Juvenile Enemy Combatants and the Juvenile Death Penalty in U.S. Military Commissions

Suzanne Farley

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation
Available at: http://digitalcommons.law.scu.edu/lawreview/vol47/iss4/5
JUVENILE ENEMY COMBATANTS AND THE JUVENILE DEATH PENALTY IN U.S. MILITARY COMMISSIONS

Suzanne Farley*

"[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty."
- U.S. Supreme Court in Roper v. Simmons

I. INTRODUCTION

Currently, the United States military is detaining juvenile terror suspects in military prisons around the world. Some of these juveniles will eventually be tried for their crimes by a military commission. In addition, some of

* Senior Articles Editor, Santa Clara Law Review, Volume 47; J.D. Candidate, Santa Clara University School of Law; B.F.A., Music Engineering, City University of New York. Dedicated to Harvey Sears.


2. The terms “juvenile” or “child” as used in this comment refer to an individual under the age of eighteen unless stated otherwise. See infra Part II.D.

3. An individual at Guantanamo Bay prison would be called a “terror suspect” or a “detainee” until such time as the President labeled such individual an “enemy combatant” in order to initiate prosecution by military commission. A person would remain a “terror suspect” or “detainee” during his or her entire detention if the United States only wished to interrogate him or her. See infra Part II.A.


5. Military commissions, or tribunals, are courts set up by a country to try prisoners of war. They have been used throughout time, but were specifically set up and authorized to try alien unlawful enemy combatants in the War on Terror at Guantanamo Bay. See LOUIS FISHER, CRS REPORT FOR CONGRESS, MILITARY TRIBUNALS: HISTORICAL PATTERNS AND LESSONS 1, 3, 30 (2004), available at http://www.globalsecurity.org/military/library/report/crs/rl32458.pdf (last visited
these children, who were under the age of sixteen when they committed their crimes, may be subject to the death penalty. According to President Bush's Detention Order of November 13, 2001, non-citizens with ties to al Qaeda may be sentenced to death for their crimes against humanity. This order does not distinguish between adults and children with regard to the death penalty.

In contrast, the policy for U.S. citizens is much different. A recent U.S. Supreme Court decision abrogated the death penalty for U.S. citizens under the age of eighteen. This comment addresses this disparity and the implications that follow. Specifically, this comment considers whether alien unlawful "juvenile enemy


7. The President must first declare the juvenile terror suspect a "juvenile enemy combatant" to bring the suspect under the jurisdiction of a military commission. The suspect will then be subject to the death penalty. Military Commissions Act §§ 948d(a), (c), (d).


9. Id. at 57,834 § 2(a).

10. There are various spellings of al Qaeda, such as al Qaida, al-Qaeda or al Qa'ida.

11. Detention Order, supra note 8, at 57,834 § 4(a).

12. Id. (emphasis added) (the death penalty applies to "[a]ny individual subject to this order" (emphasis added)).

13. Note that non-citizens are sometimes granted access to U.S. courts, such as when the U.S. Supreme Court grants certiorari on an appeal, or the individual committed his crime in, was detained in, or otherwise had contact with U.S. sovereign territory. Nevertheless, most non-citizens do not obtain this access. E.g., Graham-Levin Amendment, Pub. L. No. 109-148, Title X, § 1005, 119 Stat. 2680, 2740-44 (2005) (limiting federal court jurisdiction of cases filed by prisoners at Guantanamo Bay).


15. Id. at 578.

16. See infra Parts IV.A-C.

17. If an enemy combatant is being tried by military commission, then it can be presumed that he is "unlawful" because military commissions are not authorized to try lawful "enemy combatants." See Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948d(a)-(c), 1200 Stat. 2600, 2603 (to be codified at 10 U.S.C. §§ 948a-950v (2006)).
combatants" can be sentenced to the death penalty when tried by U.S. military commissions.19

Part II begins with a brief background of the United States' War on Terror that began with the terrorist attacks of September 11, 2001. Part II.A examines legislation passed by Congress, actions taken by the President and case law that occurred as a result of these events.20 Part II.B examines the U.S. domestic, U.S. military and the international policies on the juvenile death penalty.21 Part II.C sets forth the consequences of being labeled an alien unlawful juvenile enemy combatant.22 Finally, Part II.D discusses the differing definitions of the term "juvenile" under U.S. domestic, U.S. military and international law.23

Part III presents the problem addressed by this comment—whether alien unlawful juvenile enemy combatants will be subject to the death penalty when tried by U.S. military commissions.

Part IV analyzes this problem by examining three possible safeguards against the death penalty that may be available to such individuals. Part IV.A examines possible constitutional protections,24 Part IV.B examines protection under the Uniform Code of Military Justice (UCMJ),25 and Part IV.C examines protection under international human rights and international humanitarian law.26

Part V sets forth a proposal for resolving this legal problem by examining various ways the law could be

18. See infra Part II.C.
19. See infra Parts IV.A-C.
20. See infra Part II.A.
21. See infra Part II.B.
22. See infra Part II.C. The phrase "unlawful enemy combatant" indicates that the President has labeled a terror suspect as an individual with connections to al Qaeda who is suspected of having engaged in acts of terrorism against the United States. Military Commissions Act § 948a(1). The term "juvenile enemy combatant" has yet to be used by the United States. However, it is a natural extension of the phrase "enemy combatant." The term should be used in future prosecutions of juvenile detainees. See infra Part III. See generally Amnesty Int'l, Case Studies: Who Are the Guantanamo Detainees?, http://news.amnesty.org/pages/torture-case8-eng (last visited May 7, 2007) (providing information about Omar Khadr, a Canadian national).
23. See infra Part II.D.
24. See infra Part IV.A.
25. Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 801-940 (2006); see also infra Part IV.B.
26. See infra Part IV.C.
amended or interpreted in order to proscribe the juvenile death penalty in U.S. military commissions.  

Finally, Part VI concludes that while alien unlawful juvenile enemy combatants will most likely not have constitutional or military law protection against the juvenile death penalty in U.S. military commissions, they may have protection under international law.

II. BACKGROUND OF THE U.S. WAR ON TERROR

A. Legislation, Presidential Actions and Case Law Following September 11, 2001

The events of September 11, 2001 and the resulting deaths of 2,819 individuals are forever etched into the minds of Americans. What is less documented and well-known are the consequences of those terrorist attacks with regard to case law and legislation, and the derogation of rights that has occurred as a result.

On September 14, 2001, President Bush declared a state of emergency: "A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States." On the same date, Congress passed the Authorization for Use of Military Force (AUMF), a joint resolution which 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, ... in order to prevent any future acts of international terrorism against the United States."

After receiving this authorization from Congress,

27. See infra Part V.
29. See infra Part II.A.
32. Id. § 2(a).
President Bush issued a military order concerning the detention, treatment, and trial of certain non-citizens in the war against terrorism on November 13, 2001 (Detention Order). This Detention Order had two significant consequences. First, it apparently accorded the President with broad discretion to identify "member[s] of the organization known as al Qaida" who engaged in "acts of international terrorism," and to subject them to military commissions. The Detention Order was also the first step in labeling such individuals as alien unlawful "enemy combatants," which may have placed them outside the scope of constitutional law and the majority of international legal protections. Second, the Detention Order, combined with the UCMJ, the AUMF and the DTA, "acknowledge[d] a general Presidential authority to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war." As a result, unlawful enemy combatants and juvenile enemy combatants may be tried by military commissions, where they have significantly fewer rights than in U.S. domestic courts.

33. Detention Order, supra note 8.
34. Id. §§ 2(a)(1)(i)-(iii).
35. Id.
36. Id. § 1(e).
37. Individuals are only classified as "lawful" combatants if they: (1) are commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention].
39. See infra Parts II.C, IV.C.
40. "[I]t is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Detention Order, supra note 8, at 57,833 § 1(e).
41. UCMJ, 10 U.S.C. §§ 801-940 (2006). The UCMJ sets forth the law and procedures to be followed in U.S. military commissions and U.S. courts-martial proceedings. Id.; see also infra Parts II.B.2, IV.B.
43. See Michael Ratner, PBS, Military Tribunals or Civil Courts: Violations of the Laws of War or Criminal Acts?,
After these actions diminished the rights of unlawful enemy combatants, the 2005 Detainee Treatment Act (DTA)\(^{44}\) placed some limits on the abrogation of their rights.\(^{45}\) Importantly, this legislation may have particular significance for juvenile enemy combatants. The DTA expressly prohibits the "cruel, inhuman, or degrading treatment or punishment [of detainees],"\(^{46}\) which it defines as the "cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States."\(^{47}\) This statement, if interpreted in a manner consistent with the Supreme Court's definition of "cruel and unusual punishment" under the U.S. Constitution,\(^{48}\) may abrogate the juvenile death penalty in U.S. military commissions.\(^{49}\)

Shortly following the passage of the DTA, the United States Supreme Court, in *Hamdan v. Rumsfeld*,\(^{50}\) issued two significant findings with respect to the justification for military commissions and the rules and procedures to be followed in them. First, the *Hamdan* Court decided that military commissions may be justified, under appropriate circumstances, to try individuals subject to the President's Detention Order.\(^{51}\) The lower court in *Hamdan* previously found that individuals falling under the President's Detention Order were automatically subject to trial by military commissions.\(^{52}\) *Hamdan*, conversely, clarified that the U.S.

\(^{44}\) DTA, Title X, 119 Stat. 2739.
\(^{45}\) *Id.* §§ 1003(a) (prohibiting cruel, inhuman, or degrading treatment or punishment), 1005(1)(a)-(e) (setting forth detailed rules and procedures for determining the status of detainees outside of United States, and requiring annual reports to Congress regarding the number of detainees reviewed and the procedures used at each location, and allowing for judicial review of the detention of enemy combatants).
\(^{46}\) *Id.* § 1003(a).
\(^{47}\) *Id.* § 1003(d).
\(^{48}\) *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (finding that the death penalty for individuals under the age of eighteen constituted cruel and unusual punishment prohibited by the Eighth Amendment).
\(^{49}\) See infra Part IV.A.
\(^{51}\) See *Hamdan*, 126 S. Ct. at 2775-98.
government had the initial burden of showing that the military commission was justified. Second, *Hamdan* clarified the law and procedures necessary for a lawful military commission. The Supreme Court stated that military commissions must comply with "the American common law of war," the UCMJ, and, at the least, Common Article 3 of the Geneva Convention. Importantly, these legal doctrines do not prohibit the juvenile death penalty, unlike international law sources, and, arguably, the DTA.

The final piece of relevant legislation came as a result of the Supreme Court's finding in *Hamdan* that the President did not have authorization from Congress to try individuals by military commissions. In order to resolve this issue, Congress, on October 17, 2006, less than four months after *Hamdan*, passed the Military Commissions Act of 2006 (Military Commissions Act) giving the President specific authorization to try individuals by military commissions. Importantly, the Military Commissions Act has further significance. This legislation added to *Hamdan*'s holding regarding the rules and procedures of military commissions' in two important areas: the applicability of the Geneva Convention, and the UCMJ, to alien unlawful enemy combatants. In both instances, the Military Commission Act

---

53. The prosecutor in military commissions is the U.S. government. The U.S. government must justify the need for the military commission before it can proceed to prosecute an enemy combatant. See *Hamdan*, 126 S. Ct. at 2775-98.
54. See id.
55. Id. at 2786.
56. Id.
57. Id.; infra Part II.B.2 (discussing the UCMJ).
58. Geneva Convention, supra note 37, at arts. 3(1)(a)-(c); *Hamdan*, 126 S. Ct. at 2786; infra Part II.B.3.
59. See infra Parts II.B.3, IV.C.
60. *Hamdan*, 126 S. Ct. at 2774-75.
61. Between the decision in *Hamdan* and the passage of the Military Commissions Act, prisoners at Guantanamo Bay had no means of trial. *Hamdan* was decided on June 29, 2006, and the Military Commissions Act of 2006 was set forth on October 17, 2006. *Hamdan*, 126 S. Ct. 2749.
64. Military Commissions Act § 948b(g).
65. Id. §§ 948b(d)(A)-(C), 950(b)-(g).
resulted in the further abrogation of the rights of juvenile enemy combatants.

First, the Military Commissions Act stated that while Common Article 3 protected alien unlawful enemy combatants, the remaining articles of the Geneva Convention were not applicable to such individuals. By comparison, the Supreme Court in Hamdan found that at the least Mr. Hamdan was entitled to Common Article 3 protection, but did not decide whether his rights extended beyond this section of the Geneva Convention. The Military Commissions Act, therefore, decided this issue for the Judiciary and chose to limit alien unlawful enemy combatants' protection under international law.

Second, the Military Commissions Act limited the application of several sections of the UCMJ, the doctrine which set forth the rules and procedures to be followed in U.S. military commissions. While Hamdan clearly stated that the rules in the UCMJ "must apply to military commissions unless impracticable," the Court did not define "impracticable." On the contrary, Congress, by passing the Military Commissions Act, defined which rights were "impracticable" by expressly stating which sections of the UCMJ did not apply in U.S. military commissions. In doing

---

66. Id. § 948b(f); see also infra Part II.B.3 (setting forth the protection offered by Common Article 3).
67. Id. § 948b(g) (emphasis added). Further, note the signing agreement to the Military Commissions Act, which states that the President "has the authority for the United States to interpret the meaning and application of the Geneva Conventions." Id. § 6(a)(3)(A); see also Remarks on Signing the Military Commissions Act of 2006, 42 WEEKLY COMP. PRES. DOC. 1831 (Oct. 17, 2006). Therefore, despite promulgations by the U.S. Judiciary, the Military Commissions Act leaves the final interpretation of the Geneva Convention to the President.
68. Salim Ahmed Hamdan was captured in Afghanistan in 2001 and detained at Guantanamo Bay. Hamdan was believed to be Osama bin Laden's personal bodyguard, and was suspected of many crimes in the War on Terror, including murder. The President determined that Hamdan was an alien unlawful enemy combatant, and in 2003, he was designated for trial by military commission. Hamdan v. Rumsfeld, 415 F.3d 33, 35-36 (D.C. Cir. 2005), rev'd, 126 S. Ct. 2749 (2006).
69. Hamdan, 126 S. Ct. at 2795 (emphasis added); see also infra Part II.B.3.
70. Hamdan, 126 S. Ct. at 2795.
71. Military Commissions Act §§ 948b(d)(A)-(C), 950(b)-(g).
72. See Hamdan, 126 S. Ct. at 2790-91.
73. Id. at 2791.
74. Military Commissions Act §§ 948b(d)(A)-(C), 950(b)-(g).
so, Congress also limited the rights of alien unlawful enemy combatants under military law.

As a result of this legislation, military commissions became a lawful means of trying enemy combatants. What remains unclear is the policy of the U.S. military regarding the use of the juvenile death penalty in military commissions.


In order to determine whether the juvenile death penalty is a lawful means of punishment in U.S. military commissions, the U.S. domestic, military and international policies regarding this matter must be examined.  


The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishment." On March 1, 2005, the Supreme Court, in *Roper v. Simmons*, found that imposing the death penalty on offenders who committed their crimes while under the age of eighteen, constituted "cruel and unusual punishment" as envisioned by the framers of the Constitution.

*Roper* involved a minor respondent, Christopher Simmons. At the age of seventeen, Simmons decided that "he wanted to murder someone," and planned a murder with two friends. After breaking into the home of the victim, Shirley Crook, Simmons and his friends bound her hands and feet with electrical wire, wrapped her entire face in duct tape, and pushed her from a bridge, drowning her in the waters below. Despite the callousness of this crime, the Supreme Court categorically held that the Eighth Amendment prohibits the execution of *any* offender under the age of eighteen, for *any*

---

75. This comment will not resolve the issue, but may offer insight into the likelihood of the U.S. government approving the use of the juvenile death penalty in U.S. military commissions.
76. U.S. CONST. amend. VIII.
78. *Id.* at 578.
79. *Id.* at 556.
80. *Id.*
crime. This finding was supported by three rationales: (1) the maturity and irresponsibility of juveniles as compared to adults; (2) juveniles' vulnerability and susceptibility to negative influences in their environments; and (3) the unformed character and personality of juveniles as compared to adults. As a result of Roper, it is now unconstitutional to sentence any juvenile to the death penalty in U.S. courts.


U.S. domestic courts have also addressed the constitutional rights of non-citizens tried outside of U.S. sovereign territory. In order to determine if alien unlawful juvenile enemy combatants have constitutional rights when tried in U.S. military commissions, the cases of Boumediene v. Bush, Johnson v. Eisentrager and Dorr v. United States must be examined. Although these cases considered the applicability of the Fifth and Sixth Amendments to non-citizens, they offer the only guide available to the possibility of non-citizens' rights under the Eighth Amendment.

Boumediene, Eisentrager, and Dorr are split on whether non-citizens are afforded the protection of the particular constitutional right at issue in each case. Boumediene found that non-citizens tried outside of U.S. sovereign territory do not have any constitutional rights, whereas Eisentrager and

81. Id. at 574 (emphasis added).
83. Id. (emphasis added).
85. Johnson v. Eisentrager, 339 U.S. 763 (1950) (concerning twenty-one German nationals, or enemy aliens, who were arrested in China and detained in Germany after World War II, principally for collecting and furnishing American intelligence to Japanese forces; they petitioned for writs of habeas corpus and lost).
86. Dorr v. United States, 195 U.S. 138 (1904) (involving an appeal from the Supreme Court of the Philippine Islands concerning the right to a jury trial; finding that a jury trial was not a constitutional necessity in a criminal case in the Philippine Islands, where there was already an established system of justice).
Dorr found that such individuals are not protected by the Fifth or Sixth Amendments, while leaving open the question of other constitutional rights.88

In reaching their conclusions, each court had a different rationale for its denial of the constitutional right in question. The Boumediene court concentrated merely on the location of the petitioners outside of U.S. sovereign territory.89 In contrast, the Eisentrager Court focused on the loss of Fifth Amendment protection endured by U.S. military personnel when tried by courts-martial,90 and the injustice of extending such protection to non-citizens while denying such a right to citizens.91 The Court in Dorr instead concentrated on how the U.S. constitutional right would affect and fit into the country and court system in question.92 These different rationales may offer some insight into whether alien unlawful “enemy combatants” will be offered the Eighth Amendment protection against the juvenile death penalty in U.S. military commissions.

2. U.S. Military Policy on the Juvenile Death Penalty

The UCMJ contains the basic rules and procedures to be followed in U.S. courts-martial93 and in U.S. military commissions.94 United States military personnel and lawful enemy combatants95 are tried by U.S. courts-martial.96 The entire UCMJ applies in these proceedings.97 In contrast,

88. Eisentrager, 339 U.S. at 784; Dorr, 195 U.S. at 148.
89. Boumediene, 476 F.3d at 991.
90. See infra notes 91, 93 (providing information on courts-martial and their law).
91. Eisentrager, 339 U.S. at 783-84. Courts-martial are governed by the UCMJ, which does not require the granting of constitutional rights, to persons subject to its jurisdiction. See Note, Constitutional Rights of Servicemen Before Courts-Martial, 64 COLUM. L. REV. 127, 127 (1964).
92. See Dorr, 195 U.S. at 144-45.
93. See UCMJ, 10 U.S.C. §§ 801-940 (2006); see also id. § 816, art. 16. A courts-martial is a court where the U.S. military try individuals, either U.S. citizens or non-citizens, including “prisoners of war in custody of the armed forces,” or “persons serving with or accompanying an armed force in the field,” who commit crimes of war. Id. § 802, arts. 2(a)(1)-(12).
97. Military Commissions Act § 948d(b).
alien unlawful enemy combatants are subject to trial by military commissions. Military commissions are governed by both the UCMJ and the Military Commissions Act. Therefore, determining the law that will apply in U.S. military commissions concerning the juvenile death penalty requires an examination of death penalty laws under the UCMJ and under the Military Commissions Act.

The UCMJ is ambiguous with regard to the juvenile death penalty. It states that "any person" subject to its provisions "shall suffer death" for unlawfully killing another human being with a premeditated design to kill, or for burglary, sodomy, rape, robbery or aggravated arson resulting in death. The word "juvenile," nor any synonym for it, is never used within the UCMJ. Therefore, "any person" most likely includes both juveniles and adults. However, the UCMJ also prohibits "cruel and unusual punishment," which under U.S. domestic law would prohibit the juvenile death penalty for individuals under the age of eighteen.

In contrast, the Military Commissions Act authorizes the death penalty for a longer list of offenses which result in the death of a protected person. The Military Commissions Act similarly does not distinguish between adults and children, but does use the phrase "any person" in reference to the death penalty. Yet, the Military Commissions Act also includes a proclamation against cruel and unusual

98. Id. § 948c. Military commissions are not authorized to try lawful enemy combatants. Id. § 948d(b).
99. See Hamdan, 126 S. Ct. at 2786.
100. See Military Commissions Act §§ 948b(a)-(c), 948c.
101. See infra Part IV.B.
102. UCMJ, 10 U.S.C. §§ 801-940 (2006); see also id. § 918, art. 118.
103. Id. § 855, art. 55.
104. Roper v. Simmons, 543 U.S. 551, 578 (2005); see also infra Part IV.A.
105. Military Commissions Act § 948d(d).
106. Id. §§ 950v(b)(1)-(28). Comparatively, the UCMJ lists the offenses punishable by murder as premeditated murder, or the "perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson" resulting in death. UCMJ § 918, art. 118.
107. "Protected persons" include civilians not taking an active part in hostilities, military personnel who are set aside from fighting by sickness, wounds or detention, and military medical or religious personnel. Military Commissions Act §§ 950v(a)(2)(A)-(C).
108. Id. § 950v(b)(15).
punishment\textsuperscript{109} that may curtail the use of the death penalty for individuals under eighteen according to U.S. domestic law.\textsuperscript{110}

3. \textit{International Policy on the Juvenile Death Penalty}

The Vienna Convention on the Law of Treaties\textsuperscript{111} sets forth the general rules a state must follow in its treaty obligations. While many international human rights and international humanitarian treaties concern the rights of juveniles,\textsuperscript{112} for the purpose of a defense against the juvenile death penalty, this comment will focus on: (1) the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention);\textsuperscript{113} (2) the Convention on the Rights of the Child (CRC);\textsuperscript{114} (3) its Optional Protocol on the Involvement of Children in Armed Conflict (Optional Protocol to the CRC);\textsuperscript{115} and (4) the International Covenant on Civil

\begin{footnotesize}
\begin{enumerate}
\item Id. § 949s.
\item Roper v. Simmons, 543 U.S. 551, 578 (2005); see also infra Part IV.A.
\item The rights of juveniles are protected in other treaties, but these are the most significant and widely-ratified for the purpose of a discussion about the juvenile death penalty. See Melissa A. Jamison, \textit{Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children}, 9 U.C. DAVIS J. JUV. L. & POLY 127, 145-53 (2005).
\item Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 263, U.N. GAOR, 54th
\end{enumerate}
\end{footnotesize}
and Political Rights (ICCPR).\textsuperscript{116}

Both the CRC and the ICCPR contain express proclamations that recognize the greater protections and rights of juveniles.\textsuperscript{117} The CRC recognizes that children deserve special safeguards, care and legal protection,\textsuperscript{118} and that "every child has the inherent right to life."\textsuperscript{119} The ICCPR explicitly extends this protection to the context of the juvenile death penalty, stating that the "[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age."\textsuperscript{120}

The Geneva Convention instead prohibits "cruel and unusual punishment."\textsuperscript{121} Common Article 3 of the Geneva Convention, on the other hand, which is the only section of the Geneva Convention available in military commissions,\textsuperscript{122} offers less protection. Common Article 3 "prohibits cruel treatment and torture," but does not address specific punishments.\textsuperscript{123}

Finally, the CRC,\textsuperscript{124} the Optional Protocol to the CRC,\textsuperscript{125}
and the ICCPR\textsuperscript{126} make explicit the intention of international law to define a juvenile as an individual under the age of eighteen.\textsuperscript{127} This is accomplished by setting forth an express definition of the terms "juvenile" and "child."\textsuperscript{128} This language clarifies international law's stance on the definition of juvenile; a definition that is contrary to that enunciated by the U.S. military.\textsuperscript{129}

\textbf{C. The Title of Alien Unlawful Juvenile Enemy Combatant and Its Consequences}

The War on Terror involves a new kind of fighter and a new kind of war not envisioned at the time of the implementation of the Geneva Convention.\textsuperscript{130} Modern wars have resulted in a breakdown of international law distinctions between international armed conflicts versus internal conflicts,\textsuperscript{131} between state actors versus non-state actors,\textsuperscript{132} between combatants versus civilians,\textsuperscript{133} between spatial zones where the war is occurring versus zones where it is not occurring,\textsuperscript{134} and between temporal distinctions of war and peace.\textsuperscript{135} No longer is war fought exclusively on an open battlefield, with men in fatigues openly carrying guns, lined up in neat rows across opposing spatial boundaries.\textsuperscript{136} The War on Terror instead involves combatants who are terrorists, who hide their combatant status behind plain clothes, who strike with bombs and in suicide missions rather than carrying arms openly, and who may be unaware of their "commander in chief."\textsuperscript{137}

Because the Geneva Convention's definitions no longer apply to most modern wars and combatants,\textsuperscript{138} almost all

\textsuperscript{125}Optional Protocol to the CRC, supra note 115, at pmbl.
\textsuperscript{126}ICCPR, supra note 116, at art. 6(5).
\textsuperscript{127}See infra Part II.D.
\textsuperscript{128}CRC, supra note 114, at art. 1; ICCPR, supra note 116, at art. 6(5); Optional Protocol to the CRC, supra note 115, at pmbl.
\textsuperscript{129}See infra Parts II.D, IV.C.
\textsuperscript{130}Brooks, supra note 113, at 710-14.
\textsuperscript{131}Id. at 711-14.
\textsuperscript{132}Id. at 707-11, 714.
\textsuperscript{133}Id. at 729-36.
\textsuperscript{134}Id. at 720-25.
\textsuperscript{135}Id. at 725-28.
\textsuperscript{136}See, e.g., Brooks, supra note 113, at 730.
\textsuperscript{137}See, e.g., id. at 708-10, 731.
\textsuperscript{138}However, the War on Terror is one of the most prevalent modern-day
combatants in the War on Terror will be considered "unlawful."\textsuperscript{139} As a result, they will be denied the majority of international law protections,\textsuperscript{140} at most receiving the protection of Common Article 3 of the Geneva Convention.\textsuperscript{141} If the U.S. government wishes to prosecute an unlawful combatant or detainee, they must further classify him as an "alien unlawful enemy combatant"\textsuperscript{142} to subject him or her to trial by a military commission.\textsuperscript{143} With the exception of Common Article 3 of the Geneva Convention,\textsuperscript{144} these individuals then lose the majority of international law protections,\textsuperscript{145} perhaps constitutional protections,\textsuperscript{146} and even

---


\textsuperscript{140} See, e.g., Brooks, supra note 113, at 694; see also infra Part IV.C.

\textsuperscript{141} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2794-95 (2006). Common Article 3 protection is granted to all individuals, regardless of lawful or unlawful status. Yet, this provision grants few rights short of the right to humane treatment. Geneva Convention, supra note 37, at art 3; supra Part II.B.3.

\textsuperscript{142} Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948a(1)(i)-(ii), 949d(c), 1200 Stat. 2600 (2006). Individuals can be labeled "unlawful" because they do not fit the definition in the Geneva Convention, see supra note 37, but fall short of an "enemy combatant." Almost all detainees at Guantanamo Bay are "unlawful" because they are members of al Qaeda, but are not yet "unlawful enemy combatants." This second determination is made by a Combatant Status Review Tribunal once the U.S. government chooses to prosecute the individual. Military Commissions Act § 948d(c).

\textsuperscript{143} Military Commissions Act § 948d(a). It is not clear where an unlawful combatant who is not also labeled an "enemy combatant" would be tried. Military commissions do not have authorization to try unlawful combatants or prisoners of war, only alien unlawful enemy combatants. Military Commissions Act § 948a(3), § 948d(a). In the War on Terror, the issue has not yet emerged because the U.S. government, through the Combatant Status Review Tribunal, labels any unlawful combatant or detainee an "alien unlawful enemy combatant" at the time they seek prosecution. Military Commissions Act § 948d(c). Generally, the unlawful combatants or detainees are held for questioning and released. See Eric Lichtblau, Study Finds Sharp Drop in the Number of Terrorism Cases Prosecuted, N.Y. TIMES, Sept. 4, 2006, at A9.

\textsuperscript{144} Military Commissions Act §§ 948b(f)-(g).

\textsuperscript{145} See, e.g., Brooks, supra note 113, at 694.

\textsuperscript{146} See infra Part IV.A.
some military law protections.\textsuperscript{147}

In the War on Terror, "the U.S. has so far insisted that it recognizes no lawful enemy combatants at all,"\textsuperscript{148} and in fact, the President declared that all members of al Qaeda, the Taliban and associated forces are "unlawful enemy combatants."\textsuperscript{149} As trials by military commissions offer significantly fewer rights than trials in U.S. courts-martial, this is a weighty designation.\textsuperscript{150}

The label of "unlawful enemy combatant" has further consequences. No longer is war fought only between adults. Modern wars, especially wars involving Third World countries, less organized forces, or "wars on terror," often involve combatants that are children.\textsuperscript{151} The terrorist organization al Qaeda is one such example.\textsuperscript{152} International law has sought to protect such children, both as combatants and civilians,\textsuperscript{153} but the definitions of war have deteriorated and led to a derogation of juveniles' rights.\textsuperscript{154}

As a result, we are now faced with a new label, "alien unlawful juvenile enemy combatant,"\textsuperscript{155} and possibly with a further derogation of rights.\textsuperscript{156} A label arbitrarily defined and

\textsuperscript{147} The Military Commissions Act expressly states that not all provisions of the UCMJ apply to enemy combatants tried by military commission. Military Commissions Act §§ 948b(d)(A)-(C), 950(b)-(g) (eliminating the right to a speedy trial, the right against self-incrimination, some rights during pre-trial investigation, and some rights to appeal, rehearing and/or review of decisions).

\textsuperscript{148} E.g., Brooks, supra note 113, at 735.

\textsuperscript{149} Detention Order, supra note 8, §§ 1(e), 2(a)(i)-(iii); Military Commissions Act § 948a(1)(i); Brooks, supra note 113, at 732-33.

\textsuperscript{150} See Ratner, supra note 43. Military Commissions offer the least amount of protections and rights. See, e.g., Military Commissions Act §§ 948b(d)(A)-(C) (listing the UCMJ provisions that do not apply to alien unlawful enemy combatants tried by military commission); Press Release, Human Rights First, Military Commission Proceedings Violate International Law (Aug. 17, 2004), at http://www.humanrightsfirst.org/media/2004_alerts/0817.htm (presenting the statement of Avidan Cover, Senior Associate of Human Rights First).


\textsuperscript{152} See, e.g., Amnesty Int'l, supra note 22.

\textsuperscript{153} See CRC, supra note 114; Geneva Convention, supra note 37; ICCPR, supra note 116; Optional Protocol to the CRC, supra note 115.

\textsuperscript{154} See Brooks, supra note 113, at 677.

\textsuperscript{155} See generally Jamison, supra note 112 (discussing the detention of juveniles in U.S. military commissions and the law and protections that are offered to them).

\textsuperscript{156} With the passage of the Graham-Levin Amendment, once an individual is determined to be an enemy combatant by the Combatant Status Review
applied in taking away adults' vital rights is now being attached to a group of individuals traditionally afforded even greater protection and rights. This label may now be used to sentence juveniles to the death penalty when tried by U.S. military commissions. Importantly, this protection from the juvenile death penalty is fervently guarded by almost every state in the world, including by U.S. domestic law, but it may not be protected by U.S. military law in military commissions.

D. Differences in the Definition of "Juvenile"

Further exacerbating the aforementioned derogation of rights, the U.S. military defines the terms "juvenile" or "child" differently than U.S. domestic law or international law. U.S. domestic and international law define the term as any individual under the age of eighteen. United States military law, as applied in military commissions, instead

---

157. See In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 474-77 (D.D.C. 2005). Some believe the United States impermissibly applies this classification to al Qaeda detainees as a group. See Mofidi & Eckert, supra note 139, at 87-88. In addition, the United States does not appear to maintain the presumption of prisoner of war status, as required by the Geneva Convention, until this status is determined otherwise by a competent tribunal. Geneva Convention, supra note 37, at art. 5.

158. E.g., Jamison, supra note 112, at 153-55.

159. See infra Parts IV.A-C.


161. See id. at 578 (ending the juvenile death penalty for individuals under the age of 18); infra Part IV.A.

162. See infra Part IV.B.


164. CRC, supra note 114, at art. 1 (stating that a “child” is “every human being under the age of 18 years”); ICCPR, supra note 116, art. 6(5) (stating that a sentence of death shall not be imposed for crimes committed by persons below eighteen years of age); Optional Protocol to the CRC, supra note 115, pmbl. (stating that a child means every human being below the age of 18); Roper, 543 U.S. at 574. The phrases “child,” “juvenile,” or even “persons below eighteen,” are used interchangeably, but appear to mean the same thing.
defines a "juvenile" or "child" as a non-citizen held outside U.S. sovereign territory who is under the age of sixteen.\textsuperscript{165} This difference has a potentially grave impact on children ages sixteen and seventeen. It also demonstrates the ability and intention of the U.S. military to interpret laws differently than U.S. courts, and the implications this may have for alien unlawful juvenile enemy combatants.

III. THE LEGAL PROBLEM: UNLAWFUL JUVENILE ENEMY COMBATANTS AND THE DEATH PENALTY

President Bush's Detention Order authorizes him to detain anyone "who is not a United States citizen"\textsuperscript{166} whom he has "reason to believe . . . is or was a member of the organization known as al Qaida"\textsuperscript{167} and who "has engaged in . . . or conspired to commit, acts of international terrorism . . . that have caused . . . injury to or adversary effects on the United States."\textsuperscript{168} Any such individual may then be labeled an "alien unlawful enemy combatant,"\textsuperscript{169} tried by a military commission and "punished in accordance with the penalties provided under applicable law, including life imprisonment or death."\textsuperscript{170} This authorization of the death penalty for "enemy combatants" does not discriminate between adults and children.\textsuperscript{171}

On November 7, 2005, the first alien unlawful juvenile enemy combatant, Omar Ahmed Khadr, was docketed for trial by a military commission.\textsuperscript{172} Khadr is a Canadian citizen who, at the age of fifteen, allegedly killed a U.S. soldier during a battle near Khost, Afghanistan.\textsuperscript{173} Because Khadr is not a U.S. citizen, is classified as an "al-Qa'ida fighter,"\textsuperscript{174} and

\begin{footnotes}
\item[165] E.g., Jamison, supra note 112, at 135-36.
\item[166] Detention Order, supra note 8, § 2(a).
\item[167] Id. § 2(a)(1)(i).
\item[168] Id. § 2(a)(1)(ii).
\item[169] See supra Part II.C; see also supra note 156 (discussing the Combatant Status Review Tribunal).
\item[170] Detention Order, supra note 8, § 4(a).
\item[171] Id. (stating that the death penalty would apply broadly to "[a]ny individual subject to this order").
\item[173] E.g., Amnesty Int'l, supra note 22.
\item[174] E.g., id.
\end{footnotes}
allegedly engaged in terrorism aimed at harming the United
States, he falls under President Bush's Detention Order and therefore is subject to trial by a military commission. As a result, he may also be subject to the death penalty, despite his young age. Despite this authorization, pursuant to a request from Canada, the U.S. Department of Defense agreed to forego the death penalty in his case. It is significant, however, that Canada felt the need to insist on this pardon, as it appeared that this plea was necessary to avoid the pursuit of the juvenile death penalty. Also significant is that this juvenile enemy combatant was a citizen of Canada, a country to which the United States is known to have close ties. It is questionable whether the result would have been different if Khadr had been from a country with which the United States is not closely allied.

Importantly, an investigation in 2004 reported that there are up to 107 other juveniles from countries around the world currently detained in U.S. military prisons. The Pentagon has confirmed at least 60 such individuals. At the present time, it remains unclear whether these juvenile terror suspects will be prosecuted, and if the death penalty will be pursued in their cases. While some legislation could be interpreted to prohibit the juvenile death penalty for such individuals, it is unclear how the United States will choose

175. Detention Order, supra note 8, § 2(a)(1).
176. The Detention Order does not differentiate between children and adults. Id. § 4(a).
177. E.g., Amnesty Int'l, supra note 22.
178. Condoleezza Rice, U.S. Sec'y of State, Remarks at 9/11 Commemoration Ceremony with Citizens of Halifax (Sept. 11, 2006), available at http://canada.usembassy.gov/content/textonly.asp?section=can_ua&subsection1=security&document=rice_visit_091106citizens. Because of close relations between the two countries, it is possible that the United States felt political pressure to forego the death penalty for sake of future relations. If the juvenile had not been a Canadian national, the result might have been different. See generally Amnesty Int'l, supra note 22.
180. Mackay, supra note 4.
181. Id. This discrepancy could have something to do with the definition of "juvenile." See supra Part II.D.
182. Id. Many of the terror suspects may never be prosecuted, but will be held until the end of the War on Terror with al Qaeda. See Lichtblau, supra note 144.
to interpret the various legislation and case law that has been generated by the War on Terror. Therefore, the question remains whether the United States will subject future alien unlawful juvenile enemy combatants to the death penalty when they are tried by U.S. military commissions.

IV. ANALYSIS: THREE SOURCES OF POSSIBLE PROTECTION AGAINST THE JUVENILE DEATH PENALTY

Having established that U.S. military commissions are valid forms of trial for alien unlawful juvenile enemy combatants, there are three possible sources of law which may be available to protect such individuals from the death penalty. This protection could come in the form of U.S. constitutional protection, military law protection, or protection under international human rights or humanitarian law. Each of these sources should be examined thoroughly to determine their availability and the strength of their protection against the juvenile death penalty.

A. Constitutional Law Protection Against the Juvenile Death Penalty: The Eighth Amendment

1. U.S. Domestic Courts and the Eighth Amendment: Roper v. Simmons and the Court's Rationale

The Eighth Amendment to the U.S. Constitution prohibits "cruel and unusual punishments." Roper v. Simmons held that imposing the death penalty on any offender who committed a crime when under the age of eighteen constitutes "cruel and unusual punishment" under the Eighth Amendment to the U.S. Constitution. Roper, importantly, is a categorical rule that is not restricted to the facts of that case, but instead, unconditionally forbids the

\[\text{References:}\]
184. See infra Parts IV.A-C.
185. U.S. CONST. amend. VIII.
186. Roper, 543 U.S. 551.
188. Roper, 543 U.S. at 587 (O'Connor, J., dissenting).
execution of any offender under eighteen, for any crime, no matter how deliberate, wanton, or cruel.\textsuperscript{189}

The rationale for the \textit{Roper} decision was that juveniles have a greater "vulnerability and comparative lack of control over their immediate surroundings"\textsuperscript{190} and "struggle to define their identity,"\textsuperscript{191} and therefore, "have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."\textsuperscript{192} In addition, the Court noted that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."\textsuperscript{193}

The categorical rule of \textit{Roper} clearly states that all juveniles under the age of eighteen may not be subjected to the death penalty.\textsuperscript{194} This is despite the fact that "some under [eighteen] have already attained a level of maturity some adults will never reach."\textsuperscript{195} Nevertheless, the Court felt that because some under eighteen did not have sufficient culpability and maturity, it was important to draw a line at eighteen.\textsuperscript{196} Importantly, this opinion did not differentiate between citizens and non-citizens. If juveniles that are U.S. citizens have a "lack of maturity and an underdeveloped sense of responsibility,"\textsuperscript{197} and therefore, "a greater claim than adults to be forgiven for failing to escape negative influences in their environment,"\textsuperscript{198} then so should non-citizen juveniles, including alien unlawful juvenile enemy combatants. In addition, the \textit{Roper} Court noted that it would be morally misguided to "equate the failings of a minor with those of an adult."\textsuperscript{199} This moral duty may also extend to non-citizen juveniles tried by U.S. military commissions.

\begin{itemize}
\item \textsuperscript{189} \textit{Id.} (emphasis added).
\item \textsuperscript{190} \textit{Id.} at 570 (majority opinion).
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id.} at 553.
\item \textsuperscript{193} \textit{Id.} at 570.
\item \textsuperscript{194} \textit{Roper}, 543 U.S. at 574.
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{See id.}
\item \textsuperscript{197} \textit{Id.} at 569.
\item \textsuperscript{198} \textit{Id.} at 553.
\item \textsuperscript{199} \textit{Id.} at 570.
\end{itemize}
2. U.S. Military Commissions and the Possibility of Eighth Amendment Protection

The Supreme Court has yet to consider whether non-citizens held outside of U.S. sovereign territory have the Eighth Amendment constitutional right against "cruel and unusual punishment" in the form of the juvenile death penalty. Courts who have considered the application of other amendments to the U.S. Constitution to non-citizens have found either that such individuals do not have any constitutional rights, or that they may have certain constitutional rights, but not all of them. Importantly, each of these courts relied on a different rationale in reaching their decisions. These different rationales may offer insight into whether the Eighth Amendment right against cruel and unusual punishment will be offered in U.S. military commissions.

First, non-citizens held outside U.S. sovereign territory may not have any constitutional rights when tried outside U.S. sovereign territory. This view was espoused in Boumediene, where the court stated that "[p]recedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States." The rationale in Boumediene was resolute; the petitioners were outside of U.S. sovereign territory, and therefore, did not have constitutional rights. Under this unconditional rationale, alien unlawful juvenile enemy combatants would not have the protection of the Constitution because U.S. military commissions are held outside of U.S. sovereign territory.

Second, non-citizens held outside U.S. sovereign territory may not have all constitutional rights, but may have certain limited ones. This interpretation can be found in

---

200. See infra Part IV.A.2.
203. See id. at 990 n.8 ("[T]he dispositive fact was not a petitioner's enemy alien status, but his lack of presence within any sovereign territory.").
Eisentrager.\textsuperscript{205} and in Dorr.\textsuperscript{206} The Court in Eisentrager stated that it is "well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."\textsuperscript{207}

The rationale of the Eisentrager\textsuperscript{208} Court was that it was inconsistent to offer the Fifth Amendment due process right to non-citizens tried outside of U.S. sovereign territory, when this right is denied to U.S. citizens who entered military service.\textsuperscript{209} After entry into military service, U.S. citizens are subject to trial by courts-martial, where the rules and procedures to be followed are set forth in the UCMJ, which is not obligated to recognize constitutional rights.\textsuperscript{210} In 1950, the Eisentrager Court felt that at the least U.S. military personnel would be "stripped of their Fifth Amendment rights" in courts-martial.\textsuperscript{211} However, based on more recent decisions by the U.S. Court of Military Appeals,\textsuperscript{212} the trend is moving towards granting U.S. military personnel all or almost all of the rights contained in the Bill of Rights.\textsuperscript{213} Accordingly, at the least, U.S. military personnel may be granted the Eighth Amendment right against cruel and unusual punishment in the form of the juvenile death penalty.\textsuperscript{214} Therefore, according to Eisentrager's rationale and more recent decisions by the U.S Court of Military Appeals, the Eighth Amendment may be available to protect non-citizens tried in military commissions.

The Dorr\textsuperscript{215} Court relied on a different rationale in denying constitutional protection to parties outside of U.S.

\textsuperscript{207} Boumediene, 476 F.3d at 991 (quoting Zadvydas v. Davis, 533 U.S. 678, 693 (2001)) (emphasis added).
\textsuperscript{208} See Eisentrager, 339 U.S. 763.
\textsuperscript{209} See id. at 783-84.
\textsuperscript{210} Note that a citizen tried by courts-martial will still have greater rights than a non-citizen tried by military commission, and most likely will have at least some constitutional rights. See CRS REPORT, supra note 5, at 59.
\textsuperscript{211} Eisentrager, 339 U.S. at 783. The traditional view is that in courts-martial defendants do not have Fifth Amendment constitutional rights because the UCMJ does not include them. See Note, supra note 91 at 127.
\textsuperscript{212} Eisentrager was decided in 1950. Eisentrager, 339 U.S. 763.
\textsuperscript{213} See Note, supra note 91, at 127.
\textsuperscript{214} See id.
\textsuperscript{215} Dorr v. United States, 195 U.S. 138 (1904).
sovereign territory. In making its determination of whether the Sixth Amendment right to a jury trial applied outside of U.S. sovereign territory, the Supreme Court instead concentrated on the country and the court system trying the non-citizen. Specifically, the Court examined “the legal traditions employed in the Philippines . . . , the significance of the constitutional rights asserted, and the ability of the existing system to accept the burdens of applying new constitutional constraints” before coming to its holding. The petitioners in Dorr were prosecuted in the Philippine court system and asserted a right to a jury trial under the Sixth Amendment to the U.S. Constitution. Importantly, Dorr asserted this right in a system that “already provided numerous procedural safeguards” and operated under an “established system of jurisprudence.” Therefore, the burden of granting the Sixth Amendment right in this established Philippine court system was great. Indeed, the Court felt that recognizing the right to a trial by jury as a fundamental right in the Philippine courts might “work injustice and provoke disturbance” rather than aid in the “orderly administration of justice” because “a large majority of the population would be unfit to serve as jurors.” Ultimately, the Court held that the Sixth Amendment “right to trial by jury was not a ‘fundamental’ right guaranteed outside of the United States.”

Notably, the Eighth Amendment right against cruel and unusual punishment in the form of the juvenile death penalty has not been expressly addressed in the context of trials by U.S. military commissions. Also, there are no impediments to “work injustice” by applying this right in U.S. military commissions, which already operate under “an American

216. Id.
218. Dorr, 195 U.S. at 139.
221. See id.
223. Id.
224. See supra Part II.B.1.
system of justice," namely, the UCMJ. The Court in Dorr also looked at "the significance of the constitutional rights asserted." In Dorr, the asserted right was the right to a jury trial, whereas for juvenile enemy combatants tried in U.S. military commissions, the concern is the right against cruel and unusual punishment in the form of the juvenile death penalty. Under any standard, the right against the juvenile death penalty is clearly a "significant" right.

While there is no clear ruling that the Eighth Amendment to the U.S. Constitution applies to alien unlawful juvenile enemy combatants, it appears from Roper, Eisentrager, and Dorr that there is an argument to support such a holding. Nevertheless, without a clear ruling to that effect, it appears that currently, the U.S. Constitution will not protect such individuals from the death penalty.

B. Military Law Protection Against the Juvenile Death Penalty: The Uniform Code of Military Justice

The UCMJ and the Military Commissions Act are available to protect juvenile enemy combatants in U.S. military commissions. On the other hand, the extent to which these doctrines protect individuals under the age of eighteen against the death penalty in U.S. military commissions remains unclear.

The UCMJ sets forth the basic rules and procedures to be followed in U.S. military commissions and courts-martial, and the Military Commissions Act supplements and abridges those rules for military commissions specifically. Under the UCMJ and the Military Commissions Act, "all persons" who

---

228. Dorr, 195 U.S. at 139.
230. Military Commissions Act § 948b(c).
231. Id. §§ 948b(d)(A)-(C), 950(b)-(g).
232. The Military Commissions Act uses the phrase "any person" instead of
commit the crime of murder are subject to the death penalty. A

233. “All persons” presumably includes children under the age of eighteen given that neither doctrine mentions the words “juvenile” or “child,” nor makes any distinctions based on the age of an individual. Therefore, based on the express statements of both doctrines, it appears the death penalty may be sought against juvenile enemy combatants in U.S. military commissions.

On the other hand, both the UCMJ and the Military Commissions Act also contain express proclamations against cruel and unusual punishments. Yet, neither doctrine offers an express definition of the term. One means of interpreting U.S. military law would be to use definitions of the same phase set forth in U.S. domestic law. According to U.S. law, as enunciated by the U.S. Supreme Court in Roper, the prohibition against cruel and unusual punishment prohibits the use of the death penalty against individuals under the age of eighteen. Therefore, using this definition of “cruel and unusual punishment” to interpret the UCMJ and the Military Commissions Act would protect juvenile enemy combatants from the death penalty in U.S. military commissions.

Another complication is that U.S. military law defines a non-citizen juvenile as a child under the age of sixteen, whereas U.S. domestic law defines a citizen juvenile as one under the age of eighteen. As a result, individuals ages

233. UCMJ, 10 U.S.C. §§ 801-940 (2006); see also id. § 918, art. 118; Military Commissions Act § 950v(b)(15).

234. Neither doctrine explicitly states this, but neither distinguishes between children and adults.

235. Military Commissions Act § 950v(b)(15) (referring to “all persons” or “any person” throughout); UCMJ § 918, art. 118 (same).

236. Military Commissions Act § 949s; UCMJ § 855, art. 55.

237. Note that while U.S. military commissions are operated by the U.S. military, they do not have to follow U.S. domestic rules and procedures, or U.S. interpretations of laws. See Johnson v. Eisentrager, 339 U.S. 763, 784 (1950). But, as the UCMJ and the Military Commissions Act do not define “any persons” or all things that account for “cruel and unusual punishments,” this is one of the few means available to interpret these phrases. The U.S. military could also choose to define the phrases separate from any other body of law.


239. E.g., Jamison, supra note 112, at 135-36.

240. Roper, 543 U.S. at 574; Jamison, supra note 112, at 135-36; supra Part II.D. The phrases “child,” “juvenile,” or even “persons below eighteen,” are used
sixteen and seventeen are more likely to be subject to the death penalty in U.S. military commissions.\textsuperscript{241} Conversely, while it appears that such individuals under the age of sixteen may be protected against the juvenile death penalty, this protection is not guaranteed.\textsuperscript{242} Whether the U.S. military will choose to interpret U.S. military law using the same definition as U.S. domestic law is unclear. Like the phrase "juvenile," the phrase "cruel and unusual punishment" could be defined differently under U.S. military law.\textsuperscript{243} Therefore, it remains unclear whether the UCMJ and the Military Commissions Act protect any juvenile under the age of eighteen from the death penalty in U.S. military commissions.

C. International Human Rights and Humanitarian Law
Protection Against the Juvenile Death Penalty

"Treaties made . . . under the Authority of the United States are to be the supreme law of the Land."\textsuperscript{244} Many of these treaties, comprising both international human rights and international humanitarian law, are applicable to the War on Terror.\textsuperscript{245} While both bodies of law permit derogations from treaty obligations during times of emergency, there are core rights that cannot be eliminated.\textsuperscript{246} The relevant issue here is whether these core international law rights will protect alien unlawful juvenile enemy combatants from the death penalty in U.S. military commissions.\textsuperscript{247}

\textsuperscript{241} The U.S. military could follow all U.S. domestic prohibitions against executing juveniles and still execute sixteen and seventeen year-olds according to their definition of "juvenile."

\textsuperscript{242} The U.S. military could not follow U.S. domestic laws that prohibit the execution of juveniles by executing individuals under the age of sixteen. Even according to their own definition of "juvenile," this practice would be precluded.

\textsuperscript{243} See The Threat of a Bad Example — Undermining International Standards as "War on Terror" Detentions Continue, supra note 163; Jamison, supra note 112, at 135-36.

\textsuperscript{244} Hamdan v. Rumsfeld, 415 F.3d 33, 38 (D.C. Cir. 2005), rev'd, 125 S. Ct. 2749 (2006) (quoting U.S. CONST. art. VI, §1, cl. 2). Thus, the treaties to which the United States is a party should have the force and effect of U.S. legislation.

\textsuperscript{245} See supra Part II.B.3.

\textsuperscript{246} See Brooks, supra note 113, at 711-14.

\textsuperscript{247} Note that while the protection under either body of law may be clear, the enforcement of those obligations in military commissions is not.
The Vienna Convention on the Law of Treaties\textsuperscript{248} sets forth the general rules that a state must follow in its treaty obligations.\textsuperscript{249} First, a state is obligated to carry out the conventions and treaties to which they are a party.\textsuperscript{250} This obligation is generally not imposed by penalty.\textsuperscript{251} Alternately, a state is obligated to not frustrate the purpose of those treaties to which they are not a party, but only a signatory.\textsuperscript{252} Second, treaty obligations may not be supplanted by contrary domestic laws.\textsuperscript{253} A state is expected to make reservations to a treaty in so far as a treaty obligation is contrary to the state's domestic law.\textsuperscript{254} A reservation cannot be made, however, if it is incompatible with the object and purpose of the treaty.\textsuperscript{255}

The rights of juveniles are protected in the Geneva Convention,\textsuperscript{256} the CRC,\textsuperscript{257} the Optional Protocol to the
CRC,\textsuperscript{258} and in the ICCPR.\textsuperscript{259} Each of these treaties protects against the juvenile death penalty or against cruel and unusual punishment.\textsuperscript{260} Whether these rights will be extended to alien unlawful juvenile enemy combatants in U.S. military commissions depends on the United States’ relation to each treaty, and the interaction between the treaty obligations and U.S. law and policy.

The Geneva Convention distinguishes between international armed conflicts\textsuperscript{261} and internal armed conflicts in order to determine the applicable rights.\textsuperscript{262} Yet, in reality, few modern wars fit into either category,\textsuperscript{263} leaving combatants without the protection of the majority of the Geneva Convention.\textsuperscript{264} The War on Terror is one such example.\textsuperscript{265} Perhaps recognizing this breakdown of Geneva Convention definitions, the Supreme Court recently held that individuals tried by military commissions are protected by, at the least, Common Article 3 of the Geneva Convention.\textsuperscript{266} While Common Article 3 offers very minimal protection, it does protect against “cruel treatment.”\textsuperscript{267} According to U.S. case law, the juvenile death penalty for individuals under eighteen constitutes “cruel and unusual punishment” under the U.S. Constitution.\textsuperscript{268} Despite similar wording, the definition of this phrase under U.S. law and international law may be interpreted differently.\textsuperscript{269}

\textsuperscript{257} CRC, supra note 114.
\textsuperscript{258} Optional Protocol to the CRC, supra note 115.
\textsuperscript{259} ICCPR, supra note 116.
\textsuperscript{260} CRC, supra note 114, at arts. 6.1, 37; Geneva Convention, supra note 37, at art. 3; ICCPR, supra note 116, at art. 6(5).
\textsuperscript{261} The current war on terror is not an international armed conflict. See Brooks, supra note 113, at 711-14.
\textsuperscript{262} The War on Terror is also not an internal armed conflict. See id. at 711-15.
\textsuperscript{263} Id. at 713-14.
\textsuperscript{264} Common Article 3 of the Geneva Convention extends to all combatants. See, e.g., id. at 712.
\textsuperscript{265} Id. at 711-14.
\textsuperscript{266} Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2795 (2006). Common Article 3 extends to all combatants, regardless of title. See, e.g., Brooks, supra note 113, at 712; supra Part II.B.3 (providing background information on Common Article 3).
\textsuperscript{267} Geneva Convention, supra note 37, at art. 3.
\textsuperscript{268} See Roper v. Simmons, 543 U.S. 551, 578 (2005).
\textsuperscript{269} The phrase “cruel and unusual punishment” can be and often is interpreted differently depending on the document in which it is located. In the U.S. Constitution, punishment is “cruel and unusual” if it offends the “evolving
The CRC expressly forbids the imposition of the juvenile death penalty.²⁷⁰ Importantly, the United States chose to join only as a signatory to this treaty, while all other states in the world except for Somalia have ratified it.²⁷¹ Nevertheless, as a state signatory, the United States still has a clear duty to not frustrate the purpose of the treaty.²⁷² Article 1 of the CRC states that “[f]or the purposes of the present Convention, a child means every human being below the age of eighteen.”²⁷³ To treat an individual under the age of eighteen as an adult may frustrate the purpose of this obligation.²⁷⁴ In addition, Article 6.1 states that “[p]arties [must] recognize that every child has an inherent right to life.”²⁷⁵ The duty under Article 37 is similar but more explicit: “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”²⁷⁶ This includes imposing “capital punishment” on “persons below eighteen years of age.”²⁷⁷

The United States is a party to the Optional Protocol to the CRC.²⁷⁸ As a party to this treaty, the United States has the duty to carry out all sections of the treaty, even where contrary to its own law.²⁷⁹ Yet, the Optional Protocol to the CRC, along with the CRC, deals almost exclusively with the recruitment of child soldiers,²⁸⁰ and therefore, is only marginally helpful as a defense for alien unlawful juvenile enemy combatants.²⁸¹ At the least, the Optional Protocol to standards of decency that mark the progress of a maturing society.” See Roper, 543 U.S. at 561 (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)). This standard is not used to interpret the “cruel and unusual punishment” clause of the English Declaration of Independence of 1689. See id. at 577-78.

²⁷⁰. CRC, supra note 114, at arts. 6.1, 37.
²⁷¹. See Int’l Comm. of the Red Cross, supra note 113.
²⁷². Vienna Convention, supra note 111, at art. 18. The U.S. military may do this by defining “juvenile” differently under U.S. military law than under U.S. law. See supra Part II.D.
²⁷³. CRC, supra note 114, at art. 1.
²⁷⁴. See supra Part II.D.
²⁷⁵. CRC, supra note 114, at art. 6.1.
²⁷⁶. Id. at art. 37.
²⁷⁷. Id.
²⁷⁹. Vienna Convention, supra note 111, at art. 27.
²⁸¹. Because these treaties are aimed at the recruitment of child soldiers,
the CRC stands for the proposition "that the rights of children require special protection." In addition, the treaty is important in that it clearly states that "a child means every human being below the age of [eighteen] years." As a party to this treaty, the United States has an obligation to recognize that alien unlawful juvenile enemy combatants are individuals under the age of eighteen. The practice of distinguishing alien juveniles tried by military commissions, and holding them to a different standard may run contrary to the United States' obligation under this treaty.

The ICCPR also expressly prohibits the juvenile death penalty for individuals under the age of eighteen. The United States is a party to the ICCPR, but in 1992, made an express reservation to the clause which prohibits the juvenile death penalty. Nevertheless, it is possible that the Roper decision in 2005 effectively withdrew this reservation.

In the 1992 Reservation to the ICCPR, the Senate stated that "[t]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." The clause "subject to its Constitutional constraints" seems to imply that this reservation is subject to the United States' current interpretation of the U.S. Constitution. In 2005, the Roper decision changed the United States' interpretation of

they do not focus on the detention and punishment of child soldiers, which is the focus of comment. See supra notes 114, 115.

282. Optional Protocol to the CRC, supra note 115, at pmbl.
283. Id.
284. Note that, since the United States is a signatory to the Optional Protocol to the CRC, this is an "obligation" to carry out the treaty, not merely a "duty not to frustrate" the treaty. See supra notes 250, 252, 253 and accompanying text (defining "party" and "signatory").
285. See supra Part II.D.
286. ICCPR, supra note 116, at art. 6(5).
287. The United States ratified the ICCPR on September 8, 1992. See UNHCHR, supra note 116.
289. Id. at 653.
the Eighth Amendment to the Constitution to preclude the juvenile death penalty.\textsuperscript{290} Therefore, it is possible that the U.S. military's interpretation has also changed to mirror that of U.S. law.

Second, in the Reservation to the ICCPR, the Senate explicitly noted that the "execution of people for crimes committed while they were under the age of [sixteen] has been ruled unconstitutional by the Supreme Court."\textsuperscript{291} It is significant that the Senate, in making this reservation to international law, referenced then-current U.S. domestic law on the juvenile death penalty,\textsuperscript{292} and made the reservation parallel to this U.S. domestic law.\textsuperscript{293} Currently, the 1992 reservation does not parallel the new law, set forth in 2005 by \textit{Roper}, that individuals under the age of eighteen may not be subjected to the death penalty.\textsuperscript{294} It is not clear whether the United States intends for its international obligations regarding the juvenile death penalty to parallel its current domestic policy.\textsuperscript{295} If it does, the United States may choose to withdraw the Reservation to the ICCPR.\textsuperscript{296} If the United States then upholds its obligations under the ICCPR, free from the reservation, it would no longer be allowed to execute alien unlawful juvenile enemy combatants under the age of eighteen.\textsuperscript{297}

If the Reservation to the ICCPR is still in effect, there is

\begin{itemize}
\item \textsuperscript{291} \textit{Report on the ICCPR}, \textit{supra} note 288, at 651.
\item \textsuperscript{292} \textit{Stanford}, 492 U.S. at 380, \textit{overruled by Roper}, 543 U.S. 551 (holding that the Eighth Amendment prohibition against "cruel and unusual punishment" precluded the death penalty for individuals under the age of sixteen).
\item \textsuperscript{293} \textit{Report on the ICCPR}, \textit{supra} note 288, at 651 (stating that the United States made the reservation to the ICCPR "on executing people for crimes committed while they were 16 or 17").
\item \textsuperscript{294} \textit{Roper}, 543 U.S. at 578.
\item \textsuperscript{295} The fact that Congress has not addressed this difference between the 1992 reservation and current U.S. domestic law does not mean that the United States intends to overturn the 1992 reservation. Congress may be aware of the contrasting positions, and intend maintain the status quo. Nonetheless, there is an important tension between the contrasting statements made in the 1992 reservation and the rule articulated in \textit{Roper v. Simmons}.
\item \textsuperscript{296} \textit{Vienna Convention}, \textit{supra} note 111, at pt. II, § 2, art. 22(1) ("[A] reservation may be withdrawn at any time.").
\item \textsuperscript{297} There would most likely still be a problem with the admissibility of the ICCPR obligation in military commissions. \textit{See supra} note 247.
\end{itemize}
yet another consideration. The Vienna Convention explicitly states that reservations cannot be "incompatible with the object and purpose of the treaty." It is possible that the reservation clarifying that the United States does not accept the prohibition on executing people for crimes committed while they were sixteen or seventeen years of age frustrates the object and purpose of the ICCPR. Clearly, the ban on the juvenile death penalty is a major component of the ICCPR. In addition, international law clearly states that a juvenile is an individual under the age of eighteen. Thus, a strong argument can also be made that the Reservation to the ICCPR, which allows for the juvenile death penalty, frustrates the purpose of the ICCPR, and therefore, was invalid at its implementation.

V. PROPOSAL: CHANGES IN EXISTING LAW TO ABROGATE THE JUVENILE DEATH PENALTY FOR JUVENILE ENEMY COMBATANTS

Juveniles, regardless of their country of citizenship, possess similar mental capacities and developmental levels. This similarity was the motivation behind the Supreme Court's categorical rule against the juvenile death penalty in the 2005 Roper decision. However, the United States appears to harbor the intention of treating non-citizen juveniles as if they are somehow different than their own. If this distinction is allowed, U.S. military law conflicts with U.S. domestic law. While there are many ways to resolve

298. Vienna Convention, supra note 111.
299. Id. at pt. II, § 2, art. 19(c).
300. The goal of the ICCPR was to protect the basic human rights and freedoms of all individuals. See ICCPR, supra note 116, at pmbl. Protection against the death penalty is a very important human right.
301. CRC, supra note 114, at art. 1; Optional Protocol to the CRC, supra note 115, at pmbl.
302. See Vienna Convention, supra note 111, at arts. 18, 19(c); Amnesty Int'l, The Exclusion of Child Offenders from the Death Penalty under General International Law (July 18, 2003), http://web.amnesty.org/library/index/engact500042003 (discussing eleven countries and the Human Rights Committee that made this argument).
303. See Jamison, supra note 112, at 153-55.
305. See Detention Order, supra note 8, § 4(a).
306. While it is true that the U.S. judicial system is separate from the U.S.
this conflict, two proposals appear to be the strongest.

The first proposal would be to add an assertion in the Detention Order, the DTA, or the Military Commissions Act, that “individuals under the age of eighteen are not subject to the death penalty.” This has the advantage for the United States of keeping the bag of constitutional rights sealed from non-citizens, while removing the juvenile death penalty as a possible punishment. Such a clear-cut proposition is also advantageous because there is no room for interpretation in the statement “no death penalty for individuals under eighteen,” and therefore, no room to circumvent the obligation to protect juveniles.

The second proposal is to withdraw the United States’ 1992 reservation to the ICCPR. While the reservation has already come into question with the 2005 Roper decision, in order for the United States to fortify its position, a formal withdrawal would be advantageous. This proposal has the disadvantage that it may advance further than the United States is currently willing to. The United States may instead prefer to leave the issue of the juvenile death penalty open to discretion. Yet as evidenced by the definitions of the laws of war in the Geneva Convention, precise definitions are far superior, and even necessary, to avoiding future conflicts and derogation of rights. This proposal also has the disadvantage that the right against the death penalty granted to juveniles by international law may not be directly enforceable in private actions. In the end, however, withdrawing the reservation would constitute a strong statement by the United States on the juvenile death penalty by aligning its practices with the majority of the world. For that reason, such action would be the strongest method for ending the current dilemma.

military system, both operate under the rules and procedures enacted by the U.S. government. Conflicts between the two systems are inherent, but for issues as weighty as the juvenile death penalty, such a disparity is more serious.

307. See supra Part IV.C.
308. See supra Part IV.A.
309. See Brooks, supra note 113, at 677-87.
310. See supra note 247.
VI. CONCLUSION

With between 60 and 107 juvenile terror suspects currently being detained in U.S. military prisons, the issue of whether the juvenile death penalty will be imposed on such individuals in U.S. military commissions is likely to emerge. Currently, it does not appear that such individuals will have U.S. constitutional law protections, which, under Roper, clearly protects against imposition of the juvenile death penalty for all individuals under the age of eighteen. Nevertheless, using the definition of "cruel and unusual punishment" articulated in Roper would protect juvenile enemy combatants from the death penalty in U.S. military commissions.

Second, military law does not appear to protect alien unlawful juvenile enemy combatants from the death penalty. The UCMJ makes no distinction between adults and children in its authorization of the death penalty. However, an assertion added to the Detention Order, the DTA, or the Military Commissions Act that "individuals under the age of eighteen are not subject to the death penalty" would unambiguously preclude the juvenile death penalty in U.S. military commissions.

Finally, international human rights and international humanitarian law, like U.S. domestic law, clearly protect all individuals under the age of eighteen from the death penalty. In spite of this clarity, the United States has been careful to avoid joining as a party any treaty that expressly forbids the imposition of the juvenile death penalty without making a reservation. The fact that the United States made an express reservation to the ICCPR's prohibition against the juvenile death penalty demonstrates that as of 1992, the United States wanted this punishment to remain available

312. Mackay, supra note 4, at 1.
313. See supra Part IV.A.
314. Roper, 543 U.S. at 578.
315. Id.; see also supra Part IV.A.
316. The question remains whether the U.S. military would use U.S. domestic law to interpret military law. See supra note 237.
317. UCMJ, supra note 25, § 855, at art. 55.
318. These pieces of legislation act together with the UCMJ to set forth the law in U.S. military commissions.
319. See supra Part IV.C.
for non-citizens. Nonetheless, a withdrawal of the United States’ 1992 reservation to the ICCPR\textsuperscript{321} would preclude the future imposition of the juvenile death penalty in U.S. military commissions.\textsuperscript{322}

In the end, it is possible that the weight of international practice and opinion may tip in favor of abolishing the death penalty for alien unlawful juvenile enemy combatants.\textsuperscript{323} There is no question that in authorizing the juvenile death penalty for U.S. military commissions, the United States stands in stark contrast to the world community.\textsuperscript{324}

\textsuperscript{321} See supra Part IV.C.
\textsuperscript{322} See supra Part IV.C.
\textsuperscript{324} See Roper, 543 U.S. at 577 (majority opinion) (“[T]he United States now stands alone in a world that has turned its face against the juvenile death penalty.”).