, see JOHN PRENDERGAST & COLIN THOMAS-JENSEN, A PLAN B WITH TEETH FOR DARFUR (2007), *available at* http://www.enoughproject.org/reports/pdf/plan_b_20070509.pdf. For an analysis of how to revitalize the Sudanese Peace Process, see DARFUR: REVITALISING THE PEACE PROCESS (2007), *available at* http://www.crisisgroup.org/home/index.cfm?id=4769&l=1.

110. *See* Thomas Claburn, *Push For Internet Freedom in China Hits Close To Home*, INFO. WEEK, Feb. 20, 2006, at 30.

111. *See generally* COUNTRY REPORTS INTRODUCTION, *supra* note 3 (mentioning country-specific internet restrictions throughout).

islative and executive branches.[112] The real question is why the U.S government chose to open Guantanamo as a detention facility in the first place after the disastrous episodes in which the Naval Base was used to hold tens of thousands of Haitian and Cuban refugees.[113] This time, hundreds of detainees have been brought there without an "exit strategy," another example of a broader planning failure in the U.S. "war on terror." The U.S. government should either charge the detainees criminally in civilian courts or find other countries who will accept them for criminal trial. Second, the United States unequivocally should renounce the practices of torture and extraordinary renditions and, in the process, reaffirm our national commitment to adhere to the Geneva Conventions. Third, the United States should admit that its six-year experiment with military commissions has been a failure, to this point yielding no trials, no convictions, one Supreme Court defeat, and massive criticism both at home and abroad.[114]

Fourth and finally, the United States should reengage with multilateral institutions, especially the United Nations Human Rights Council and the ICC. In the last six years, the United States has unwisely disengaged from various institutions that promote fundamental human rights, chief among them the ICC and the newly-established Human Rights Council (Council).[115] While the United States likely will not become a state-party to the ICC or a member of the Council in the near future, the Administration can show its good faith by reengaging with both institutions and establishing special envoys to represent U.S. interests at those institutions. In addition, the United States can and should articulate a policy that encourages the success of these institutions, even if the United States chooses not to seek full membership in them at the present time.

Demonstrating U.S. support for these institutions is critical now, when those institutions are necessary to resolve major crises, such as the ongoing genocide in Darfur and the human rights crisis in Iraq, especially while these institutions are still defining their operating structures and policies. Many of our closest allies interpret current U.S. policies hostile to these institutions as signs that the U.S. government is determined to ensure that these institutions fail.[116] It is essential that the U.S. government both

112. See Thom Shanker & David Johnston, *Legislation Could Be Path to Closing Guantánamo*, N.Y. TIMES, July 3, 2007, at A10.

113. *See generally* Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 RICH. L. REV. 139 (1994).

114. *See* Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002).

115. *See* Neil A. Lewis, *U.S. Rejects All Support for New Court on Atrocities*, N.Y. TIMES, May 7, 2002, at A11; Ambassador John R. Bolton, U.S. Permanent Rep. to the U.N., Address to the U.N.: Moving Forward on Establishing a Credible and Responsible Human Rights Council (Jan. 11, 2006), *available at* http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=January&x=20060111135042frllehctim0.2209436.

116. *See* Peggy Hicks, *How to Put U.N. Rights Council Back on Track*, JEWISH DAILY FORWARD, Nov. 3, 2006, http://www.forward.com/articles/how-to-put-un-rights-council-back-on-track/.

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support and be understood by others as supporting these important and necessary multilateral institutions.

1. United Nations Human Rights Council

On March 5, 2007, the same day that the Country Reports were released, the Administration indicated that it would refuse to run for a position on the United Nations Human Rights Council for the second time.[117] This continued disengagement with a reformed human rights body that the United States initially favored severely hamstrings American efforts to promote human rights through multilateral processes. I agree with both Human Rights Watch and Freedom House that the United States should modify its stance by appointing a Special Envoy to the Council to engage in discussions about institutional design and to enable the Council to respond more effectively to human rights abuses worldwide.[118]

The State Department claims that the United States should remain an observer of the Council until it "expand[s] its focus and become[s] a more credible institution."[119] Yet, that is hardly likely to happen without U.S. participation and leadership. Admittedly, the Council's first year was unsuccessful, focusing almost exclusively on scapegoating Israel[120] and failing to address serious human rights problems in such countries as Sudan, Uzbekistan, and Iran. Much of the Human Rights Council's lack of credibility can be traced to the lack of leadership within it on the part of countries that traditionally promote human rights, especially the United States. Thus far, the dominant voices within the Council have belonged to such countries such as Algeria, Saudi Arabia, and Azerbaijan, which currently lead the Eastern Europe, Asia, and Africa regional groups. The hesitancy of Council members who have long promoted human rights to assume leadership, coupled with the United States' own failure to engage, have hampered the Council's credibility.[121]

The United States should break this vicious cycle by engaging itself and also encouraging likeminded human rights-friendly countries, such as European Union members, to seek stronger leadership roles or at least membership on the Council. Obviously, the Council can only be as strong and as credible as its member states. Without United States engagement and additional leadership from other countries promoting human rights, the Council likely will not improve significantly upon its performance. Without engagement, our self-defeating claim that the Human Rights

117. Sean McCormack, Spokesman, U.S. Dep't of State, Daily Press Briefing (Mar. 6, 2007), *available at* http://www.state.gov/r/pa/prs/dpb/2007/mar/81471.htm.

118. *See* Letter from Kenneth Roth, Executive Dir., Human Rights Watch, to Secretary Rice Regarding the Appointment of a Special Envoy to the UN Human Rights Council (Mar. 9, 2007), http://hrw.org/english/docs/2007/03/14/usint15486.htm; FREEDOM HOUSE, THE U.N. HUMAN RIGHTS COUNCIL AT THE HALFWAY MARK: A REPORT CARD (2006), *available at* www.freedomhouse.org/uploads/special_report/47.pdf.

119. McCormack, *supra* note 117.

120. *See* Hicks, *supra* note 116.

121. *See id.*

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Council "doesn't work and is hostile to U.S. interests" will surely become a self-fulfilling prophecy.

2. International Criminal Court

As noted above, for all its harsh rhetoric, the United States government has already de facto shifted its policy stance toward the ICC by abstaining from Security Council referrals to the ICC regarding Darfur.[122] I have elsewhere argued that the United States should shift its approach from counterproductive hostility to constructive engagement with that body.[123] The United States government should continue in this direction to engage with the ICC in order to demonstrate the United States' commitment to multilateral human rights institutions, to influence the future policy and practice of the ICC, and to better utilize the ICC in response to human rights crises, including the ongoing genocide in Darfur and the looming crisis in Iraq. At the same time, Congress should move to demonstrate the United States' changed attitude toward the ICC by repealing provisions of American Service-Members' Protection Act of 2002.[124] By implementing this counterproductive and ineffective law, this administration has wasted untold diplomatic capital with key allies whose support we desperately need on a range of global issues. The United States should repeal portions of this law, including the prohibitions on military assistance to countries that have ratified the Rome Statute and on U.S. cooperation with the ICC, establishing instead procedures for sharing intelligence with the ICC under certain circumstances.[125]

D. Supporting the Democratic Opposition and Promoting Democratic Transitions

Finally, the United States needs to make clear again, wherever possible, its support for genuine democratic oppositions and potential democratic transitions. Nowhere is this more necessary than in Cuba, where the human rights record has remained dismal for half a century.[126] On July 31, 2006, after undergoing surgery, Fidel Castro transferred his responsibilities to his younger brother, Raúl Castro.[127] Although proclaimed "temporary" by the Castro regime, many observers—including many I spoke to

122. *See* Nora Boustany, *A Shift in the Debate on International Court; Some U.S. Officials Seem to Ease Disfavor*, WASH. POST, Nov. 7, 2006, at A16.

123. *See* Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1503-09 (2003).

124. American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-33 (2002).

125. The law currently prohibits U.S. cooperation with the ICC (including intelligence sharing) and military assistance to states that have ratified the ICC, authorizes the President to use military force to free American citizens held by the ICC, and restricts U.S. participation in peacekeeping missions where U.S. citizens might be subject to ICC jurisdiction. *See generally* Col. M. Tia Johnson, *The American Servicemembers' Protection Act: Protecting Whom?*, 43 VA. J. INT'L L. 405, 461-72 (2003).

126. *See* WORLD REPORT 2007, *supra* note 24, at 201-05.

127. *See* Manuel Roig-Franzia, *Ailing Castro Transfers Powers; Cuban Leader Has Surgery, Cedes Interim Control to Brother*, WASH. POST, Aug. 1, 2006, at A14.

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during my recent trip to Havana—believe that Castro's deteriorating health likely will mean a permanent transfer of power.[128] The Cuban people may soon have a historic window of opportunity to move towards democracy and whatever U.S. administration is in office must be ready to support them.[129]

Broadly speaking, one could envision four possible scenarios for Cuban transition, only the last of which is desirable: first, maintenance of the fifty-year status quo under Raul Castro; second, unrest, violence, chaos, and possible military intervention; third, a "Chinese-style" economic liberalization under Raul Castro without political liberalization; or fourth, a peaceful democratic transition driven by the nonviolent pro-democracy activists who are best poised to lead such a transition in Cuba.

The best known of these leaders is pro-democracy activist Oswaldo Payá Sardinas, whom I recently visited in Cuba, along with former Congressman Sam Gejdenson. As the leader and founder of the Christian Liberation Movement, Payá has fought courageously for freedom of association, freedom of expression, freedom of the press, free elections, the right to operate private businesses, and amnesty for political prisoners.[130] In 2004, under a constitutional provision that puts any proposal to a national referendum if it receives over 10,000 signatures, Payá conceived the Varela Project and presented over 11,000 signatures to the National Assembly, which ignored his request.[131] Payá subsequently delivered 14,000 additional signatures for a total of more than 25,000.[132] Although Payá remains free in Cuba, the government severely has restricted his freedom of movement.[133] Many of his supporters remain held as political prisoners. As I can personally attest, he and his family are daily subjected to routine and cruel intimidation.

The Cuban people must be in charge of their own future. The United States should stand in solidarity with them, as we have done historically with democratic movements in Eastern Europe, Burma, Korea, the Philippines, South Africa, and Latin America. The United States should reach out to Oswaldo Payá and other democratic activists on the island and offer

128. *See* Bill Nichols, *Americans Await Word on Castro; Some Speculate Wildly; Others Plan for Transition*, USA TODAY, Aug. 2, 2006, at 1A.

129. The United States has already approved $80 million for fostering democratic change in Cuba and has committed to supporting any government succeeding Castro that guarantees fair elections and puts an end to repression. *See* Karen DeYoung, *GAO Audit Finds Waste In Cuban Aid Program; USAID Is Criticized for Lack of Oversight*, WASH. POST, Nov. 16, 2006, at A12.

130. *See* Duncan Campbell, *What Happens After Fidel Castro?*, GUARDIAN (London), Aug. 2, 2006, at 16, *available at* http://www.guardian.co.uk/cuba/story/0,,1835341,00.html.

131. *Year Two of Castro's Brutal Crackdown on Dissidents: Joint Hearing Before the Subcomm. on Africa, Global Human Rights, and International Operations and the Subcomm. on the W. Hemisphere of the H. Comm. on International Relations*, 109th Cong. (2005) (statement of Roger F. Noriega, Ass't Sec'y for W. Hemisphere Affairs, U.S. Dep't of State), *available at* http://www.foreignaffairs.house.gov/archives/109/99597.pdf.

132. *See id.*

133. *See* Campbell, *supra* note 130.

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support. However, the transition must be designed and led by Cubans themselves. A historic change is coming soon in Cuba. Supporting democratic transitions by reference to the genuine will of the people should be a high priority in the United States' effort to rebuild its reputation as a human rights leader.

Conclusion

The Pew Global Attitudes Project recently found, based on in-depth interviews with about 110,000 people in fifty countries, that the United States' image has plummeted abroad since September 11, and that anti-Americanism increasingly is becoming entrenched in the twenty-first century.[134] America's perceived commitment to human rights principles has significantly declined as a source of our soft power. As the director of the survey stated in congressional testimony, "favorable attitudes toward the U.S. declined in Germany, from seventy-eight percent in 2000 to thirty-seven percent currently. The numbers are similar in France, but even worse in Spain, where only twenty-three percent have a favorable view, and in Turkey, where it is twelve percent. Most people in these countries held positive views of the U.S. at the start of the decade."[135] Four years ago, I testified before the House Committee on Foreign Affairs that:

> [I]n its single-minded pursuit of the war against terrorism, the Administration has permitted some human rights concerns to fall by the wayside and has consciously sacrificed others . . . . But democracy and human rights cannot be pursued in a selective or piecemeal fashion. [Rather, t]he events of September 11th make clear that the United States must work to achieve its global objectives within a framework of international law and multilateral cooperation, holding ourselves to the same standards to which we hold others . . . . [W]e have the tools to make the world safer and more democratic, [but] if only we use them fairly and consistently.[136]

If anything, I believe those words even more strongly today.

In sum, America's human rights reputation defines who we are as a Nation and a People. What the last six years have taught us is that restoring that human rights reputation is simply too important a task to be left to politicians. Civil society has defended core principles of human rights and humanitarian law throughout the post-World War II Age of Human Rights. Protecting our human rights system and reputation is, and must remain, a core challenge for all thinking twenty-first-century citizens, especially those lawyers, educators, and law students, who are the guardians of tomorrow's global rule of law.

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134. *America's Image in the World: Findings from the Pew Global Attitudes Project: Hearing Before the H. Comm. on Foreign Affairs, Subcomm. on International Organizations, Human Rights, and Oversight*, 110th Cong. (2007) (remarks of Andrew Kohut), *available at* http://pewglobal.org/commentary/display.php?AnalysisID=1019.

135. *Id.*

136. *A Survey and Analysis of Supporting Human Rights and Democracy: The U.S. Record 2002-2003: Hearing Before the H. Comm. on Int'l Relations*, 108th Cong. 179, 191 (2003) (statement of the Harold Hongju Koh), *available at* http://commdocs.house.gov/committees/intlrel/hfa88166.000/hfa88166_0.HTM.

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