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U.N. Rapporteur Scheinin Issues Wrong Opinion on U.S. War on Terrorism

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Last month, the U.N. Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism visited the United States for the stated purpose of reviewing its counterterrorism practices for compliance with its treaty obligations, such as those in the International Covenant on Civil and Political Rights and the Convention Against Torture. On the final day of his visit, the Rapporteur, Finnish academic Martin Scheinin, issued a lengthy press release setting forth his “preliminary findings” regarding the U.S. human rights record.¹ Scheinin’s findings sharply criticized several aspects of U.S. counterterrorism policy and practices. Among Scheinin’s “findings” are that the United States is *not* engaged in a war on terrorism, that the detention facility at Guantanamo Bay should be closed, and that the members of al-Qaeda and the Taliban detained there should be set free. If these findings—really just statements of opinion—are any indication of the contents of Scheinin’s final report to the U.N. Human Rights Council, then it will be clear that Scheinin placed the agenda of the “international human rights community” over the right of the United States to defend itself against international terrorism.

A War by Any Other Name.... During his 10-day visit, Scheinin met with officials from the U.S. Departments of State, Defense, Justice, and Homeland Security, with Members of Congress, and with non-governmental organizations. He met with Heritage Foundation experts to discuss U.S. laws relat-

ing to the ongoing war on terrorism, including the Military Commissions Act, the Patriot Act, the REAL ID program, and other U.S. policies and practices. Little that he heard seems to have sunk in.

Among the many erroneous “findings” of Rapporteur Scheinin’s preliminary report is his statement that the United States is not currently engaged in a war against terrorism. Scheinin’s report reflects his belief that America is not at war: “The Special Rapporteur does not consider the international fight against terrorism as a ‘war’, at least not in other than rhetorical terms.”² Scheinin’s opinion that the United States is not at war seems to be nothing more than a reflection of the views of some within the international human rights community. And to be sure, there is some debate on this topic, chiefly among human rights “experts,” particularly in Europe.

The reality is, however, that the United States is engaged in a global armed conflict with terrorist networks such as al-Qaeda and its affiliates. This is not merely a rhetorical war. Osama bin Laden and al-Qaeda have launched attacks against American targets for the past 15 years. Al-Qaeda operatives attacked the World Trade Center in 1993, U.S.

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embassies in Kenya and Tanzania in 1998, the destroyer USS *Cole* in 2000, and the World Trade Center and the Pentagon in 2001. Further, al-Qaeda certainly has no reservations about its status vis-à-vis the United States: Osama bin Laden issued a “fatwa” declaring war upon the United States in August 1996 entitled “Declaration of War against the Americans Occupying the Land of the Two Holy Places.”³ It is not clear what course of events must transpire before Rapporteur Scheinin deigns to recognize this war.

Rapporteur Scheinin disagrees that the United States is engaged in armed conflict in Afghanistan. While he concedes that the United States was engaged in an armed conflict at the commencement of Operation Enduring Freedom, when U.S. forces entered Afghanistan, Scheinin posits that the war ended upon “the fall of the Taliban regime as the de facto government of Afghanistan.”⁴ It is not, however, the place of a U.N. human rights official to make such a determination. Only the duly elected representatives of the U.S. government—not any other nation, the United Nations, or any human rights expert—may decide when the United States is at war and when it is not.

The Constitution assigns both the executive branch (the President) and the legislative branch (Congress) independent yet complementary powers to make, prosecute, and terminate war. As commander in chief, the President is authorized to engage the military forces authorized and funded by Congress to defend America from its enemies.⁵ When the President engages those forces to make

and prosecute war, the nation is, in a very real sense, “at war,” regardless of the opinion of any group of academics or theoreticians.

On September 18, 2001, Congress authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”⁶ The President thus acted with Congress’s authorization when he engaged U.S. forces in Afghanistan. Congress has not withdrawn, amended, or otherwise limited its authorization. As such, the United States remains “at war” with any organization or person involved in the September 11 attacks, such as the forces U.S. troops now combat in Afghanistan.

Moreover, the United Nations Security Council recognizes that the military conflict in Afghanistan did not suddenly end when the Taliban regime was deposed in December 2001. In a September 2006 resolution extending the authorization for the international armed forces mission in Afghanistan through September 2007, the Security Council stated that “the situation in Afghanistan still constitutes a threat to international peace and security.”⁷ It is likewise unlikely that members of the 36,000-strong international security force (including 15,000 U.S. troops) in Afghanistan would agree that the war there ended in 2001, even as fighting has continued.

1. Office of the United Nations High Commissioner for Human Rights, “Preliminary Findings on Visit to United States by Special Rapporteur on Promotion and Protection of Human Rights While Countering Terrorism,” Press Release, May 29, 2007, at www.unhcr.ch/hurricane/hurricane.nsf/view01/338107B9FD5A33CDC12572EA005286F8?opendocument (hereafter “Preliminary Findings”).
2. Preliminary Findings.
3. Osama bin Laden, “Declaration of War against the Americans Occupying the Land of the Two Holy Places,” *Al Quds Al Arabi*, August 1996.
4. Preliminary Findings.
5. In only five of the more than one hundred instances of armed conflict in which the United States has engaged during its history has Congress exercised its authority under Article I of the Constitution “to declare” war, a legal act with numerous legal and practical implications for U.S. relations with enemies and the nations and individuals who support them. U.S. CONST., Art. I, Section 8.
6. Authorization for Use of Military Force, P.L. 107-40, 50 U.S.C. §1541, 2 (a).
7. U.N. Security Council Resolution 1707 (Sept. 12, 2006).

The situation on the ground in Afghanistan belies Scheinin's opinion. Wars do not necessarily end when an invading force topples the enemy regime. Combat operations continue today in southern Afghanistan and along the Pakistan border by U.S. and NATO forces.⁸ Top Taliban military commander Mullah Dadullah, known as the "butcher of Kandahar," was killed only a few weeks ago in one such operation in the southern province of Helmand.⁹ The U.N. Security Council recognizes the violent reality of the situation on the ground in Afghanistan. In September 2006, it stated its concern regarding "the security situation in Afghanistan, in particular the increased violent and terrorist activity by the Taliban, Al-Qaida, illegally armed groups and those involved in the narcotics trade...."¹⁰ The fact that the Taliban and al-Qaeda stopped fighting Coalition forces in the open and chose instead to mount an insurgency does not mean that the state of armed conflict ceased.

Yet Rapporteur Scheinin maintains that the war in Afghanistan has ended and, so, argues that the soldiers and agents of the Taliban and al-Qaeda held in the Guantanamo Bay detention facility must be released and the facility should, in turn, be closed.¹¹ This actually does not accord with U.S. treaty obligations. The Geneva Conventions require that combatants be released from custody only "after the cessation of active hostilities."¹² The logic behind that requirement is that parties engaged in warfare have no obligation to release enemy combatants who are likely to return to the battlefield to

fight again. Such logic does not appear to persuade Scheinin, who apparently overlooked the fact that the return of formerly detained combatants to Afghanistan is a proven threat. As many as 30 former Guantanamo Bay detainees are confirmed to have returned to Afghanistan and engaged in further hostilities against Coalition forces.¹³ (These combatants presumably would disagree that the war is over.) The United States would recklessly endanger its soldiers, its citizens, and the rest of the free world if it were to release the remaining 380 detainees held at Guantanamo Bay.

Conclusion. Later this year, Rapporteur Scheinin will issue his final report detailing his findings relating to the U.S. human rights record. Scheinin should ensure that his final report takes into consideration the constitutional structure and legal traditions of the United States and reflects the challenges faced by the U.S. government and armed forces in prosecuting the war on terrorism.¹⁴ If Scheinin's preliminary findings are any indication of what will be in his final report, then the U.N. Human Rights Council and the international human rights community will be no closer to understanding—let alone reconciling—its disputes with the United States over the global war on terrorism.

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8. See, e.g., "Afghans Say U.S. Bombing Killed 42 Civilians," *The New York Times*, May 2, 2007, at www.nytimes.com/2007/05/03/world/asia/03afghan.html.

9. "Top Taliban commander killed in Afghanistan," *The Daily Telegraph*, May 14, 2007, at www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/13/wafgh113.xml.

10. U.N. Security Council Resolution 1707 (Sept. 12, 2006).

11. Preliminary Findings. ("In the case of those who have been captured during armed hostilities... such individuals should be released, or tried by civilian courts for their suspected war crimes.")

12. Geneva Convention Relative to the Treatment of Prisoners of War, Article 118, August 12, 1949.

13. "U.S. divulges new details on released Gitmo inmates," CNN.com, May 15, 2007, at www.cnn.com/2007/US/05/14/gitmo.inmates.reut/index.html.

14. Steven Groves, "The U.S. Deserves a Fair Report from the U.N. Human Rights Envoy," Heritage Foundation *WebMemo* No. 1470, May 24, 2007, at www.heritage.org/Research/InternationalOrganizations/wm1470.cfm.