

# The Age of Conflict: Rethinking Childhood, Law, and Age Through the Israeli-Palestinian Case<sup>1</sup>

*Hedi Viterbo*

## 10.1 Introduction: age, childhood, and law

‘Are you a child?’ To ascertain the answer to this question in relation to any given individual, contemporary society, and law in particular, readily resort to another question: ‘How old are you?’<sup>2</sup> In both international child rights legislation<sup>3</sup> and national laws,<sup>4</sup> the term ‘child’ is defined solely as a matter of age. The prominence of age in relation to children is manifest in many other legal contexts, such as the ages of criminal responsibility, consent, driving, or drinking.<sup>5</sup>

This legal fetishism of age is, in itself, questionable for reasons beyond the scope of this chapter. Among other things, it ignores differences between same-age children, disregards disparities in the meaning of childhood in different societies and

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<sup>2</sup> Cf. Clayton A. Hartjen, *Youth, Crime, and Justice: A Global Inquiry* (Piscataway, New Jersey, 2008) 1–2. However, the understanding of childhood as primarily an age category seems most salient within contemporary Western societies: Allison James, Chris Jenks, and Alan Prout, *Theorizing Childhood* (Cambridge, 1998) 60–1. For an example of a competing conception of childhood in which age is not accorded as much prominence, see Thérèse Blanchet, *Lost Innocence, Stolen Childhood* (Bangladesh, 1996) 41–4.

<sup>3</sup> A ‘child’ is generally defined as any human being under the age of 18 years in, e.g., Convention on the Rights of the Child (adopted 1989; entered into force 1990), art. 1; African Charter on the Rights and Welfare of the Child (adopted 1990; entered into force 1999), art. 2. But see n. 127, below, and accompanying text. On the question of the applicability of the Convention on the Rights of the Child to the Occupied Palestinian Territories see Eyal Benvenisti, ‘The Applicability of Human Rights Conventions to Israel and to the Occupied Territories’ (1992) 26 *Israel Law Review* 24, 34–5; Philip Veerman and Barbara Gross, ‘Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza’ (1995) 3 *International Journal of Children’s Rights* 296. A ‘juvenile’ is similarly defined as any person under 18 years of age in United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (adopted 1990), art. 11(a).

<sup>4</sup> For a comparison of the age classification of young offenders in selected countries see Hartjen, n. 2, above, 5–6; John Winterdyk (ed), *Juvenile Justice Systems: International Perspectives*, 2nd ed (Toronto, 2002), XII–XIII.

<sup>5</sup> For further information, see, e.g., Hartjen, n. 2, above; Elizabeth S. Scott, ‘The Legal Construction of Childhood’ in Margaret K. Rosenheim (ed), *A Century of Juvenile Justice* (Chicago, 2002), 113, 113–14, 118–19, 121–2; Winterdyk, n. 4, above.

communities, and neglects the socio-economic circumstances of 'children'.<sup>6</sup> The aim of the present chapter, however, is neither to provide a thorough critique of age nor an alternative to it.<sup>7</sup> Instead, I endeavour to provide a contextualized investigation of some of the central factors which inform the intricate interplay between childhood, law, and age. To date, despite being a constitutive legal signifier of childhood, age has remained relatively unexplored and under-theorized—as opposed to the attention given to other social categories, such as gender, race, and class.<sup>8</sup>

The context chosen for this study is the Occupied Palestinian Territories (hereinafter: OPT), where children have played key roles, symbolically and practically.<sup>9</sup> An age perspective on the situation in the OPT may render children demographically salient. If we imagine, provisionally and doubtfully, a 'child' as anyone under the age of 18 years, most people residing in the OPT—53 per cent of Palestinians and a half of Israeli settlers—will appear to be children.<sup>10</sup> This population is significantly younger than populations in the West<sup>11</sup> and within Israel proper.<sup>12</sup> Furthermore, most Israeli soldiers serving in the OPT, while not 'children' according to the above definition, are confined to the relatively young age group of 18 to 21 years—another clue to the significance of age in this context.

<sup>6</sup> Erica Burman, 'Local, Global or Globalized?: Child Development and International Child Rights Legislation' (1996) 3 *Childhood* 45, 60–2; Allison James and Adrian James, *Key Concepts in Childhood Studies* (Los Angeles and London, 2008) 7–8, 15; David Jeffress, 'Neither Seen Nor Heard: The Idea of the "Child" as Impediment to the Rights of Children' (2006) 7 *Topias: Canadian Journal of Cultural Studies* 75, 75–6.

<sup>7</sup> Suffice it to note that alternatives of this kind, such as the 'evolving capacities' approach, might also be problematic. On some of the possible problems of the 'evolving capacities' approach see, e.g., Jeffress, n. 6, above, 80–2.

<sup>8</sup> On the relative disregard for age in the social sciences see, e.g., César Gonzáles, 'Age-Graded Sexualities: The Struggles of Our Ageing Body' (2007) 11 *Sex Cult* 31; Emma Halliwell and Helga Dittmar, 'Qualitative Investigation of Women's and Men's Body Image Concerns and Their Attitudes Toward Aging' (2003) 49 *Sex Roles: A Journal of Research* 675. More specifically, on the neglect of age in childhood studies and in criminology, see, respectively, Anja Müller, 'Introduction' in Anja Müller (ed), *Fashioning Childhood in the Eighteenth Century: Age and Identity* (Aldershot and Burlington, 2006) 1, 5; Rachel Pain, 'Theorising Age in Criminology: The Case of Home Abuse' in Mike Brogden (ed), *British Criminological Conferences: Selected Proceedings—Volume 2* (Belfast, 1997) 1.

<sup>9</sup> John Collins, *Occupied By Memory: The Intifada Generation and the Palestinian State of Emergency* (New York, 2004) 35–74; Daniel Dor, 'Arafat Has Decided to Sacrifice Ishmael': The Intifada Children in the Israeli Press' in Naomi Bacon-Schnoor, Charles W. Greenbaum, and Philip E. Veerman (eds), *Protection of Children During Armed Political Conflict: A Multidisciplinary Perspective* (Oxford, 2006) 257; Jonathan Kuttab, 'The Children's Revolt' (1988) 17 *Journal of Palestine Studies* 26; New Profile—The Movement for the Civil-ization of Israeli Society, *Child Recruitment in Israel* (Ramat Hasharon, Israel, 2004); David Rosen, *Armies of the Young: Child Soldiers in War and Terrorism* (Piscataway, New Jersey, 2005) 91–131.

<sup>10</sup> Menachem Klein, 'The Intifada: The Young Generation in the Front', in Naomi Bacon-Schnoor, Charles W. Greenbaum, and Philip E. Veerman (eds), *Protection of Children During Armed Political Conflict: A Multidisciplinary Perspective* (Oxford, 2006) 45, 45–6. Forty-six per cent of Israeli settlers are aged 17 years or under: Israeli Central Bureau of Statistics, *Selected Data for International Child Day* (2008) (Hebrew), <[http://www1.cbs.gov.il/reader/newhodaot/hodaa\\_template.html?hodaa=200811235](http://www1.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=200811235)>, 2.

<sup>11</sup> For example, in the US people under the age of 18 years comprise 23 per cent of the population: US Census Bureau, *Age and Sex* (2009), <[http://factfinder.census.gov/servlet/STTable?\\_bm=y&-geo-id=01000US&-qr\\_name=ACS\\_2009\\_1YR\\_G00\\_S0101&-ds\\_name=ACS\\_2009\\_1YR\\_G00\\_-lang=en&-redoLog=false&-state=st&-CONTEXT=st](http://factfinder.census.gov/servlet/STTable?_bm=y&-geo-id=01000US&-qr_name=ACS_2009_1YR_G00_S0101&-ds_name=ACS_2009_1YR_G00_-lang=en&-redoLog=false&-state=st&-CONTEXT=st)>. In the UK people aged 19 years or under comprise 25 per cent of the population: Office for National Statistics, *Census 2001* (2001), <[http://www.statistics.gov.uk/census2001/pop2001/united\\_kingdom.asp](http://www.statistics.gov.uk/census2001/pop2001/united_kingdom.asp)>.

<sup>12</sup> About 33 per cent of the Israeli population is under 18: The National Council for the Child, *A Collection of Data from the Annual 'Children in Israel—2009'* (2009) (Hebrew), <<http://www.children.org.il/Files/File/Leket%20Shnaton2009.doc>>, 1. This figure excludes non-citizen children, 74 per cent of whom reside in East Jerusalem: *ibid.*, 2.

To a great extent, the Israeli occupation of the Palestinian Territories has been a legalistic one:<sup>13</sup> Israeli authorities have tended to rely on law as a basis to undertake and justify their actions.<sup>14</sup> Hence, the Israeli law in force in the OPT—which despite its importance has been largely understudied<sup>15</sup>—is an apt arena to examine age and childhood in this context. By focusing on the encounter between Israeli criminal law (domestic and military) and minors in the OPT, the present chapter rethinks the age-childhood-law triangle and explores its complexity.

The first part of the chapter explains how Israeli criminal legislation constructs two different childhoods along national lines in the OPT. Two central disparities concern the end of childhood and its uniformity: Israeli law defines 18 years as the age of majority for Israeli settlers in the OPT, and 16 years as the age of majority for Palestinians;<sup>16</sup> additionally, Israeli law constructs Israeli minority as mostly unitary, while dividing Palestinian minority into significant sub-categories, thereby constituting it as relatively fragmentary.

Despite this contingency of childhood and age upon nationality, the relationship between childhood, age, and law is not as simple as being merely determined along national lines. Contrasting demarcations of childhood, different dimensions of age, various meanings assigned to age, and conflicting age norms all bear on law's encounter with the child, and render age and childhood elusive. The second part of this chapter investigates the complex role these forces play in Israeli military law (which applies to Palestinians), especially with regard to four manifestations of the elusiveness of age and childhood. First, age categories in Israeli military law evince an ambiguous meaning. As will be explained, this terminological ambiguity is informed by competing demarcations of childhood and is linked to a broader incoherence which characterizes the military legal system. Secondly, several military court rulings have treated youth as an aggravating factor, thereby challenging prevalent age norms. Thirdly, Israeli military court judges have occasionally determined Palestinian minors' sentences in consideration of what they saw as those minors' physical age (rather than their chronological age). Through these cases I will explore how what I term the 'childhood body' functions as a 'body of evidence', and how, through this body, the judicial gaze establishes the child's 'true' age. Lastly, Palestinian minors are often simultaneously ascribed two different ages: their age at the time of the offences (which the court considers when determining their sentencing), and their age at the

<sup>13</sup> Characterizing the Israeli occupation as legalistic differs from determining its legality. Lisa Hajjar, *Courting Conflict: The Israeli Military Court System in the West Bank and Gaza* (London, 2005) 4, 27, 218–19, 248. Cf. Orna Ben-Naftali, Aeyal M. Gross, and Keren Michaeli, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2006) 23 *Berkeley Journal of International Law* 551.

<sup>14</sup> Hajjar, n. 13, above, 27–8, 49–61, 129, 235–6, 243–4, 247–8; Emma Playfair, 'Playing on Principle? Israel's Justification for its Administrative Acts in the Occupied West Bank' in Emma Playfair (ed), *International Law and the Administration of Occupied Territories* (Oxford and New York, 1992) 205; Idith Zertal and Akiva Eldar, *Lords of the Land: The War Over Israel's Settlements in the Occupied Territories, 1967–2007* (New York, 2007) 341, 343–4, 361–71. On the centrality of the Israeli military legal system see Hajjar, n. 13, above, 2–3, 16, 24, 26, 44, 187. On the centrality of the Israeli prisons see Esmail Nashif, *Palestinian Political Prisoners: Identity and Community* (London and New York, 2008) 70, 72, 94.

<sup>15</sup> Apart from the present chapter, there has been very little academic writing on Israeli military legislation, and virtually no writing on Israeli military court rulings.

<sup>16</sup> In 2011, the age of majority in the Israeli military legislation (applicable to Palestinians) was raised to 18 years. However, while this development might be of some symbolic significance, it is inconsequential in practice—among other reasons because even before the age of majority was formally raised, Palestinians aged under 18 years had already been tried separately in military youth courts. See n. 54, below, and accompanying text.

time of the sentencing (which determines their eligibility for maximum-sentence limitations). I will describe how, due to this coexistence of different ages in the same subject (the defendant), age and time both collapse and intensify.

The third part of the chapter focuses on two cases—one regarding a Palestinian defendant and the other concerning Israeli settler girls—in which law's subjects were seen as obscuring their age. The concerns and confusion evoked within the legal system are discussed in this section.

The chapter concludes by pointing, among other things, to the resonance of the issues discussed in this chapter with other contexts outside Israel-Palestine, including—but not limited to—international law, US law, and UK law. In light of the significant commonalities among these different contexts, the Israeli-Palestinian case is read as a 'super-experiment', through which to rethink how age functions and is utilized in the legal fabrication of childhood.

## 10.2 Age and nationality

Israel has concurrently operated two separate legal systems in the OPT (now excluding the Gaza Strip<sup>17</sup>), effectively dividing the population there along ethnic lines.<sup>18</sup> On the one hand, Palestinians have been subject to Israeli military law and tried in military courts<sup>19</sup> for all sorts of offences, including those considered unrelated to security.<sup>20</sup> Israeli settlers in the OPT, on the other hand, have been extra-territorially placed under domestic Israeli law,<sup>21</sup> which contains a considerably broader array of rights.

<sup>17</sup> Israel withdrew its military forces from the Gaza Strip and evacuated its settlements there in 2005. The courts now operating in the Gaza Strip are Palestinian military courts, run by the Hamas government. However, despite the formal pullout, Israel has occasionally arrested and interrogated Gazan Palestinians. See Defence for Children and Save the Children, *Child Rights—Situation Analysis: Right to Protection in the Occupied Palestinian Territory 2008* (Ramallah and Jerusalem, 2008) 63. If prosecuted, these Palestinians are tried in domestic Israeli courts. See Kathleen Cavanaugh, 'The Israeli Military Court System in the West Bank and Gaza' (2007) 12 *Journal of Conflict & Security Law* 197, 199; Defence for Children—Palestine, *Palestinian Child Prisoners* (Jerusalem, 2009) 8. The issue of whether the Israeli occupation of the Gaza Strip has terminated is in dispute. See, e.g., Susan Power, 'War, Invasion, Occupation—A Problem of Status on the Gaza Strip' (2009) 12 *Trinity College Law Review* 25; Yuval Shany, 'Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 *Israel Law Review* 68, 76–7.

<sup>18</sup> See, e.g., Ben-Naftali, Gross, and Michaeli, n. 13, above, 584; Hajjar, n. 13, above, 58–61; Ardi Imseis, 'On the Fourth Geneva Convention and the Occupied Palestinian Territory' (2003) 44 *Harvard International Law Journal* 65, 106.

<sup>19</sup> However, there have been notable exceptions, when Palestinians from the OPT were tried in domestic Israeli courts. Cavanaugh, n. 17, above, 199–200; Hajjar, n. 13, above, 234. Furthermore, Palestinian residents of East Jerusalem are tried in either Israeli military courts or domestic Israeli courts, depending on where they are alleged to have offended. See, e.g., Defence for Children—Palestine, n. 17, above, 8. Additionally, the Palestinian Authority currently operates local courts in the West Bank (alongside the Israeli military courts), authorized to try Palestinians in civil and criminal matters which the Israeli military views as internal to Palestinian society. Asem Khalil, 'Formal and Informal Justice in Palestine: Dealing with the Legacy of Tribal Law' (2009) 184 *Etudes Rurales* 169; Shany, n. 17, above, 78. Palestinian citizens of Israel are tried in the domestic Israeli legal system.

<sup>20</sup> Hajjar, n. 13, above, 59, 255. See also Raja Shehadeh, *The Declaration of Principles and the Legal System in the West Bank* (Jerusalem, 1994) 23, 25; Sharon Weill, 'The Judicial Arm of the Occupation: The Israeli Military Courts in the Occupied Territories' (2007) 89 *International Review of the Red Cross* 395.

<sup>21</sup> Ben-Naftali, Gross, and Michaeli, n. 13, above, 584; Hajjar, n. 13, above, 58–9; Shehadeh, n. 20, above, 24–5. In principle, the military courts have jurisdiction over Israeli settlers living in the West

The national identity ascribed to suspects and defendants in the OPT thus determines how Israeli law classifies and treats them. One basic disparity in this regard is the age of majority. Whereas Israeli defendants are defined (by the domestic legislation) as minors up to the age of 18 years,<sup>22</sup> Palestinian defendants are defined as minors (by the military legislation<sup>23</sup>) up to the age of 16 years,<sup>24</sup> that is, two years younger.

Another nationally-based difference concerns the degree of fragmentation within childhood. The domestic law delineates Israeli minority as mostly unitary: for almost all purposes, 'minor' is the only age category in use.<sup>25</sup> Israeli military law, in comparison, constructs Palestinian minority as relatively fragmentary, by employing three sub-categories:<sup>26</sup> the first, 'child', denotes any person under the age of 12 years. Palestinians under the age of 12 years bear no criminal responsibility,<sup>27</sup> similarly to their Israeli peers.<sup>28</sup> The second sub-category is 'youth', referring to any person aged 12 or 13 years old. The maximum prison sentence which can be imposed on Palestinian 'youth' (12- and 13-year-olds) is six months,<sup>29</sup> whereas Israelis of the same ages cannot be sentenced to prison at all.<sup>30</sup> 'Tender adult', the third sub-category, denotes any person aged 14 or 15 years old. The maximum sentence for Palestinian 'tender adults' (14- and 15-year-olds) is one year, but only if the defendant is charged with offences for which the maximum sentence does not otherwise exceed five years.<sup>31</sup> This one-year limitation rarely applies, however, because Palestinian minors are usually charged with offences for which the maximum sentence does exceed five years.<sup>32</sup> For example, the maximum sentence for stone throwing—the most common charge against Palestinian minors—is 10 years, or, if the stones are thrown at a driving vehicle, 20 years.<sup>33</sup>

This classificatory system is not entirely unparalleled: similar fragmentary models have been in use in Germany, Switzerland, Finland, Hong Kong, and elsewhere.<sup>34</sup> Such fragmentary models of classification seem to echo psychological (mainly developmental-psychological) and sociological truth-claims about the

Bank but, almost invariably, settlers are tried by domestic Israeli courts: Hajjar, n. 13, above, 5, 58–9, 81, 255; Zertal and Eldar, n. 14, above, 372–3.

<sup>22</sup> Youth Law (Adjudication, Punishment, and Modes of Treatment) (1971, 14th amendment 2008), art. 1.

<sup>23</sup> Israeli authorities consider the military orders as constituting 'primary legislation corresponding to acts of Parliament or Laws'. David Yahav (ed), *Israel. The 'Intifada' and the Rule of Law* (Tel Aviv, 1993), 23. Cited in Shehadeh, n. 20, above, 31.

<sup>24</sup> Order 1651 Concerning Security Provisions (Integrated Version) (Judea and Samaria) (2009) (Hebrew), <[http://www.law.idf.il/SIP\\_STORAGE/files/5/685.pdf](http://www.law.idf.il/SIP_STORAGE/files/5/685.pdf)>, art. 136. Only for the purpose of release on bail, a 'minor' is defined as a person aged 12 to 17 years inclusive: *ibid.*, art. 181(a).

<sup>25</sup> Only in the particular context of obtaining evidence is the term 'child' used (denoting anyone under the age of 14 years). Law to Amend the Rules of Evidence (the Protection of Children) (1955), art. 1.

<sup>26</sup> These three sub-categories are defined in Order 1651, n. 24, above, art. 1. I use literal translation of the Hebrew sub-categories which appear in the Israeli legislation.

<sup>27</sup> *Ibid.*, art. 191.

<sup>28</sup> Penal Code (1977), art. 34(f). <sup>29</sup> Order 1651, n. 24, above, art. 168(b).

<sup>30</sup> Youth law, n. 22, above, art. 25(d). <sup>31</sup> Order 1651, n. 24, above, art. 168(c).

<sup>32</sup> According to my independent sample of military court cases. See also Defence for Children—Palestine, n. 17, above, 99–100.

<sup>33</sup> Order 1651, n. 24, above, art. 212.

<sup>34</sup> For example, German law uses the categories 'child' (up to the age of 13 years), 'juvenile' (ages 14–17), and 'young adult' (ages 18–20): Winterdyk, n. 4, above, 171–205. See also Donald J. Shoemaker (ed), *International Handbook on Juvenile Justice* (Westport, Connecticut, 1996) 127–8. On other fragmentary models of age classification used in Switzerland, Finland, Hong Kong, the Cayman Islands, the Philippines, and Nigeria see Paul C. Friday and Xin Ren (eds), *Delinquency and Juvenile Justice Systems in*

existence of standard stages of cognitive and emotional development and/or of socialization.<sup>35</sup> Through the fragmentation of childhood and the use of developmental-like terminology,<sup>36</sup> such models intensify age norms<sup>37</sup> and normalize age homogeneity.<sup>38</sup>

What is distinctive of the situation in the OPT is thus not the application of either model of age (the unitary or the fragmentary), but rather their simultaneous application, which contributes to constituting two different childhoods—Palestinian and Israeli—in the same territory.<sup>39</sup> For this reason, the Israeli-Palestinian case is a striking reminder of the need for childhood studies to acknowledge the intersectionality of ‘child’ and other social categories.<sup>40</sup>

### 10.3 The elusiveness of age

While childhood and age seem significantly contingent on nationality in Israel/Palestine, their legal construction is much more complex than merely an unequivocal echo of the dominant national imaginary. In fact, the boundaries of childhood—temporal (for instance, the ending of childhood, the time of transition between its supposed stages) and spatial (for example, the type of courts where defendants of a certain age are tried)—are considerably elusive. The present section identifies in Israeli military law four manifestations of this elusiveness—four different challenges to age demarcations and age norms, which exemplify that childhood and age are far from being stable, clear, or definite. Parenthetically but importantly, while the term ‘elusiveness’ describes here the equivocal demarcation of childhood, by no means am I implying that if only childhood could be tracked down and unmasked then it would be fixed and tangible; my understanding of childhood is as innately fluid (yet this issue exceeds the scope of this chapter).<sup>41</sup>

*the Non-Western World* (Monsey, New York, 2006) 56, 90; Hartjen, n. 2, above, 5–6; Winterdyk, n. 4, above, xii–xiii, 219.

<sup>35</sup> On these psychological and sociological understandings of childhood see, e.g., James, Jenks, and Prout, n. 2, above, 20–4.

<sup>36</sup> On developmentalist conception(s) of childhood see Lynn Fendler, ‘Educating Flexible Souls: The Construction of Subjectivity through Developmentality and Interaction’ in Kenneth Heltqvist and Gunilla Dahlberg (eds), *Governing the Child in the New Millennium* (London and New York, 2001) 119; Nancy Lesko, *Act Your Age!: A Cultural Construction of Adolescence* (New York and London, 2001) 137; Nikolas Rose, *Governing the Soul: The Shaping of the Private Self*, 2nd ed (London and New York, 1999) 142–54.

<sup>37</sup> The phrase ‘intensification of age norms’ is borrowed from Howard P. Chudacoff, *How Old Are You: Age Consciousness in American Culture* (Princeton, 1989) 65–91.

<sup>38</sup> On the uniqueness attributed to different age groups, see Lesko, n. 36, above, 107.

<sup>39</sup> Alongside the disparity between the legal treatment of Palestinians and Israelis in the OPT (children and adults), Hassin has pointed to the discrimination of Arab vis-à-vis Jewish juvenile delinquents in Israel proper. See Yael Hassin, ‘Minority Juvenile Delinquents in the State of Israel and the Social Reaction to Their Delinquency’ (1997) 17 *Hevra U-Revava (Society and Welfare)* 283 (Hebrew).

<sup>40</sup> On this need see, e.g., Peter Hopkins and Rachel Pain, ‘Geographies of Age: Thinking Rationality’ (2007) 39 *Area* 287, 289–90; Gill Valentine, ‘Boundary Crossings: Transitions from Childhood to Adulthood’ (2003) 1 *Children’s Geographies* 37, 39.

<sup>41</sup> For some work on the elusiveness and fluidity of childhood see David Buckingham, *After the Death of Childhood: Growing Up in the Age of Electronic Media* (Cambridge, 2000) 3–4, 10, 14, 21–40; Chris Jenks, *Childhood*, 2nd ed. (London and New York, 2001) 112, 117–18, 128, 130–1, 144–5, 147, 150; David Kennedy, *The Well of Being: Childhood, Subjectivity, and Education* (Albany, New York, 2006) xi–xii, 12, 15–17, 71–3, 95; Nick Lee, ‘The Challenge of Childhood: Distributions of Childhood’s Ambiguity in Adult Institutions’ (1999) 6 *Childhood* 455; Helga Zeiher, Dympna Devine, Anne Trine

The Israeli-Palestinian case thus exemplifies the dialectical function of law in reproducing the very elusiveness that it seems to dread. On the one hand, law strives to forge and consolidate childhood through age demarcations (which, in turn, are informed by national demarcations). On the other hand, law not only makes but also unmakes age by reproducing and contributing to its elusiveness, as will now be demonstrated.

### 10.3.1 The ambiguity of age terminology

Israeli law's differential demarcation of childhood(s) along national lines in the OPT has been denounced repeatedly by various non-governmental and inter-governmental organizations. For instance, the UN Committee on the Rights of the Child recently expressed its concern that 'Israeli legislation continues to discriminate in the definition of the child between Israeli children (18 years) and Palestinian children in the occupied Palestinian territory (16 years)'.<sup>42</sup>

Notwithstanding their importance, such statements, by focusing on the Israeli legislation, ignore the question of how Israeli courts interpret and apply age categories in practice. Examining this overlooked issue may lead to the conclusion that, at least in relation to Palestinian minors, age demarcations have been considerably more elusive than both NGOs and Israeli legislation present them to be. As will be demonstrated, the meaning of age categories in Israeli military law is, in effect, indeterminate and ambiguous. This ambiguity is manifest in different ways which, as the following discussion will make clear, involve factors pertaining to broader complexities and elusiveness of both the military law and childhood.

As explained above, Israeli military legislation (applicable to Palestinians) currently defines a 'minor' as anyone under the age of 16 years.<sup>43</sup> But this definition is a very recent development. Until 2009, the military legislation did not include any definition of 'minor';<sup>44</sup> the age categories in use in this legislation were 'child' (under 12 years of age), 'youth' (12 or 13 years old), and 'tender adult' (14 or 15 years old).<sup>45</sup> Prior to 2009, it was only in the domestic legislation (applicable to Israelis) that 'minor' was defined, and there it has been defined as anyone under 18 years of age.<sup>46</sup>

Hence, unsurprisingly, until 2009 military courts offered two competing interpretations of the term 'minor'. On the one hand, some judges defined 'minor' as referring to Palestinians up to the age of 16 years.<sup>47</sup> This interpretive approach could

Kjørholt, and Harriet Strandell (eds), *Flexible Childhood? Exploring Children's Welfare in Time And Space* (Odense, Denmark, 2007) 11–12, 14, 49–51, 55–62.

<sup>42</sup> United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict—Concluding Observations: Israel* (2010), <<http://www2.ohchr.org/english/bodies/crc/docs/CRC-C-OPAC-ISR-CO-1.pdf>>, 2.

<sup>43</sup> N. 24, above, and accompanying text.

<sup>44</sup> More accurately, a definition of 'minor' appeared in the military legislation since 1975, but the legislation explicitly stated that this definition applied only for the purpose of release on bail: n. 24, above. This provision was originally anchored in Order 132 Concerning the Adjudication of Juvenile Delinquents (1967), art. 7a(e). Also, in 1988, an order—which has since then been annulled—defined a 'minor' as 'anyone who cannot be criminally prosecuted due to his [sic] age': Order 1235 Concerning the Supervision of Minors' Behaviour (1988), art. 1.

<sup>45</sup> Nn. 26–33, above, and accompanying text.

<sup>46</sup> N. 22, above, and accompanying text.

<sup>47</sup> See, e.g., Case 2651/09 *The Military Prosecution v. Hasnia* [2009] (Mil. Ct. App.) (stressing that a 16-year-old is not a 'minor' according to the military law). There are many similar rulings.

have derived mainly from the fact that the three age categories applicable to minor Palestinians—‘child’, ‘youth’, and ‘tender adult’—extended up to the age of 16 years. On the other hand, in numerous military court rulings, judges classified and referred to Palestinians aged 16<sup>48</sup> and 17<sup>49</sup> years old as minors. This latter interpretation of minority may have been influenced by domestic Israeli law’s definition of ‘minor’ as anyone under the age of 18.<sup>50</sup>

In July 2009, the military legislation was amended to add a definition of ‘minor’ (as anyone under 16 years of age), alongside the age categories ‘child’, ‘youth’, and ‘tender adult’, which remained in force. But while one might have expected this to resolve the interpretive incoherence among the judiciary, rulings given after this legislative revision indicate otherwise. For instance, a ruling by the Military Court of Appeals stated, in stark contradiction to the letter of the military legislation, that a defendant, who had been ‘about 16 years old’<sup>51</sup> when perpetrating the offences attributed to him, ‘was a minor when committing the offences’.<sup>52</sup>

Another amendment made to the military legislation in July 2009 was the stipulation that hearings concerning Palestinian ‘minors’ be held separately from those concerning adults. This separation between minors and adults could have been expected to be carried out along the age of 16 years, since this age was now defined in the military legislation as the age of majority. But here too, judicial practice rendered age much more ambiguous than the legislation (or the military’s public statements<sup>53</sup>) alone would indicate: in practice, the military courts have voluntarily extended the separate adjudication of minors to Palestinians up to the age of 18 years.<sup>54</sup>

Thus, in the Israeli military courts, the meaning of ‘minor’ has remained highly ambiguous, even after a definition of the term was added to the military legislation in 2009. Furthermore, the ambiguity of age terminology in the military law concerns not only ‘minor’, but other age categories as well. For instance, whereas the military legislation unequivocally defines a ‘tender adult’ as anyone aged 14 or 15 years

<sup>48</sup> There are many examples. See, e.g., Case 66/03 *The Military Prosecutor v. Abu Saфра* [2003] (Mil. Ct. App.); Case 2274/05 *The Military Prosecutor v. Abda* [2005] (Mil. Ct. App.); Case 3098/07 *The Military Prosecution v. Harfush* [2007] (Mil. Ct. App.); Case 1442/09 *Kuwasma v. The Military Prosecution* [2009] (Mil. Ct. App.).

<sup>49</sup> Here, too, the examples are numerous. See, e.g., Case 128/02 *Kudsi v. Military Prosecutor* [2002] (Mil. Ct. App.); Case 30/04 *Satita v. The Military Prosecutor* [2004] (Mil. Ct. App.); Case 4361/07 *Amaria v. The Military Prosecution* [2007] (Mil. Ct. App.); Case 2728/09 *Halil v. The Military Prosecution* [2009] (Mil. Ct. App.).

<sup>50</sup> N. 22, above.

<sup>51</sup> While the court’s use of the word ‘about’ further illustrates the elusiveness of age, according to the information in the court ruling the defendant was indeed 16 years old at the time.

<sup>52</sup> Case 1528/09 *Massarwah v. The Military Prosecution* [2009] (Mil. Ct. App.) (emphases added). There are other military rulings which, even after the amendment to the military legislation, referred to defendants aged 16 and 17 years old as ‘minors’. See, e.g., Case 2689/09 *The Military Prosecution v. Yamin* [2009] (Samaria Mil. Ct.); Case 3291/09 *The Military Prosecution v. John Doe* [2010] (Samaria Mil. Ct.); Case 4770/09 *The Military Prosecution v. Safadi* [2009] (Samaria Mil. Ct.).

<sup>53</sup> The Military Prosecution, *Annual Activity Report—2009*, at 91 (2010) (Hebrew), <[http://www.law.idf.il/sip\\_storage/FILES/0/750.pdf](http://www.law.idf.il/sip_storage/FILES/0/750.pdf)> (‘The [military] order was amended [...] so that a military youth court has been established, in which [...] cases of minors under the age of 16 would be heard.’)

<sup>54</sup> Case 2919/09 *The Military Prosecutor v. Abu Rabma* [2009] (Mil. Ct. App.) (‘the [military] courts have voluntarily adopted the age of minority in Israel [namely, 18 years], for the purpose of separating the proceedings of minors from those of adults.’). See also Hanan Greenberg, ‘Military Ushers Juvenile Court Pilot Program’ (9 June 2009) *Ynet News*, <<http://www.ynetnews.com/articles/0,7340,1-3728449,00.html>>.



old, Military Court of Appeals judge Daniel Friedman stipulated that a 17-year-old defendant 'is a tender adult, as he has not yet turned 18 years old'.<sup>55</sup>

The salient ambiguity of age terminology could be read against the backdrop of a wider incoherence, arguably characteristic of the Israeli military legal system. This institutional incoherence is manifest, among other things, in the substantial disparity which has been argued to exist between the sentences Israeli military courts issue for similar charges.<sup>56</sup> More specifically, military court rulings have been inconsistent in relation to the punishment and detention of Palestinian minors—as the Military Court of Appeals itself has admitted.<sup>57</sup>

Alongside the inconsistencies of the military legal system, what may also be at play in relation to the ambiguity of age categories is a collision between two competing demarcations of the child/adult divide. As explained, on the one hand, military law defines the age of 16 years as the threshold between childhood and adulthood. On the other hand, 18 years is probably the socially dominant (or at least a more dominant) drawing of the age of majority. The latter conception is manifest in myriad popular and professional representations of childhood, across various cultural, political, and legal sites.<sup>58</sup> These include domestic Israeli law, where 18 years marks majority not only with regard to offending, but also for many other purposes, such as voting, conscription, and various legal obligations and issues concerning the child-parent relationship. The different interpretations of 'minor' by military court judges may thus reflect different understandings of how to resolve the collision between these two competing demarcations of the end of childhood.

What links these two frontiers—the institutional incoherence of the military legal system and the collision between competing demarcations of childhood—is the indeterminate influence of domestic Israeli law on the military law: according to the military courts, while the domestic law is not operative in the OPT with regard to the adjudication of Palestinians, there are nevertheless some links between the domestic and military laws.<sup>59</sup> 'Some links' is the key phrase here, since the exact nature and strength of these links have been left to the discretion of each military court judge. Consequently, when determining the meaning of 'minor' and other age categories, some military court judges have ignored the domestic law, while others have advocated adherence to it (and to its marking of 18 years as the age of majority).<sup>60</sup> This has contributed to the aforesaid incoherence of the military law, and has sustained the collision between the competing demarcations of the age of majority.

One military court ruling advocating compliance with the domestic law stipulated, for instance, that '*a minor is a minor is a minor*, whether he [sic] lives where [domestic]

<sup>55</sup> Case 28/04 *Abu-ALShabab v. The Military Prosecutor* [2004] (Mil. Ct. App.).

<sup>56</sup> Hajjar, n. 13, above, 256.

<sup>57</sup> Case 355/03 *Abiyat v. The Military Prosecutor* [2004] (Mil. Ct. App.); Case 4497/08 *The Military Prosecution v. Hawajab* [2008] (Mil. Ct. App.). One military judge further described the military prosecution as inconsistent in relation to the sentences it requests to be imposed on minors: Case 1261/09 *The Military Prosecution v. Al-Farukh* [2009] (Judea Mil. Ct.).

<sup>58</sup> My use here of the terms 'legal', 'political', and 'cultural' is not aimed to mark them as disparate realms. On the indistinguishability of the 'legal' from the 'extra-legal' see, e.g., Nikolas Rose and Mariana Valverde, 'Governed by Law?' (1998) 7 *Social & Legal Studies* 541, 545–6; Pierre Schlag, 'The Dedifferentiation Problem' (2009) 42 *Continental Philosophy Review* 35.

<sup>59</sup> See, e.g., Case 2912/09 *The Military Prosecution v. Abu Rahma* [2009] (Mil. Ct. App.).

<sup>60</sup> Judges who have chosen to emphasize the influence of the domestic law on the military legal system, attributed this influence among other things to the fact that the legal education of military court judges, in Israeli higher education institutions, is based on the domestic law. See, e.g., Case 3975/04 *The Military Prosecution v. Nemer* [2006] (Judea Mil. Ct.).

Israeli law fully applies to him, or elsewhere [namely in the OPT], where [domestic] Israeli law indeed does not fully apply but there is a real influence of the [domestic] Israeli legal system'.<sup>61</sup> This ruling could be read as implying that, to some extent, the definition of 'minor' in the military legislation (as anyone under the age of 16 years) is only formal, and that the 'true' substance of 'minor' is different. This argument was expressed more explicitly in a ruling of the Military Court of Appeals from 2003. The two defendants in that case had been 16 years old at the time of the offence, and the judge declared that while they were '[f]ormally... adults according to the [military] law in the Area [that is, in the OPT],... their adulthood is *merely formal*'.<sup>62</sup> Another ruling of the Military Court of Appeals, from 2004, can be read as betraying a similar sentiment: in that case, the court rejected an appeal by a Palestinian defendant whose age, at the time of the offences, had been between 15 and 17 years. In its ruling, the court declared that 'the [defendant's] appeal is... grounded on... [his] age—or perhaps his "minority"'.<sup>63</sup> Why, one may wonder, did the court put the word 'minority' in quotation marks? A possible reading is that, in order to justify its decision, the court resorted—consciously or not—to portraying the defendant as not a minor in the full sense of the word, and hence the quotation marks. These rulings implicitly or explicitly depict the military legislation's demarcation of the age of majority as a formal demarcation, which supposedly coexists alongside a 'truer', more substantial demarcation of childhood. Sixteen- and 17-year-old Palestinian defendants are thereby labelled as both children (in what is seen as the socially dominant sense of the word) and non-children (in the formal, legal sense).

In interim conclusion, we have witnessed the ambiguous meaning of age categories in Israeli military law—ambiguity which has persisted even after a seemingly unequivocal definition of 'minor' was added to the military legislation. And as has been explained, this ambiguity—and the debate about the 'true' age of majority—are both linked to a broader incoherence of the military legal system, to an indeterminate relation between the military and the domestic laws, and to a collision between competing socio-legal demarcations of childhood.

### 10.3.2 Young and aggravating

The military legislation instructs courts, when determining a minor's sentence, to take into consideration his or her age at the time of committing the offence.<sup>64</sup> This instruction, adopted from the domestic legislation,<sup>65</sup> seems to be based on the prevalent association of childhood with innocence,<sup>66</sup> and the consequent conception—shared by many criminal legal systems worldwide—of young age as a mitigating factor. However, in practice, Israeli military court judges have held on several occasions that young age can, in fact, be an aggravating factor when determining the sentence. By so asserting, these judges departed from the prevalent understanding

<sup>61</sup> Case 2912/09, n. 59, above (emphasis in original). The judicial use of the term 'Israeli law' to denote only *domestic* Israeli law, which is typical of Israeli popular and legal discourses, reproduces the popular Israeli conception of the OPT as located outside Israeli space and time.

<sup>62</sup> Case 65/03 *The Military Prosecution v. Abu Hagier* [2003] (Mil. Ct. App.) (emphases added).

<sup>63</sup> Case 1553/07 *Karini v. The Military Prosecution* [2007] (Mil. Ct. App.).

<sup>64</sup> Order 1651, n. 24, above, art. 168(a). <sup>65</sup> Youth law, n. 22, above, art. 25(c).

<sup>66</sup> On this association see, e.g., David Archard, *Children: Rights and Childhood* (London and New York, 1993) 22, 37–41; James and James, n. 6, above, 50, 74–6, 140; Jenks, n. 41, above, 49, 58, 62–4, 75–6, 119, 124–5.

of childhood and young age, and in that sense undermined the child/adult differentiation.

An early case in which the court described young age as an aggravating circumstance dates back to July 1967—only a month after Israel completed its occupation of the Palestinian Territories, and more than a decade before the aforesaid consideration of age was introduced into the military legislation. In that case, military judge Avraham Fechter stated that under certain circumstances, youth could be an aggravating factor: 'As regards criminal terrorist activity which includes using weapons, *the defendants' young age works against them when determining the punishment*, inasmuch as for such roles and goals young people are the best suited, and when these people hold weapons to realize their intents, they should be punished severely in order to prevent other young people of their age from being tempted by adventures of this sort.'<sup>67</sup>

Young age was again depicted as a potentially aggravating factor in another military court ruling, more than three decades later. In 2003, military judge Ori Egoz conceded that young age is a mitigating factor in principle, but added that according to rulings by the Military Court of Appeals, 'the age consideration will be *an aggravating circumstance, when the minors are sent to carry out missions precisely because of their age* to prevent a stricter punishment from being imposed on the sender should he [sic] take action [instead of sending the minor to act for him]. . . . Implementing a lenient punitive approach might lead to the opposite of the desired result, and encourage the use of minors to interfere with public order and security. Young age cannot grant immunity to the imposition of deterring punishments (see: JSA A/291/91; JSA A/228/92<sup>68</sup>), and the court is obligated to make its contribution to eliminating this phenomenon'.<sup>69</sup>

The basis for judge Egoz's argument is a scenario in which Palestinian adults take advantage of the law's leniency towards children, by intentionally choosing young children to carry out terrorist attacks. To justify her stance, judge Egoz depicted this scenario as an epidemic, arguing that such use of 'young children and youth spread during the violent rampages in the beginning of the 90s when children were sent to throw stones and Molotov cocktails and to participate in violent disorderly conducts. Unfortunately, the circumstances of the case before us prove that a similar negative phenomenon might also spread nowadays, although through much graver crimes such as weapons smuggling and the execution of gunshot terrorist attacks'.<sup>70</sup>

This narrative, in which Palestinian children commonly serve as devices in the hands of adult terrorists, was designed to establish the necessity of judge Egoz's stance that young age could be an aggravating factor. 'I am not happy', stated Egoz, 'to [make] this harsh assertion from which derives the reduction of the relative weight which should be given to the fact that the offender is a young youth, but the state of affairs now in the region [that is, in the West Bank] and the worry of an increase in

<sup>67</sup> Abstract of the ruling in Case 331/68 *The Military Prosecutor v. Abd Al-Mussa and others* [possibly 1969] (Nablus Mil. Ct.) in Military Attorney General's Office, *Selected Rulings of the Military Courts in the Administered Territories—vol. 1* (1970), 252, 253. Some information on the case is unknown because the only two documents that have been published are a court decision (regarding one of the defendants, an adult) and a summary of the court's ruling.

<sup>68</sup> I currently do not have these two military court cases in my possession.

<sup>69</sup> Case 3900/03 *The Military Prosecutor v. Al-Nasirat* [2003] (Judea Mil. Ct.) (emphases changed).

<sup>70</sup> *Ibid.* (emphases changed).

such crimes, make this assertion inevitable.<sup>71</sup> Eventually, judge Egoz translated her view of young age as aggravating into an exceptionally harsh sentence of 14 months (six months in prison and eight on probation). This ruling disregarded the fact that the defendant was 13 years old at the time of the sentencing, and that the military legislation therefore limits his sentence to six months.<sup>72</sup>

As we have seen, both judges Fechter (in 1967) and Egoz (in 2003) described youth as aggravating in order to accentuate the need for deterrence.<sup>73</sup> At the same time, the two judges hoped to deter different groups: Fechter aimed to deter ‘other young people’,<sup>74</sup> whereas Egoz endeavoured to discourage adults (from using minors for terrorist purposes).<sup>75</sup> This disparity is perhaps due to their different views of child-adult relationships: Egoz considered Palestinian minors to be passively and instrumentally used by Palestinian adults, whereas Fechter depicted them as calculated and potent.

In 2004, another military judge, Yoram Hani’el, voiced a stance similar to that of judges Fechter and Egoz: ‘experience shows that the appellant’s young age has a twofold consequence. On the one hand we take his age into consideration. . . . But on the other hand, *his age also has an aggravating consequence*, as it becomes clear time after time that there is a directing hand in the sending of minors by adults to actions endangering their lives as well as the lives of others. Their purpose is to receive a lenient sentence thanks to the [sic] young age.’<sup>76</sup>

Notwithstanding some differences in their reasoning, all three judges portray the Palestinian child as a challenge to age norms—and therefore as a challenge to childhood. The Palestinian child is said to be involved in executing terrorist attacks, and this depiction contests the common association between young age and innocence (which is the basis for seeing young age as a mitigating circumstance). Thus, the Palestinian child is portrayed as a Trojan horse: on the surface a child—an emblem of innocence—but in practice the ultimate challenge to childhood.<sup>77</sup>

### 10.3.3 Bodies of age

So far, we have seen how the elusiveness of the boundaries, meaning, and nature of childhood and age manifests itself through two different phenomena: the ambiguity of age terminology and the view of youth as aggravating. Disparate, sometimes conflicting, conceptions of age and childhood have appeared to be at play with regard to these two manifestations of elusiveness.

Also contributing to the elusiveness of age is the potentially competing ‘evidence’ according to which age can be determined. Several rulings of the Israeli military

<sup>71</sup> Ibid. (emphases changed).

<sup>72</sup> For this reason, the Military Court of Appeals reversed this ruling, and clarified that the six-month limit refers to the prison sentence together with the probation period. Case 358/03 *Al-Nasirat v. The Military Prosecutor* [2003] (Mil. Ct. App.).

<sup>73</sup> This raises the question, which in itself is beyond the scope of the present chapter, of how effective harsh sentences can be in deterring politically motivated perpetrators.

<sup>74</sup> N. 67, above.

<sup>75</sup> N. 69, above. However, the Military Court of Appeals eventually shortened the prison sentence imposed by judge Egoz from six to three months, and held that although ‘the inclusion of minors in such [terrorist] offences should truly be discouraged, . . . this deterrence should be achieved through punishing those *adults* who exploit minors in their activity, as harshly as possible’: Case 358/03, n. 72, above (emphasis in original).

<sup>76</sup> Case 30/04, n. 49, above.

<sup>77</sup> This portrayal is possibly shared also by the two rulings cited in judge Egoz’s decision. See n. 68, above, and accompanying text.

courts, which will now be discussed, exemplify this 'competition of age'. In these rulings, judges examined and took into consideration the appearance of Palestinian minors' physical age, even when it was seen as discrepant from these minors' chronological age. As will now be demonstrated, the judges' willingness (and even desire) to observe children as 'bodies of evidence'<sup>78</sup> show age to be open for contention and negotiation.

Thus, in one case, a military judge justified a relatively short sentence (in Israeli military law terms), on the grounds, among others, that '[t]he defendant in this case is 13+ years old, *but physically he looks no older than 9 years*'.<sup>79</sup>

In another case, the court rejected the plea bargain reached by the parties, and instead imposed a significantly shorter sentence. The judge justified this decision by noting, *inter alia*: 'The defendant came across to me as honestly remorseful, an impression intensified by the fact that he was a young child who *according to his exterior appearance looks much younger than his age* [15 years old at the time of his arrest], *short, weak and undeveloped*'.<sup>80</sup> The military prosecution successfully appealed this decision, and the Military Court of Appeals doubled the length of the sentence, while nevertheless stipulating: 'I too have been able to *observe the appellant*, and I must concur with the assertions of the first instance court about *the level of his physical and mental development*'.<sup>81</sup>

In a later case, the court ordered a defendant's release from detention under certain restrictions, justifying this decision by describing the defendant as 'a 14 year old minor, *of a minor body size*, whom detention . . . will not benefit to say the least'.<sup>82</sup> A year later, in yet another case, the court justified the sentence it imposed, which was shorter than requested by the military prosecution, by contending, among other things: 'before me stands a defendant who has not yet turned 16 years old (and *it should be noted that his appearance is even younger*). . . . In such a case, prolonged incarceration . . . is likely to gravely harm his rehabilitation chances and consequently the public interest as well.'<sup>83</sup>

While young appearance was seen in these four cases as a mitigating factor, the lack of such appearance could correspondingly be seen, under certain circumstances, as an aggravating factor. This is illustrated by a ruling of the Military Court of Appeals, which stipulated: 'the appellant's young age [17 years at the time of the offences] cannot justify a substantial shortening of his punishment, since he is not a minor, but a

<sup>78</sup> This is a paraphrasing of Heather D'cruz, 'The Social Construction of Child Maltreatment: The Role of Medical Practitioners' (2004) 4 *Journal of Social Work* 99, 105. Of course, adulthood bodies have also been used as a source of evidence: for example, profiling and other techniques mark certain bodies as more or less threatening. See, e.g., Louise Amoore and Marieke de Goede, 'Transactions after 9/11: the banal face of the preemptive strike' (2008) 33 *Transactions of the Institute of British Geographers* 173.

<sup>79</sup> Case 1506/06 *The Military Prosecutor v. Sabih* [2006] (Judea Mil. Ct.) (emphasis added). This decision was reversed, less than a week later, by the Military Court of Appeals judge Nethanel Benisho, who sentenced the defendant to five months in prison, 10 months on probation, and a fine of 1000 New Israeli Shekels: Case 1413/06 *The Military Prosecutor v. Sabih* [2006] (Mil. Ct. App.). The Court of Appeals' ruling made mention of (but did not criticize) the first instance court's consideration of the defendant's young appearance ('the first court reached . . . [its] conclusion in reference to the . . . [defendant's] exterior looks').

<sup>80</sup> Case 4668/06 *The Military Prosecutor v. Halaf* [2006] (Judea Mil. Ct.) (emphases added).

<sup>81</sup> Case 1350/07 *The Military Prosecutor v. Halaf* [2007] (Mil. Ct. App.) (emphases added).

<sup>82</sup> Case 4380/08 *The Military Prosecution v. Hawajah* [2008] (Judea Mil. Ct.) (emphasis added).

<sup>83</sup> Case 1261/09, n. 57, above (emphasis added).

person who according to his age, and *also according to his looks*, should have understood well the severe consequences of his acts.<sup>84</sup>

At the same time, in a legal system which has occasionally treated youth as an aggravating factor (as discussed earlier), young appearance was seen not only as a mitigating but also as an aggravating consideration. In 2003, in the Bet El Military Court, military judge Menashe Vahnish ruled that 18-year-old Muhamad Saleh Salim Sha'alan be held in detention until the end of the proceedings in his matter. In explanation of his decision, judge Vahnish contended that treating his young appearance as an aggravating factor could protect the defendant from unwanted adult influences: 'according to the evidence [in the case] and *a visual observation of the defendant's face*, he is a young youth in his adolescence who appears to be influenced by others. . . . [R]eleasing him [from detention] . . . might bring him to be again under the influence of those people.'<sup>85</sup>

The six cases discussed thus far exemplify how the child's chronological age can be rivaled by the judge's gaze at the 'childhood body' (a phrase used here to convey the complexity of the body-child(hood) relationship<sup>86</sup>). The childhood body—a constitutive and inseparable part of the category 'child'<sup>87</sup>—serves as a means through which the court can produce claims about the 'true' age of the child. These claims, in turn, reflect and reproduce developmentalist conceptions of childhood (psychological and other),<sup>88</sup> and bodily stereotypes of 'the normal child'.<sup>89</sup>

To explore further the role of the childhood body in this context, the legal knowledge produced through the spectatorship of that body, and the implications for law's conceptualization of childhood, let us turn to two rulings of Military Court of Appeals judge Moshe Tirosh from 2003, which elucidate these issues. In these two cases, judge Tirosh rejected (fully or partly) appeals from the military prosecution, to increase the sentences of Palestinian minors convicted of illegally exiting the Gaza Strip, cutting the separation barrier, and entering Israel.

In the first of these two rulings of his, judge Tirosh held that the probation sentences imposed by the first instance court be prolonged, but the prison sentence and the fine imposed by that court remain unchanged. Tirosh noted: 'the court's eyes are in its head, and it can see before it three mere children, and despite the light moustache above their upper lip, their mother's milk has still not dried on their lips.' In the eyes of judge Tirosh—and it is indeed his eyes which largely determine the defendants' age—the defendants are the embodiment of competing signs of age: a hint of

<sup>84</sup> Case 149/02 *Harbawi v. The Military Prosecutor* [2002] (Mil. Ct. App.) (emphasis added).

<sup>85</sup> Case 1173/03 *The Military Prosecution v. Sha'alan* [2003] (Bet El Mil. Ct.) (emphasis added).

<sup>86</sup> Whereas phrases such as 'the child's body' reduce this relationship to a unidirectional ownership of the body by the child, the present chapter suggests that, to some extent, it is the body that appears to 'own' the child. Furthermore, the phrase 'childhood body' emphasizes the inextricability of childhood and embodiment. For another use of the term 'childhood body' see Alan Prout, 'Childhood Bodies: Social construction and translation' in Simon Johnson Williams, Jonathan Gabe, and Michael Calnan (eds), *Health, Medicine, and Society: Key Theories, Future Agendas* (London and New York, 2000) 109.

<sup>87</sup> Allison James, 'Embodied Being(s): Understanding the Self and the Body in Childhood' in Alan Prout (ed), *The Body, Childhood and Society* (London, 2000) 19, 27. See also Allison James, 'On Being a Child: The Self, the Group and the Category' in Anthony Paul Cohen and Nigel Rapport (eds), *Questions of Consciousness* (London, 1995) 60, 63–6.

<sup>88</sup> See nn. 35–8, above, and accompanying text.

<sup>89</sup> Allison James comments that such 'bodily stereotypes of "the normal child", historically derived and ultimately contingent, provide a measure of any individual child's conformity to that category of child': James, 'Embodied Being(s)', n. 87, above, 27. See also Berry Mayall, 'Children, emotions and daily life at home and school' in Gillian Bendelow and Simon Johnson Williams (eds), *Emotions in Social Life: Critical Themes and Contemporary Issues* (New York, 1998) 135, 144–5.

moustache implying that (masculine) maturity is nearing, and on the other hand babyish lips said to have recently been breastfed. The judge's self-proclaimed role, when facing these competing signs, is to 'uncover' the defendants' 'true' age.

For this purpose, judge Tirosh relies on developmental theory, as he perceives it, stating: 'We would not be introducing any innovation to developmental theory by saying that no 15- or 16-year-old is identical to any other 15- or 16-year-old. At this age, some are adults and some are still children. The appellants before us belong to the latter group.' Having inspected the defendants' appearance (an inspection legitimized by relying upon developmental concepts), judge Tirosh concludes: 'It could be said, jokingly, that they [the defendants] are not appellants, but rather mini-appellants. . . . [They are] not merely formally minors, but evidently immature.'<sup>90</sup>

The second military court case was heard later that day, and the defence attorney—who also represented the defendant in the above case—referred to judge Tirosh's decision in that case, and argued among other things: 'I have nothing to add to what His Honour noted in the verdict. These youths appear smaller than their real age. The court described this eloquently. . . . The prison sentence imposed [on the defendants. . . is appropriate] especially in light of. . . [their] age [and] body structure.'<sup>91</sup> Judge Tirosh concurred, and rejected the prosecution's appeal. In his ruling, judge Tirosh stipulated that '[f]ormally, the appellants are adults according to the [military] law in the area [that is, in the OPT]. Nevertheless, the court is under the impression that their adulthood is but formal. . . . We find no reason to change the decision [of the first instance court] . . . , given the necessary balance between the security of the area [that is, the OPT] and these appellants' age and physical and mental maturity, as they appeared to the [first instance] court.'<sup>92</sup>

The transformative judicial gaze at childhood bodies thus constitutes age as a site of competition between the corporeal and the chronological, between the unstable 'real' and the merely formal. The 'real' itself functions as neither a given nor a constant, as it can be located either in the chronological or in the physical, and perhaps in the mixture of both.<sup>93</sup>

#### 10.3.4 Coevality—the coexistence of age(s)

After examining the interplay between different ages—physical age (as it appears to the court) and chronological age—let us turn to discuss another manifestation of the elusiveness of age, which involves the simultaneous application of two different ages to the same child defendant.

As noted earlier, the military legislation limits the maximum sentences which may be imposed upon Palestinian 'youth' (12- and 13-year-olds) and 'tender adults' (14- or 15-year-olds), to six months and a year respectively. However, these restrictions only apply to defendants who are 'youth' or 'tender adults' at the time of the sentencing. What matters is not the defendant's age at the time of the offence, but only how old the defendant is when the sentence is determined.<sup>94</sup> In comparison, no parallel provision exists in the domestic legislation (which applies to Israeli minors).

Indeed, in some cases, Palestinian defendants shift from one age category to another between their offending and sentencing. For example, in two cases, the

<sup>90</sup> Case 66/03, n. 48, above.

<sup>91</sup> Case 65/03, n. 62, above.

<sup>92</sup> Ibid.

<sup>93</sup> The 'real'/'formal' interplay also appeared in another form of elusiveness discussed earlier: the meaning of 'minority' (and the question of whether the defendant is 'really' or merely 'formally' a minor). Nn. 61–3, above, and accompanying text.

<sup>94</sup> Order 1651, n. 24, above, arts 168(b) and 168(c).

defendants were 15 years old ('tender adults') when they committed the offences, but reached the age of 16 years ('adults') by the time of their sentencing.<sup>95</sup> In another case, the defendant was 13 years old (a 'youth') at the time of his offending, and 14 years old (a 'tender adult') by the time his sentence was determined.<sup>96</sup>

In such cases, defendants are simultaneously ascribed two different ages, in a manner which deviates from the normalization of age groups and age homogeneity: their age at the time of the offending (which is a consideration in the sentencing<sup>97</sup>), as well as their age at the time of the sentencing (which determines their eligibility to the maximum-sentence limitations). Symbolically, a defendant thus can be, for example, simultaneously 13 and 14 years old (and therefore both a 'youth' and a 'tender adult'), or simultaneously 15 and 16 years old (both a 'tender adult' and an 'adult').

I shall term this coexistence of different ages and age groups, embodied concurrently in the same subject—the defendant—'coequality'. This is a state of different coeval regimes (two ages and/or two age groups) becoming coeval (in the sense of being applicable or realized at the same time). To a certain degree, the legal ambiguity of age categories such as 'minor', which we discussed earlier, renders coequality an integral component of Palestinian childhood: defendants of the same age can be classified, for example, as both 'minors' and 'adults'.<sup>98</sup>

The coequality of the sentencing in the military court makes it a moment when time both collapses and is intensified. It collapses because the distinction between past and present is challenged, by retrospectively narrating the defendant's past (the offending) through his or her present (the current age). It is intensified because not one but two ages—and hence two times—must be borne in mind.

This dual challenge—to the fixity of both age and time differentiations—is heightened with the passing of time between the moment of the offending and that of the sentencing. The longer it takes for the court to try defendants, the older these defendants become and the longer their sentence might be.<sup>99</sup> The NGO, Defence for Children—Palestine, succinctly described this situation, in 2007, as follows: '[a] child who is accused of committing an offence when s/he is 15, will be punished as an adult if s/he has a birthday whilst awaiting sentence. This places enormous pressure on a 15 year old child, the child's family and legal advisor to accept a plea bargain rather than risk court delays leading to the child being sentenced as an adult.'<sup>100</sup> Two years later, the NGO voiced a similar concern: 'a child who is accused of committing an offence when he or she is 15, is punished as an adult if he or she has a birthday whilst awaiting sentence.'<sup>101</sup>

These excerpts portray the defence's battle in such situations as a battle against time. In this battle, age norms are both idealized and dreaded: idealized—by criticizing the court's deviation from these norms (a deviation manifest in sentencing as an adult a defendant who offended at the age of 15); but age norms are also dreaded,

<sup>95</sup> Case 1091/02 *The Military Prosecutor v. Janam* [2003] (Hebron Mil. Ct.); Case 1001/04 *The Military Prosecutor v. Dib* [2004] (Judea Mil. Ct.).

<sup>96</sup> Case 4407/03 *The Military Prosecutor v. Harfish* [2004] (Judea Mil. Ct.). <sup>97</sup> N. 64, above.

<sup>98</sup> See text accompanying n. 63, above.

<sup>99</sup> At the same time, courts may consider the passing of a long period of time between the crime and the sentencing as a mitigating factor. See, e.g., Case 3131/06 *The Military Prosecutor v. Arar* [2006] (Judea Mil. Ct.). However, the Military Court of Appeals described that case as unique and unrepresentative: Case 2481/06 *The Military Prosecutor v. Arar* [2006] (Mil. Ct. App.).

<sup>100</sup> Defence for Children—Palestine, *Palestinian Child Political Prisoners—2007 Report* (2007), <<http://www.dci-pa.org/english/publ/research/2008/PCPRreport.pdf>>. 11.

<sup>101</sup> Defence for Children—Palestine, n. 17, above, 15.



which is illustrated when birthday—a quintessential social mechanism of age normalization<sup>102</sup>—is rendered a threat. Thus, the time with which the defence struggles is related not only to the moment of sentencing, but also to the day on which the defendant's age changes.

This turbulence of time and age may account for the anxiety which is not exclusive to the above excerpts from Defence for Children—Palestine, and has been expressed in other NGO documents as well.<sup>103</sup>

#### 10.4 (Not) knowing age

As has been explained, the relationship between law and the child is informed by various, sometimes competing forces, which render age a matter of significant elusiveness. In this relationship, the legal system sees age and childhood as in need of being deciphered and known, and it considers itself to be the authorized producer of that knowledge. The following questions thus arise: how would the legal system react when its competence and ability to know the child's 'true' age are called into question? And, in particular, how would it react in circumstances in which it believes legal subjects to be able to hinder it from knowing their age?

A possible starting point to explore these questions is the following assertion, which an Israeli military prosecutor made when asked by ethnographer Lisa Hajjar about the young age of many Palestinian defendants. 'Don't let them fool you', said the prosecutor. 'They might look like children, but they are really adults. If they look fifteen, they are probably twenty-five. You can't trust Palestinians for anything, even their ages.'<sup>104</sup> This statement can be read in light of, and as complementary to, my discussion earlier of the legal knowledge produced around childhood bodies. That discussion highlighted how judges use childhood bodies as evidence of children's 'true', 'substantial' age. The military prosecutor's statement, brought here, illustrates again the significance of physical age, as well as law's desire to ascertain defendants' 'true' age. But what makes the prosecutor's assertion all the more intriguing is that it adds the figure of the legal subject to the legal interplay of 'truth' and age, and depicts that figure as subversive. The danger perceived from this figure (in this case—from the figure of the Palestinian defendant) lies in what is seen as its ability to use physical age as deception, as trickery, as a stratagem.

I wish not to question whether this statement is 'true' or 'false', accurate or paranoid. Instead, I would suggest using it as a preliminary example of how the legal

<sup>102</sup> On the significance of birthdays as cultural mechanisms of age normalization, see, e.g., Chudacoff, n. 37, above, 126–37; Lea Shamgar-Handelman and Don Handelman, 'Celebrations of Bureaucracy: Birthday Parties in Kindergartens' in Esther Hertzog, Orit Abuhav, Harvey E. Goldberg, and Emanuel Marx (eds), *Perspectives in Israeli Anthropology* (Detroit, 2010) 111. On the celebration of birthdays as a Western ritual, which represents a different conception of age than conceptions dominant in other cultures, see, e.g., Blanchet, n. 2, above, 41–3.

<sup>103</sup> Defence for Children and Save the Children, n. 17, above, 67–8; Yesh Din—Volunteers for Human Rights, *Backyard Proceedings: The Implementation of Due Process Rights in the Military Courts in the Occupied Territories* (Tel Aviv, 2007) 155. In both these documents, it was argued that alongside the legal consideration of the defendant's age at the time of the sentencing, there is a common practice in Israeli military courts of prolonged proceedings. The combination of these two factors, contended the documents, inevitably makes many minor offenders likely to become adults by the date of their sentencing, which exerts pressure on their lawyers to bring trials quickly to an end. For more information on prolonged proceedings in the military courts, see Yesh Din, *ibid.*, 18–19.

<sup>104</sup> Hajjar, n. 13, above, 117.

system may conceptualize the role of law's subjects in the production of knowledge about age—'their' age. For this purpose, two cases will now be examined—one regarding a Palestinian defendant, and the other concerning Israeli settler girls—in which the behaviour of legal subjects was seen as deviating from, or obscuring their 'true' chronological age.

#### 10.4.1 Reverting to childhood

In 2001, the Israeli armed forces arrested 15-year-old Umar Abu Snima for illegally exiting the OPT. When deciding to sentence him to a month on probation, military judge Sigal Mishal noted that she was taking into consideration Abu Snima's young age.<sup>105</sup>

A year later, Abu Snima was once again arrested for illegally exiting the OPT. But this time, he presented himself to the interrogators as *Muhammad* Abu Snima—which the military court would later pronounce to be his real name.<sup>106</sup> When his fingerprints were taken, he was discovered to be 'about 20 years old', as the court would later put it.<sup>107</sup> Consequently, Abu Snima was charged not only with exiting the OPT but also with perjury. The Erez Military Court sentenced him to two-and-a-half months in prison, and 45 days on probation.<sup>108</sup>

Following an appeal by the military prosecution, the Military Court of Appeals increased Abu Snima's sentence to 10 months in prison and nine months on probation. Military Court of Appeals judge Sha'ul Gordon justified this decision by arguing that 'the offences of which the appellant has been convicted are very grave, and beyond the severity of exiting the Area [that is, the OPT] without permission are his false testimonies about his identity. The appellant hindered the interrogation and even managed to deceive the court and receive a short sentence by presenting himself as a minor'.<sup>109</sup>

In this case, Abu Snima's acts were conceptualized as bending, at least temporarily, the boundaries of childhood. Abu Snima's story, as told by the military court, is that of a legal subject turning back time, reverting to childhood, and by so doing, reversing one of the most basic assumptions for modern conceptions of childhood: that children become adults—not the other way around.<sup>110</sup>

As the eventual charges and sentence illustrate, this supposed 'manipulation' of the boundaries and foundations of childhood might not go unpunished. The court's actions further indicate its forcefully maintained self-image as the sole authorized determiner of the defendant's 'true' age. It is not that chronological age cannot be challenged, but rather that the court alone has the authority to challenge it. And as

<sup>105</sup> Case 164/01 *The Military Prosecutor v. Abu Snima* [2001] (Erez Mil. Ct.).

<sup>106</sup> Case 12/02 *The Military Prosecutor v. Abu Snima and others* [2002] (Mil. Ct. App.). The Military Court of Appeals speculated that Abu Snima's decision to use his 'real' first name when he was arrested for the second time was aimed to evade the enforcement of his probation sentence (from 2001). *Id.*

<sup>107</sup> Case 12/02, n. 106, above.

<sup>108</sup> Case 5/02 *The Military Prosecution v. Abu Snima* [2002] (Erez Mil. Ct.).

<sup>109</sup> Case 12/02, n. 106, above. My above description of Abu Snima as a 15-year-old was meant to reproduce, to some extent, the effect of his supposed impersonation.

<sup>110</sup> Although in practice, there are notable exceptions to this conception. For example, on the infantilization of the elderly and of 'Third World' peoples see, respectively, Sonia Miner Salari and Melinda Rich, 'Social and Environmental Infantilization of Aged Persons: Observations in Two Adult Day Care Centers' (2001) 52 *International Journal of Aging and Human Development* 115; Erica Burman, 'Innocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies' (1994) 18 *Disasters* 238.

we saw earlier, this authority has indeed been implemented, with courts occasionally giving precedence to defendants' physical age over their chronological age.

#### 10.4.2 Withholding age

Whereas in Abu Snima's case, the behaviour denounced was his self-association with a supposedly 'wrong' age group, in the following case Israeli settler girls refused to disclose their ages altogether. This too was treated as an obstacle to law's resolve to know the age of the child-subject.

The background to this case is what Israel called its 'disengagement' from the Gaza Strip: the withdrawal of Israeli military from within the Strip and the evacuation of all Israeli settlements there, which took place in the summer of 2005.<sup>111</sup> This step encountered opposition from parts in the Israeli political right, which demonstrated, sometimes violently, and in some cases blocked transportation routes.

Minor settlers took an active part in those demonstrations, and a great number of them were detained as a result. Many refused to disclose their personal details to the police, including their ages. Consequently, some were held in detention for weeks, which instigated considerable public and legal debate in Israel. The Attorney General later explained these events from his perspective: 'Hundreds of minors refused to identify themselves. They said: we wouldn't identify ourselves, we don't care, even if we would have to sit in jail. The State then had the option to give in to that demand and release them without identification. This meant an inability to enforce the law on them, since it's clearly impossible to try an offender who hasn't identified himself. Therefore our policy, backed by the courts, was that a person who didn't identify himself... and which there was allegedly evidence that he committed an offence, would not be released until he identified himself... Most of the minors who refused to identify themselves were identified within 24–48 hours. The big commotion revolved around a small group of girls who could not be identified.'<sup>112</sup>

While, in general, the settler girls' refusal to identify themselves baffled the legal system, it was the inability to 'know' conclusively their ages which was seen as particularly challenging. The legal system was thrown into confusion by what it saw as the virtually impossible task of placing these seemingly ageless girls in the legal array of age-based arrangements. Judge Galit Wigotsky-Mor, the president of the Youth Courts, pointed to this in a meeting of the Children's Rights Committee of the Israeli Parliament (the Knesset), which dealt with the prolonged detention of the settler girls. 'With regard to the detentions during the opposition to the disengagement', said judge Wigotsky-Mor, 'sometimes we [youth court judges] didn't even know whether the minor was over the age of criminal responsibility, 12 years, or under the age of criminal responsibility, in which case he [sic] couldn't even be arrested.'<sup>113</sup>

A similar dynamic interestingly took place two years later, in 2007. Two settler girls, 14 and 15 years old at the time (as would later be realized), were arrested for entering a sealed-off military area during a protest at an outpost in the West Bank.

<sup>111</sup> See also n. 17, above.

<sup>112</sup> Minutes number 11 of the meeting of the Children's Rights Committee of the 17th Knesset (17 October 2006) (Hebrew).

<sup>113</sup> Minutes number 32 of the meeting of the Children's Rights Committee of the 17th Knesset (12 June 2007) (Hebrew).

Like their predecessors, these girls also refused to state their age or any other identifying information to the police when they were arrested.<sup>114</sup>

The behaviour of both Abu Snima (the Palestinian defendant who 'posed' successfully as a child) and the settler girls who refused to disclose their age exemplifies the full potency of the utterance customarily directed at children: 'Act your age!' While expressing the dominance of age norms, this utterance also constitutes age as a matter of acting.<sup>115</sup> Through the eyes of Israeli law, both the Palestinian adult/child and the settler girls are seen to 'act their age' (in an improper manner).

However, the case of the settler girls differs from Abu Snima's case in two respects which make it particularly notable. First, in the girls' case, not only is the determining of age attributed to legal subjects (rather than to legal professionals), but those legal subjects are defined as children<sup>116</sup>—which in itself is of great significance in such an adult-governed social field. An alarming capacity is thereby ascribed to the child: to confound, even temporarily, the seemingly stable regimes of age and law.

Also distinctive of the case of the settler girls is law's outright inability to know their age. Whereas in Palestinian defendant Abu Snima's case the law had his age 'wrong', with regard to the settler girls what was seen as so disturbing was law's failure to ascribe to them any age whatsoever. 'How old are you?'—the question which in this case was left unresolved—is generally of great social importance because it enables the enforcement of age norms, and more specifically because it allows society to place children along developmental-moral standards.<sup>117</sup> The legal urge to know a child's age can be read as a manifestation of a broader social urge to decipher the child.<sup>118</sup> Therefore, when a child is perceived to be evading or resisting law's desire to know her or his age, anxieties and confusion are almost bound to arise within the legal system.

Thus, when asked about their age, silence may (under certain circumstances) be perceived as a particularly challenging response children can give.<sup>119</sup> This deviates from the portrayal of silence as associated with impotence, an association traditionally drawn in many discourses about children and other groups defined as 'disempowered'.<sup>120</sup> But what rendered the settler girls' silence so effective, and in this

<sup>114</sup> Chaim Levinson, '5 Religious Girls Sue Police for Allegedly Strip-Searching Them' (31 December 2009) *Haaretz*, <<http://www.haaretz.com/news/5-religious-girls-sue-police-for-allegedly-strip-searching-them-1.1012>>.

<sup>115</sup> Gill Valentine argues that 'age is . . . like gender, . . . a performative act that is naturalized through repetition and therefore is both fluid and contested': Gill Valentine, *Public Space and the Culture of Childhood* (Aldershot and Burlington, 2004) 55.

<sup>116</sup> The legal subjects' gender is also noteworthy, but I will not elaborate on this due to space limitations.

<sup>117</sup> The social centrality of the particular question 'how old are you?' is illustrated by Chudacoff's choice to use it as a title for his book: Chudacoff, n. 37, above.

<sup>118</sup> See, e.g., Jenny Hockey and Allison James, *Social Identities Across the Life Course* (Basingstoke and New York, 2003) 15, 18; Rose, n. 36, above, 135–54.

<sup>119</sup> Cf. Elaine Chase, 'Agency and Silence: Young People Seeking Asylum Alone in the UK' (2010) 40 *British Journal of Social Work* 2050, 2052, 2059–65; Ian Hutchby, 'Resisting the Incitement to Talk in Child Counselling: Aspects of the Utterance "I Don't Know"' (2002) 4 *Discourse Studies* 147, 149, 165.

<sup>120</sup> See, e.g., Jeffress, n. 6, above, 88–91; Alan Prout and Allison James, 'A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems' in Allison James and Alan Prout (eds), *Contemporary Issues in the Sociological Study of Childhood* (London and New York, 1997) 7, 7–8. For an example relating to the OPT, see Save the Children Sweden, *I Miss My House and My Pink Dress: Palestinian Children's Voices* (Stockholm, 2004). On the legislation and policies which have promoted 'child voice' in the UK since the 1990s, see Ann Lewis, 'Silence in the Context of "Child Voice"' (2010) 24 *Children & Society* 14, 14–15. For further critique of the association between silence and powerlessness (in the feminist context), see Susan Gal, 'Between Speech and Silence: The Problematics of Research

sense not silent at all, was the reaction of the Israeli police and courts to it: holding these girls in prolonged detention. It is due to this reaction that these girls' silence was heard loudly all the way to the Israeli Parliament, as was described earlier.

During the meeting of the parliamentary Children's Rights Committee, the representative of the Israeli Public Defense critically described as irrational and childish the state's insistence upon not releasing the girls from detention unless they sign an obligation concerning their probation conditions. The Public Defense lawyer further added: 'we would expect the [legal] system to take a deep breath. In the same way that we sometimes tell children to count to three and think how to get off the tree, here too a creative way to get off the tree was called for. . . . [As regards] those 13- or 14-year-old girls, minors who cannot even be legally sentenced to prison. . . .'<sup>121</sup> there should have been created conditions which do not depend on their active participation. Meaning, for instance, not forcing them to sign the obligation [regarding their probation conditions].'<sup>122</sup> Perhaps this comparison, by an Israeli public lawyer, of Israeli legal authorities to an impatient child who needs to be taught restraint and reason, implies that during Israel's 'disengagement' from the Gaza Strip childhood was not only an exterior force with which Israeli law had to reckon; the image of law as a child characterizes childhood as an interior characteristic of the legal system itself. To some extent, this might hint to another frontier of the question of elusiveness: not only is childhood elusive, but so is the basic distinction between 'childhood' and 'law'.

### 10.5 Conclusion: childhood, law, and age in Israel/Palestine and beyond

This chapter has explored the intricate relationship between childhood, age, and law through the Israel-Palestinian case, and particularly through Israeli (military and domestic) criminal law's conceptualization and construction of age and childhood in the OPT.<sup>123</sup> As we have seen, age is saliently contingent upon nationality in this context: the age-based demarcation of childhoods in the OPT varies significantly along national lines.

Also at the heart of the chapter is the elusiveness of age, four manifestations of which we have discussed: the ambiguity of legal age terminology; the legal conception of youth as aggravating; the punishment of minors according to what is seen as their physical age (rather than according to their chronological age); and the simultaneous application of different ages to the same minor. These four phenomena illustrate that both age and childhood are far from being stable, clear, or unequivocal.

Furthermore, we have examined how Israeli law conceptualizes and reacts to circumstances in which its subjects appear somehow to obscure their age. Such

on Language and Gender' in Micaela di Leonardo (ed), *Gender at the Crossroad of Knowledge: Feminist Anthropology in the Postmodern Era* (Berkeley, Los Angeles, and Oxford, 1991) 175.

<sup>121</sup> See n. 30, above, and accompanying text.

<sup>122</sup> Minutes number 11 of the meeting of the Children's Rights Committee, n. 112, above. Three other suggestions heard in the meeting of the committee were: to impose probation conditions on the girls even if they do not sign the conditions papers; to hold an immediate trial so that the girls are held in prolonged detention; and to release the girls and possibly even withdraw the charges altogether. *Ibid.*, 39–40.

<sup>123</sup> Due to space constraints, some of the complexities characterizing this context have been somewhat simplified, and some issues have remained unexplored.

circumstances seem to pose a formidable challenge to the legal system, which is largely governed by an urge to know the child's age.

While each of these different aspects of the legal construction of age and childhood is noteworthy in itself, it is only by jointly examining these aspects that a rich understanding of the relationship between childhood, age, and law can be gained. For example, the story of childhood and law would be partial if we were to describe it merely as dictated by the dominant national imaginary. While age and childhood are indeed constructed along national lines, their prominent elusiveness renders them irreducible to national demarcations. In a similar manner, the story of the elusiveness of childhood and age consists not only of the reproduction of elusiveness by the law, but also of circumstances in which children are the ones perceived (by the legal system) as bringing forth that elusiveness.

An amalgam of legal systems, of various—often competing—conceptions and constituents of childhood, the Israeli-Palestinian case could be read as a super-experiment for law and childhood. This experiment, while clearly involving unique inter-relationships between childhood and law/politics, nonetheless resonates with other contexts.

For example, while the childhood-nationality linkage is salient in Israel/Palestine, the intersectionality of childhood and other social categories is prevalent elsewhere.<sup>124</sup> The definition of 16 years as the age of majority is also not unique to Israeli military law and can be found, for example, in US military law.<sup>125</sup> Additionally, the elusiveness of age and childhood is far from being exclusive to Israel/Palestine: for instance, the definition of 'child' in the UN Convention on the Rights of the Child as anyone under 18 'unless, under the law applicable to the child, majority is attained earlier',<sup>126</sup> renders the ending of childhood flexible and its beginning unresolved.<sup>127</sup> Similarly, youth has been regarded as aggravating outside Israel/Palestine—for example in several death penalty rulings of the Supreme Court of the US.<sup>128</sup> Issues pertaining to childhood bodies and law in Israel-Palestine also appear in many other contexts. Among these is the functioning of childhood bodies as evidence of the child's 'real' age, which is prominent, for example, in the British asylum system—where disputes often arise with regard to asylum seekers' age and the question of

<sup>124</sup> See, e.g., George S. Bridges and Sara Steen, 'Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms' (1998) 63 *American Sociological Review* 554, 567; Nura Taefi, 'The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalisation of the Girl-Child' (2009) 17 *International Journal of Children's Rights* 345.

<sup>125</sup> Melissa A. Jamison, 'Detention of Juvenile Enemy Combatants at Guantanamo Bay: The Special Concerns of the Children' (2005) 9 *UC Davis Journal of Juvenile Law & Policy* 127, 136, 139, 151–3.

<sup>126</sup> Convention on the Rights of the Child, n. 3, above.

<sup>127</sup> Jenny Kuper, *International Law Concerning Child Civilians in Armed Conflict* (Oxford, 1997) 8–9.

<sup>128</sup> On the judicial and prosecutorial reference to youth as aggravating in *Roper v. Simmons* (where the Supreme Court held unconstitutional capital punishment for crimes committed by persons under 18 years of age), see Tamar R. Birckhead, 'The Age of the Child: Interrogating Juveniles After *Roper v. Simmons*' (2008) 65 *Washington & Lee Law Review* 385, 395–406; Elizabeth F. Emens, 'Aggravating Youth: *Roper v. Simmons* and Age Discrimination' (2005) *Supreme Court Review* 51, 51–2. The argument that youth is aggravating is not unique to *Simmons*, and such prosecutorial rhetoric appeared in at least seven other instances. Birckhead, *ibid.*, 404–5; Emens, *ibid.*, 75. See also Seung Oh Kang, 'The Efficacy of Youth as a Mitigating Circumstance: Preservation of the Capital Defendant's Constitutional Rights Pursuant to Traditional Eighth Amendment Jurisprudence' (1994) 28 *Suffolk University Law Review* 747, 774.

whether they 'truly' are children.<sup>129</sup> Similarly, the precedence of physical appearance over chronological age is clearly not exclusive to the context discussed in the present chapter, and characterizes, for example, the social recourse to plastic surgery and the use of cosmetic products.<sup>130</sup> Another commonality between Israel/Palestine and other contexts is the conception of the figure of the child as somewhat able to influence society's knowledge of her or his age.<sup>131</sup>

These and additional commonalities between the Israeli-Palestinian case and other contexts suggest the need further to explore the workings of age. The complex ways in which age functions and is utilized in the legal imagining and fabrication of childhood clearly require rethinking. Through its contextualized investigation of the childhood-age-law triangle, the present chapter offers a starting point for such an enterprise.<sup>132</sup>

<sup>129</sup> It has been argued that in this context, legal professionals, social workers, and other practitioners tend to rely on asylum seekers' physical appearance as an indicator of their age. Immigration Law Practitioners' Association and Heaven Crawly, *When is a child not a child? Asylum, age disputes and the process of age assessment* (London, 2007), <<http://www.ilpa.org.uk/publications/ILPA%20Age%20Dispute%20Report.pdf>>, 48–53. A more recent legal development with regard to the assessment of age of asylum seekers who claim to be children is the judgment of the UK Supreme Court in the case of *A v. London Borough of Croydon & Anor; M v. London Borough of Lambeth & Anor* [2009] UKSC 8, <[http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2009\\_0106\\_Judgment.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0106_Judgment.pdf)>.

<sup>130</sup> Mike Featherstone and Mike Hepworth, 'The Mask of Ageing and the Postmodern Life Course' in Mike Featherstone, Mike Hepworth, and Bryan S. Turner (eds), *The Body: Social Process and Cultural Theory* (London, 1991) 371, 374 (describing how chronological age is discredited as an indicator of inevitable age norms, while different health regimens are prescribed to control biological age, which is argued to be the true index of how people should feel). See also Simon Biggs, 'Choosing Not to be Old? Masks, Bodies and Identity Management in Later Life' (1997) 17 *Ageing and Society* 553.

<sup>131</sup> For sociological writing on children's ability, under certain circumstances, to make their social age older or younger, see Lesko, n. 36, above, 144–5; Anne Solberg, 'Negotiated Childhood: Changing Constructions of Age for Norwegian Children' in Allison James and Adrian James (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood*, 2nd ed (London, 1997) 126. See also Valentine, n. 40, above, 38.

<sup>132</sup> [Editor's Note: See further now Christina Alfreive in ed. J. Bhasha, *Children Without a State* (MIT Press, 2011), 67–88.]